New Jersey Court of Errors & Appeals

OSWALD SCHMIDT, et als., Defendants in Error, vs. JOHN ZELLER, Sheriff, and RANDOLPH PERKINS, Auditor, Plaintiffs in Error.	In Error to Hudson Circuit Court.

BRIEF FOR PLAINTIFFS BELOW—DEFENDANTS IN ERROR.

This action is in replevin, brought by Oswald Schmidt, Paulo Roddewig, Waldo Becker and Alphonse L. Hageboeck against John Zeller, Sheriff of the County of Hudson and Randolph Perkins, auditor, to recover certain engines and appurtenances mentioned in the declaration.

The defendants, by their avowry, claim title under an attachment issued out of the Circuit Court of the County of Hudson, at the suit of Charles J. Dorrance against the Whitehead Machinery Company, a corporation of the State of Iowa, under which the said sheriff claimed to have attached the property mentioned in the declaration, and the said Perkins, as auditor, to have taken it into his possession.

New Jersey State Library

The issue made by the pleadings is whether or not the property in question was, at the time of the attachment, the property of the Whitehead Machinery Company or of the plaintiffs.

The facts with reference to this property are admittedly the following:—

The Whitehead Machinery Company was a corporation of the State of Iowa, its principal place of business being at Davenport, in that State, and was engaged in buying and selling second hand machinery. In Nineteen hundred and Four the Company became desirous of purchasing the property in question, being second hand engines which were then in the City of New York from the Edison Electric Company.

The Company not having the ready money to make the purchase, it was arranged between the Company and the plaintiffs that the plaintiffs and Mr. Whitehead, the General Manager of the Company, should endorse notes for the Company to the extent of $7,500, which notes were to be discounted at the Citizens National Bank of Davenport. The property after paying transportations, commissions, etc., actually came to about $11,000, of which the Company paid all above $9,975, and notes for this amount ($9,975) were endorsed by the plaintiffs and Whitehead. These notes were discounted at the Citizens National Bank of Davenport and the money used to pay the Edison Company.

On the first of November of the same year, Nineteen hundred and four, these notes were consolidated into one promissory note, dated

November 1st, 1904, signed by the Whitehead Machinery Company, A. L. Hageboeck, Treasurer, and endorsed by W. W. Whitehead, A. L. Hageboeck, Waldo Becker, Oswald Schmidt and Paulo Roddewig. This note was payable one year after date, with interest at the rate of six per cent. per annum.

(Testimony of Whitehead, p. 9, l. 10 to p. 12, l. 8.)
Oswald Schmidt, p. 32, l. 36 to p. 33 l. 36.
Testimony of Roddewig, p. 40, l. 35 to p. 41, l. 20.
August A. Balluff, p. 46, l. 34 to p. 47, l. 2.
Waldo Becker, p. 48, l. 31 to p. 49, l. 24.
Dr. A. L. Hageboeck, p. 65, l. 13 to p. 66, l, 38.
Exhibit P. 1, p. 124.

It was agreed at the time of the purchase that any returns from sales of this machinery were to be applied on the liquidation of the notes.

(Testimony of Whitehead, p. 12, l, 23.)
Roddewig, p. 41, lines 11 to 18.
(Schmidt, p. 36, lines 19 to 24).
(Waldo Becker, p. 49, l. 25 to p. 50, l. 8).
(Dr. Hageboeck, p. 65, l. 27 to p. 66, l. 3.)

Sixteen hundred dollars was realized from the sale of one piece of machinery, but this was

kept by the Company and never turned over to the plaintiffs.

(Whitehead, p. 27, l. 14 and p. 28 l. 11 to 26.)

The note was due by its terms on the first day of November, Nineteen hundred and five. Before that date, Paulo Roddewig and Oswald Schmidt, two of the endorsers, announced that they would not consent to any renewal of the note, and the cashier of the Citizens National Bank, notified the endorsers that the note was coming due and must be paid.

(Schmidt, p. 38, l. 7; Becker, p. 50, l. 16.)

Under these circumstances the machinery still remaining unsold and the note about to come due, the four plaintiffs who were liable on the note (the other endorser, Whitehead, not having any money) took a bill of sale from the Company of the property in question in this suit, and paid the note at the bank.

(Testimony of Whitehead, p. 13, lines 20 to 30; p 17, l. 38 to p. 18, l. 30.
Schmidt, p. 34, l. 20 to p. 35, l. 30.
Roddewig, p. 41, l. 21 to p. 42, l. 32.
Balluff, Cashier of Citizens National Bank, p. 47, lines 11 to 40.
Waldo Becker, p. 50, l. 37 to p. 51, l. 35.
Dr. Hageboeck, p. 66, l. 38 to p. 67, l. 39.
Exhibit P. 5, p. 139.)

The property in question was at that time in storage on the pier of the Pennsylvania Railroad Company in Jersey City, having been left

there in its transit from the City of New York, where it had been purchased, and notice was at once given to the freight agent of the Pennsylvania Railroad Company at Davenport, who notified the General Agent of the Pennsylvania Railroad Company at New York of the transfer.

(Testimony of C. E. Adams, Freight Agent, p. 29, l. 31 to p. 31, l. 2, including letter to George T. Smith, there inserted, Exhibit P. 20, p. 140 and 141.)

The property then consisted of a lot of second hand machinery which had cost, including transportation, commissions and all expenses, $9,400 ($11,000, less the $1600 received from a sale), which the company had never been able to sell, which had been held by it for a year and three quarters and had not only suffered from time but was subject to charges for storage, demurrage and transportation. (Whitehead, p. 25, l. 35.)

Parrish, one of the attaching creditors, testified that he had endeavored to sell these engines and had been unable (p. 82 l. 18 to 21) and it appears by cross-examination of Whitehead by Parrish's attorney that the best offer he could get was $2,500 (p. 19 l. 39).

For this machinery, therefore, the four plaintiffs paid the sum of $9,388.75, being $9,250, the principal of the note, and $138.75 interest; (*Balluff, p.* 47, *lines* 3 *to* 6) and all of this was paid in cash or in notes which have since been paid, and the promissory note made by the Whitehead Machinery Com-

pany was surrendered to the Whitehead Machinery Company. This transaction occurred on the third and fourth days of October, Nineteen hundred and five. The notification to the Railroad Company was made on the same day. (*Exhibit P.* 20, *p.* 140-141).

The attachment in question was issued on the seventh day of October, Nineteen hundred and five, three days after this transaction was completed. There is no question that the transfer is prior in time to the attachment.

The testimony of the defendants, most of which went in under objection, was introduced to show that at the time of this transfer the Whitehead Machinery Company was insolvent and that all the four plaintiffs were directors of the company and had notice of its insolvency.

The facts above stated, as to the purchase of the machinery, the value thereof, the particulars of the transfer from the company to the plaintiffs and the priority in time were not controverted. The plaintiffs and the applying creditors in the attachment suit are and were non-residents of the State of New Jersey.

I.

The law governing this case is the law of the State of Iowa. If the transfer was valid by the laws of that State it is valid here as against all persons not residents of this State.

Varnum vs. Camp, 1st *Green*, 326;
Bentley vs. Whittemore, 4th *C. E. Green*, 462.

II.

The transfer to the plaintiffs was valid by the laws of the State of Iowa. The law of the State of Iowa was proved in the case both by the plaintiffs and the defendant.

(*Testimony of Waldo Becker, p.* 54, *l.* 39 *to p.* 57, *l.* 13.)
(*Testimony of Carr, defendants' witness p.* 115, *l.* 18 *to p.* 116, *l.* 25.)

The leading case in Iowa is the case of *Garrett, Trustee, vs. Burlington Plow Company*, 70 *Iowa*, 697. On page 701, Beck, Justice, delivering the opinion of the court, says:

> "We understand that he (a director) may become a creditor of the corporation, may advance it money or sell it property and the obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position from that of any other creditor, and if the debt which he holds was contracted in good faith and there is an absence of fraud on his part he may take security or payment though the corporation be insolvent and he may thereby acquire priority in the payment of his claim." And the court refers to the following cases:
>
> *Buell v. Buckingham*, 16 *Iowa*, 284;
> *Farmers and Merchants Bank of Lyneville v. Wasson*, 48 *Iowa*, 336;
> *Hallon v. Indianola Hotel Co.* 56 *Iowa*, 178, and many other decisions to the same effect.

In the case of *Warfield, Howell & Co. v. Marshall County Canning Co. et al.* 72 *Iowa*, 666, the court, through SEEVERS, Judge, used the following language, on page 670:

> "Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals (Code, Section 1059). Such is the rule in the absence of a statute, and therefore it has the right to prefer one creditor to another (2 Mor. Priv. Corp. Section 802)."

This case was referred to and affirmed in 80 *Iowa, p.* 386, on page 386, in which the following language was used by the court:

> "It was held in Warfield v. Canning Co., 72 Iowa, 667, that a corporation may prefer its own stockholders and directors to other creditors, and that a mortgage given to secure an officer and stockholder was valid even though it was authorized by his own vote."

And further states from Garrett v. Plow Co., supra:

> "No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent in a fair and honest way, take its property in security."

The same doctrine is declared in *Re-assignment* of Woolen Mills, 101 Iowa, 189, in which DEEMER, Judge, used the following language:

> "Another point made is that the beneficiaries in the mortgage are directors of

> the corporation, and that as such they could not take security to the prejudice of other creditors. This question seems to be settled adversely to appellants in the cases of *Garret v. Plow Co.*, 70 *Iowa*, 702 (29 *N. W. Rep.*, 395); *Warfield v. Canning Co.*, 72 *Iowa*, 670 (34 *N. W. Rep.*, 467), and *Rollins v. Carriage Co.*, 80 *Iowa*, 386 (45 *N. W. Rep.*, 1037)."

As late as the case of *First National Bank v. Garretson*, 107 *Iowa* (*see bottom of page* 200), the following language is used by the Supreme Court:

> "It is well settled in this State that an insolvent corporation may make payment of its debts or give property in security therefor, just as a natural person may do, and it may prefer one of its creditors over another."

The Court further states in *Manton v. Seiberling*, 107 Iowa, 531, that there are no decisions, to its knowledge, conflicting, criticising or overruling the cases referred to.

Mr. Carr, the defendants' witness, admits that that is the law, and in answer thereto simply states a criticism by a Judge in a recent opinion, which amounts merely to this; that if the question were res nova he (the Judge, not necessarily the Court) might take a different view, but it is admitted on all sides that the law of the State of Iowa stands thus to-day. That he (a director) may become a creditor of the corporation; may advance it money or sell it property, and obligations of the corporation executed therefor may be enforced by him.

In this regard he occupies no different position from that of any other creditor. And if the debt which he holds was contracted in good faith and there is an absence of fraud on his part, he may take security or payment though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim.

That being so, the question of the solvency or insolvency of the corporation became entirely immaterial.

The attorney for the defendants, however, insisted that he had a right to go to the jury upon the question of the good faith of the transaction, and that the question of good faith was a jury question.

As we have before said, the facts respecting the acquisition of and payment for the machinery with the plaintiff's money, the indebtedness of the corporation to the plaintiffs for this machinery, the circumstances of the transfer of the machinery are not controverted and are admitted by the testimony of the defendants' witness. (*Testimony of Johnson, p.* 106, *line* 24, *to p.* 107, 1, 13.)

The plaintiffs themselves are people of standing in the community where they belong. Mr. Oswald Schmidt is a manufacturer (p. 32, lines 20 to 25); Paulo Roddewig is also a manufacturer (*p.* 40, *lines* 21 *to* 24); Waldo Becker is a lawyer and is Mayor of the City of Davenport (*p.* 48, *lines* 19 *to* 22), and Alphonse L. Hageboeck is a leading physician of Davenport, having a large practice (*p.* 107, *l.* 30, *to p.* 108, *l.* 12).

It appears, moreover, that before the transfer

of this machinery was made the parties consulted with Judge Waterman, an ex-Justice of the Supreme Court of the State of Iowa, and acted under his advice as to the legality and the character of the transaction.

(*Whstehead, p.* 18, *lines* 1 *to* 28; *Roddewig, p.* 41, *l.* 37, *to p.* 42, *line* 11; *Becker, p.* 51, *line* 10 *to line* 30; *Hageboeck, p.* 67, *lines* 18 *to* 22.)

It seems by the testimony of Dr. Hageboeck that not only was Judge Waterman consulted, but other lawyers. They state that they consulted some of the best legal talent in the City of Davenport.

Under these circumstances there was nothing that could go to the jury.

"Good faith means without fraud or deception. It signifies honesty as distinguished from mala fides or bad faith."

Am. & Eng. Encycl. of Law, 2nd Ed., Vol. 14, *p.* 1078.

"It means acting with an honest purpose."

