

that it was given, and if the evidence is equal on both sides you will say that the plaintiff will have to fail on that issue."

And the question was put to the jury thus: "Did Baxter warrant the age, soundness and capacity of the horse, or any or either of these qualities?" to which the jury replied, "Evidence evenly balanced."

The learned trial Judge was of opinion that under this expression of the jury's opinion the plaintiff failed on the question and directed judgment to be entered for the defendant.

I think this answer must be read in the light of the learned Judge's charge. The question of warranty or no warranty depended upon a conversation between plaintiff and defendant as to which there was no evidence except that of plaintiff and defendant respectively, the plaintiff giving his version of the conversation and the defendant his, both in direct conflict on the material question. It will be noted that the Judge said: "You have conflicting evidence on the point; that of the boy on the one side, and the defendant on the other. If you find that you are not able to believe one more than the other, you will have to find against the plaintiff because the burden of proof rests upon him.—And if the evidence is equal on both sides you will say that the plaintiff will have to fail on that issue."

Considering this instruction it seems to me reasonably clear that the jury were by their answer informing the Judge that in their opinion on the question submitted the evidence was evenly balanced and he had already informed them what followed in such a case. It was not necessary for them to say more. Had they literally followed the instruction they would have added: "and the plaintiff fails on this issue." But was it necessary that they should add this to make their meaning clear? I think not and am of opinion the learned trial Judge in accepting this as a finding against the plaintiff under the charge so given was not on any uncertain ground as to the meaning of the jury. Had the Judge simply told the jury that if in their opinion the evidence on the point was equal on both sides they should say so and they had replied "Evidence evenly balanced," there could be no question, I think, then that the proper direction would be to enter judgment for defendant. It must always be borne in mind that the jury was dealing with a number of