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EXHIBITS.

SUMMONS.

The State of New Jersey to Vineland National Bank & Trust Company and William Marshall Carew, Executors and Trustees of the Last Will and Testament of John W. Carew, Deceased, and Vineland National Bank & Trust Company and William Marshall Carew, Individually: 10

You are summoned to answer the annexed complaint of Oswald Stern in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the said suit and judgment may be entered against you. 20

Witness, Hon. Thomas J. Brogan, Chief Justice of the New Jersey Supreme Court, at Trenton, this tenth day of August in the year of our Lord one thousand nine hundred and thirty-three.

Fred L. Bloodgood,
Clerk.

LeRoy W. Loder,
Attorney. 30

COMPLAINT.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

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OSWALD STERN, *Plaintiff*, v. VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, executors and trustees of the last will 20 and testament of JOHN W. CAREW, deceased, and VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, individually, *Defendants*.	Action at Law. Complaint.

30 The plaintiff, Oswald Stern, who resides at Vineland, Cumberland County, New Jersey, says:

1. In his lifetime John W. Carew was the owner of certain real estate including a large farm with dwelling house and out buildings situate thereon

near Port Elizabeth, in the Township of Maurice River, County of Cumberland and State of New Jersey.

2. John W. Carew died testate and in and by his last will and testament constituted and appointed Vineland National Bank & Trust Company and William Marshall Carew, executors and trustees of the last will and testament, which last will and testament was duly probated before the Surrogate of the County of Cumberland and is recorded in the surrogate's office at Bridgeton, New Jersey.

3. The said Vineland National Bank & Trust Company and William Marshall Carew duly qualified as such executors and trustees and took upon themselves the administration of said estate.

4. Under the terms of the said last will and testament the said John W. Carew did authorize and empower his executors and trustees to sell either at public or private sale any or all of his real estate and personal property not previously disposed of by the prior provision of his said will at such price and upon such terms as his executors and trustees may deem fit.

5. Under and by virtue of the provisions of said last will and testament the said defendants advertised the real estate and personal property of the said John W. Carew for sale at public sale, and included in such sale was the real estate and personal property consisting of the farm, dwelling

house and out buildings, hay in the mow of the barn, farming implements and machinery and other personal property on the farm near Port Elizabeth aforesaid, and said sale was publicly advertised for February 10, 1933.

6. By invitation of the defendants, the plaintiff, Oswald Stern, in company with others, entered upon the said land and premises, namely, the farm near Port Elizabeth aforesaid on February 10, 1933, for the purpose of inspecting and examining the real and personal property including the hay in the mow of the barn on said premises which was advertised for sale and in the purchase of which the said Oswald Stern was interested.

7. By invitation of the defendants, their agents and servants, the plaintiff entered in and upon the large barn located on the farm near Port Elizabeth, New Jersey, described as aforesaid, and at the invitation of the defendants proceeded into the mow of the said barn for the purpose of examining the hay advertised for sale and in the purchase of which the said plaintiff was interested.

8. It then and there became the duty of the defendants to have, keep and maintain the premises upon and into which they had invited the plaintiff as aforesaid, in a proper and safe condition so as to avoid injury to the plaintiff, who had been invited to come on the said premises as aforesaid.

9. The defendants failed in their said duty to have, keep and maintain said premises including

the mow into which the plaintiff had been invited, in a safe and proper condition, but on the contrary said premises were kept and maintained in a dangerous condition in that the hay in the mow into which the plaintiff had been invited as aforesaid was so kept and arranged that when the plaintiff entered the hay mow by invitation as aforesaid and stepped upon the hay, that he did without fault on his part slip and fall through an opening in the hay mow and fell a great distance to the ground and seriously injured himself.

10. The negligence of the defendants consisted in keeping and maintaining the hay in said mow in such a condition that a person entering the mow, without negligence upon his part, when he walked over the hay to inspect the same, would slip and fall through said opening which was left unguarded and without warning of any kind for the protection of the plaintiff.

11. By reason of the premises the plaintiff was seriously and permanently injured. He sustained a multiple fracture of the skull, concussion of the brain, a bursting of the right ear drum which destroyed his hearing, a tearing of the brain tissue, a fractured vertebra, an injury to the knees and other external and internal injuries. Some of said injuries are permanent in character and will permanently maim, weaken, disable and disfigure the plaintiff.

12. He has suffered and will suffer great pain and has paid out and will be compelled to pay out

in the future large sums of money for physicians, hospitals and nurses in an endeavor to cure himself of his said injuries.

13. He has lost and will lose money which he otherwise would have made in his business as a shipper of produce and has lost profits and wages which he would have derived from said business. He has been unable to do any work and has lost large sums of money which he might have had except for said injuries.

Plaintiff demands of the defendants both as executors and trustees aforesaid and individually the sum of fifty thousand dollars.

LeRoy W. Loder,
Attorney of Plaintiff.

NOTICE OF MOTION TO STRIKE COMPLAINT.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

10

OSWALD STERN, *Plaintiff,* v. VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, executors and trustees of the last will and testament of JOHN W. CAREW, deceased, and VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, individually, *Defendants.*	Action at Law. Notice of Motion to Strike Complaint.

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To LeRoy W. Loder, Attorney for Plaintiff, Oswald Stern:

Take notice that on Friday, the 8th day of September, A. D. 1933, at 10 o'clock in the forenoon

(daylight saving time), at the Court House in Camden, before the Honorable V. Claude Palmer, Judge of the Cumberland County Circuit Court sitting as Supreme Court Commissioner, I shall move to strike out the complaint in the above-entitled cause as to the defendants, Vineland National Bank & Trust Company and William Marshall Carew, executors
10 and trustees of the last will and testament of John W. Carew, deceased, because the said complaint fails to disclose a cause of action against the said defendants in that:

1. There is no allegation in the complaint of any fact by virtue of which the negligence of defendants is sought to be established. The negligence pleaded is in the nature of a conclusion and is predicated upon no fact set up in the complaint.

20

2. Said complaint charges the said defendants in their representative capacity with negligence, and seeks to hold them liable in their representative capacity for the said alleged negligence.

Take further notice that I shall move to strike out the above complaint, at the aforesaid time and place, as to the defendants, Vineland National Bank and Trust Company and William Marshall Carew,
30 individually, for the reason that said complaint fails to disclose a cause of action against said defendants in that:

1. There is no allegation in the complaint of any fact by virtue of which the negligence of defendants

is sought to be established. The negligence pleaded is in the nature of a conclusion and is predicated upon no fact set up in the complaint.

2. The allegations in said complaint fail to charge these defendants in their individual capacity with negligence.

10

Take further notice that I shall move to strike out the above complaint, at the aforesaid time and place, as to all of the defendants for the reason that said complaint fails to disclose a cause of action in that:

1. There is no allegation in the complaint of any fact by virtue of which the negligence of defendants is sought to be established. The negligence pleaded is in the nature of a conclusion and is predicated 20 upon no fact set up in the complaint.

2. Said complaint charges the defendants, Vineland National Bank & Trust Company and William Marshall Carew, in their capacity as executors and trustees, with negligence and seeks to hold them liable in their representative capacity for the said alleged negligence.

3. The allegations in said complaint fail to charge 30 the defendants, Vineland National Bank & Trust Company and William Marshall Carew, individually, in their individual capacity, with negligence.

T. G. Hilliard,
Attorney for Defendants.

Memorandum

[Endorsed]

Service of the within Notice is hereby acknowledged this day of August, 1933.

.....

Attorney for Plaintiff.

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MEMORANDUM.

NEW JERSEY SUPREME COURT.
Cumberland County.

Oswald Stern, *Plaintiff*, v. Vineland National Bank & Trust Company and William Marshall Carew, executors and trustees under the last will and testament of John J. Carew, deceased, and Vineland National Bank & Trust Company and William Marshall Carew, individually, *Defendants*.	Action at Law. On Motion to Strike Complaint. Memorandum.

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30

LeRoy W. Loder, Esquire, attorney for plaintiff.

Thomas G. Hilliard, Esquire, attorney for defendants.

Palmer, C. C. J., sitting as S. C. C.

Memorandum

Motion is made to strike the complaint in the above-entitled cause for the reason that the complant does not allege any act of negligence upon the part of the defendants, and secondly because the defendants have been made parties both in their individual capacity and as executors and trustees under the last will and testament of John W. Carew, deceased. 10

I think that there is a sufficient allegation of acts of the defendants to constitute negligence, so that upon the reason first above stated the complaint will not be stricken out.

It is practically conceded by the attorney for the plaintiff that the defendants in their representative capacity cannot be held for any acts of negligence, but that they may be held for acts of negligence committed as representatives of the estate in their individual capacity. This seems to be the law so 20 far as I have been able to ascertain it.

The complaint will therefore be stricken to the extent that it charges the defendants with any acts of negligence in their representative capacity. The balance of the complaint may stand.

30

ORDER.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

10

OSWALD STERN, *Plaintiff*, v. VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, executors and trustees under the last will and testament of JOHN W. CAREW, deceased, and VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, individually, *Defendants*.	Action at Law. On Motion to Strike Complaint. Order.

20

30

Due notice of a motion to strike the complaint for failure to allege any acts of negligence upon the part of the defendants, and secondly because the defendants have been made parties both in their individual capacity and as executors and trustees

under the will of John W. Carew, deceased, having been given and the matter coming on to be heard before Honorable V. Claude Palmer, sitting as Supreme Court Commissioner, and the arguments of counsel having been heard, and the briefs submitted having been read:

It is, on this day of November, nineteen hundred and thirty-three, ordered, that the complaint be stricken to the extent that it charges the defendants with any acts of negligence in their representative capacity. The balance of the complaint may stand.

It is further ordered that the defendants, Vineland National Bank & Trust Company and William Marshall Carew, have ten days from the date of this order within which to plead and/or answer the complaint filed in the above-entitled cause.

V. Claude Palmer,
Circuit Court Judge Sitting as a Supreme Court Commissioner.

ANSWER.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

10

Between OSWALD STERN, *Plaintiff,* and VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, 20 *Defendants.*	Action at Law. Answer.

The Vineland National Bank & Trust Company, a corporation having its principal office and place of business in Vineland, Cumberland County and State of New Jersey, and William Marshall Carew, the defendants, answering the complaint of the plaintiff, Oswald Stern, say that:

30 They deny each and every allegation of the plaintiff's complaint.

FIRST SEPARATE DEFENSE.

The defendants were not guilty of negligence.

SECOND SEPARATE DEFENSE.

The defendant agents were not guilty of negligence.

THIRD SEPARATE DEFENSE.

That they, as executors and trustees under the will of John W. Carew, deceased, were not guilty of negligence. 10

FOURTH SEPARATE DEFENSE.

The defendants were not present at the time of the occurrence of the accident, nor were their servants or agents present; neither the defendants nor their servants nor agents caused said accident, nor did they contribute in any extent whatever to the occurrence of said accident; and whatever caused said accident or contributed to the occurrence thereof, the plaintiff was guilty of contributory negligence, of which the particulars are as follows: 20

Whatever damages and injuries were sustained by the plaintiff, Oswald Stern, at the time and place mentioned in the complaint, were caused and contributed to by his negligence in that he negligently and carelessly exposed himself to the risk of such an accident, and neglected to take precaution or to exercise care to guard and protect himself against such an accident; moreover, at the time and place mentioned in the complaint, he was conducting himself in a careless, negligent and reckless manner, and was not exercising care or taking proper precautions. 30

FIFTH SEPARATE DEFENSE.

Defendants allege that at the time of the accident mentioned in the complaint, plaintiff was a trespasser.

SIXTH SEPARATE DEFENSE.

10

Defendants allege that at the time of the accident mentioned in the complaint, plaintiff was a mere licensee.

Wherefore, the defendants demand judgment that the complaint herein be dismissed, with the costs and disbursements in this action.