Winter vs. Haynes, 84, *Illinois,* 585.

"It means absence of bad faith or mala fides."

Margridge vs. Clapp, L. R. Ch. Div., 1892, *Vol.* 3, *p.* 391.

"Good faith is the opposite of fraud and bad faith and its non-existence, as in all other cases where fraud is imputed, must be established by proof."

McConnell vs. Street, 17*th, Illinois,* 253.

What element of fraud or of mala fides could a jury have possibly found? There was no

concealment; immediate notice of the transfer was given to the carrier, and such possession as could be taken of the property was taken.

There was no advantage taken of the other creditors of the corporation except such as the laws of the State of Iowa permitted, and it surely cannot be bad faith to do what the laws permit.

And lastly, there was no inadequacy of consideration. The plaintiffs were paying $9,388.75 for machinery which, including the costs of transportation from New York to Jersey City, of commissions on its sale and all other expenses, had cost $9,400. It had been standing in Jersey City subject to rust and other deterioration for a year and three-quarters and had on it all manner of charges and demurrage.

It was machinery which one of the attaching creditors himself had tried to sell unsuccessfully and had not been able to get an offer of more than $2,500.

The defendants offer no evidence whatever as to value of the property. If this property had been worth more than what the plaintiffs had given for it they could and would have shown it. Parrish is a dealer in engines and the other attaching creditors were all engaged in the same line of business.

The transaction was beneficial to the other creditors of the Company. For this machinery which, at a forced sale, would probably not have realized even the $2,500 which Mr. Parrish was unable to obtain. By taking in this property at the figure they did, the plaintiffs immediately reduced the liability of the

Company by about $9,400, and so they settled their claim for practically 25 cents on the dollar, giving the other creditors the benefit of this large reduction in the liabilities of the Company.

Moreover, equitably this property was never really the property of the Whitehead Machinery Company. It was purchased in the name of the Whitehead Machinery Company under the explicit agreement that the moneys realized from the sale should go to the people advancing the money. They were therefore equitably entitled to be reimbursed out of this property for the amounts they had paid for it before the general creditors of the Company had any share in it. When they took the property they did not deprive the creditors of the Company of anything that they had a right to look to.

There was no estoppel against them. No credit was shown ever to have been given to the Whitehead Machinery Company on the strength of its ownership of this property.

Fraud is a qucstion for the jury, *but only when the facts are disputed.*

Sturtevant v. Ballard, 9 *Johns, N. Y.*, 337–342.
Macullar vs. McKinley, 99 *N. Y.*, 353.
Upton vs. Tribilcock, 91 *U. S.*, 45;

Citing

Pettibone v. Stevens, 15 *Conn.*, 19.
Beers vs. Bottsford, 13 *Conn.*, 146.
Cyc. of Law & Pro., *Vol.* 20, *p* 123; and cases there cited.
Amer. & Eng. Encycl. of Law, *2nd Ed.* *Vol.* 14, *p.* 190.

The charge of fraud must be proved by clear and satisfactory evidence. It cannot be sustained by mere insinuation or suspicion, strained inference, doubtful or suspicious circumstances or mere conjecture and evidence which produces a vague misgiving is not enough.

Cyc. of Law & Pro., Vol. 20, *p.* 120, *and cases cited.*

The burden of proof is on the person setting up the fraud. Fraud is never presumed but must be affirmatively proved. *Cyc. of Law and Pro., Vol.* 20, *p.* 108, citing many cases in various States of the Union.

The question was raised whether or not the plaintiffs were creditors of the corporation at the time of this transfer.

They were liable for the debt to the bank. They received from the bank the note on which the company was liable. If they had not been creditors before, by paying the note at the bank and receiving the same they became creditors; and if that be not so then the transaction was a sale, by which the plaintiffs purchased from the corporation and instead of paying the money to the corporation used it at the corporation's request for the purpose of paying its debts, a perfectly valid consideration under the cases in Iowa, which have been cited, under which it has been held that a director may deal with a corporation as though he were not a director, and corporation have the same powers to transfer their property as private individuals this transaction was perfectly legal.

But the company had agreed with them to

protect them out of the sales of the machinery. Having the right to the performance of that duty by the company, they were clearly creditors.

New Jersey Insurance Co. v. Meeker, 8*th Vroom*, 300, in which Chief Justice Beasley reviews the various decisions defining debtor and creditor and lays down a definition of creditor.

III.

If the case had gone to the jury and the jury for any reason should nave found a verdict for the defendants it would have been the duty of the Court to set it aside.

Baldwin vs. Shannon, 14*th Vroom*, 596, which has frequently received the approval of this Court.

Myer vs. Madreperla, 39*th Vroom*, 258; and *McCormack vs. Standard Oil Co.*, 31 *Vroom*, 243.

To sum it all up the equities are entirely on the side of the plaintiffs. To all intents and purposes this machinery was their machinery; they had paid every dollar for it which it represented; they were the ones to receive the proceeds.

The transaction with the bank by means of the note was a transaction by which they raised the money to buy the machinery; it was their credit that was pledged.

What the Whitehead Machinery Company spent in the purchase of this machinery was re-paid to it by a sale of a part of this ma-

chinery, so that the machinery as it stood, represented not one cent of the Whitehead Machinery Company's money and not one cent of the money or property of its creditors, outside of the plaintiffs. The creditors had no interest whatever in it. The taking of it by the plaintiffs reduced the indebtedness of the corporation by about $9,400, which reduction went to the increase of the dividends of the other creditors.

In the whole transaction these plaintiffs have acted as they lawfully might act under the laws of the State of Iowa, under the advice of most reputable counsel and with entire honesty. Their action redounded to the benefit of all the creditors of the Whitehead Machinery Company.

To allow the plaintiffs in the attachment suit, non-resident creditors, to reap the fruits of their attachment would be giving them the property of the plaintiffs; would be giving them an advantage over all the other creditors of the Whitehead Machinery Company and would use the Courts of this State to work out a result inequitable and unjust.

We respectfully insist that upon every principle of law and justice the action of the trial Court in directing a verdict was right and that the judgment should be affirmed.

GEORGE W. RURODE,
Attorney.

M. T. ROSENBERG,
Of Counsel.

NEW JERSEY

Court of Errors and Appeals.

OSWALD SCHMIDT ET ALS.,
Defendants in Error.

vs.

RANDOLPH PERKINS ET AL.,
Plaintiffs in Error.

} *In Replevin.*

Brief for Plaintiffs in Error.

THE FACTS.

Whitehead Machinery Company was a corporation organized under the laws of the State of Iowa. Its business was the buying and selling of second-hand machinery. In February, 1903, the company purchased several large pieces of second-hand machinery from the Edison Company in New York City. This was taken across the river to Jersey City and stored on one of the piers of the Pennsylvania R. R. Co. It remained there until it was attached by the Sheriff of Hudson County on October 7, 1905, pursuant to a writ of attachment issued out of the Hudson County Circuit Court at the suit of Charles J. Dorrance. Two other creditors afterwards filed affidavits in that suit and were admitted as applying creditors. Randolph Perkins, one of the plaintiffs in error, was duly appointed auditor under the attachment act, and was about to sell the property, as perishable, under an order obtained for that purpose, when the defendants in

error sued out a writ of replevin against him and the Sheriff who had executed the original writ of attachment. A declaration was subsequently filed, and pleas and avowries followed. The issue was whether the property was the property of the Whitehead Machinery Company or of the defendants in error. Judgment in the original attachment suit was shortly after entered against the Whitehead Machinery Company by default.

The defendants in error claimed that they secured title to the machinery by a bill of sale, or receipted bill (Exhibit P 5 on page 139) on October 4th, 1905, or three days before the attachment issued. It was shown that, at least a year prior to that time the company had held a creditors' meeting at which an extension of credit was given; that during the year 1905, the company struggled along, doing less and less business; that the storage charges on the machinery in question had not been paid, and that the railroad company had threatened to sell to collect the amount due. The President of the company admitted that creditors were pressing for payment of its bills (page 73, l. 20). Many other instances of the company's inability to pay its ordinary debts were testified to clearly; even a book-keeper of the company was never paid his wages, because of lack of funds. An assistant in the company's office was paid only on account of his salary from time to time, because there were no funds to pay him regularly (page 100, l. 20). The company's attorneys, themselves, held for collection claims against the company aggregating at least one thousand dollars (page 61, l. 20). The company's property located in other States was sold under judicial proceedings after judgment. The company was contemplating steps to wind up its affairs. Several conferences and meetings of the defendants in error were held

in September, 1905, in reference to the company's affairs. Attorneys in Davenport who had claims were pressing for payment. The President, Dr. Hageboeck, had been advancing moneys, and insisted that as moneys come in, they should be turned over to him so that he could deduct 50 per. cent to reimburse himself for his advances. To provide ready cash for the office and to prevent the President from getting so much of the returns, Whitehead, the Manager, had several checks cashed, without going through the company's account, and used the money to pay pressing office expenses. A clerk in the office was asked to act as trustee to wind up the company, sell the property and settle with the creditors. This clerk left the company on September 30, 1905, because he saw the company was about to fail. The plaintiff and the applying creditors in the attachment suit (supra) had been attempting to collect their claims for several months. The claim of Parrish, for about $1,500, was due prior to March 31, 1905, (page 111, l. 30). The claim of Dorrance was based on the company's protested promissory notes, which had been in attorney's hands in Davenport, Iowa (page 19, l. 20). And the President and Mr. Moore (a business associate of Dorrance), had talked about it a year before the attachment proceedings, at which time Hageboeck said the company was "hard up" (page 72, l. 40). On November 2, 1905, a deed of all the company's property (excepting the Jersey City machinery) was made to J. E. Burmeister, as Trustee for the creditors; this was in the nature of a common law assignment. It was admitted that the trusteeship would pay, to such creditors who had filed claims, only about 20 per cent.; this did not include the attaching creditors in the Hudson Circuit Court (page 26, l. 23). **The company was clearly insolvent** when it attempted to convey the

Jersey City machinery to the defendants in error. The defendants in error derived their alleged title to the machinery under the following circumstances. In February, 1903, Whitehead suggested that the company purchase it and hold it for a sale at an advanced price. In order to raise the purchase price, notes were made by the company and endosed by the defendants in error. They were renewed from time to time. The last note was for $9,250, dated Nov. 1, 1904, payable to August A. Balluff, Cashier, one year after date (Exhibit P 1, page 134). On October 3rd, **almost one month prior to the maturity of this note,** the Cashier of the bank notified the endorsers that the money would have to be paid when due. It is clear from the evidence that the bank would not continue the credit (page 45, l. 20; page 50, l. 17). Becker (one of the defendant in error) says that none intended to endorse a renewal (p. 50, l. 35). Whitehead (one of the endorsers), had no funds, and the other four directors each gave to the bank his check for one-fourth the amount due. **That money went to the bank and not to swell the assets of the Whitehead Machinery Company.** Both Roddewig and Schmidt, two of the endorsers, were directors in the bank which held the note (page 24, l. 10). The note was marked paid, and the receipted bill for the machinery was handed to them. **The situs of the property was never changed** from the time of the original purchase in February, 1903, until long after the trial in this case. **The property had never been in Iowa.**

Dr. Hageboeck was a director of the company, and its President, as well as Treasurer; Roddewig and Becker claimed that they were not legal directors. Roddewig thought he was a director when he endorsed the note (page 43, l 35). It appears that by the articles of incorporation only three

directors were authorized and they failed to publish, as required by law, an amendment to the by-laws; "consequently, Roddewig and Becker were not legal directors" (page 12, l 35); see also (page 52, l 33). But the testimony shows clearly that they all continued to meet from time to time, as an advisory board (see Whitehead testimony on page 22, l 20 et seq.; also page 25, l. 20 et seq.) Hagaboeck's testimony (page 71, l. 20 et seq.); Johnson's testimony (page 87), where it clearly appears all of these men were attending to their duties as *de facto* directors. And that their very close relations to the company were of such a nature that they were intimately acquainted with all its details. On page 69, on direct examination of Dr. Hageboeck, it appears all of these gentlemen participated **as Directors** in the proceedings relating to the sale of the machinery to themselves.

"Q. You (Dr. Hageboeck) and Mr. Whitehead and Oswald Schmidt were directors? A. Yes, sir.

"Q. And all participated in that proceeding? A. Yes, sir.

"Q. So that there was not either officer or director that did not participate in the transaction? A. There was not."

ARGUMENT.

It is to be observed that

1. They were directors, *de jure* or *de facto*, both at the time of endorsing the note and of meeting its payment.

2. The company was insolvent when the transfer of the machinery was made.

3. The note had almost a month to run when they paid it off.

4. They did not **swell the assets** of the company

by paying the amount of the note into the company's treasury; they paid the amount to the bank and took the receipted bill for the machinery as evidence of the transfer to themselves.