T. G. HILLIARD,
Attorney for the Defendants.

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REPLY.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

10

OSWALD STERN, *Plaintiff,* v. VINELAND NATIONAL BANK AND TRUST COMPANY and WILLIAM MARSHALL CAREW, *Defendants.*	Action at Law. Reply.

20

The plaintiff denies all of the allegations set forth in the answer and in the separate defenses annexed thereto, except insofar as they may admit the allegations of the complaint.

LEROY W. LODER,
Attorney of Plaintiff.

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NOTICE OF APPLICATION FOR AMENDMENT OF ANSWER.

NEW JERSEY SUPREME COURT.
10 CUMBERLAND COUNTY.

OSWALD STERN, *Plaintiff,* v. VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL 20 CAREW, *Defendants.*	Action at Law. Notice of Application for Amendment of Answer.

To LeRoy W. Loder, Esquire, Attorney of Plaintiff:

Please take notice that on Wednesday, the seventeenth day of January, 1934, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be 30 heard, at the Court House in the City of Bridgeton, Cumberland County, New Jersey, I shall apply to his Honor, V. Claude Palmer, Circuit Court Judge, sitting as a Commissioner of the Supreme Court, or to such other Justice, Judge or Commissioner as shall sit to hear motions herein, for an order amend-

ing the answer in the above-entitled cause to include a seventh separate defense to read as follows:

Said public sale of said real estate and personal property of the said John W. Carew, referred to in plaintiff's complaint, was arranged for, advertised and conducted by an independent contractor, one John A. Ackley & Son, Inc. 10

Respectfully,

T. G. Hilliard,

Attorney for Defendants.

[Endorsed]

Service of the within Notice of Motion is hereby acknowledged. 20

.....

Attorney for Plaintiff.

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ORDER.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

10

OSWALD STERN, *Plaintiff*, v. VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, *Defendants*.	Action at Law. Order.

20

Application having been made to this Court by Thomas G. Hilliard, attorney for defendants, to amend the answer filed in the above-entitled cause to include a seventh separate defense to read as follows:

Said public sale of said real estate and personal property of the said John W. Carew, referred to in plaintiff's complaint, was arranged for, advertised and conducted by an independent contractor, one Charles W. Ackley;

30

And it appearing that due notice of said motion was given to plaintiffs, and the same having been argued before this Court by Thomas G. Hilliard,

Esq., for defendants and LeRoy W. Loder, Esq., for plaintiff, and due cause appearing therefor;

It is on this 17th day of January, 1934, ordered that the answer filed in the above-entitled cause be amended to include a seventh separate defense to read as follows:

Said public sale of said real estate and personal property of the said John W. Carew, referred to in plaintiff's complaint, was arranged for, advertised and conducted by an independent contractor, one John A. Ackley & Son, Inc.

V. Claude Palmer,
Judge.

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POSTEA.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

10

OSWALD STERN, *Plaintiff,* v. VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, executors and trustees of the last will 20 and testament of JOHN W. CAREW, deceased, and VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, individually, *Defendants.*	Action at Law. Postea.

30 This case was tried before Honorable V. Claude Palmer with a jury at the Cumberland County Circuit on January 18, 1934.

After the plaintiff had concluded his case, a motion having been made by the defendant for a non-suit, a non-suit was granted against the plaintiff.

V. CLAUDE PALMER,
Judge.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, executors and trustees of the last will and testament of JOHN W. CAREW, deceased, and VINELAND NATIONAL BANK & TRUST COMPANY and WILLIAM MARSHALL CAREW, individually, *Defendants,* ads OSWALD STERN, *Plaintiff.*	Action at Law. On Postea.

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20

Costs, $51.50.

It is ordered that judgment of non-suit be and hereby is entered in favor of defendants and against the plaintiff, with costs to be taxed *nisi.*

Entered January 26, 1934.

On motion of

30

T. G. HILLIARD,
Attorney.

A true copy.
FRED L. BLOODGOOD,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

10

OSWALD STERN, *Plaintiff,* v. VINELAND NATIONAL BANK AND TRUST COMPANY and WILLIAM MARSHALL CAREW, *Defendant.*	Action at Law. Notice and Grounds of Appeal.

20

To Thomas G. Hilliard, Attorney of Defendants:

Take notice that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, upon the following grounds:

The trial Court directed a judgment of non-suit
30 against the plaintiff and in favor of the defendants when thereunto moved by counsel for the defendants, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

LEROY W. LODER,
Attorney of Appellant.

[Endorsed]

Service of the within Notice of Appeal and Grounds of Appeal is hereby acknowledged this 5th day of January, 1935.

T. G. Hilliard,
Attorney of Defendants.

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TESTIMONY.

NEW JERSEY SUPREME COURT.

CUMBERLAND COUNTY.

10

OSWALD STERN, *Plaintiff,* v. VINELAND NATIONAL BANK AND TRUST COMPANY, *et al.,* *Defendants.*	Action at Law.

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Bridgeton, N. J., January 18, 1934, before HON. V. CLAUDE PALMER, Circuit Judge, and a jury.

APPEARANCES:

For the plaintiff, LEROY W. LODER, ESQ.

For the defendants, THOMAS G. HILLIARD, ESQ., and J. ROY OLIVER, ESQ.

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(Mr. Loder opened the case to the jury, for the plaintiff.)

(Mr. Hilliard opened the case to the jury, for the defendants.)

Mr. Loder: Now, if your Honor please, I have talked with Mr. Hilliard, and for the purpose of doing away with the necessity of bringing in deeds and certified copies of wills, and so on, I understand the defendant will admit that the real estate described in the complaint filed in this cause was the property of John W. Carew at the time of his death; 10 and that under the will of John W. Carew, the Vineland National Bank and Trust Company and William Marshall Carew were constituted executors and trustees; that the will was duly probated by the Surrogate of Cumberland County, and that the Vineland National Bank and Trust Company and William Marshall Carew duly qualified as executors and trustees thereunder, and took upon themselves the administration of the estate; that under the terms of the last will and testament, the real estate was to 20 be sold.

The Court: I will suggest, gentlemen, that dealing with the fourth paragraph of the complaint, where you charge that these executors were authorized to sell real estate, wouldn't it be better to put on the record, the particular paragraph of the will dealing with that particular situation? Then there can be no question about the extent of it.

30

Mr. Hilliard: I think that has been admitted in the answer. No, I denied it all. I think that might be cured very readily by ——

The Court: My suggestion is that the particular paragraph of the will giving the executors power to

sell, be dictated into the record, so that there can be no question about it.

Mr. Hilliard: It is the eighth paragraph, Judge Loder, I think.

Mr. Loder: Paragraph eight of the will of John
10 W. Carew, deceased, reads as follows:

"I hereby authorize and empower my executors and trustees hereinafter named to sell, either at public or private sale, any or all of my real estate and personal property, not hereinbefore bequeathed, at such prices and upon such terms as they, in their judgment, shall deem best; to give deeds and acquittances therefor, as I might, were I alive."

And it is admitted that the farm and personal property on the Port Elizabeth Road, described in
20 the complaint in this cause, was not any of the property that had been bequeathed or devised in any of the other provisions of the will.

Mr. Hilliard: That is correct.

Charles W. Ackley, sworn.

30 Direct examination.

By Mr. Loder:

Q. Mr. Ackley, where do you reside?
A. Vineland, New Jersey.

Q. And what is your business?

A. Auctioneer.

Q. Were you in that business on the 10th of February, 1933?

A. I was.

Q. And prior to that time?

A. Yes.

Q. Were you in business as an individual, or were you associated with a partnership or firm or corporation? 10

A. Associated with a corporation.

Q. And what was the name of the corporation?

A. John A. Ackley and Son, Incorporated.

Q. Prior to February 10, 1933, did you enter into any arrangement with the Vineland National Bank and Trust Company and William Marshall Carew, executors of the Estate of John W. Carew, for the sale of certain real estate and personal property? 20

A. I did.

Q. Was that a written contract, or was it a verbal arrangement that you had with them?

A. Written.

Q. Do you have such contract with you?

A. I do.

Q. Will you produce it, please? (Witness produces paper.)

Q. What office, at the time this arrangement was made with the executors of the Carew Estate, did you hold in the corporation of John A. Ackley and Son? 30

A. Secretary.

Q. I show you the written contract which you have produced, and ask you if that is the contract that was entered into?

A. It is.

Q. And who signed for John A. Ackley and Son?

A. I did.

Q. Is that your signature?

A. It is.

Q. And I call your attention to the words, "Estate of John W. Carew, J. B. Cramer, Trust Officer,"
10 was that signed in your presence?

A. It was.

Q. By whom?

A. Mr. Cramer.

Mr. Loder: I assume there is no objection to offering it in evidence.

Mr. Hilliard: There is no objection to the marking of it in evidence.

20

(Contract marked "P1.)

Q. After the contract was signed between your firm and the Carew Estate, what did you then proceed to do, insofar as the real estate and personal property of the Carew Estate was concerned?

A. Prepared the advertising.

Q. How was it advertised, was it advertised by handbills, or newspaper articles?

30 A. Both.

Q. Do you have any newspapers in which the advertisement appears, with you?

A. Yes.

Q. Will you produce them? (Witness produces papers.)

Q. Are there any others?

A. No newspapers.

Q. Do you have any handbills with you, that were prepared, advertising the real and personal property for sale?

A. Yes, sir.

Q. Mr. Ackley, the advertisement handbill which you have produced, who prepared that advertisement? 10

A. I did.

Q. And did you prepare it at anyone's direction, or with anyone's assistance?

A. Yes.

Q. Whose?

A. Well, no, not with anyone's assistance.

Q. At whose direction?

A. It was directed by the executors of the estate, and submitted to them for their approval. 20

Q. And it was submitted by you to the executors of the Carew Estate for their approval, before it was actually published?

A. It was. Particularly to Mr. Carew.

Q. William Marshall Carew?

A. Yes.

Q. On the—I call your attention to the fact that on this handbill, there are a number of farms advertised, and photographs of the farms; where did the photographs come from? 30

A. They were taken by Mr. Robbins, of Vineland, in the presence of myself and Mr. Carew; Mr. Carew took Mr. Robbins and myself, and we selected the pictures.

Q. And when you say Mr. Carew, do you mean William Marshall Carew?

A. Yes.

Q. And is the handbill which you presented an exact copy of the advertisements which were prepared, and which were posted?

A. It is.

Q. And how large a number were posted, and how were they posted?

10 A. We mailed out from our office, several hundred, and Mr. William Marshall Carew attended to the distribution of those out in the rural section; whom he employed, I don't know.

Mr. Loder: We offer the handbill in evidence.

Mr. Hilliard: No objection.

("P2.")

20

Mr. Loder: I also offer in evidence, the advertisement appearing on page 4 of the Evening News and Gloucester County Democrat, Woodbury, Friday, January 27, 1933.

Mr. Hilliard: No objection.

("P3.")

30 Q. Now, Mr. Ackley, in addition to the newspaper which has been offered in evidence, was this same advertisement inserted in any other newspapers?

A. Yes, in the Elmer Times, and in the Salem paper. I am not so sure—I think the advertisement was placed by Mr. Foster, of the Elmer Times.

Q. Did, or did you not receive any instructions from the executors of the estate, as to what papers it should be advertised in?

A. Well, I don't believe that we ever conducted a sale where there was closer conference ——

The Court: No, answer the question.

10

A. I did.

Q. And what were those instructions? And who gave them?

A. They came from Mr. Carew.

Q. William Marshall Carew?

A. William Marshall Carew.

Q. What were the instructions?

A. In our local advertising campaign, we proposed to advertise it in the Evening Journal, the local paper, but he thought that because of the business of the Garden State Dairies, it might create a misunderstanding, and the change was made at his suggestion.

20

Q. After these various properties were advertised, and prior to the actual sale day of the properties, who was conducting these farms?