5. Their position as endorsers of the note did not make them creditors of the company; they were only secondarily liable to pay the note to the bank. When they paid it, they did not become assignees of it. The note was marked "Paid Oct. 4, 1905." The transfer of the machinery was a simultaneous transaction; there was no time between the payment of the note and the taking of title to the machinery so that the directors could be classed as creditors.

To justify the otherwise unlawful preference to themselves, by taking over the assets of the company, in which they were so closely interested. they sought to show that by the common law of Iowa such a preference was not invalid and that a director of an insolvent corporation being a bona fide creditor, could be preferred in this manner.

In support of this, evidence was given (taken *de bene esse* at Davenport, Iowa), by Mr. Becker, one of the defendants in error, he being a member of the Iowa bar. Mr. Becker's testimony as to the law of Iowa will be found on page 55 et seq. He read into the testimony opinions of the courts of Iowa. To meet this the plaintiffs in error called Judge Carr, who had served for seven years on the bench of Iowa. He called attention to **portions of the opinions,** cited by Mr. Becker, which had been omitted by him (Becker) in his quotations. In one case the very Judge who wrote the opinion cited by Mr. Becker said: "The writer of this opinion is inclined to doubt the correctness of the general rule adopted in these cases, but does not find it necessary to do more than this in this particular case,

for the reason that he thinks that under the facts disclosed, it is a proper rule to be applied" (bottom page 113). In that case, it will be found that all the creditors had consented to the preference they subsequently attacked.

Judge Carr then went on to show the elements which must enter into the case to call for the application of the rule. A careful reading of his testimony is most earnestly invited (page 115 et seq.) The following essentials are clearly pointed out:

1. **The directors must be actual creditors.**
2. **The indebtedness must be a bona fide one.**
3. **The consideration which goes to make up the indebtedness must go to swell the assets of the corporation.**
4. **The defendants in error, being endorsers or sureties for the company's note were not its creditors. The relation of debtor and creditor did not exist; therefore, the rule permitting the preference did not apply. The endorsers on the company's note were therefore sureties for it, and were not its creditors.**
5. **When a director, being also a creditor of the insolvent company, takes security, he must do so in good faith, and in a fair and honest way.**
6. **The question whether good faith was, or was not, exercised in the particular case, is a question of fact to be determined by the fact determining body; the facts surrounding the transfer must be examined to see whether GOOD faith was or was not exercised.**

7. The burden of showing that good faith was exercised is upon those who occupy the fiduciary relation. The transaction "will be scanned with care, even with suspicion."

There were several questions of fact raised by the evidence:

A. What was the law of Iowa?

B. Does the Iowa law apply to this case?

C. If Judge Carr's theory of the Iowa law was correct, was good faith exercised in the transaction, resulting in the transfer of the machinery?

The company had sent out a letter on March 21, 1905 (Exhibit D 1), in which it was stated that "it was proper you should know that of $20,000 bills payable we have out, $16,500 are held by our directors, who are of course friendly to us; *and this paper does not mature until the 31st day of December next*, so that until that time there is nothing to worry about, and of course when these notes reach maturity such extension will be made as may be desired." As a matter of fact the note would have matured November 1, 1905, but it was paid off *almost a month* before it became due. Under Judge Carr's theory of the law, all these facts should be considered by the jury in determining whether the obtaining of the preference was brought about by good faith. Coming only three days before the attachment, the transaction should be "scanned with care, even with suspicion." They were not primarily liable to pay the note. Their endorsement was only a secondary liability—contingent upon the failure of the comphny to pay it **when due,** Was it good faith to anticipate the pending insolvency—the closing of the company's business—

to pay one creditor in advance of the time when payment of its debt had been fixed—they being liable to pay that debt if the company did not—and then turn over to themselves machinery to the value of $10,000—the largest part, by far, of its assets? Was this an honest and fair way to bring about a preference?

But the Circuit Court Judge says that he cannot see that "good faith means anything further than a full, fair and adequate consideration is given for the property." On page 119, line 3, the same Judge admits that he does not know that "there has been any definition of good faith, any more than there has been a definition of fraud." Judge Carr, in referring to the Iowa opinions, clearly shows (page 123, l. 20), that in order to make the transaction a good faith transaction, the money paid "should go into the company to swell its assets." It is admitted that the money consideration did not go into the treasury, but was paid to the bank. If it had gone to the company's treasury, all the creditors could have shared it, but it was paid in full to one creditor—the bank,—and the effect to the other creditors was entirely different (see also page 119, l. 15).

It is respectfully submitted that, aside from the meaning of the term as applied to the science of the law in Iowa (as testified to by Judge Carr), the question of good faith has a much broader meaning than given by Judge Parker. *Good faith* must mean the absence of *bad faith;* and the absence of bad faith certainly calls for more than the payment of an adequate consideration. "The term is used in law to qualify many different kinds of actions; thus it embraces those obligations which are imposed upon one in dealing with property by the circumstances attending it at the time; when used to

qualify the action of a purchaser, it means a purchase made honestly, for a valuable consideration, and without notice of adverse claims to the property by others. An honest intention; honest lawful intent, an honest purpose as contrasted with collusion; abstaining from taking an unconscientious advantage of another." (20 Cyc., 1261). When the question of good faith arises, we submit that it must relate to *all* the facts involved in the transaction and not alone the adequacy of consideration. Did they pay the money to the company's treasury? Should they not, in justice to the other creditors, permit the credit the company had obtained to remain until its maturity? Was it bad faith, or good faith, to take up this indebtedness in advance? Was not this a question for the jury? Judge Carr said that it was, under the Iowa law; and our Circuit Court Judge said he would leave the *bona fides* of the transaction to the jury; but he shifted his position in his reasons for a direction of verdict.

THE LAW.

I.

A question of fact arose as to what was the Iowa law, and it was the duty of the trial court to submit that question to the jury.

The editor of Cyc., Vol. 16, page 887, in treating with the subject of Evidence says, on this subject: "Where the testimony is uncontradicted, is based on a document, or harmonious judicial opinion, or is adduced in connection wtih an offer of a written instrument as evidence, the effect of the evidence is to be determined by the Court, *but if the evidence is conflicting, the jury must as-*

certain under proper instructions what is the foreign law."

Several cases are cited in support of this latter proposition, and so far as we have had access to the reports, we quote the language, of the opinion in those cases.

Ingraham vs. Hart, 11 Ohio, 255: Opinion by Chief Justice Lane. This was an action of debt. The statute of limitations of Pennsylvania was pleaded. "To escape the bar of this statute the plaintiff wishes to lay before the Court the construction of that statute by the Courts of Pennsylvania, by which the effect of it is limited to debt for rent by parol, demise. The point in issue is, what is the law in Pennsylvania? What is the law of another State? The existence of the law of another State is a question of fact triable by a jury and provable, if necessary, by witnesses * * * The question is not what is the *just and true* interpretation, but what is the actual construction of the document by the Pennsylvania tribunals."

Moore vs. Gwynn, 5 N. C., page 190, Judge Nash said: "Was his Honor correct in stating to the jury that they were to be instructed by the Court what the law of Virginia was and in stating to them what was the law? In other words, was it a question of law for the decision of the Court, or one of fact for the determination of the jury? We think that his Honor erred and that it ought to have been left to the jury as a question of fact. The case does not arise under any statute of Virginia, but under the common law of that State. The first thing to be done, was to prove the existence of the law, and, according to the opinion in the State vs. Jackson, it was a question of fact to be decided by the jury. How was it to be done? In this case by the testimony taken, and that consisted of the

opinions of three gentlemen learned in the laws of that State. In one of these opinions it was stated that from such a possession, a gift was presumed; in another that from such a possession a loan was presumed. And the third, that no presumption arose of either kind but that it was a matter of fact to be determined by the jury, in view of all the circumstances attending the possession in each case. Here then was a conflict of testimony upon the point in controversy, the existence of the law of Virginia—not contained in any statute or record, but to be found, if at all, in the common law of that State. The existence of such a law could be proved only by the opinions of persons learned in that law. Instead of leaving that testimony to the jury to be weighed by them, and directing their attention to the circumstances attending the possession of the intestate, the presiding Judge, considering it a question of law for the Court, decides it himself, and informs them that, by the law of Virginia, such a possession by a son-in-law is presumed to be a gift. In so charging the jury we think his Honor erred."

Charlotte vs. Chouteau, 25 Mo., page 465, Judge Richardson said, page 475: "It may be doubted whether the rule ought to be applied or can be practically enforced when the foreign law offered in evidence is unwritten, or is the common law of the country where it prevails; for in many instances, as in the case in 5 Ired. 190, the evidence may be conflicting, and all the witnesses may state the law differently, in which case it would be extremely difficult for the Court to determine either the fact sought to be proved or to declare the legal effect of the evidence. And whilst it may be the better rule to submit as a question of fact the existence of a foreign law to the jury, we think that when it is

written and received in evidence it is the duty of the Court to construe it, and to instruct the jury as to its meaning and effect. We do not mean by the written law the statements of text writers or the decisions of courts; but these may be used with the evidence of experts to enlighten the Court in expounding the foreign law; for when a foreign law has received a local construction, judicial decisions and law writers may be consulted, and professional witnesses may be examined for the purpose of ascertaining its meaning."

In *Kline vs. Baker*, *99 Mass.*, Judge Gray said: "Where the evidence consists of the parol testimony of experts as to the question of prevailing construction of a statute or as to any point of unwritten law the jury must determine what a foreign law is, as in the case of any controverted fact taken upon like testimony," Judge Gray draws the distinction between uncontradicted testimony and conflicting testimony, and he says, "if the evidence is uncontradicted and will not support the action it is the duty of the Court to so instruct the jury." In that case one side put in evidence several volumes of the Pennsylvania reports and the other side introduced evidence to the effect that certain things had been done which brought the case within the opinions which had been introduced in evidence. The Trial Judge directed a verdict against the plaintiff, and Judge Gray held that this was error, *because there was evidence to warrant a jury in considering whether the facts come under the theory of the law as set forth in the opinion offered in evidence.*

In Holman vs. King, 7 Metcalf (Mass.), Judge Wilde said, page 388: "It is equally clear, that the instructions given to the jury were entirely correct, and that the instructions which the defendant's counsel requested to be given could, on no principle

of law, be sustained. The Court was requested to decide authoritatively what was the law of the State of Georgia as to the matter in issue between the parties. This the Court declined to do; and the question was left to the jury to decide, as a fact, with such instructions to assist them in ascertaining and applying the law, as were deemed proper, and to which there is no objection. That foreign laws, whether written or unwritten, are to be proved as facts is well established; the only difference is as to the mode of proof. Mostyn vs. Fabrigas, 4 Cowp., 174; Male v. Roberts, 3 Esp. R., 164; Millar v. Heinrick, 4 Campb., 155; Haven v. Foster, 9 Pick., 130. And the same rule of law is applicable to the construction of foreign statutes. The question for the jury to decide was, what had been the construction given to the statute, as to this case, by the Court in the State of Georgia; for this case is to be decided in the same manner as it would be decided if it had been commenced and tried in that State."

In Ames vs. McCamber, 124 Mass., page 85, Judge Endicott said: "When the law of another State is in dispute it is to be determined as a question of fact by the Court or the jury trying the case. If the evidence was conflicting we have no authority to revise the finding."

In Hopper vs. Moore, 5 N. C., page 134, Judge Pierson said: "But if the existence of an unwritten law of another State, or foreign country, is not presumed or admitted, then its existence must be proved by competent witnesses, and the jury must then pass on the credibility of the witness, and it is the province of the Court to inform the jury as to the construction, meaning and legal effect of the law, supposing its existence to be proved; and to this end, the Court should avail itself of the judi-

cial decision of the State or country. For example, if the existence of a judgment in France, sued on here, is proved by a sworn copy, the jury passes on the credibility of the witness, the rest is for the Court. So, if the existence of the unwritten law of Russia is sworn to by witnesses, the jury passes on their credibility, but its meaning, &c., is for the Court."

In our State, the leading case is Title Guarantee and Trust Co. vs. Trenton Potteries Co., 11 Dick, 444, where the opinion of the Court of Errors and Appeals was delivered by Judge Gummere. He cites the leading English cases, Baron De Boyde's case, 8 Q. B., 265; Nelson vs. Bridgport, 8 Bear, 535, and the Sussex Peerage case, 11 Cl. & F., 114. After quoting freely from the reasoning in these cases, Judge Gummere said, page 444: "The question to be determined is not what the language of the law is, but what the language of the law is altogether, as shown by exposition, interpretation and adjudication, and thus stated it can best be ascertained by the testimony of a professional witness, whose special knowledge enables him to speak to that fact."