A. The various tenant farmers.

Q. Were, or were they not the same farmers that had been in possession of the farms at the time John W. Carew died?

30

A. To the best of my knowledge, they were.

Q. Does that apply to the sale of this particular farm on the Port Elizabeth Road?

A. It does.

Q. And that is what number on the bill of sale?

A. It was the last farm sold. Number six.

Q. Now, the advertising of these farms, who paid for this advertising; you, or the Estate of John W. Carew?

A. The estate of John W. Carew.

Q. Who set the dates on which the sales of this property, the date or dates on which the sale of this
10 property was to be conducted?

A. They were set by a joint conference, and then afterward changed at the suggestion of one of the —of Mr. Cramer—moved, advanced one week forward, because it interfered with a meeting of trust officers over in New York.

Q. And Mr. Cramer was the trust officer of the Vineland National Bank and Trust Company, was he not?

A. He was.

20 Q. Prior to the sale, and on the day of the sale, were there any persons working on these farms, taking charge of the property, looking after the various items that had been advertised?

A. The employees of the Carew Estate.

By the Court:

Q. Employees of whom?

A. Employees of the Carew Estate.

30

By Mr. Loder:

Q. Now, I call your attention to the fact that in both advertisements, there is the wording that "It is important that you arrange to inspect all of the

farms before the day of sale. We are prepared to show you any or all of the properties; also inspect horses, cows, implements. Opportunity of a lifetime.'' Do you know of your own knowledge whether people did come upon the advertised premises prior to the sale, to inspect the properties?

A. Not of my own knowledge.

Q. Now, the proceeds of the sale of these farms; to whom were they paid, to you, or to someone else? 10

A. In most cases, the proceeds were collected by the executors. In four instances, we collected the deposits on the real estate; two of those checks were made payable to the Estate of John W. Carew; but the cash from the proceeds of the personal property was itemized by our bookkeeper, but the funds were taken to the bank.

Q. Taken to where?

A. To the Vineland National Bank. 20

Q. And deposited to whose credit?

A. To the credit of the Estate of John W. Carew.

Cross-examination.

By Mr. Hilliard:

Q. This contract, with the terms of which you are familiar, provides, among other things, that the executors of the Estate of John W. Carew agree to 30 pay a commission of three per cent of the gross amount of all real estate sales, and five per cent of the gross amount of all personal property sales, these payments to be made to your corporation, John A. Ackley and Son, Inc.; will you tell me what

it is that you did in return for the five per cent and the three per cent?

A. Sold the real estate and personal property.

Q. You have already testified that you prepared the advertising, is that correct?

A. Yes.

Q. So that in addition to selling the property, you
10 did prepare the advertising?

A. Yes.

Q. You dealt with the newspapers with regard to the advertising, did you not?

A. I did.

Q. The bills for the advertising were rendered to John A. Ackley and Son, Inc., weren't they?

A. No. Not in all cases.

Q. They were in most of the cases, weren't they?

A. Yes.

20 Q. You have been in the sales business for many years, haven't you?

A. Yes.

Q. And this contract that you made with the executors of the will of John W. Carew was not an unusual bargain or contract, was it?

Mr. Loder: That is objected to, as immaterial.

The Court: I will sustain the objection.

30

Mr. Hilliard: I have no desire to press it.

Q. How many years have you been in the sales business, Mr. Ackley?

A. Oh, I am forty-five; ever since I was fifteen years of age.

Q. And you are the secretary of John A. Ackley and Son, Inc.?

A. Yes, sir.

Q. And you have authority to make bargains to bind that corporation?

A. Yes, sir.

Q. You are the operator of that corporation, aren't you? 10

A. Yes, sir.

Q. In other words, you do business as John A. Ackley and Son, Inc., in your sales business?

A. Yes, sir.

Q. Who was it that you referred to when you say in the advertisement, "We are prepared to show you any or all of the properties?" Who did you refer to when you said "We?"

A. John A. Ackley and Son, Incorporated.

Q. And did you furnish prospective purchasers 20 with information in connection with these sales of the John W. Carew Estate?

A. We did.

Q. And that is a portion of what it was for which you were paid?

A. That was a part of our services.

Q. In addition to crying the sales?

A. Yes.

Q. Who was it, under this bargain, Mr. Ackley, who prepared the personal property for sale? 30

A. The occupants of the various farms.

Q. And who paid them for that service?

A. The Estate of John W. Carew.

Q. Did you have no employees in connection with these sales?

A. Yes, we had some in connection with the sales.

Q. What did they do?

A. We took a clerk, and we took a collector, which we used at the time of sale.

Q. And that also was furnished by you as a portion of what it is that you did for the three and five per cent?

10 A. Yes.

Q. Who was it that directed these employees of the Carew Estate in the arrangement of the personal property?

A. That was done jointly ——

Q. How do you mean, jointly?

A. I mean that I went with Mr. William Carew, and I think that Mr. Cramer was on one of those trips; and we talked over the method of arranging the goods. I didn't make another trip to the places 20 until about a week prior to the sale, and after that trip, I suggested that they should have one of their employees who apparently knew, who had a great deal of experience in arranging sales, to assist the other farmers.

Q. Who was that employee?

A. Everett Moore.

Q. And did you give Everett Moore his instructions with regard to how this stuff was to be arranged?

30 A. It wasn't necessary; he had his knowledge from a number of sales; he knew how to do it better than I did.

Q. And the arrangement of the personal property that was sold by you on this Riverview Farm, so-called, was made by Mr. ——

A. Marshall went there to assist the farmers; just what part of that work he did, I don't know.

Q. You mean Mr. Marshall Carew?

A. No, Mr. Everett Moore went and assisted the various farmers; what part of the work he did down there, I don't know.

Q. Do you know whether Mr. Marshall Carew or the Vineland Bank had anything to do with it? 10

A. I don't know as they did; I think that perhaps of the Carews, Mr. Russell Carew took a little more interest in the Millville farm, because that was a little nearer to him.

Q. Not the defendant in this case, but another member of the Carew family, you think?

A. Yes.

Q. But you have no personal knowledge with regard ——

A. No. 20

Q. Did you direct anybody in the hay-mow down at this Riverview Farm?

A. No.

Q. The bills for advertising that were made out to John A. Ackley and Son, and received by you, were turned over for payment to the executors of the will of John W. Carew, were they not?

A. They were.

Q. The contract called for the payment of advertising, up to $350.00? 30

A. The instructions which we sent to the various newspapers were that these bills were to be charged to the Estate of John W. Carew, and if they would send the bills to us, we would O. K. them and turn them over to the estate for payment. In connection

with the Philadelphia and New York advertising, that advertising was placed through the firm of J. W. Johnson, and instructions were given to them that it should be charged to our account, but not mixed up with our regular account, to our account for the Estate of John W. Carew, deceased, and that is how they were billed.

10 Q. When you say your account, you mean your corporation?

A. Yes, sir.

Q. That was bound by this contract you have identified, P1?

A. Yes, sir.

Q. You had no assistance, I think, Mr. Ackley, in the preparation of this advertising, but you submitted it for approval before you used it, to somebody?

20 A. In connection with that, I worked very closely with Mr. William Carew. We had a number of photographs; I think there are seven photographs that appear there; we took nine; we conferred on the selection of them, and the arrangement and order of the sales. The actual writing of the matter, that was prepared in our office.

Q. And the form of the advertisement was dictated by you, wasn't it?

A. No, sir. It was suggested by me, and approved
30 by them.

Q. The difference between us is, that you didn't want to say that you forced them to use it; you suggested it, and they used it?

A. In this sale, there was no dictation on my part.

Q. But you suggested the form of this advertise-

ment, which met with the approval of the representatives of the Estate of John W. Carew?

A. I did.

Q. And it was the preparation of this advertising, as well as the auctioneering, for which you agreed to be paid, and were paid?

A. Not entirely.

Q. Something else for which you were to be paid, was there; what was that? 10

A. We did more than what we were actually paid for.

Q. What was it you did that you weren't paid for?

A. Well ——

The Court: What difference does that make, Mr. Hilliard?

20

Mr. Hilliard: I don't know that it makes any difference; I will withdraw the question.

Re-direct examination.

By Mr. Loder:

Q. Did you say who paid Everett Moore?

A. The Carew Estate.

30

OSWALD STERN, sworn.

Direct examination.

By Mr. Loder:

10 Q. Mr. Stern, are you the plaintiff in this case?
A. Yes, sir.
Q. And where do you reside?
A. South Vineland.
Q. And how old are you?
A. Thirty.
Q. Were you injured as the result of a fall on February 10, 1933?
A. Yes, sir.
Q. At that time, what business were you engaged
20 in?
A. Farming.
Q. Any other business?
A. Yes.
Q. What was that?
A. Shipping and buying of produce.
Q. Are you married?
A. No.
Q. Did you go down on the Port Elizabeth Road, to the Carew farm that was being advertised for
30 sale?
A. Yes, sir.
Q. And when did you go there?
A. On the morning of February 10th.
Q. And about what time of the morning did you reach that place?

A. I should judge, around nine o'clock.

Q. What was your purpose in going to the Carew farm?

A. I read an advertisement in the newspaper, stating the fact that there would be a public sale of the farm, cows, hay and different things. I went there to look over the place and inspect it.

Q. Was there anything in the advertisement which you saw, that said anything about inspecting the premises? 10

A. Yes, sir.

Q. Could you identify a newspaper advertisement that you saw, do you think, if I handed you a paper?

A. Yes, sir.

Q. I show you a newspaper that has been marked P3, and call your attention to an advertisement headed "Absolute Auction Sale of six valuable farms," on page 4, and ask you to look at that advertisement carefully, and say whether that was the advertisement which you saw, either in that or some other newspaper? 20

A. That is the advertisement I saw.

Q. Did you see any posters or handbills announcing this sale?

A. Yes, sir.

Q. Do you think you could identify one of those posters if you saw it?

A. Yes, sir. 30

Q. I show you Exhibit P2, and ask you to look at it carefully, and say whether or not that is identical with the poster which you saw?

A. Yes, sir.

Q. Now, you say you went to the farm, did you?

A. Yes, sir.

Q. After reading that poster?

A. After reading those.

Q. And the advertisements?

A. And the advertisements.

Q. What did you do after you reached the farm?

A. Why, I got out of the car, and a man came out
10 of the house, and I asked him, I said "Is this the place to be put on public sale?" he says "Yes," and I says, "I would like to take a look around, I want to see the cows, and particularly the hay."

Q. Now, did anybody direct you as to where the cows and hay might be?

A. Yes, sir, this man did.

Q. Now, did you follow—this man came out of the house, did he?

A. Yes.

20 Q. Did you follow his direction?

A. Yes, sir.

Q. And where did you go?

A. To the barn.

Q. Did you see anybody at the barn?

A. After going inside, I did.

Q. Who did you see there?

A. I saw two men.

Q. What were they doing?

A. They were engaged in cleaning the cows.

30 Q. The cows there in the barn?

A. Yes.

Q. The cows were advertised for sale on that poster, weren't they?

A. Yes, sir.

Q. Were you interested in the cows?

A. Yes, sir.

Q. Did you look at them?

A. Yes, sir.

Q. Did you inquire where the hay might be?

A. Yes, I did.

Q. Were you told where it was?

A. Yes.

Q. Where was it? 10

A. A man came with me, and he showed me where to go to see the hay.

Q. Who was the man that showed you where the hay was?

A. The man at that time, I think, was cleaning the cows.

Q. Was it the same man that was cleaning cows?

A. The man that was cleaning the cows showed me where to go.

Q. And showed you where the hay was? 20

A. Yes, sir, he walked over with me to the place where there was a stairway, and he says "You go up there." He walked right to the foot of the stairs and pointed, he said "You go up there; there is a feed place there, then there is a ladder on the side;" he says "Go up that, and you will find the hay." As I was going up the stairs, I asked him was it perfectly safe to go up there, and he says "Yes, perfectly all right."

Q. Did you go up, then? 30

A. Yes, I did.

Q. When you reached the mow where the hay was, just tell to the jury, what you did?

A. I went up there and got to the hay; it was rather dark. I stopped for a minute or so, to get

accustomed to the surroundings of the haymow. I could see a lot of hay there, practically all the hay. Before going up there, I told my father that I was going to bring him a sample ——

The Court: That is not competent testimony.

10 Q. Don't tell what you told your father, just tell what you did. You say you looked at the hay; tell what you did, or tried to do.

A. After getting accustomed to the light, which was still dark there, I proceeded in picking up samples of hay; and before proceeding to pick up samples of hay, I felt my way around with my feet and the weight of my body, knowing that there is probably some place in that barn, a place where they throw down hay for the cows, and I looked around, 20 I didn't see any opening of that kind, all I could see was hay. Knowing that barns always have an opening, or they are covered by a trap door, I didn't see any opening, or light shining from underneath, so I went along very cautiously, and picked up a sample of hay, went a few feet further and picked up another sample, and a few samples from different parts of the barn. I went a few more feet; suddenly, the hay under me gave way; I had no chance to try to grip for something to hold on before I slipped 30 through.

Q. Was, or was not the hole through which you fell, covered with hay?

A. Yes, sir.

Q. How large a mow was this that you went into?

A. It was quite a big mow.

Q. And you were getting several samples?
A. Yes, sir.
Q. From different parts?
A. From different parts of the mow.
Q. What were you going to do with that?
A. I was going to take it down to show my father the kind of hay.
Q. You said you were in the farm business and produce shipping business; was anybody associated with you in the farm business at that time? 10
A. Yes, sir; my father.
Q. Who went to the farm with you that day?
A. My father and two brothers.
Q. And what is your father's name?
A. Samuel.
Q. And your two brothers?
A. Adolph and Gus.
Q. You say you were interested in buying this hay? 20
A. Yes, sir.
Q. Did you go on the farm for the purpose of inspecting any of the other property that was advertised, except hay?
A. Yes.
Q. What?
A. I went to the farm the day before that ——

The Court: On this particular day, was there anything else other than the hay that you wanted to inspect? 30

A. Yes, sir.
Q. What?
A. To see the general conditions of the farm.

By Mr. Loder:

Q. Well, were you interested in being a possible purchaser for the farm?

A. Yes, sir.

Q. When you were in the haymow getting samples of this hay, was there anything that you saw that
10 would indicate that there was an opening anywhere in the vicinity of where you were?

A. No, sir.

The Court: He said that, Judge.

Q. Now, after you went through this hole, what was the next thing that you remember after that?

A. I don't remember anything until I was at the hospital.

20 Q. In the Millville Hospital?

A. The Millville Hospital.

Q. Do you know how long you stayed in the hospital?

A. I think it was over six weeks.

Q. And after you left the hospital, you went to your father's home?

A. Yes, in an ambulance.

Q. Were you confined to your bed after you went to your home?

30 A. Yes, sir.

Q. For how long?

A. Over two months.

Q. Prior to this accident, what was your condition of health?

A. I beg pardon?

Q. What was your general condition of health?

A. Very good.

Q. What kind of work were you able to do?

A. Any hard work on the farm.

Q. Now, since the accident, have you been—what kind of work have you been able to do?

A. I haven't been able to do anything.

Q. While you were in the hospital, did you suffer pain? 10

A. Yes, sir, very much.

Q. And while you were confined to your home, did you suffer pain?

A. Yes, sir.

Q. Do you suffer any pain now?

A. Yes, sir.

Q. And that is where?

A. Headaches and pains throughout the head, back, and in several parts of the body, and dizziness. 20

Q. Do you have any trouble with the movements of your back?

A. Yes, sir, very much.

Q. What trouble do you have?

A. It is very hard for me to bend down, it is very tiresome to sit, and hard to walk.

Q. Prior to the accident, you say you did hard work on the farm, did you do any other kind of work, in looking after the clerical end of it?

A. Yes, sir, I did. 30

Q. What kind of work did you do?

A. I looked after the loading of the trucks, after the manifesting, and looked after books.

Q. Who kept the books?

A. I did.

Q. Have you been able to do any of that since the accident?

A. No, sir.

Q. How was your hearing before the accident?

A. Very good.

Q. Have you had any trouble with your hearing since?

10 A. Yes, sir.

Q. In which ear?

A. In my right ear, I don't hear at all.

Q. Is it improving?

A. No.

Q. Now, at the hospital, did you have any special nurses?

A. Yes, sir.

Q. How many?

A. Two.

20 Q. Did you have any nurse or nurses while you were at your home?

A. Yes, sir.

Q. How many?

A. Two.

Q. Now, who has been your physician during all this time?

A. Dr. Kauffman.

Q. Are you still under Dr. Kauffman's care?

A. Yes, sir.

30 Q. How often do you visit the doctor now?

A. About once a week.

Q. Do you know whether there was a doctor by the name of Dr. J. P. Carnett, of Philadelphia, who came to see you at the hospital?

A. Yes, I was told.

Q. Do you know what his bill is?
A. Yes, sir.
Q. How much is it?
A. $150.00.
Q. Do you know what the total amount of the bills were for the nurses at the hospital and the nurses that attended you in the home?
A. Yes, sir. 10
Q. How much?
A. $740.00.
Q. You had a bill from the hospital?
A. Yes, sir.
Q. I show you a bill from the Millville Hospital to Mr. Oswald Stern, and ask you if that is the hospital bill?
A. Yes, sir.
Q. And what is the amount of your bill to the hospital? 20
A. $373.25.
Q. Did you go to Wildwood in June and July of 1933?
A. Yes, sir.
Q. At whose direction?
A. At the doctor's orders.
Q. And how long did you stay there?
A. I think it was over six weeks; about six weeks.
Q. What were you doing there, Oswald?
A. Staying there for rest and quiet. 30
Q. And do you know what the expense of that trip amounted to?
A. Yes, sir.
Q. How much?
A. $90.00 or over.

Q. Do you wear any belt or support?

A. Yes, sir.

Q. Who prescribed that?

A. Dr. Kauffman.

Q. And how long have you been wearing it?

A. Several months, almost from the time that I came back from Wildwood.

10 Q. Did you pay for that, know what the bill is?

A. Yes, sir.

Q. How much?

A. $9.00.

Q. Do you still have your association with your father in the farm and produce business?

A. Yes, sir.

Q. Have you had to hire anyone to take your place in performing the work which you yourself previously did in that business?

20 A. Yes, sir.

Q. Who?

A. Ed Warren, my brother-in-law.

Q. Who pays him?

A. My father pays him what I should have gotten during that time.

Q. Out of the business?

A. Yes, sir.

Q. Well, is, or is not that expense taken out of your share?

30 A. Yes, sir.

Q. And how much does it amount to?

A. It amounts to $20.00 a week.

Q. $20.00 each week?

A. Yes, sir.

Q. And do you know how long that has been going on?

A. From the time that I was hurt.

Q. Is he still working there?

A. Yes, sir.

Q. Now, prior to this accident, did Mr. Warren work for you or your father?

A. No, sir.

Q. What did he do?

A. He was working for himself. 10

Q. In Vineland?

A. Yes, sir.

Q. In addition to these other items you have testified to as having paid out, did you have to pay anything out for medicines?

A. Yes, sir.

Cross-examination.

By Mr. Hilliard: 20

Q. What is the arrangement between you and your father with regard to the profits, if any, of your business?

A. We work on a partnership ——

Q. You are equal partners?

A. No, my father gets more than I do.

Q. And what wage did you receive prior to February 10th, the date you were injured?

A. I didn't receive any wage, I received the commissions and profits of the business that we were doing. 30

Q. The proportion that was due to you under the agreement with your father?

A. Yes, sir.

Q. And you rendered your service in exchange for that proportion?

A. Yes, sir.

Q. And since the accident, there has been paid out of the funds of the business, to Mr. Warren, $20.00 a week for doing work that you theretofore did?

A. Yes, sir.

10 Q. And do you still receive from the business, that portion of the profits above $20.00, that are earned?

A. No, sir.

Q. You are not any longer, then, in connection with that business?

A. I am connected with the business, but I don't receive anything.

Q. You don't receive any return whatever from it?

A. No return.

20 Q. Mr. Stern, would you recognize, do you think, the man who you say directed you up into the mow from which you fell and were injured?

A. I don't think so.

Q. Would you recognize the person with whom you talked in the yard of the Carew farm. If you would see him?

A. I don't know as I would.

Q. Your answer is that you don't think you would?

A. I don't think I would.

30 Q. Have you been down to the scene of this accident since the injury was received by you?

A. I don't recall.

Q. You don't remember having been down on the farm since that time?

A. I don't remember.

Q. Didn't you go down there in the summer, during last summer some time, and talk with someone on the farm about this accident?

A. I don't remember.

Q. Do you desire to be understood as saying that you did not go down there?

The Court: He said that he didn't remember. 10

Mr. Hilliard: If your Honor finds the question objectionable, I will withdraw it.

The Court: In view of the previous answer, I think it is.

Q. Was there anything, Mr. Stern, said to you by anyone, that induced you to go down to the farm the day of the sale? Except the advertisements to 20 which you have testified?

A. It was just by the—through the advertisements.

Q. And that is what induced you to go there?

A. Yes, sir.

Q. Did you see Mr. William Carew at any time prior to this sale, and have any talk with him about it?

A. No, sir.

Q. You know Mr. Carew, do you not? 30

A. No, sir.

Q. You do not know him?

A. No, sir.

Q. But you are quite sure you didn't talk with him about it?

A. Positively.

Q. Did you talk with Mr. Cramer, of the First National Bank of Vineland, about it?

A. No, sir.

Q. And you were wholly induced to go there by having read these advertisements?

A. Yes, sir.

10 Q. Did you have any conversation with any other officer or official of the bank, besides Mr. Cramer, with regard to the sale, and going down there to the premises?

A. No, sir.

Q. Did you explain to the man with whom you talked in in the yard, that you were interested in purchasing the farm yourself?

A. The farm and some cows, and particularly, the hay.

20 Q. Do you remember discussing with the man with whom you talked in the yard, the bigness of the farm?

A. No, sir.

Q. You didn't ask him how large the farm was, or anything of that kind, or where it led?

A. I don't remember.

Q. You don't remember having done that?

A. No.

Q. But you were interested in purchasing the 30 farm, if it was sold right?

A. Yes, sir.

Q. And so informed this fellow in the yard?

A. Yes, sir.

Q. When you reached the mow, I understand you to say that you stood at the entrance into the mow until you could accustom your eyes to the darkness?

A. Yes, sir.

Q. And that thereafter, you proceeded into the mow and walked around in there from place to place?

A. Yes, sir.

Q. Taking samples of hay?

A. Yes, sir.

Q. And that that was the reason why you did walk around in the mow? 10

A. Yes, sir.

Q. Were you able to see that you were taking different kinds of hay when you picked up these samples?

A. No, sir.

Q. Did you observe the railings that surrounded this mow-hole?

A. I didn't see any railings. It was dark.

Q. You are aware of the fact that frequently, these mow-holes do have railings around them, 20 aren't you?

A. No, I don't know.

Q. You knew that this mow must have a hole in it somewhere, down which the hay was pitched, didn't you?

A. Yes, sir.

Q. And it was with that in mind, that you were so careful in picking your way around over the hay, wasn't it?

A. Yes, sir. 30

Q. But notwithstanding the care that you took, you managed to fall through that opening?

A. Yes, sir.

Q. Do you know whether you were involved in any other accident on that same day, Mr. Stern?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. How far, Mr. Stern, could you see ahead of you into the mow, when you left the ladder-head?