The Hudson Circuit Court Judge said, bottom page 131: "It has been said here that the relation of debtor and creditor did not exist at the time of the transaction; it was so stated on the witness stand by Judge Carr. I think I understand what he meant in his testimony, but feel compelled to differ with him in his conclusion."

Lord Langdale (Nelson vs. Lord Bridgport) said: "The foreign law and its application, like other results of knowledge and experience in matters of which no knowledge is imputed to the Judge, must be proved as facts are proved by appropriate evidence, *i. e.*, by properly qualified witnesses who can state from their own knowledge and experience,

gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question."

II.

If the facts did not support the Iowa law, the law of New Jersey must be applied.

Judge Carr made it clear that in this particular case, the relation of debtor and creditor, *necessary under the Iowa law* to invoke the rule in question, did not exist. Furthermore, it was necessary to have the consideration go to *swell the assets of the company.* If it did not go, the rule did not apply. The necessary elements which were required to support the Iowa theory of preference having failed, we revert to our own law. No other branch of the Iowa law was referred to. It will be presumed, in the absence of proof to the contrary, that the common law of New Jersey is the common law of Iowa, and it is clear that such a transaction would be void if attempted by a New Jersey corporation. See Savage vs. Miller (Court of Appeals), 11 Dick., 432, and cases cited, where the history of the legislation and various cases on this subject is fully set out by Mr Justice Garrison. See also Stewart vs. Lehigh Valley R. R. Co., 9 Vroom, p. 522-3.

III.

There was no evidence of any legal transfer of the machinery to defendants in error.

There was no legal evidence to show authority in Mr. Whitehead to make the transfer or bill of sale. He was asked (page 17, l. 22) what his power

and authority was in the disposition of property of the company and for the company. This was objected to as not being the best evidence. He said there were by-laws which would show his authority, but they were not produced or offered in evidence. Even with Whitehead's testimony standing as it does, it can only mean *disposition of the company's property for the company in the ordinary course of business.* The transfer to these directors was not "for the company," and it was certainly not in the "ordinary course of business." Without such proof of authority the alleged title of the defendants in error has no support and their claim must fail. Aside from the testimony offered on part of the defendants in error on this point, Judge Carr testified that there is no law peculiar to Iowa, as to how the powers of a general manager of an Iowa corporation are determined (page 123, l. 25). He says that he would examine the articles of incorporation, their by-laws, if they had any, their procedings of the board of directors. We submit that it was incumbent on defendants in error, aside from the many other questions in the case, to show their title to this machinery. They attempted to show their title by Exhibit P 5 (page 139), but no authority is shown for the execution of such a paper—no authority in Whitehead to act for the company in such a matter. Surely the law requires more than this proof to show their title—obtained at such a time, and under such circumstances—a paper which purports to transfer the larger part of the assets of a corporation to four men, all occupying the closest fiduciary relations to the company.

IV.

The so-called original agreement cannot justify the alleged transfer.

In his reasons for directing the verdict in this case, the Circuit Court Judge sought to justify his action on the theory that by the original agreement, *inter sese*, the defendants in error were to have the loan, for which they had become sureties or endorsers, repaid. Whether that was the truth or not might be, and should have been, properly considered by the jury, especially in view of the fact that part of this machinery was subsequently sold for $1,600.00, which sum was not used to reduce the indebtedness but went directly into the company's business (page 27, l. 10, and page 28, l. 10). It must appear to this Court that such an agreement would not bind or affect creditors, without notice. Credit was undoubtedly given on the known assets of the company. The claim of one of the creditors (Parrish) in the original attachment suit was made up very largely on matters relating to this very machinery. How could any **secret understanding** or agreement **among** the **directors** that this **machinery** was to be **sold** for **their benefit, affect** the **rights of creditors?** Such a theory, if true, is hardly consistent with the letter sent out in May, 1905 (Exhibit D 1), when creditors were informed that $16,500 out of $20,000, bills payable, were held by these directors, "so that there is nothing to worry about, and of course when these notes reach maturity, such extensions will be made as may be desired!" Certainly the theory of the law as applied in New Jersey cannot support such an understanding. It amounts to nothing less than a preference; *it is a transfer to secure to themselves an antecedent indebtedness for which they were only secondarily or contingently liable.*

There is nothing in the testimony to support such a transaction on such a theory in the Iowa law. The only evidence as to the Iowa law, given by Mr. Becker, relates wholly to the preference for an actual indebtedness. On that phase of the case Judge Carr says (page 117) there was no indebtedness existing, and as the principle sought to be invoked by these directors is based or bottomed upon an indebtedness *actually* existing, the Iowa law did not apply. The presumption will be that the common law of New Jersey is the common law of Iowa, and the transaction is, therefore, void.

It is respectfully submitted that the Circuit Court committed error in directing a verdict for the defendants in error, and that the judgment should be reversed and a *venire de novo* ordered.

TENNANT & HAIGHT,

Attorneys for Plaintiffs in Error.

INDEX.

TO PLEADINGS, ETC.

	PAGE
Writ of Error	1
Return of Writ of Error	2
Declaration	2
Pleas and Avowry	3
Replication	7
Motion for Non-suit	79
Motion for Direction of Verdict	129
Direction of Verdict	130
Exhibits	134
Assignments of Error	143

TO EVIDENCE.

ADAMS, CLARENCE E.

Direct	29
Cross	31

BALLUFF, AUGUST A.

Direct	46
Cross	48

BECKER, WALDO.

Direct	48
Cross	57

BUDDEN, FREDERICK P.

Direct	81

CARR, GEORGE H.

Direct	111
Cross	126

HAGEBOECK, ALPHONSE L.

Direct	64
Cross	71
Re-direct	74

JOHNSON, ARTHUR S. PAGE

Direct 86
Cross 105

MURPHY, I. A.

Direct 60
Cross 62

MOORE, OLIVER B.

Direct 128

PERKINS, RANDOLPH.

Direct 79

PARISH, WILLIAM F.

Direct 81
Recalled 111
Cross 111

RODDEWIG, PAULO.

Direct 40
Cross 43

SCHMIDT, OSWALD.

Direct 32
Cross 36
Re-direct 39

SMITH, GEORGE T.

Direct 77

WHITEHEAD, WILLIAM W.

Direct 9
Cross 19
Re-direct 27
Re-cross 28

NEW JERSEY

Court of Errors and Appeals.

NEW JERSEY, SS.

The State of New Jersey to the Hudson

[SEAL.] County Circuit Court:

GREETING:

For as much as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in the said Hudson County Circuit Court, between Oswald Schmidt, Waldo Becker, Paulo Roddewig and Alphonse L. Hageboeck, plaintiffs, and Randolph Perkins, Auditor, and John Zeller, Sheriff, defendants, in an action of replevin, manifest error hath interned, to the great damage of the said defendants, as is said; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the first Tuesday of July next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS, Our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the 19th day of June, A. D. 1906.

S. D. DICKINSON,
Clerk.

TENNANT & HAIGHT,
Attorneys.

The answer of Charles W. Parker, Esquire, Judge of the Circuit Court above mentioned.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, I certify to the Judges of the New Jersey Court of Errors and Appeals in the last resort in all causes, at Trenton, at the day and year within contained, in a certain schedule to this writ annexed, as I am commanded.

CHARLES W. PARKER, [L. S.]
Judge.

DECLARATION.

HUDSON COUNTY, SS.

John Zeller and Randolph Perkins, the defendants in this suit, were summoned to answer Oswald Schmidt, Paulo Roddewig, Waldo Becker and Alphonze L. Hageboeck, the plaintiffs therein, wherefor they took the goods and chattels of the said plaintiffs, and unjustly detained the same against sureties and pledges, until, etc., and thereupon the said plaintiffs, by George W. Rurode, their attorney, complains; for that the said defendants, on the sixth day of October, in the year of our Lord nineteen hundred and five, in the City of Jersey City, in the County of Hudson, took the goods and chattels, to wit, one 22 and 42x47 Hamilton engine, condenser and heater No. 317 and all appurtenances, one 22 and 42x47 Hamilton engine, condenser 316 and all appurtenances, one 22 and 42x47 Hamilton engine, condenser 350 and all appurtenances, one 22 and 42x47 Hamilton engine, condenser 351 and all appurtenances, one 22x42 Hamilton engine, condenser 366 and all appurtenances, of the said plaintiffs, of great value, to wit, of the value of ten thousand

dollars, and unjustly detained the same against sureties and pledges, until, etc.

Wherefore the said plaintiffs say that they are injured, and have sustained damage to the amount of ten thousand dollars, and therefore they bring their suit, etc.

GEO. W. RURODE,
Attorney of Plaintiffs.

PLEAS AND AVOWRY.

And the said defendants, by Tennant & Haight, their attorneys, come and defend the wrong and injury, when, and say that they did not take the said goods and chattels, in the declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiffs have above thereof complained against them. And of this the said defendants put themselves upon the country, etc.

And the said defendants, by leave of the Court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, come and defend the wrong and injury, when, etc., and say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say, that the goods and chattels, at the said time, when, etc., were the property of Whitehead Machinery Company, a corporation of the State of Iowa and not of the said plaintiffs, as by the said declaration is above supposed, and this they, the said defendants, are ready to verify; wherefore, they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, and they also pray return of the said goods and chattels, together with their damages and costs in this behalf, according to the form of the statute

in such case made and provided, to be adjudged to them, etc.

And the said defendants, by further leave of the Court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, come and defend the wrong and injury, when, etc., and the said defendant John Zeller, as Sheriff of the County of Hudson, in the State of New Jersey, at the said time, and Randolph Perkins, as the Auditor appointed by the Hudson County Circuit Court in a certain cause in attachment depending in the said Court wherein Charles J. Dorrance is plaintiff and Whitehead Machinery Company, a corporation of the State of Iowa, is defendant, well acknowledge the taking of the said goods and chattels in said declaration mentioned, at the said place, in which, etc., and justly, etc., because they say that at the time when, etc., and for a long time before, to wit, three years, the said defendant, John Zeller, was the Sheriff of the said County of Hudson, and that before the commencement of this suit, to wit, on the seventh day of October, nineteen hundred and five, Charles J. Dorrance made an affidavit that Whitehead Machinery Company, a corporation of the State of Iowa, was indebted to him in the sum of nine hundred and fifty dollars, and that said Whitehead Machinery Company was a corporation not created or recognized as a corporation of New Jersey by the laws of New Jersey. And on the day and year last aforesaid, after the making of the said affidavit, a writ of attachment was lawfully and in due form of law issued out of and under the seal of the Circuit Court of said County of Hudson, at the suit of said Charles J. Dorrance against said Whitehead Machinery Company, which said writ of attachment was afterwards, to wit, on the day and year last afore-

said, directed and delivered to the said defendant, John Zeller, as Sheriff of said County of Hudson, as aforesaid, in which said writ of attachment amongst other things, the said defendant, John Zeller, as Sheriff, as aforesaid, was commanded to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements, of the said Whitehead Machinery Company, in whosoever hands the same might be, and those rights and credits, moneys and effects, goods and chattels, lands and tenements, safely keep, so that the said Whitehead Machinery Company should be and appear before said Court on the fourteenth day of October, nineteen hundred and five, to answer unto said Charles J. Dorrance in an action upon contract wherein the said Charles J. Dorrance demanded nineteen hundred dollars; and afterwards, on the day and year last aforesaid, the said defendant, John Zeller, as Sheriff as aforesaid, by virtue of said writ of attachment, directed and delivered to him as aforesaid, and in obedience to which direction in due form and lawful manner in all respects attached the said goods and chattels in the said declaration mentioned, as the goods and chattels of the said Whitehead Machinery Company. And that the said defendant, John Zeller, as the Sheriff aforesaid, made a return of the said writ of attachment according to the form of the statute in such cases made and provided and as directed by the said writ of attachment. And afterwards, on the return of said writ, to wit, on the fourteenth day of October, nineteen hundred and five, by order of the Hudson County Circuit Court, the said defendant, Randolph Perkins, was appointed auditor in the said suit to audit and ascertain the amounts due to the said Charles J. Dorrance and each of the applying creditors; and afterwards, by another order of the said Hudson County Circuit Court made in the said suit,

on the thirtieth day of October, in the year last aforesaid, the said defendant, Randolph Perkins, was ordered and directed to sell the said goods and chattels, attached by the defendant, John Zeller, as aforesaid, as the goods and chattels of the said Whitehead Machinery Company, according to the form of the statute in such cases made and provided, and by virtue of and in accordance with the said last mentioned order, the said defendant, Randolph Perkins, did advertise the said goods for sale at public auction; and the said defendants say that the said goods and chattels, at the time of the attaching of the same in manner aforesaid, were in fact the goods and chattels of the said Whitehead Machinery Company, and were not the goods and chattels of the said plaintiffs, as by the said declaration is above supposed, and that the said goods and chattels were in the joint possession of the said defendant, John Zeller, as Sheriff as aforesaid, by virtue of the said attachment, and said defendant, Randolph Perkins, as auditor as aforesaid, by virtue of said orders, at the time of the commencement of this suit, and at the time of replevying the said goods and chattels, to wit, at the place aforesaid, and within the jurisdiction of this Court, and this they, the said defendants, are ready to verify. Wherefore they pray judgment and return of the said goods and chattels, together with their damages and costs according to the form of the statute in such case made and provided, to be adjudged to them, etc.

TENNANT & HEIGHT,

Attorneys for Defendants.

REPLICATION.

And the said plaintiffs, as to the plea of the said defendants, by them firstly above pleaded and whereof they have put themselves upon the country, doth the like.

And the said plaintiffs, as to the plea of the said defendants, by them secondly above pleaded, say that they, the said plaintiffs, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against them, the said defendants, because they say that the said goods and chattels at the same time when, &c., were the property of the said plaintiffs and not of the Whitehead Machinery Company, a corporation of the State of Iowa, and this the said plaintiffs pray may be inquired of by the country, &c.

And the said plaintiffs, as to the said avowry of the said defendants, say that the said defendants, by reason of anything by them in that avowry above alleged, ought not to avow or acknowledge the taking of the said goods and chattels in the said declaration mentioned, at the said place in which, &c., and justly, &c., because they say that the said goods and chattels, at the time of the attaching of the same in manner aforesaid, were in fact the goods and chattels of the said plaintiffs and were not the goods and chattels of the said Whitehead Machinery Company, and this the said plaintiffs pray may be inquired of by the country, &c.

GEORGE RURODE,
Attorney of Plaintiffs.

HUDSON COUNTY CIRCUIT COURT.

OSWALD SCHMIDT, PAULO RODDEWIG, WALDO BECKER, ALPHONS L. HAGEBOECK,

vs.

JOHN ZELLER, SHERIFF, AND RANDOLPH PERKINS, AUDITOR.

Depositions of witnesses produced, sworn and examined de bene esse the twenty-fifth day of May, 1906, at Suite No. 450, 451 and 452 Hageboeck Building, Davenport, Iowa, under and by virtue of a stipulation in an action in the Hudson County Circuit Court of the State of New Jersey, wherein Oswald Schmidt, Paulo Roddewig, Waldo Becker and Alphons L. Hageboeck are plaintiffs, and John Zeller, Sheriff, and Randolph Perkins, Auditor, are defendants, before me, C. W. Jones, agreed upon as a Commissioner.

Said depositions were taken by me stenographically and thereafter transcribed by me.

There appeared for the plaintiffs George W. Rurode and W. A. Foster as attorneys, and Tennant & Haight and Martin & Son as attorneys for defendants.

It is stipulated and agreed by counsel representing the respective parties to this action, that C. W. Jones may be substituted as Commissioner instead of Adolph Ruymann, and the signing of this stipulation is waived.

It is stipulated and agreed by counsel representing the respective parties of this action, that if any objections are made by either party to questions propounded to the witnesses, the question shall be

propounded to the witness and answered by him and the objection entered by the Commissioner, and the validity of the objection to be passed upon by the Court during the case, and the signing of this stipulation is waived.

WILLIAM W. WHITEHEAD, a witness produced on the part of the plaintiffs, being duly sworn deposes and says:

Examination by Mr. Foster.

I. You may state your name, residence, age and occupation. A. William W. Whitehead, Davenport, Iowa, 32; I suppose you would call me a manufacturer.

I. Are you the W. W. Whitehead connected with the Whitehead Machinery Company? A. I am.

I. Where was that company's principal office and place of business? A. Hageboeck Building, Davenport, Iowa.

I. About when was it organized? A. May, 1902, and June, 1902.

I. State whether or not it was incorporated, and if so, under what State? A. Incorporated under the laws of Iowa.

I. I will ask you, Mr. Whitehead, if you remember of the purchasing of some property from the Edison Electric Company on 80th street, in the city of New York, which was afterwards removed to the terminal station of the Pennsylvania Railroad Company? A. I do.

I. When was that purchase made? A. January, 1904.

I. Was there any action on the part of the board of directors of the Whitehead Machinery Company relative to the purchase of that property? A. There was.

I. What was your position, if any, with the

Whitehead Machinery Company? A. Manager and Secretary.

I. I will ask you if you have before you the minutes of the Whitehead Machinery Company showing the authority to purchase the property referred to in the previous interrogatory? A. Yes.

I. Will you kindly read into the record so much of the minutes of the meeting referred to, together with the date, as may be necessary for an understanding of the proceedings? A. "Minutes of February 5. It was moved by Mr. Schmidt and seconded by Mr. Becker, that the deal presented to-day by Mr. Whitehead with the Edison Company purchasing four tandem compound condensing and two simple condensing engines at the price of seven thousand dollars, with a commission of five hundred dollars to be paid to Thompson, Son & Co., be authorized, and that the directors will endorse notes to the extent of $7,500 immediately to obtain the required purchase money at the Citizens National Bank; these notes to run four months. Unanimously carried."

"It was moved by Mr. Becker and seconded by Mr. Whitehead, that an additional loan be authorized, subject to the approval of the Treasurer, to cover cost of moving, storing and repairing the engines above mentioned, the money to be borrowed as required. Carried."

I. I will ask you who the directors of the company then were, or were supposed to be? A. Waldo Becker, Paulo Roddewig, Oswald Schmidt, Dr. Hageboeck and myself.

I. In pursuance of these resolutions by the board of directors, what was in fact done with reference to raising any money for the purchase of this property on 80th street, New York? A. We made notes and the five directors endorsed them and dis-

counted them at the Citizens National Bank and bought the stuff.

I. Are you able, from memory, to state what amounts were procured from the Citizens National Bank? A. $9,750.

I. Kindly state what figured up the $9,750? A. One note of $5,000, one note of $2,500 and the rest is split up in smaller notes that I don't remember the dates or amounts, but these smaller amounts were borrowed as required to take care of the moving, storage, etc., as provided in the resolution.

I. Now, how much was given for the property to the Edison Company? A. $7,500.

I. How much was paid for commission? A. $500.

I. And how was the rest made up? A. Expenses of moving, storing, and so forth.

I. Approximately, $3,000 additional? A. All of that money we didn't borrow. Probably eighty per cent. was borrowed and the balance was paid by the company out of its own funds.

I. What were done with these short time notes that were given to the Citizens National Bank on their endorsement? A. They were renewed.

I. Were they renewed in different notes or in one note? A. From memory, I believe they were once renewed and later new notes were made to run a year, and the new note was a lump note.

I. Do you remember the amount of that note? A. I think it was $9,250. The money actually borrowed on the Edison deal was $9,975, but through some oversight or error all the directors didn't go on these extra notes, that is, on the notes that represented between $9,250 and $9,975, and we never settled it how that occurred.

I. I will now show you what purports to be a promissory note, dated Davenport, Iowa, November 1st, 1904, signed by the Whitehead Machinery Company, A. L. Hageboeck, Treasurer, and en-

dorsed by W. W. Whitehead, A. L. Hageboeck, Waldo Becker, Oswald Schmidt and Paulo Roddewig, and ask you to state what that note is. A. That is the second renewal I have mentioned—the lump note.

MR. FOSTER—I will present this note to the Commissioner taking these depositions, to be marked "Exhibit P 1 for Identification," and request the Commissioner attach a copy of the same to the deposition of the witness Whitehead.

I. State whether or not there was any agreement entered into between the officers and directors of the Whitehead Machinery Company whereby on a sale of the property purchased on 80th Street, belonging to the Edison Company, that the money received therefor, or sufficient thereof, should be used to take up and cancel the notes given for the purchase price of said property and, if any such agreement did exist, state in detail the same? A. Any returns from sales were to be applied to the liquidation of the notes.

I. By whom was this agreement made? A. By the five directors; that was the condition on which they would loan the money—on which they would endorse the notes at the Citizens National Bank, so we could borrow the money.

I. As a matter of fact, were there five legal directors of the Whitehead Machinery Company at that time? A. We supposed there were, but our attorneys later told us we had only three in the articles of incorporation, and it had not been changed to five because we didn't publish the amendment to our articles which changed the number from three to five; consequently Paulo Roddewig and Waldo Becker were not legal directors.

I. I see, according to the terms of that note, that

the same matured on the first day of November, 1905, and from endorsement thereon I also observe that it was paid before maturity; can you, and will you, kindly explain the reason of this? A. In the month of July, 1905, I spoke to all the endorsers individually about the renewal of it at maturity; two of them refused to endorse for any renewal, the two refusing being Paulo Roddewig and Oswald Schmidt; without those two endorsers, the bank would not give us a renewal, consequently we must either arrange to lift the note at maturity or probably stand a suit. On account of the disagreement between the trustees, I suggested the easiest way out would be for the five endorsers to buy the machinery and in that way reduce the company's indebtedness to that extent and get rid of an obligation which would probably get the company into trouble if we were sued on it.

I. Well, what was the result? A. After two months they agreed to do it.

I. Was the note taken up by the five endorsers? A. It was taken up by four of the five endorsers.

I. What one of the five endorsers did not participate in taking up his portion? A. Myself.

I. Why was that? A. Because I could not get the money.

I. I will ask you, Mr. Whitehead, whether this note referred to for $9,250 was or was not paid at the date stamped thereon by the Citizens' National Bank, viz., October 4th, 1905? A. On the fourth day of October, 1905, I was in the Citizens' National Bank and saw the checks passed over and saw the stamp put on there on October 4th, 1905. Waldo Becker was with me. Roddewig was there and Balluff did the stamping.

I. Who is Balluff? A. Cashier of the Citizens' National Bank.

I. Then the entire amount of the note, together

with accumulated interest, was paid in equal portion by Waldo Becker, Oswald Schmidt, A. L. Hageboeck and Paulo Roddewig? A. It was actually paid; I don't know the proportions; the four put up my fifth.

I. At the time this note was paid, October 4th, 1905, what had been said, if anything, between any of the officers, directors or stockholders of the Whitehead Machinery Company about making an assignment? A. Nothing at all.

I. When was your first discussion, to the best of your knowledge and recollection, when there was some talk about an assignment? A. There was never any talk about an assignment. The thing happened in twenty minutes. Hageboeck, on the 25th of October, agreed to let us have $2,500 on the company's note. I was to go to the Iowa National Bank and get it on the date mentioned and arrange for the credit. A couple of days previous, Hageboeck was taken sick, and when I went to the bank and found that by reason of his sickness or some such matter we could not make the loan—we had made a lot of promises to creditors based on this prospective loan, and at that time and on that day it was decided there was only one thing to do and that was to turn over everything to a trustee, and inside of the following three days an agreement was made to do this.

I. What was the position of A. L. Hageboeck in this company? A. President and Treasurer.

I. Who was the trustee to whom the assignment was made? A. Julius Burmeister, Cashier of the Iowa National Bank of Davenport.

I. I will show you a paper and ask you if that is a true copy of the assignment to Mr. Burmeister, referred to in your last answer? A. Yes, sir.

MR. FOSTER—I desire to present the paper referred to to the Commissioner taking

the depositions and request that he identify it as "Exhibit P 2," and that it be attached to tbe deposition of the witness.

MR. HAYNES—I object to the admission of this paper on the ground it is immaterial and irrelevant, and also that it is not properly authenticated.

I. I will ask you whether or not there ever was an assignment under the statutes of the State of Iowa for the benefit of creditors made in the matter of the Whitehead Machinery Company? A. No.

I. I will ask you to refer to the records of the Whitehead Machinery Company and to read into the record the proceedings of the meeting of the stockholders on October 30th, 1905?

MR. HAYNES—I object to the reading of this unless the minute book as a whole is produced on the trial of this case.

A. At a special stockholders' meeting, held on the date mentioned, called by me as Secretary on October 24th, 1905, "L. G. Susemihl moved that the stockholders of the Whitehead Machinery Company direct and authorize the Board of Directors of the company to transfer by proper instrument all of the property and assets of every kind to a competent trustee to be selected by the directors for the purpose of disposing of all of the property of the company to the best advantage, and converting all of the assets into cash for the use and benefit of such creditors of the Whitehead Machinery Company as would voluntarily consent to such transfer in trust and would ratify the conveyance by the directors to the trustee. The motion was seconded by W. W. Whitehead and after discussion was voted upon and carried unanimously." This is

signed by A. L. Hageboeck, President, and W. W. Whitehead, Secretary.

I. State what action, if any, was taken by the directors of the Whitehead Machinery Company in pursuance of the action you have just read off.

MR. HAYNES—I object to that unless the minute book is produced at the trial of this case.