A. Not very far.

Q. Well, could you see three feet before you?

10 A. I should judge around that, or probably a little more.

Q. A little more than three feet?

A. Around three feet or so.

Q. Now, you said something in your direct examination that I didn't quite catch, about a trap-door; what connection had a trap-door with this matter?

A. I know that the barns that I have been accustomed to, in our own farms, the different places 20 have always had a trap-door, but after we have thrown down hay to the cows, we close that door to keep the place warm.

Q. That trap-door is on the floor of the mow, isn't it?

A. Yes, sir.

Q. The hay in this mow was a long distance above the floor, wasn't it, to the top of the hay?

A. I don't know.

Q. You climbed up a ladder how far?

30 A. I don't know how far it would be, it was just an ordinary ladder.

Q. Twenty feet, wasn't it, from the level of the mow floor?

A. I don't think it was quite that high.

Q. Fifteen feet?

A. Between 12 and 15 feet.

Q. And when you reached the top of that ladder, you found the hay to be about level with the top of the ladder, didn't you?

A. Yes, sir.

Q. So that the hay was fifteen feet, that is, the hay level, about 12 to 15 feet above the floor level of the mow? 10

A. Yes, sir.

Q. Will you suggest, if you can, how there could be a trap-door hung in that hay, 15 feet above the floor level? You certainly weren't looking for a trap-door in the level of that hay, were you?

A. No.

Q. The trap-door that you are speaking about would be in the floor, 15 feet below the level of the hay on which you were walking, wouldn't it?

A. Yes, sir. 20

Re-direct examination.

By Mr. Loder:

Q. Oswald, when you went up in the mow on the ladder, how far away from that opening was the hole through which you fell?

A. I don't know.

Q. But it wasn't the same hole that you went up, 30 was it?

A. No, sir.

ADOLPH STERN, sworn.

Direct examination.

By Mr. Loder:

10 Q. Mr. Stern, where do you reside?

A. South Vineland.

Q. And are you related to Oswald Stern, the plaintiff in this case?

A. I am.

Q. You are his brother?

A. I am.

Q. In company with Oswald, did you go to the Carew farm on the Port Elizabeth Road on the 10th of February, 1933?

20 A. I did.

Q. Anybody go with you?

A. My father, and my brother Gus, and Oswald, of course.

Q. How did you happen to go there, and for what purpose?

A. Well, we had attended a previous sale of the Carew estate. Personally, I was interested, along with my father and my brothers, to purchase the farm. My brother Oswald and Dad were interested 30 in purchasing some cows and some hay on that place as well. I recall having seen an advertisement in some one of the papers; I don't recall the name of the paper at this time; also some circulars. The night before, I had called Charles Ackley and had asked him with regard to the inspection of the place

and the personalty on it. Charles Ackley told me to go right ahead and do that the next morning; it would be perfectly all right.

Q. Is that the Charles Ackley who is an officer of John A. Ackley and Son, Inc., who testified this morning?

A. It is.

Q. Did the advertisement say anything about inviting people to inspect the premises? 10

A. As I recall it, it did.

Q. Could you identify the advertisement, do you think, if it was shown to you?

A. I think I could.

Q. I show you a newspaper, on page four of which there appears an advertisement, "Absolute auction of six valuable farms, and ask you if that advertisement is the same as the one that you saw?

A. Yes, sir. 20

Q. Had you seen any handbills advertising this sale?

A. I had.

Q. I show you a handbill or poster, which has been marked Exhibit P2, and ask you if that is identical with the handbill which you saw?

A. It is.

Q. When you and your brother Oswald and your father reached the Carew farm on the Port Elizabeth Road, what was the first thing that you did? 30

A. We drove into this particular farm, near where the house is located, and I was the driver of the automobile. I was driving my own car, a five-passenger sedan; and as I recall it, I sounded the horn, it was a very cold day. A man came out of the

house; my brother Oswald, who, as I recall it, was sitting in the front seat at the time, spoke to the man, and asked him whether it was all right to look the farm over, and to go down there and see the cows and hay. He directed us to the place where the barn was located, and said "There will be somebody there to show you around," as I recall it.

10 Q. Did you proceed to the barn?

A. We did.

Q. Where the cows were?

A. Yes, sir.

Q. Did you find anybody working there?

A. We did.

Q. What was he doing?

A. There were, I believe, either two or three men, as I recall it; one was white, and I believe there were one or two colored men, who were cleaning the cows.

20 We walked over to the white man; my brother asked him then as to where the hay was located, and he walked over with us toward the platform, and he said "Go up to this platform" (By the way, it is a loading platform) "and you will find a ladder going up to a trapdoor; throw that up, and over that, is the hay. As my brother started up, I remember him asking whether it was all right to go up, and he said "Go ahead, perfectly safe." We walked up to the platform, Dad and I and my brother Gus; we

30 waited a considerable length of time, and the next thing we heard was a moaning or groaning of some kind. We walked down the platform, and when we did, there were a couple of men carrying Oswald by his legs and hands, and supporting him as best they could. His face was completely covered with blood,

and he was as white as paper. He was unconscious, and blood was streaming from his ear.

Q. Where did you take your brother, and what did you do?

A. I ran to get the car started, which was a few feet away. These men, with the assistance of my father and brother, carried him into the automobile; my father and brother took the back seat, and laid Oswald across their laps, as I recall it; I think father held him near the head, and tried to talk to him, but there was no response. I started the car in that position, and drove as fast as I knew how, to the Millville Hospital. I didn't believe we would bring him there alive.

Q. Did you get doctors at the hospital?

A. Yes, I got Dr. Kauffman and Dr. Sheppard.

Q. Do you know whether they called anybody in, in consultation?

A. They did, Dr. Carnett, I telephoned him.

Q. Do you know where he is now?

A. He is in Philadelphia; I had a letter from him; he is very seriously ill.

Q. Did you stay in the room with your brother in the hospital, for a while?

A. I saw the time that he was put on the table, whatever that table is in the emergency room; he was in convulsions; and afterwards, Dr. Kauffman asked me out of the room; and we stayed there, waited to hear the decision afterwards.

Q. After he left the hospital, he was taken to your father's home?

A. Yes.

Q. Prior to the accident, what was the general condition of your brother's health?

A. He was a healthy, rugged young man, stronger than the ordinary young fellow, very rugged.

Q. And what kind of work did he do?

A. He did the work around the farm, loaded trucks with produce for the market, and did the bookkeeping for Dad, did the—what we call manifesting, shipping, and all of that.

10 Q. How about his hearing prior to the accident?

A. It was good.

Q. His general mental condition prior to the accident?

A. Very good.

Q. Do you know whether your brother has done any work since the accident?

A. He has not.

Cross-examination.

20

By Mr. Hilliard:

Q. I understand you to say, Mr. Stern, that you drove as fast as you could from the place of injury?

A. Yes, sir.

Q. To the hospital?

A. Yes, sir.

Q. On the way, did you encounter any other automobile?

30 A. At Millville, I believe it was, at Second and Vine.

Q. What happened at Second and Vine?

A. When I got into the town of Millville, I put my hand on the horn, and just sounded the horn constantly and steadily, and slowed down considerably,

by virtue of the fact that I was in town; but at Second and Vine, an automobile came along from the left side, and at the northeast corner, the two automobiles came together.

Q. So that you were in collision with another car on your way to the hospital?

A. Yes, sir, that is right.

Q. Were you able to continue to the hospital in your car? 10

A. No, the steering column, or the steering gear, whatever you call the little thin rod that goes across, was bent.

Q. The tie rod between the two front wheels was injured, so that it became necessary to transship your brother into another automobile to finish the trip?

A. That's right.

Q. And has the damage done to your car been compensated for by the person who ran into you? 20

A. No, sir.

Q. Nor any personal injuries sustained by you compensated for, either?

A. No one was injured in any way at all.

Q. Would you know the man with whom your conversation, or your brother's conversation was had in the yard of the Carew farm on the day of that sale, if you were to see him?

A. I might, I only saw him for just a very few moments. 30

Q. You are not sure whether you could identify him or not?

A. I might, if I see him.

Q. And how about the white man who gave the

directions with regard to the means of access to the haymow?

A. The same holds true with him; the conversation with him was only from the cows up to the platform; and as they came up, I was walking ahead, and my brother-in-law was behind him, so I didn't get very much of a look at him.

10 Q. Now, you say that your brother asked about the hay and how to get to it; do you mean your injured brother?

A. Yes, Oswald.

Q. It wasn't your remaining brother who was with you, but your injured brother, who had this conversation?

A. Oswald was the spokesman in the whole matter.

Q. And I understand that all three of you—all four, your father, your brother, who has not been 20 injured, and the plaintiff and yourself went up the steps in the barn to the feed room?

A. That's right.

Q. That is a short flight of steps, located on the end of the barn toward the house?

A. I believe that is correct.

Q. Just as you come into the door, from the door of the barn on the end of the barn toward the house, these steps are immediately at your left as you come in, aren't they?

30 A. As near as I can recall it.

Q. Have you been down to that place since the day of the accident?

A. I have not.

Q. So that your memory of that is based on this one trip?

A. That's right.

Q. And your brother, the plaintiff, ascended from the level of this floor in the feedroom, a ladder that was fastened perpendicularly in the corner of the barn?

A. That's right.

Q. And about how high is that ladder, as you recall it? 10

A. Probably around fifteen, or even twenty feet; that is from the platform, that is not from the bottom of the mow.

Q. Now, at what point above the floor of the platform does the bottom of the mow begin, if you know?

A. It can't very well begin unless it begins with the ceiling of the cow stables, which is considerably below this platform.

Q. What is your estimate of the distance—the ceiling of the cow stable is probably the floor of the 20 mow?

A. Yes.

Q. What is your estimate of that distance, up to this ladder, the ladder beginning down on the feedroom floor?

A. It would only be a guess; I would guess eight or ten feet.

Q. So that the top of this ladder is quite a distance above the floor of the mow?

A. I presume so. 30

Q. And that distance, you could only estimate?

A. Yes.

Re-direct examination.

By Mr. Loder:

Q. Mr. Stern, the man whose car was in collision with your car that morning in Millville, do you know
10 his name?

A. I do not.

Q. Ever hear anything from him?

A. I don't recall it.

Q. And you say nobody was hurt?

A. No.

The Court: He said that; he answered that question.

20 Mr. Loder: The plaintiff rests.

(The following motion was made at side bar.)

Mr. Hilliard: I desire to interpose a motion for a non-suit, on a number of grounds:

First, I take it that it is a court question as to whether the testimony adduced establishes the existence of an independent contractor; and I further take it to be established, and the law, that if the
30 Court finds that the inducement that led the injured plaintiff into the place at which he was injured is that of an independent contractor, and not of the defendant, that must terminate the action against the defendant.

The second is that there is no proof whatever of any negligence on the part of these defendants.

Third, that if there were such proof, the proofs clearly establish the fact to be that the plaintiff contributed by his own negligence to the injury that he has sustained; because there isn't any question about the fact that this man has been injured, and seriously injured, as a result of falling down that mow-well to the floor of the barn.

Fourth, that he must be, under the testimony, taken to have assumed the risk that was there in that mow, to his knowledge. 10

Those are the grounds on which, it seems to me, on any one or all of which the defendants are entitled—There is a further ground, pardon me ——

There has been no allegation of any notice to these defendants of any dangerous condition existent in that mow, if a dangerous condition has been proved; and without such allegation and proof of notice, the plaintiff cannot succeed. 20

The Court: I am unable to find any legal theory that will support this action, together with the question of contributory negligence on the part of the plaintiff. The motion will be granted.

(Exception noted for plaintiff.)