A. In accordance with the resolution of the stockholders, the Board of Directors selected J. E. Burmeister as the trustee, and the Board of Directors authorized the proper officers to execute the necessary documents.

I. Will you read the action into the record?

MR. HAYNES—I object to this upon the same ground, unless the minute book as a whole is produced at the trial.

A. "At a meeting of the Board of Directors of the Whitehead Machinery Company, composed of A. L. Hageboeck and W. W. Whitehead, the resolution passed by the stockholders of said Company at the stockholders' meeting held October 30th, was received, and in accordance with such resolution the Board of Directors selected J. E. Burmeister, Cashier of the Iowa National Bank, as the trustee to whom the assets and property of the Whitehead Machinery Company should be assigned and transferred pursuant to the resolution referred to, and after receiving the consent of said Burmeister to act as such trustee, the Board of Directors instructed the proper officers of said Whitehead Machinery Company to execute the necessary instruments in writing to carry out the purpose of said resolution.

"Dated at Davenport, Iowa, November —, 1905," and signed by A. L. Hageboeck, President, and W. W. Whitehead, Secretary.

I. Are those records upon loose leaves in Tatems loose sheet holders and binders the records of the company?

MR. HAYNES—Objected as not the best evidence.

A. They are.

MR. FOSTER—Now, I desire to produce for identification by the Commissioner taking this testimony the record of October 30th, 1905, read into the record and the subsequent proceedings read in the record as to the action of the Board of Directors, and will ask to have the first of said papers designated as "Exhibit P 3," and the second as "Exhibit P 4."

MR. HAYNES—They are objected to unless the whole minute book is placed in evidence.

I. I will ask you, Mr. Whitehead, as manager of the Whitehead Machinery Company, what your powers and authority was in the disposition of property of the company and for the company?

MR. HAYNES—I object to that question as it is not the best evidence.

A. Absolute.

I. Was there any by-laws or constitution of the Whitehead Machinery Company from which you were enabled to answer the question as you have or was it from the general course of business of the company? A. Both.

I. Where is your by-laws and constitution? A. At the bank, I believe.

I. Are they printed? A. No, sir; typewritten.

I. Who sold and transferred the Edison property, so-called, to Hageboeck, Becker, Roddewig and Schmidt? A. I did.

I. Before doing so, I will ask you to state whether or not special counsel was called in and the matter canvassed in the presence of the purchasers and yourself and special counsel as to the validity of the transaction? A. The five directors called in Judge Waterman so as to satisfy themselves as to the validity of the transaction, saying they would not pay for the stuff twice.

I. I will ask you who the Judge Waterman you refer to is? A. He was Judge of the Supreme Court of Iowa and now a member of the firm of Lane & Waterman.

I. You may state whether he is or is not regarded as one of the best lawyers in this part of the country? A. His reputation is of the highest.

I. What was his advice as to the legality of this proceeding, if any such advice was given? A. That he hardly saw the necessity of asking the question.

I. What did he say? A. To go right ahead; that there was no question as to our rights.

I. I will ask you if, in pursuance of the advice of Judge Waterman given to the endorsers of the note, you executed a paper transferring to Schmidt, Becker, Hageboeck and Roddewig this 80th street property in New York City? A. I did.

I. I will ask you to look at the paper now shown you, and state whether or not that is the paper you executed on that occasion? A. It is.

I. What do you call the paper shown you? A. Invoice and receipt.

MR. FOSTER—I present to the Commissioner taking this deposition the invoice and receipt referred to and ask that the same be marked "Exhibit P 5," and also that the same be attached to the deposition, the same being hereby offered in evidence by the plaintiffs.

Cross-examination by Mr. Haynes.

I. Mr. Whitehead, do you know that Mr. Dorrance had, for some time previous to this transfer of property to the four directors, been pressing the Whitehead Machinery Company for the payment of his claim?

MR. FOSTER—Plaintiff objects to the question as improper cross-examination and immaterial.

A. Mr. Dorrance had a claim against the company but didn't press it very hard.

I. Hadn't it been in the hands of an attorney in Davenport for collection?

MR. FOSTER—Plaintiffs object to the question as improper cross-examination and immaterial.

A. It had been turned over to an attorney here. I do not know the instructions to the attorney, but it had never been pressed.

I. Didn't Mr. Dorrance speak to you about it and you had agreed to pay it off? A. We had talked about it and said we would do the best we could.

I. Do you know whether Mr. Parrish had endeavored to sell these engines in Jersey City for you?

MR. FOSTER—That is objected to as improper cross-examination, and immaterial and irrelevant.

A. Not that I know of. What Mr. Parrish might be trying to do, is something that I would not be likely to know about.

I. You don't know whether he ever represented to you that the best offer he could get for the property was $2,500? A. He never referred anything of the kind to me.

I. What was the condition of the company at the time of this transfer, financially?

MR. FOSTER—Objected as incompetent, irrelevant and immaterial, and not proper cross-examination.

I. Was it in good financial condition or bad?

MR. FOSTER—Objected to as incompetent, immaterial and irrelevant, and not proper cross-examination.

A. It was hard up.

I. Do you know whether a suit had been instituted against it by the electric company for $100 and judgment recovered?

MR. FOSTER—Objected to as irrelevant, incompetent and immaterial, and not proper cross-examination.

A. On what day?

I. About the time of this transfer, in which they sold an engine at Pekin, Illinois.

MR. FOSTER—Objected to as imcompetent, immaterial and irrelevant, and not proper cross-examination.

A. The General Electric Company sent a bill to the Whitehead Machinery Company for stuff furnished to Cable, Nelson Company, on an order from the company and without any consent of the Whitehead Machinery Company, and the Whitehead Machinery Company refused to pay the bill. The General Electric Company didn't sell an engine belonging to the Whitehead Machinery Company, up to the time I left the company, which was the 30th of November. This engine wasn't sold on this judgment. I bought the engine yesterday myself.

I. Do you know how much of the assets of the

Whitehead Machinery Company the trustee has sold? A. I do not.

I. Do you know whether he has sold a half of it? A. I do not.

I. What would you say? A. I could not say, for I haven't any more knowledge of the subject than how much you paid for your clothes.

I. Do you know that he sold about three-fourths of the machinery to Mr. Rosenthal for about $2,000? A. I know he made a sale to Mr. Rosenthal, but don't know the consideration, and I don't know what proportion of the whole his sale to Rosenthal embraces.

I. Now, when the directors took up this note, what proceeding was followed; did they hand their checks to the Whitehead Machinery Company or to the bank? A. I was present at the bank, and remember the checks were handed to me and I handed them to the bank.

I. To whose order were those checks made payable? A. I don't remember.

I. You don't remember whether they were made payable to the Cashier of the bank or to the Whitehead Machinery Company? A. I don't know.

I. Now, Mr. Whitehead, will you tell us who were the stockholders, to the best of your knowledge, of the Whitehead Machinery Company at the time of this transaction with Oswald Schmidt, Waldo Becker, A. L. Hageboeck and Paulo Roddewig. A. Those five, Murphy & Susenihl, Taylor Smith.

I. Who were the largest stockholders? A. Myself.

I. How many shares did you have? A. Fifty-five per cent. of the whole.

I. How many had Mr. Hageboeck? A. Twenty-five.

I. How many did Mr. Becker have? A. About ten.

I. How many did Mr. Schmidt have? A. About seven.

I. How many did Mr. Roddewig have? A. About twenty.

I. How many shares were issued altogether? A. Two hundred and fifty.

I. Who was the Vice-President of the Whitehead Machinery Company. A. There was none.

I. Had there ever been any? A. Yes, sir.

I. Who had been? A. Oswald Schmidt.

I. When did he resign? A. About July, 1904.

I. Why did he resign as Vice-President? A. Disagreement among ourselves.

I. How long did he remain a director? A. About eight months.

I. When did he cease to act as director? A. About July, 1904.

I. He wasn't a director at any time during 1905? A. No, sir.

I. How many directors did you have after Mr. Schmidt resigned? A. Two.

I. How many did the articles provide for? A. Three.

I. Who were the directors? A. Dr. Hageboeck and myself.

I. Did Mr. Schmidt attend any meetings after he resigned? A. No, sir

I. Was he present at a meeting, and also Mr. Becker and Mr. Roddewig, held by the creditors in 1905? A. He was present as a stockholder.

I. Were the other gentlemen I have mentioned there? A. Yes, sir.

I. Did they take any part in the deliberations of the directors? A. Advisory and expressed their ideas as to ways and means.

I. They were heavily connected with the Whitehead Machinery Company, both by stock and notes which they had endorsed. A. Yes, sir.

I. Do you know whether in August and September and right up to the time of this transfer, the creditors of the Whitehead Machinery Company were pushing it?

MR. FOSTER—That question is objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

A. Some of the creditors.

I. Some of them, you say; had they paid some claims about that time that they were being pressed for?

MR. FOSTER—Objected to as irrelevant, incompetent and immaterial, and not proper cross-examination.

A. I could not say. You are getting into details too fine for a man's memory at this time.

I. How much did the company owe at the time of this transfer?

MR. FOSTER—That is objected to as incompetent, irrelevant and immaterial, and improper cross-examination.

A. My memory would not carry me, but around $20,000.

I. Not more than that? A. It might be.

I. Ten thousand more? A. I could not say; I haven't seen those figures in eight months.

I. Now, this note which was given, upon which the directors were endorsers and which was the basis of their taking this property, when did that become due? A. The final renewal came due, I think, on October 31st.

I. 1905? A. Yes.

I. Had you seen the Cashier of the bank previous to the making this transfer regarding the renewal of the note? A. Not personally.

I. Had you seen him at any time previous to the

transfer in regard to renewal of this particular note? A. No, sir.

I. You don't know, then, that he would not renew it? A. I have stated that I knew it, and my information came from two of the directors of the bank.

I. Two of the directors of the bank; who were they? A. Roddewig and Schmidt.

I. They were also directors in this bank? A. Yes, sir.

I. Did they tell you why it would not be renewed? A. Because they would not endorse.

I. Did they say they didn't consider Hageboeck good security? A. They didn't go into the Doc's standing.

I. He is supposed to be a man of considerable means? A. He has enough to go on.

I. When did the Whitehead Machinery Company cease practically to do business? A. The last day of October, 1905.

I. Did they really do any business from the time of the transfer to the directors of these engines in Jersey City? A. To my knowledge they sold between two and three thousand dollars worth of stuff.

I. Did they buy any? A. No.

I. Did you have a bookkeeper? A. No, sir.

I. Who did the bookkeeping? A. I did.

I. When did you cease to employ a bookkeeper? A. We never had one.

I. What did Mr. Johnson do? A. He was stenographer.

I. Did you employ him right along? A. Yes, sir.

I. Now, Mr. Whitehead, this invoice marked Exhibit P 5 is the only evidence of this transfer which was given to Schmidt, Roddewig, Hageboeck and Becker? A. Yes, sir.

I. There was no formal bill of sale drawn up? A. No, sir.

I. Or any bill of sale executed by you? A. No, sir; that is our customary way of making a sale and giving evidence of it.

I. Was one of those engines sold that you bought from the Edison Company? A. Yes, sir.

I. Was that money applied on this note? A. No.

I. Now, the difference between the amount which was actually paid for these engines and the $9,250 was paid by the company? A. No, sir; the difference between $9,975 and approximately $11,000 was paid by the company; the engines cost us all told about $11,000.

I. Where is the difference between $9,250 and $9,975? A. That was paid by the company.

I. So that the company really paid the difference between $11,000 and $9,250? A. Yes, sir.

I. How long did Mr. Becker and Mr. Roddewig act as de facto directors? A. I should say seven months.

I. But after they were told they were not actual directors, they still continued to take an active interest in the business? A. Advisorily.

I. They were familiar with the doings of the business? A. Not in detail, but generally.

I. They knew how much the company owed and how much it had, and you talked it over among yourselves? A. Yes, sir.

I. Have you tried to sell this property in Jersey City? A. Yes, sir.

I. What was the best offer you have been able to get for it? A. I never have had an offer.

I. You never have been able to sell it? A. No.

I. You say Dr. Hageboeck had promised, after this transfer, or a short time previous to the appointment of the trustee, to loan $2,500; what was

that $2,500 to be used for? A. Purchase of machinery and payment of debts, and general run of business.

I. He refused to do it? A. No, sir; he was taken sick.

I. Did you see him with reference to making an assignment to the trustee? A. Yes, sir.

I. When? A. About seven days.

I. Why did you decide to make an assignment? A. Nothing else to do.

I. Were the creditors pressing you? A. The assignment suited the creditors best.

I. Were the creditors pressing you? A. Some of them.

I. You say that no assignment was made for the benefit of the creditors under the statutes of Iowa? A. It was a sort of amicable liquidation. Everybody agreed to turn it over to the trustee.

I. Who? A. The creditors.

I. Did you confer with all of them? A. Yes, sir, except Dorrance and Davis Williams & Co. Circular letters were sent out two days before.

I. Was this assignment recorded? A. Yes, sir; in Scott County.

I. What office? A. County Recorder.

I. What did you consider the most valuable asset of the company at the time of the transfer?

MR. FOSTER—Plaintiff objects to the question as incompetent, irrelevant and immaterial and improper cross-examination.

A. All our stock was saleable, with the exception of the New York engines.

I. Did you consider that as a valuable asset of the company? A. It represented so much money tied up.

I. It represented more than any other asset of

the company? A. That is not a reasonable remark, for outside of that we had about 30 bunches of stuff.

I. It represented more than any one item? A. More than any single bunch.

I. Did it represent more than one-half of the assets of the Whitehead Machinery Company? A. It represented between 1-4 and 1-5.

I. That is so, is it? This property, Mr. Whitehead, which you received from the Edison people and afterwards transferred to these four gentlemen, never was used in the business, but was stored there? A. We sold one piece.

I. For how much? A. Sixteen hundred dollars.

I. The rest all remained there? A. Yes, sir.

I. When were these Exhibits P 3 and 4 written up? A. Prior to the signing, on the date that they bear.

I. They were written up on the date they bear? A. Yes, sir.

I. They were signed by you on that date? A. Yes, sir.

I. And by Dr. Hageboeck? A. Yes, sir.

I. Was the same true of Exhibit P 4? A. Yes, sir, except that it is not dated.

I. You are sure it was signed on the date which they bear? A. Yes, sir.

Re-direct examination by Mr. Foster.

I. You have stated your opinion as to the amount of the indebtedness of the company at the time of the transfer of the property to the directors as being approximately $20,000; now, waiving no objection as to the competency of this testimony, but for the purpose of examination as to the object of the testimony, I will ask you what, in your judgment, would the assets amount to at the same time?

MR. HAYNES—Objected to as not proper redirect examination.

A. About $33,000, above.

I. Then at the time the transfer was made to Roddewig, Becker, Hageboeck and Schmidt of the Edison property, so-called, in your opinion was the Whitehead Machinery Company solvent or insolvent? A. Entirely solvent.

I. I believe you stated in your direct examination that it was agreed that any money received from the sale of the Edison property was to be used to pay off the notes from which the money was obtained and pay for the property; I understood, in cross-examination, that you received about $1,600 from sale of part of that property and that it was not applied; state why it was not applied? A. There is no particular reason. The money was taken in and used in the general running of the business.

I. There wasn't any agreement between the trustees? A. It wasn't paid over, that is all.

I. Then, under the contract, strictly, it should have gone to the Citizens National Bank? A. Yes, sir.

Recross-examination by Mr. Haynes.

I. What do you base your idea that the assets of the company exceeded the liabilities by about $13,000? A. Recollection.

I. Of what did these assets consist? In making your estimate, where do you get your facts? A. From memory.

I. Did you estimate machinery? A. Yes, sir.

I. Wasn't the machinery paid for by proceeds of stock? A. Yes, sir.

I. Was that practically used up? A. Yes, sir; we figured our capital stock as a liability.

I. Then your liabilities figured up to more than $25,000? A. Yes, sir.

I. Then they figured up to about $45,000? A. I think $43,000.

I. In figuring your estimate of the assets of the company, how did you figure the stock which you had? A. At what it was purchased at. Whatever work we did to it subsequently.

I. Do you know whether any of this property that you figured in this estimate has been sold for that amount? A. Some of it has.

I. Well, as to the majority of it? A. I don't know since last fall.

WILLIAM W. WHITEHEAD.

Sworn and subscribed before me, this May 31st, 1906.

C. W. JONES,
Commissioner.

CLARENCE E. ADAMS, a witness produced on the part of the plaintiffs, being duly sworn, deposes and says:

I. You may state your name, residence, age and occupation. A. Clarence E. Adams; 919 East 13th street, Davenport; 39 years of age, and agent for the Pennsylvania Line.

I. I will ask you whether or not, on the 4th day of October, 1905, you were called upon by Paulo Roddewig and any one else to serve a notice upon you as agent for the Pennsylvania Line of the transfer of certain property at Pier K, in Jersey City, in the State of New Jersey? A. I was called upon by Mr. Whitehead and Mr. Waldo Becker, and given notice of the transfer of property stored at our Pier K. The persons to whom it was transferred were Waldo Becker, Paulo Roddewig, Oswald Schmidt and A. L. Hageboeck.

I. Then Mr. W. W. Whitehead and Waldo Becker were the persons who called upon you? A. Yes, sir; and gave me the regular notice of the sale of the property.

I. In addition to receiving notice of this, I will ask you if you wrote a letter to the General Agent of the Pennsylvania Line in New York City. A. Yes, sir.

I. Did you write it the same day? A. Yes, sir; to Mr. George T. Smith, General Agent, at 2 Beaver street, New York City.

I. Have you a copy of that letter in your possession? A. Yes, sir.

I. Will you produce it? A. I will have to go to the office to get it.

I. I will show you an affidavit, executed by you on April 17th, 1906, purporting to contain a copy of the letter, and ask if that is a copy of the letter.

MR. HAYNES—I object to that as irrelevant, incompetent and immaterial, and not the best evidence.

A. To the best of my recollection, that is a copy of the letter.

I. "October 4th, 1905. Mr. George T. Smith, General Agent P. R. R., New York, New York. Dear Sir: Referring to your letter August 10th, file 75338, regarding machinery stored at our Pier K, Jersey City, for Whitehead Machinery Company, Davenport, Iowa; will say we are to-day advised by Mr. Whitehead they have disposed of same to the following Davenport parties: Mr. Waldo Becker, Mr. Paulo Roddewig, Mr. Oswald Schmidt, Mr. A. L. Hageboeck. These gentlemen expect to arrange within a few days for shipping about one-half of the machinery direct to a customer at Grand Have, Michigan; and the balance to Davenport, Iowa. Yours truly, C. E. Adams, Agent." I will ask you

have you received any response from any source referring to that letter? A. I received a message.

I. Do you mean a telegraph message? A. Yes, sir.

I. From whom? A. Mr. Smith.

I. From Mr. Smith to you? A. Yes, sir.

I. Will you kindly read into the records the telegram that you received?

Witness states he will produce the original, and counsel for defendants states that the witness may read the copy, and when the original is received and the same is compared and found to be correct, the objection which is hereby made that the same is not the best evidence will be withdrawn.

A. "New York, Oct. 9, 1905. C. E. Adams, 43 McManus Building, Davenport, Iowa. See your letter October 4 about machinery stored at Jersey City for the Whitehead Machinery Co. of Davenport, Iowa. This property has been attached by the Sheriff of Hudson County, New Jersey, and he will take possession of the property at once. Desk U-1, File 75,938. G. T. Smith, 3.22 P. M.

Cross-examination by Mr. Haynes.

I. Mr. Adams, at the time these gentlemen called upon you, did they give you a written notification, or notify you verbally? A. Verbally.

I. Did they tell you that they had sold part of it? A. They told me they had prospect of selling part of it, as stated in the letter; this statement was from Mr. Whitehead.

I. Did you, at that time, receive any notice of attachment proceedings? A. No, sir.

I. Did they ever show you any postal card relative to attachment proceedings? No, sir; not that I recall.

MR. FOSTER—We offer in evidence the original telegram sent by Mr. Smith to Mr. Adams, as referred to, and ask that the same be attached to the deposition of Clarence E. Adams, after having been marked by the Commissioner as Exhibit P 6.

(Signed) CLARENCE E. ADAMS.

Subscribed and sworn before me this 28th day of May, 1906.

C. W. JONES,
Commissioner.

OSWALD SCHMIDT, a witness produced on the part of the plaintiffs, being duly sworn, deposes and says:

I. You may state your name, residence, age and occupation? A. Oswald Schmidt, Davenport, Iowa; in the cracker and macaroni business; age 44.

I. Do you mean you are a manufacturer of crackers and macaroni? A. Yes, sir.

I. Mr. Schmidt, were you connected with the Whitehead Machinery Company. A. I was.

I. In what capacity? A. Stockholder.

I. Did you ever occupy any official position? A. For a time as director and Vice-President.

I. How long were you director? A. I can't state definitely.

I. Do you remember when you ceased to be a director? A. Yes.

I. When? A. It was on or about October, 1904.

I. At that time you resigned as director? A. Yes, sir.

I. I will ask you, Mr. Schmidt, if you at one time, in connection with Dr. Hageboeck, Paulo Roddewig, Waldo Becker and W. W. Whithead, made an arrangement to borrow money at the Citi

zens National Bank to pay for certain machinery purchased by the Whitehead Machinery Company from the Edison Company on 80th street in New York City? A. Yes, sir.

I. I will ask you if you remember what amount of money was raised and how it was raised in that transaction? A. The money was raised from time to time as it was necessary, to pay for this, and the moving of it, the assembling of it, and the total amount was $9,250 in notes at the Citizen's National Bank.

I. Now, the manager, Mr. Whitehead, has testified in this case that there were additional sums paid out of the treasury of the company; do you know anything about that? A. I do not.

I. What was done with these notes that were executed and discounted by the Citizens National Bank when they matured? A. They were renewed in the shape of one note for the total amount.

I. I will show you a note dated November 1, 1904, payable to the order of August A. Balluff, Cashier, for the sum of $9,250; which bears the stamp of the Citizens National Bank as paid October 4th, 1805, and which bears the cancelled endorsement of W. W. Whitehead, A. L. Hageboeck, Waldo Becker, Oswald Schmidt and Paulo Roddewig, and ask you what that paper is? A. I recognize that as the note I am speaking of.

I. By whom was that note paid? A. That was paid by A. L. Hageboeck, Waldo Becker, Paulo Roddewig and myself.

I. Did Mr. Whitehead have anything to do with the payment of that note; that is, furnishing the money? A. No.

I. Do you know when it was paid? A. On October 4th.

I. It seems to mature on the last day of October, or one year from the first day of November, 1904;

will you explain, if you know, why it was taken up or paid before maturity? A. It was always my understanding that the note was to be due at any time, and this note was taken up and paid off by the four men stated in order to pay for the machinery that the Whitehead Machinery Company was in turn to convey to the four men that paid cash to take up the note with.

I. Was there any talk, or had there been any talk, as to whether renewal notes would be executed? A. I don't remember.

I. Did you occupy a position at the Citizens National Bank? Were you a director of the Citizens National Bank at the time? A. Yes, sir.

I. Was Mr. Roddewig at that time also? A. No, sir.

I. Now, state, if you know, any reason why this note for $9,250 in the Citizens National Bank was paid before maturity? A. Aside from the fact that this machinery was being purchased by certain stockholders, I knew the bank was anxious to have it paid. The Cashier had frequently spoken to me about it. He knew the endorsers were personally good for it.

I. Had there been any personal objection of anybody to renewing that note? A. My own.

I. Did you object? A. I didn't propose to stay on that paper any longer than I had to.

I. Who was present at the time the Edison property in New York was being transferred to A. L. Hageboeck, Waldo Becker, yourself and Paulo Roddewig by this paper—as shown by the invoice and receipt marked "Exhibit P 5?" A. Myself. Mr. Roddewig, Mr. Becker, W. W. Whitehead, and in the presence of Mr. A. A. Balluff, if I remember right.

I. Was any lawyer present? A. Do you mean when the money was paid?

I. No; I mean when you bought it. A. Yes; Judge Waterman was there.

I. Was the proceeding had in accordance with the advice of an attorney, and, if so, what one?. A. Judge Waterman's advice.

I. When was it that this property was, in fact, bargained for? A. A couple of days before—on October 2d.

I. And when was it purchased? A. October 4th.

I. I will ask you whether, on October 2d, or October 4th, or at any other time, you had any knowledge that this property had been attached in New Jersey? A. I think not.

I. Do you know? A. I know I didn't have any knowledge.

I. After the purchase of this Edison property, so-called, what was done with reference to taking up the note in the Citizens National Bank, for $9,250, and also $138.75 accumulated interest? A. Waldo Becker, Paulo Roddewig, A. L. Hageboeck and myself each paid one-fourth of that sum at the Citizens National Bank.

I. I will show you a check, purporting to be drawn on the Citizens National Bank of Davenport, Iowa, for the sum of $2,347.19, dated October 4th, 1905, and signed by you, and ask you so state what that paper or check is? A. That is the check I paid my share with.

MR. FOSTER—I will offer the check referred to in evidence and ask that it be designated as "Exhibit P 7."

I. At the time you purchased this Edison property and paid $9,250 for it—I mean you and your associates—had there been any talk, up to that time, as to the solvency or insolvency of this company? A. No, I considered the company perfectly solvent.