EXHIBIT P1.
1-18-34.
c. 30

Vineland, New Jersey
January 9, 1933

It is understood and agreed between the Executors of the Estate of John W. Carew, Deceased, and

John A. Ackley & Son, Inc., that they employ John A. Ackley & Son, Inc. to sell the real estate and personal property known as the Riverview Farm, the Williams Farm, the Squire Hitchner Farm, Riley Farm, Elbertson Farm, and Flitcraft Farm, located in Salem and Cumberland Counties, New Jersey, at Public Sale, beginning February 14th, 1933 and continuing until February 20th, 1933, with the exception of February 18th and 19th, 1933, and that they agree to pay a commission of 3% on the gross amount of all real estate sale, and 5% of the gross amount of all personal property sales.

In event that any or all of the real estate is not sold at prices acceptable to the Executors of the above Estate, it is understood that they will pay to John A. Ackley & Son, Inc. the sum of one-half of 1% of the price rejected at time of sale, in lieu of commission for the sale of real estate, and that they agree to pay the cost of advertising not to exceed the sum of $350.00.

Estate of John W. Carew
J. V. Cramer Trust Officer
William M. Carew.
Executors
John A. Ackley & Son,
Inc.
Charles W. Ackley Sec.

Y-2
1-18-33

71

"IF YOU BUY IT OF ACKLEY IT'S A BARGAIN"

SIX OF NEW JERSEY'S BEST DAIRY FARMS

Which Have Been Successfully Operated for a Number of Years

Also 5 herds of Tested High-Grade Holstein and Guernsey Milch Cows Bulls, Farm Horses and Farm Implements to be

SOLD AT ABSOLUTE AUCTION

To Settle the Estate of John W. Carew, deceased, as follows

NO. 5—SALE THURSDAY, FEB. 9TH—1 P. M.

"THE RILEY FARM"

Without exception one of the best dairy farms in the State of N. J. Located at the corner of Shirley and Greenville Rds. near Elmer, N. J. This farm contains 143 acres practically all under cultivation, with two road frontages, fine slope to be sold, Thursday, Feb. 9th, 1 P. M., 1933, rain or shine on the premises.

BUILDINGS—A very comfortable farm house which has been recently remodeled and is in first class condition. Contains six bedrooms, bath, living room, dining room, kitchen, large porch and fine shade. The barn is 55 x 150 feet which will accommodate 62 head of cattle and with enormous hay mow, which will hold about 300 tons of hay. First floor, solid brick foundation with cement floors, meeting the requirements of the state laws. Silos, milk house, poultry house, machinery warehouses, corn cribs, etc.

TERMS—Ten percent on day of sale, ten percent within thirty days, thirty percent within ninety days, fifty percent may remain on morgage for three years at six per cent interest.

CATTLE HORSES AND MACHINERY—About fifty head of exceptionally fine Guernsey cows, these animals should appeal to the dairyman as well as individuals desiring a family cow. Two Guernsey bulls, some calves, three farm horses, lot of hay, one truck, hand tools, milk cooler, cans, etc., hay loader, lot of harness, cut harrow, one Meeker harrow, one Moline tractor, Moline plow, two riding plows, three-section scratch harrow, weeder and seeder, corn planter, lime drill, riding cultivators, spring tooth harrow, roller, side delivery rake, two-horse wagon, planter, digger, wagon and hay shelving, lot of corn on the cob, etc.

TERMS ON PERSONAL PROPERTY—Cash.

For further particulars and inspection, write phone or call our Office

SELLING SCHEDULE

NO. 1—Feb. 6, 1933—1 P. M. The Flitcraft Farm. 2 1-2 miles from Elmer on the Road leading from Harding Highway to Maple Grove & Elmer.

NO. 2—Feb. 7, 1933—1 P. M. The Elbertson Farm. 3 miles from Elmer, N. J. On Monroeville Road.

NO. 3—Feb. 8, 1933—1 P. M. The Squire Hitchner Farm, in the town of Elmer, N. J.

NO. 4—Feb. 8, 1933—2 P. M. Sam Jones Farm. 1 1-2 miles from Elmer, N. J. Shirley Rd. at Steel's Corner.

NO. 5—Feb. 9, 1933—1 P. M. The Riley Farm. Corner Shirley & Greenville Rd., Elmer, N. J.

NO. 6—Feb. 10, 1933—1 P. M. The River View Farm, on Maurice River. Just north of Port Elizabeth, N. J., on West of Delsea Highway.

NO. 6—SALE FRIDAY, FEB. 10TH—1 P. M.

"THE RIVERVIEW FARM"

One of the finest large farms in Cumberland County to be sold at absolute auction, Friday, February 10th, 1 P. M., rain or shine, on the premises.

LOCATED—This farm has a frontage on the Delsea Highway just north of the bridge at Port Elizabeth, N. J. The farm proper, with the buildings, is located on the East bank of the Maurice River, about a half-mile from the Delsea Highway. Turn west on the first road north of the bridge at Port Elizabeth, N. J.

Consists of about 200 acres of tillable land, meadow, and timber, with nearly a mile frontage on the Maurice River, a tidewater stream navigable for ocean-going boats. About 90 acres of the finest meadow land, the balance in upland and timber. This farm should appeal, not only to the real farmer but to anyone seeking a large country estate or home, with all the advantages of the country, plus the recreation which an excellent waterway provides.

BUILDINGS—Two story Colonial frame residence, containing eight rooms, one of the best barns in the State of N. J., constructed of solid brick, which will accommodate about 60 head of cattle with all of the most modern equipment. Silo, large grainery and hay mow. Horse barn, machinery warehouse, tool house, corn cribs, pump house, cooler, poultry house and other out-buildings. This property is located in excellent gunning section. All kinds of game, and wonderful fishing, and excellent facilities, for pleasure as well as commercial boating.

TERMS—Ten percent on day of sale, ten percent within thirty days, thirty percent within ninety days, fifty percent may remain on mortgage for a period of three years, with interest at six percent.

PERSONAL PROPERTY—Fifty head of the finest Guernsey and Holstein cows, two Jersey cows, fine bred and registered bulls, six good farm horses, lot of harness, about 100 tons of hay, milking machine, hand tools, of all description, drill, manure spreader, Fordson tractor, seeder and weeder, corn sheller, cut harrow, three riding harrows, two one-horse cultivator, ditcher, corn planter, hay loader, side delivery rake, roller, and plows, fodder cutter and engine, wood saw, wagon, shelving, several hundred bushels of corn on the cob, etc.

DREDGING MACHINE

This is the only dredge on the Maurice River, and is large enough to do work on a large scale, and can be kept in constant use. The machine is in first class condition, has just finished a contract, and offers someone or company, an opportunity to engage in a profitable business.

ONE THIRTY-FOOT POWER BOAT IN FIRST CLASS CONDITION. Rowboat and other boat equipment.

It is important that you arrange to inspect all of the farms before day of sale—We are prepared to show you any or all of the properties—Write—Phone or Call—Also inspect the valuable Cows, Horses and implements. An opportunity of a life time.

Sold for the Estate—JOHN W. CAREW, Deceased, by order of the Vineland National Bank & Trust Co. & William M. Carew, Co-Executors—

JOHN A. ACKLEY & SON, Inc., Auctioneers

Established 1884 Bell Phone 444 427 Landis Ave., VINELAND, N. J.

EXHIBIT P3.
1-18-34.
c.

ADVERTISEMENT REPRODUCED FROM THE EVENING NEWS AND GLOUCESTER COUNTY DEMOCRAT, WOODBURY, N. J., FRIDAY, JANUARY 27, 1933 10

ABSOLUTE AUCTION SALE OF SIX VALUABLE FARMS

Five Herds of High Grade Holstein and Guernsey Cows, Farm Horses, Farm Machinery, Dairy Equipment, Corn, Etc.
To Settle the Estate of John W. Carew, Deceased. 20
Sale will be held on the various premises, starting Monday, Feb. 6th—Tuesday, Feb. 7th—Wednesday, Feb. 8th—Thursday, Feb. 9th and Friday, Feb. 10th, 1933.
One Solid Week of Auction Sales of South Jersey's Best Farms. Five Located at Elmer, N. J., and one on the Delsea Highway, South of Millville

SELLING SCHEDULE

No. 1— 30
MONDAY, FEB. 6th, at 1 P. M.
We will sell WITHOUT RESERVE the former
CLIFFORD FLITCRAFT FARM
Located on the road leading from Harding Highway to Maple Grove
About 2½ Miles from Elmer, N. J.

Containing 83 acres of land in high state of fertility. Colonial brick house which has been recently renovated. Modern barn, silo, carriage house, machinery sheds, etc.

PERSONAL PROPERTY consisting of 30 head of Holstein milk cows, bull, four good farm horses and all farm implements and machinery. Lot of
10 corn on cob.

SALE WILL BE HELD RAIN OR SHINE.

No. 2—
TUESDAY, FEB. 7th, at 1 P. M.

THE GEORGE ELBERTSON FARM
Located on the Pole Tavern-Monroeville Road
1½ miles from Pole Tavern & 3 miles from
Elmer, N. J.

Containing 186 acres with good 7-room house,
20 large barn, 4 silos, milk house, machine sheds, corn cribs, etc. An ideal Dairy Farm; 130 acres tillable, 45 acres in timber, 10 acres in meadow.

PERSONAL PROPERTY consisting of 50 head of dairy cows, Holsteins and Guernseys, 4 farm horses, colt, farm implements and machinery. Lot of corn on cob.

No. 3—
WEDNESDAY, FEB. 8th, at 1 P. M.
30 THE SQUIRE ROBERT M. HITCHNER FARM
Located on Front, State and Broad Streets, right
in the
Borough of Elmer, N. J.

Real estate only, which will be sold as a whole, or in three parts. This valuable farm consists of 148

acres, with one of the finest set of farm buildings in Salem County. Offers splendid opportunity to the investor as well as the farmer. Land is in high state of fertility.

Immediately after the sale of this property we will sell the late S. V. Jones farm, on the premises, as described below.

No. 4—
WEDNESDAY, FEB. 8th, at 2 P. M.

THE SAMUEL V. JONES FARM

Consisting of 70 acres of land Located at Steele's Corner, on the Elmer-Shirley Road
One Half Mile from Elmer, N. J.

Good 7-room house which has been thoroughly remodeled. Large barn which will accommodate 25 head of cattle; silo, milk house, carriage and machine sheds, pig sty, garage, etc. This is not only a dairy but a fine general purpose farm.

PERSONAL PROPERTY consisting of 25 head of tested Holstein Milk Cows, bull, 3 good farm horses, harness, manure spreader, hay loader, riding cultivator, mowing machine, etc. Lot of corn on the cob.

No. 5—
THURSDAY, FEB. 9th, at 1 P. M.

THE EDWARD RILEY FARM

Also known as the William Overs Farm. One of the blue ribbon dairy farms of Salem County.
Located on Greenville Road at Steel's Corner, less than
One Mile from Elmer, N. J.

Consists of 147 acres of land, practically all under cultivation; a remodeled house, 9 rooms and bath;

one of the best barns in Salem County, which will accommodate 62 head of cattle, barn has brick first floor and meets requirements of the sanitary code of the State of New Jersey. Machinery shed, poultry houses and other buildings.

PERSONAL PROPERTY consisting of 60 head of high grade Guernsey cows, bull, 3 farm horses and
10 farm machinery.

No. 6—

FRIDAY, FEB. 10th, at 1 P. M.

THE RIVERVIEW FARM

West of the Delsea Highway on the Maurice River, South of Millville, N. J.

Consisting of approximately 200 acres of land, timber and meadow, with about one mile frontage on the famous tidewater Maurice River. Also a
20 frontage on the Delsea Highway. About 100 acres of tillable upland, 90 acres of meadow and some timber.

This property should appeal not only to the farmer, but to anyone seeking a country home with a beautiful outlook on the Maurice River, convenient to Philadelphia and New York, it is ideal. And it is a country home which will pay its way. Old fashioned Colonial frame dwelling containing 8 rooms, one of the best barns in New Jersey, made of
30 solid brick and meets the requirements of the sanitary code. Also a horse barn, carriage houses, machinery sheds, pump house, etc. Must be seen in order to be appreciated.

PERSONAL PROPERTY consisting of COMMERCIAL DREDGING MACHINE—the only one

on the Maurice River which will provide a living and profit for anyone who cares to engage in that business. Also a 30 foot power boat. About 50 head of high grade GUERNSEY and HOLSTEIN milk cows, bulls, calves, 6 farm horses, milking machine, lot of harness. Fordson tractor, seeder, weeder, manure spreader, cut harrow, corn planter, scratch harrow, mowing machine, side delivery rake, hand tools of all description, 100 tons of hay. 10

EACH FARM IS MARKED WITH OUR SIGNS AND THE SALES WILL BE HELD ON THE PREMISES.

Get a Descriptive circular. Go and inspect these properties and the livestock and attend the sales prepared to bid intelligently. Any additional information you may desire can be secured at our office. 20

TERMS ON REAL ESTATE: 10 per cent of the purchase price on day of sale; 10 per cent of the purchase price to be paid within 30 days; 30 per cent to be paid within 90 days; 50 per cent may remain on mortgage for a period of three years if purchaser so desires. Properties to be free and clear of encumbrances. Taxes to be adjusted.

TERMS ON PERSONAL PROPERTY: All cash on day of sale.

30

Sold by order of the Vineland National Bank & Trust Co. and William M. Carew, Executors of the Estate of John W. Carew, deceased,

By JOHN A. ACKLEY & SON, Inc., Auctioneers
427 Landis Avenue—Vineland, N. J.
Est. 1884 — Bell Phone 444 Vineland

NEW JERSEY COURT OF ERRORS AND APPEALS.

OSWALD STERN,
Plaintiff-Appellant,
v.
VINELAND NATIONAL BANK AND TRUST COMPANY and WILLIAM MARSHALL CAREW,
Defendants-Appellees.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF PLAINTIFF-APPELLANT.

The plaintiff instituted this action in the Supreme Court against Vineland National Bank and Trust Company and William Marshall Carew, executors and trustees under the last will and testament of John W. Carew, deceased, and the Vineland National Bank and Trust Company and William Marshall Carew, individually.

The complaint set forth that John W. Carew, in his lifetime, was the owner of certain real estate, including a large farm with dwelling house and outbuildings situate thereon near Port Elizabeth in the County of Cumberland, State of New Jersey; that

John W. Carew died testate and in and by his last will and testament appointed Vineland National Bank and Trust Company and William Marshall Carew executors and trustees thereof, and that the said executors and trustees duly qualified and took upon themselves the administration of said estate; that under the terms of said last will and testament of John W. Carew the executors were authorized to sell his real estate and personal property and that they advertised the same for sale at public sale, and by invitation of the defendants the plaintiff and others entered upon the land and premises advertised for sale for the purpose of inspecting and examining the real and personal property.

The complaint further set forth that it became the duty of the defendants to have, keep and maintain the premises upon which they had invited the plaintiff, in a proper and safe condition so as to avoid injury to him, and that they failed in their duty in this behalf and kept and maintained the premises in a dangerous condition in that the hay in the hay-mow in which the plaintiff had been invited was so kept and arranged that when the plaintiff entered the hay mow by invitation of the defendants, and stepped on the hay, he did, without fault on his part, slip and fall through an opening in the hay-mow and fell a great distance and suffered serious injuries (pp. 2-6).

On motion of the defendants the Court struck out the complaint to the extent that charges the defendants with any acts of negligence in their representative capacity and ordered the balance of the complaint to stand (pp. 10-11).

The defendants answered that they were not guilty of negligence and that the plaintiff was guilty of contributory negligence; that he was a trespasser and that he was a mere licensee.

By a subsequent order of the Court an additional defense was permitted to be set up, namely, that the public sale of real estate and personal property referred to in the complaint, was arranged for, advertised and conducted by an independent contractor (p. 21).

At the close of the plaintiff's case there was a motion for a non-suit on the following grounds:

1. That the evidence establishes the existence of an independent contractor and that it was the acts of such independent contractor that led the plaintiff to come upon the premises.

2. That there was no proof of any negligence on the part of the defendants.

3. That the evidence established the contributory negligence of the plaintiff.

4. That the plaintiff assumed the risk upon entering the hay mow.

The Court granted the motion to non-suit.

The plaintiff has appealed from that action.

GROUNDS OF APPEAL.

The grounds of appeal are stated in the notice of appeal and confined to the ruling of the Court in granting the non-suit.

1. The trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendants, whereas the Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

ARGUMENT.

The Court should have refused the motion to non-suit and should have submitted to the jury for decision the questions involved in the issue.

1. As to the first ground for the granting of the non-suit, namely, that the testimony established the existence of an independent contractor; that it was the acts of the independent contractor which led the plaintiff to go upon the premises (p. 68).

2. The testimony of Charles W. Ackley (pp. 28-40) shows that John A. Ackley & Son, Inc., who arranged and conducted the sale for the defendants, was not acting as an independent contractor, but as the agent of the defendants. There was a written

contract between John A. Ackley & Son, Inc., and the defendants (p. 29), which was admitted in evidence and marked Exhibit P1 (pp. 69-70).

3. The pictures that were used in the advertisement were selected by Mr. Carew, one of the defendants, and a representative of John A. Ackley & Son, Inc. (p. 31). The advertisements were mailed from the office of John A. Ackley & Son, Inc., and Mr. Carew, one of the defendants, attended to the distribution of those in the rural section (p. 32). Mr. Carew, one of the defendants, gave instructions as to the newspapers in which the sales should be advertised (p. 33).

4. The date of the sale was set at a joint conference between a representative of John A. Ackley & Son, Inc., and the defendants and then the date was changed at the direction of one of the defendants (p. 34).

5. Prior to the sale and on the day of the sale there were persons working on the farm, taking charge of the property and looking after various items which had been advertised. They were the employees of the Carew Estate (p. 34). In most cases the proceeds of the sale were collected by the defendants, executors of the Carew Estate (p. 35).

As to the Second Ground:

1. That there was no proof of negligence on the part of the defendants.

There certainly can be no doubt about the plaintiff being invited to enter the premises for the purpose of inspecting the personal property offered for sale, including the hay in the hay-mow. Exhibit 2 (p. 71) contains such invitation; so does Exhibit 3 (p. 77, ll. 10 to 20).

These exhibits (the newspaper and handbills), were seen by the plaintiff (p. 43, ll. 17 to 35).

Upon arriving at the farm the plaintiff inquired for the cows and the hay (p. 44, ll. 8 to 15).

Upon reaching the barn the plaintiff inquired of a man who was cleaning the cows advertised for sale, where he could see the hay (p. 45). The man showed him where the hay was to be found as appears on page 45, lines 20 to 30:

> "Q. And showed you where the hay was?
> A. Yes, sir, he walked over with me to the place where there was a stairway, and he says, 'You go up there.' He walked right to the foot of the stairs and pointed, he said, 'You go up there; there is a feed place there, then there is a ladder on the side;' he says, 'Go up that, and you will find the hay.' As I was going up the stairs, I asked him was it perfectly safe to go up there, and he says, 'Yes, perfectly all right.'"

The plaintiff, following the directions given by the man (who must have been an employee of the defendants) went up the ladder into the hay-mow

(pp. 45-46). After reaching the hay-mow the plaintiff testified as follows (pp. 46 and 47):

"Q. Don't tell what you told your father, just tell what you did. You say you looked at the hay; tell what you did, or tried to do.

A. After getting accustomed to the light, which was still dark there, I proceeded in picking up samples of hay; and before proceeding to pick up samples of hay, I felt my way around with my feet and the weight of my body, knowing that there is probably some place in that barn, a place where they throw down hay for the cows, and I looked around, I didn't see any opening of that kind, all I could see was hay. Knowing that barns always have an opening, or they are covered by a trap door, I didn't see any opening, or light shining from underneath, so I went along very cautiously, and picked up a sample of hay, went a few feet further and picked up another sample, and a few samples from different parts of the barn. I went a few more feet; suddenly, the hay under me gave way; I had no chance to try to grip for something to hold on before I slipped through.

Q. Was or was not the hole through which you fell, covered with hay?

A. Yes, sir.

Q. How large a mow was this that you went into?

A. It was quite a big mow.

Q. And you were getting several samples?

A. Yes, sir.

Q. From different parts?

A. From different parts of the mow.

Q. What were you going to do with that?

A. I was going to take it down to show my father the kind of hay."

Adolph Stern, a witness for the plaintiff, testified as follows (pp. 61 and 62):

"Q. When you and your brother Oswald and your father reached the Carew farm on the Port Elizabeth Road, what was the first thing that you did?

A. We drove into this particular farm, near where the house is located, and I was the driver of the automobile. I was driving my own car, a five-passenger sedan; and as I recall it, I sounded the horn, it was a very cold day. A man came out of the house; my brother Oswald, who, as I recall it, was sitting in the front seat at the time, spoke to the man, and asked him whether it was all right to look the farm over, and to go down there and see the cows and hay. He directed us to the place where the barn was located, and said, 'There will be somebody there to show you around,' as I recall it.

Q. Did you proceed to the barn?

A. We did.

Q. Where the cows were?

A. Yes, sir.

Q. Did you find anybody working there?

A. We did.

Q. What was he doing?

A. There were, I believe, either two or three men, as I recall it; one was white, and I believe there were one or two colored men, who were cleaning the cows. We walked over to the white man; my brother asked him then as to where the hay was located, and he walked over with us toward the platform, and he said, 'Go up to this platform' (By the way, it is a loading platform) 'and you will find a ladder going up to a trapdoor; throw that up, and over that, is the hay.' As my brother started up, I remember him

> asking whether it was all right to go up, and he said 'Go ahead, perfectly safe.' We walked up to the platform, Dad and I and my brother Gus; we waited a considerable length of time, and the next thing we heard was a moaning or groaning of some kind. We walked down the platform, and when we did, there were a couple of men carrying Oswald by his legs and hands, and supporting him as best they could. His face was completely covered with blood, and he was as white as paper. He was unconscious, and blood was streaming from his ear."

The plaintiff was an invitee and having come upon the premises by the invitation of the defendants, the defendants owed him the duty of using ordinary care to render the premises reasonably safe for the purpose for which the plaintiff had been invited to enter thereon. *Phillips v. The Library,* 55 N. J. L. 307.

It is true that there was no evidence that the defendants knew that the hay had been placed over the opening in the mow, but we do not think this was necessary.

The plaintiff was walking on the hay when "suddenly the hay under me gave way; I had no chance to grip for something to hold on before I slipped through" (p. 46, ll. 20-30).

The hole through which he fell was covered with hay (p. 46, ll. 31-32).

On this motion to non-suit, all the facts and all proper inferences to be drawn therefrom, must be resolved in favor of the plaintiff.

There is no proof that any other persons had

been walking in the hay-mow; no proof that hay had been properly placed in the mow and gradually worked itself over the opening.

It is just as reasonable that the hay had been stored in the position in which it was when the plaintiff fell through the opening. This opening was not the hole through which the plaintiff had entered the mow (p. 59, l. 30). The hay upon which the plaintiff was walking was at least twelve feet above the floor. On cross-examination the plaintiff testified (pp. 58 and 59):

> "Q. The hay in this mow was a long distance above the floor, wasn't it, to the top of the hay?
> A. I don't know.
> Q. You climbed up a ladder how far?
> A. I don't know how far it would be, it was just an ordinary ladder.
> Q. Twenty feet, wasn't it, from the level of the mow floor?
> A. I don't think it was quite that high.
> Q. Fifteen feet?
> A. Between 12 and 15 feet.
> Q. And when you reached the top of that ladder, you found the hay to be about level with the top of the ladder, didn't you?
> A. Yes, sir.
> Q. So that the hay was fifteen feet, that is, the hay level, about 12 to 15 feet above the floor level of the mow?
> A. Yes, sir."

In *Phillips v. Library Co.,* the Court said: "A distinction is also to be observed between mere negligence to keep the premises in repair and acts of misfeasance, such as placing obstructions or dan-

gerous pitfalls in a way which persons have been permitted to use with the consent of the owner or on his implied invitation.'' 55 N. J. L., page 316.

We respectfully submit that the facts and inferences to be drawn therefrom bring the case within the reason for the rule in *Martin's v. Asbury Park,* 111 N. J. L. 364. The placing of the hay in the way it was placed is in the nature of a structural defect.

As to the Third and Fourth Grounds:

The evidence certainly did not show contributory negligence, or assumption of the risk, as a matter of law.

The plaintiff was assured that ''it was safe.'' He walked over the hay. The hay gave way under his feet (p. 46). The hay was twelve feet above the floor (p. 67).

It is respectfully urged that the granting of the non-suit was error and that a question of fact was presented which should have been presented to the jury.

LeROY W. LODER,
Attorney and of Counsel with Plaintiff.

NEW JERSEY COURT OF ERRORS AND APPEALS.

OSWALD STERN,
Plaintiff-Appellant,
v.

VINELAND NATIONAL BANK AND TRUST COMPANY and WILLIAM MARSHALL CAREW,
Defendants-Appellees.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF DEFENDANTS-APPELLEES.

The facts set out in the plaintiff's brief are correct as are also the grounds of appeal.

ARGUMENT.

As to the first ground, the testimony and Exhibit P1 (pp. 69 and 70) clearly show that John A. Ackley & Son, Inc., acted as an independent contractor in conducting the sale. Anything done by defendants, or either of them, was merely by way of suggestion to their independent contractor.

The contract Exhibit P1 (pp. 69 and 70) recites that they employ John A. Ackley & Son, Inc., to sell the real estate and personal property. It thus became the duty and undertaking of said John A. Ackley & Son, Inc., to do the advertising of the sales and the selling, and what the defendants or either of them did after the making of the said contract with John A. Ackley & Son, Inc., was only by way of suggestion or assistance. Neither one nor both of the defendants directed, supervised or controlled the undertaking in any way.

In *Lewis v. National Cash Register Co.*, 84 N. J. L., page 598, Justice Kalisch writing the opinion, on page 601, referred to the case of *Singer Manufacturing Co. v. Rahn,* 132 U. S. 518, and said:

> "The Supreme Court of the United States, in the Singer case, laid great stress on that part of the contract by which the agent agreed to give his exclusive time anl best energies to such business."

There was no such arrangement in the case at bar, and it is submitted that there is no agency established by the proofs in this case.

As to the Second Ground:

There is nothing in the testimony anywhere to show that defendants, or either of them, were negligent in any way, nor are there any facts established from which an inference of negligence could be drawn. There is not any fact produced showing

that the hay mow was not in a proper condition and, in fact, plaintiff himself, on cross-examination, page 57, testified as follows:

> "Q. You knew that this mow must have a hole in it somewhere, down which the hay was pitched, didn't you?
> A. Yes, sir.
> Q. And it was with that in mind, that you were so careful in picking your way around over the hay, wasn't it?
> A. Yes, sir."

The case of *Martin v. Asbury Park,* 111 N. J. L. 364, cited by counsel, is not applicable to the facts because in that case there existed a structural defect and as stated by the Court on page 366 of the opinion:

> "This witness did, however, testify that he was familiar with the standard and generally approved methods of construction of stairways in bathing establishments, frequented by large numbers of persons at seashore resorts, and that such methods required a non-slip, a condition and method of construction not found in the stairway in question, which consisted of a one-piece spruce tread with open risers."

The testimony in the case at bar fails to show that the hay-loft was not constructed in the generally approved method and there is certainly nothing in the testimony to indicate that there existed a structural defect. No testimony was offered that establishes or even indicates that the hay in the mow where plaintiff was injured was not arranged as is

usual with hay in barn mows, nor is there any proof that defendants caused the hay in the mow to be so placed as to constitute an obstruction or dangerous pitfall, as a result of which plaintiff was injured.

The mere happening of an accident is no evidence of negligence. *Garino v. Walker,* 7 N. J. Misc. R. 903.

To sustain a cause of action based on negligence, the testimony must be such that negligence may be reasonably inferred. Negligence is a fact which must be shown. It will not be presumed. *Donus v. Public Service Railway Co.,* 102 N. J. L. 644.

In the case of *Alvino v. Public Service Railway Co.,* 97 N. J. L. 526, the Supreme Court on page 527, said, "Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. McCombe v. Public Service Railway Co., 95 N. J. L. 187." And further down on the same page the Court says:

> "To establish a case of negligence and fix the liability of the defendant, it is incumbent upon the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it. Tooney v. London &c., Railway Co., 3 C. B. (N. S.) 150."

As to the Third Ground:

The testimony of plaintiff clearly shows that he was guilty of contributory negligence, that he knew of the risk that he ran when he was walking around in the dark hay-loft, that he knew that there was a

hole somewhere in the loft down which hay was thrown, and that he knew he was taking the chance of falling through this opening in the hay-loft.

On direct examination on pages 46 and 47 plaintiff testified:

> "A. After getting accustomed to the light, which was still dark there, I proceeded in picking up samples of hay; and before proceeding to pick up samples of hay, I felt my way around with my feet and the weight of my body, knowing that there is probably some place in that barn, a place where they throw down hay for the cows, and I looked around, I didn't see any opening of that kind, all I could see was hay. Knowing that barns always have an opening, or they are covered by a trap door, I didn't see any opening, or light shining from underneath, so I went along very cautiously, and picked up another sample, and a few samples from different parts of the barn. I went a few more feet; suddenly, the hay under me gave way; I had no chance to try to grip for something to hold on before I slipped through.
>
> Q. Was, or was not the hole through which you fell, covered with hay?
>
> A. Yes, sir.
>
> Q. How large a mow was this that you went into?
>
> A. It was quite a big mow.
>
> Q. And you were getting several samples?
>
> A. Yes, sir.
>
> Q. From different parts?
>
> A. From different parts of the mow.
>
> Q. What were you going to do with that?
>
> A. I was going to take it down to show my father the kind of hay.
>
> Q. You said you were in the farm business

and shipping business; was anybody associated with you in the farm business at that time?

A. Yes, sir; my father."

And on cross-examination plaintiff testified as follows on pages 56 and 57:

"Q. When you reached the mow, I understand you to say that you stood at the entrance into the mow until you could accustom your eyes to the darkness?

A. Yes, sir.

Q. And that thereafter, you proceeded into the mow and walked around in there from place to place?

A. Yes, sir.

Q. Taking samples of hay?

A. Yes, sir.

Q. And that that was the reason why you did walk around in the mow?

A. Yes, sir.

Q. Were you able to see that you were taking different kinds of hay when you picked up these samples?

A. No, sir.

Q. Did you observe the railings that surrounded this mow-hole?

A. I didn't see any railings. It was dark.

Q. You are aware of the fact that frequently, these mow-holes do have railings around them, aren't you?

A. No, I don't know.

Q. You knew that this mow must have a hole in it somewhere, down which the hay was pitched, didn't you?

A. Yes, sir."

And on page 58, on cross-examination, plaintiff testified as follows:

"Q. How far, Mr. Stern, could you see ahead of you into the mow, when you left the ladder-head?

A. Not very far.

Q. Well, could you see three feet before you?

A. I should judge around that, or probably a little more.

Q. A little more than three feet?

A. Around three feet or so."

And on page 59, on cross-examination, plaintiff testified as follows:

"Q. Will you suggest, if you can, how there could be a trap-door hung in that hay, fifteen feet above the floor level? You certainly weren't looking for a trap-door in the level of that hay, were you?

A. No.

Q. The trap-door that you are speaking about would be in the floor, fifteen feet below the level of the hay on which you were walking, wouldn't it?

A. Yes, sir."

As to the Fourth Ground:

The same testimony set out to show that the defendant was guilty of contributory negligence, shows that he knew of the risk and assumed it voluntarily.

A person being *sui juris,* who undertakes to use a dangerous way, with full knowledge of its unsafe condition, assumes the risk of injuries which may result to him from such use. *Saunders v. Smith Realty Co.,* 84 N. J. L. 276. And in this case, on

page 280, the Court of Errors and Appeals says that:

> "Accepting as proved the fact that the passageway from the front to the rear cellar was dangerous to one passing through it in the dark, the danger was as obvious to the plaintiff as to the defendant. He was *sui juris,* and when he undertook to use the passageway with full knowledge of the danger he ran in doing so, he assumed the risk of such injury as might result to him from such use, and cannot now charge it upon the defendant. Vorath v. Burke, 34 Vroom 189."
>
> "In addition it may be said that his conduct in attempting to pass along this dangerous way in total darkness was culpably negligent. The evidence discloses no necessity for his doing so."

Plaintiff-appellant on page 11 of his brief says that, "The plaintiff was assured that 'it was safe.' " The testimony of plaintiff, however, is to the effect that he knew that this mow must have a hole in it somewhere, down which the hay was pitched.

Plaintiff knew of the danger and voluntarily assumed the chance of avoiding it without taking the necessary precautions. Knowing of the danger, as he says he did, he should not have ventured into the mow without a light. The evidence in this case, as in *Saunders v. Smith Realty Co.,* 84 N. J. L. 276, discloses no necessity for his doing so.

In the case at bar, the situation established by the testimony, briefly, is this:

Plaintiff, a man thirty years of age (p. 42, l. 15), engaged in farming (p. 42, l. 21), went to the place

where he was injured, known as the Carew Farm, as the result of reading an advertisement stating the fact that there would be a public sale of the farm, cows, hay and different things. His purpose in making this visit to this place was to look over the farm and inspect it. (P. 43, ll. 1-9.) He was induced to go to this place by the reading of the advertisement, Exhibit P2 and/or Exhibit P3. (P. 43, ll. 10-35; p. 44, ll. 1-5.) Plaintiff was directed by some person, whose identity is not established, to the barn where the cows and hay that were to be sold were located. (P. 44, ll. 10-35; p. 45, ll. 1-30.)

In inquiring for the location of the hay plaintiff testifies that the person who directed him assured him that it was perfectly safe to go up to the mow where the hay was located (P. 45, ll. 20-30.) Plaintiff then proceeded up a ladder leading to the mow and out into the mow that was dark and walked about in the dark mow from place to place until he walked through the opening in the mow and fell to the floor below. (P. 46, ll. 1-30.)

The hay in the mow covered, to some depth not disclosed by the testimony, the mow hole or opening through which the plaintiff fell. (P. 46, ll. 31-33.)

It will be observed that plaintiff is a person well acquainted with barns and hay mows. He is a farmer and as such, must know all about the arrangement of barns and hay mows therein. He was visiting a farm for the purpose of inspecting and possibly bidding upon the farm itself, farm stock and produce.

It is urged that when plaintiff was assured by some person on the premises that it was safe to go

up there, that is up to the mow, that this is sufficient to relieve plaintiff of any duty cast upon him by the circumstances and conditions of a mow, well known to him as a farmer, to look for and avoid the opening in the mow through which the hay is thrown down. It is respectfully submitted that the utmost length to which the testimony in question (p. 45, ll. 20-30) goes is as to an assurance to the plaintiff that it was safe to go up to the mow. His own knowledge of the situation obtaining in every mow with regard to openings, together with his testimony in this regard (p. 46, ll. 13-27), the fact that he did know that barns "always have an opening, or they are covered by a trap door," places him squarely within the rule that he assumed the risk incident to moving about in a dark hay mow.

It is respectfully urged that the granting of the non-suit was proper and that there was no question of fact presented for the jury to pass upon.

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