I. I will ask you to state whether or not, at that time, you knew that the company was solvent or insolvent, if such was the fact? A. No, I didn't know it was insolvent.

I. I will ask you if, at the time of the purchase of this property by you and your associates and the payment of this note at the Citizens National Bank, you had discussed, or heard any discussion of the appointment of a trustee to handle these properties? A. No, I did not.

I. When did you first hear any talk whatever in regard to the appointment of a trustee to take title to the property of the Whitehead Machinery Company and dispose of it? A. I could not say definitely, but it must have been a month afterwards; I don't know the exact date.

I. What was the agreement, if any, as to what the proceeds were to be applied on, received from the sale of this New York Edison property? A. At the time it was bought—agreed to be bought—it was understood between these five men that the proceeds out of the sale of this particular property should be applied on the notes of the Citizens National Bank first.

I. Was it agreed? A. It was agreed.

Cross-examination by Mr. Haynes.

I. You were one of the original stockholders in this concern? A. I wasn't.

I. When did you first become a stockholder? A. I could not say definitely. I could only do that by referring to my stock certificate.

I. How many have you now? A. Thirteen and and a half.

I. How many did you have originally? A. Ten.

I. And subsequently increased it to thirteen and a half? A. I had fifteen once, and sold one and a half.

I. What was the par value? A. One hundred dollars.

I. When you took the ten shares you were appointed a director? A. Yes, sir.

I. And Vice-President? A. Yes, sir.

I. And you continued to act as Vice-President until when? A. October, 1904, I think. About a year before this sale.

I. Why did you cease to be a director? A. One reason is that I felt all the time that the others didn't care for me to act as such any more. That was the main reason.

I. When was the annual meeting? A. In July.

I. Did you resign at the annual meeting? A. No, sir; I resigned in October, or about.

I. Did you send a written resignation to this company? A. Yes, sir.

I. Have you a copy of it? A. No, sir.

I. Did you attend any of the meetings of the company after you resigned as a director? A. No, sir.

I. Were you familiar at all with the financial condition of the company after you were a director? A. No, sir.

I. At the time of this transfer of this Edison property to you and others, were you familiar with the financial condition of the company? A. Yes, in the way that Mr. Whitehead would furnish us statements at times.

I. Why did you want to get off this note? A. Because it had run longer than it had been presented to us. Mr. Whitehead told us, when this first came up, that it would take about from four to six months to sell, and then we would be released from the endorsements.

I. You knew at the time you paid this that it was not due? A. I found it out when we paid it.

I. Didn't you know at the time? A. No, sir; I hadn't considered it.

I. You were a director of the bank? A. Yes, sir.

I. And the Cashier told you the note was becoming due and must be paid? A. Yes, sir.

I. Who was present at the time this bargain was made for the purchase of the property? A. I said, these five gentlemen and Judge Waterman.

I. You paid the note; you didn't give your check to the Whitehead Machinery Company? A. I paid my share of the note.

I. These were the only men that were present? A. That I remember at this time. If there were others present and my memory was called to it I would recall it.

I. Did you know at all what the value of this property in Jersey City was? A. Not further than I supposed with good fortune we might realize that amount out of it.

I. Did you know at that time that you had made arrangement to sell it to some parties in Grand Rapids, Michigan. A. I did not.

I. Didn't you state it to Mr. Adams? A. I wasn't present at the interview with Mr. Adams.

I. You considered this company solvent, you say? A. I did.

I. And was this arrangement to be in entire liquidation of any indebtedness that you might have incurred by reason of that note—I mean the time that you made the arrangement to take up the note and take the property? A. Yes, sir.

I. Now, you didn't think, as a matter of fact, did you, Mr. Schmidt, that you could ever get the amount of your money out of the machinery? A. We depended upon circumstances. I would have been willing to have turned it over to any one for my share in it pretty quick.

I. Did you think you would get your money out of it? In other words, didn't you think the best way to get out of it was the easiest way? A. I was under the impression that if we had time to sell it, we might get enough to reimburse us.

I. Did you know that storage charges were accumulating on you? A. Not at that time.

I. Did you know that the creditors of the Whitehead Machinery Company had been pressing them for payments? A. I had heard that, but that was nothing unusual. I always understood that they didn't have capital enough to run the business, and at one time I suggested that the capital stock be raised to fifty thousand dollars. They were doing too large an amount of business, considering the amount of money they had.

Re-direct examination by Mr. Foster.

I. You were asked, on cross-examination, if you knew that the storage charges were increasing and you answered, "not at the time;" do you mean you didn't know at that time, or that they were not increasing at that time? A. I later on learned there were storage charges. I don't recollect that I knew anything about storage charges at that time.

I. As a matter of fact, you may state whether or not there was an agreement or understanding between the Pennsylvania Line and the Whitehead Machine Company, that there was to be no charge for storage, in the event of the property being sent over the Pennsylvania Line?

MR. HAYNES—That is objected to, as the witness cannot answer from his own knowledge, and it would be hearsay.

A. Mr. Whitehead led me to believe there was such an arrangement.

MR. HAYNES—I ask that the answer be stricken out.

I. And that there would be no charges?

MR. HAYNES—Objected to, as the witness can not answer from his own knowledge, and it would be hearsay.

A. Yes, sir.

MR. HAYNES—I ask that the answer be stricken out.

OSWALD SCHMIDT.

Sworn and subscribed before me, May 28th, 1906.

C. W. JONES,
Commissioner.

PAULO RODDEWIG, a witness produced on the part of the plaintiffs, being duly sworn, deposes and says:

Examined by Mr. Foster.

I. Mr. Roddewig, will you state your name, residence, age and occupation? A. Paulo Roddewig; 128 West 7th street, Davenport, Iowa; age, 49 years; candy manufacturer.

I. Were you connected with the Whitehead Machinery Company, and, if so, in what capacity? A. Stockholder.

I. I will ask you if you were a director at any time, or was supposed to be? A. I supposed so, but it turned out I wasn't.

I. Why? A. The articles stated the board shall consist of three directors. We thought it read five.

I. So you were never a legal director? A. No, sir; I wasn't.

I. Now, I will ask you, if you are the Paulo Roddewig who went into the arrangement for the endorsement of certain notes to purchase certain machinery from the Electric Company on 80th street in New York? A. I believe I was.

I. The amount of money that was raised by your endorsements was how much? A. It amounted to $9,250—four notes.

I. And what was done with those four notes when they matured? A. Those notes were originally given to buy this machinery; to realize upon it as quickly as possible, and to settle these notes at the Citizens National Bank.

I. What was the agreement as to you and your associates as to how those notes were to be paid; and when? A. As soon as this machinery could be sold; we received the assurance of Manager Whitehead that they would be sold in four to six months; in fact, if two of those engines could have been sold when repaired, it would have paid off the notes.

I. Were those notes paid when due? A. They were made for a very short term, until they were submerged into one note.

I. Do you remember of a transaction by which four of those endorsers bought the machinery and took a receipt and invoice from the general manager of the company? A. Finding that Manager Whitehead didn't realize on this machinery as we had expected and the note still remaining at the bank, and the bank urging us to take care of it, the directors agreed to pay their share, excepting for Mr. Whitehead, for the reason that he could not raise the money.

I. At that time, before you bought this property and received this invoice and receipt for the money, did you know the condition of the Whitehead Machinery Company as to solvency or insolvency? A. I firmly believed that it was solvent but had assets that were not quick assets.

I. What did you and your associates do, if anything, to employ special counsel to ascertain whether the purchase of this property could be legally accom-

plished? A. We consulted Judge Waterman and he said it was safe.

I. Who is Judge Waterman? A. He is Judge C. M. Waterman, who was the Judge of our County for many years and then Judge of the Supreme Court, and now a member of the firm of Lane & Waterman.

I. What is his reputation for ability in this community? A. It is considered of the highest.

I. At time of the purchase by you four gentlemen of this machinery, what proportion did you pay of the note due to the Citizens National Bank? A. One fourth of $9,388.75; or $2,347.19.

I. What made up this sum of $9,388.75? A. Principal $9,250; interest $138.75 from July 1st, 1905, to October 4th, 1905.

I. I will show you a paper, dated Davenport, Iowa, October 3rd, 1905, purporting to be a check drawn upon the German Savings Bank and payable to the Citizens National Bank or order, for the sum of $2,347.19, and purporting to be signed by you, and ask you to state what that paper is. A. It is my check, with my signature.

I. That was your signature in payment for your share of this amount? A. That was my share for the purchase of this particular machinery. The reason it is dated October 3rd is that it was after banking hours of that particular day.

I. Of what day? A. October 3rd, in the afternoon, but it was not cashed until the next day.

MR. FOSTER—I will introduce the check referred to in evidence and ask to have the Commissioner designate it as "Exhibit P 8," and to attach it to the deposition."

I. At the time this transfer was made of this machinery—this sale to you and your associates—

had you heard any talk about an assignment in this case? A. None.

I. How long after that was it that you heard of this assignment? A. The first notice was when I read the paper and saw that clipping; that was on November 4th.

I. Then, at the time, as I understand you, that you received this property and paid this note in the Citizens National Bank you believed that the Whitehead Machinery Company was solvent and you had never heard anything about a trustee? A. I believed it solvent; I had not heard anything about a trustee at that time.

I. Have you ever received from any source—from the sale of machinery or from any other source—any part of these twenty-three hundred and odd dollars that you paid in taking up the note? A. None whatever.

I. How long was it after you purchased this property and paid this note in the Citizens National Bank, in your best judgment, that you heard about a trustee being appointed? A. As near as I can remember, about thirty days.

Cross-examination by Mr. Haynes.

I. How long did you act as a director? A. I haven't been a director.

I. How long did you act when you thought you were a director? A. I would have to guess at it.

I. Well, guess? A. A year.

I. Did you think you were a director at the time you endorsed this paper? A. Yes, sir.

I. You were a stockholder in the Whitehead Machinery Company? A. Yes, sir.

I. How many shares did you have? A. Twenty.

I. Par value of one hundred dollars? A. Yes, sir.

I. This transfer of property to you and your as-

sociates you understood to be in entire liquidation of any contingent liability on this note and to wipe it all out? A. Yes, sir.

I. How much did you think was the value of that property in Jersey City at that time? A. Not much more than the note and interest and the expense of moving.

I. Did you think it was of that value? A. We hoped to realize that. It all depended upon circumstances.

I. You considered the company solvent? A. I did.

I. Had you made any arrangements at the time to sell this property? A. No.

I. Did you have any purchaser in view? A. No, we had none. I beg your pardon; Mr. Whitehead had all along assured us that he had purchasers. He had one at the coast, at San Francisco, who backed out, and Mr. Whitehead led us to believe he could sell it shortly.

I. Did you think, at the time you purchased that property, that you had a purchaser at Grand Haven, Michigan? A. I understood there was a prospective buyer there, through Mr. Whitehead.

I. Did you attend any of the meetings of the company prior to the transfer? A. I did.

I. Did you know that the company was pressed for money by its creditors? A. Why, I do remember something, but do not recollect what it was. Attorney Murphy was present, I believe, at that meeting. It was not pressed for money so much as it was a controversy.

I. Did you know that the Whitehead Machinery Company was unable to get clear of a great deal of its machinery? A. I didn't.

I. You knew they were not selling the machinery that they bought? A. The market was quiet.

I. You knew they had numerous claims against

them? A. No; I knew the machinery needed considerable extra cash to bring it in a fit shape to sell.

I. Didn't you know that a number of creditors were pressing them for payment of their claims? A. No.

I. Did you know that Mr. Dorrance had placed his claim in the hands of the attorney here for collection? A. Yes, sir, and understood from Mr. Whitehead that it was a question of dispute.

I. You knew that Mr. Dorrance's claim was based on promissory notes, didn't you? A. I understood that that was satisfactorily arranged.

I. Did you go to Mr. Adams' office and notify him? A. Yes, sir.

I. Do you know whether the capital stock of this company was all used in buying machinery and in running expenses? A. I don't.

I. You knew they didn't have much money on hand? A. I knew they didn't have much means and that is why we were asked to sign these notes.

I. Were you anxious to get off this note? A. After we were unable to dispose of the machinery.

I. You knew the bank wanted this note paid? A. I knew the bank was willing to get off.

I. You knew at the time of the transfer of this property to you that this note wasn't due? A. I did not know it.

I. Do you know it was not due? A. I didn't know. I thought it was a demand note, as the bank often takes demand notes.

I. Did you see it before? A. When I endorsed it.

I. You didn't see it until you paid it, then? A. No, sir.

PAULO RODDEWIG.

Sworn and subscribed to before me this May 28th, 1906.

C. W. JONES,
Commissioner.

AUGUST A. BALLUFF, a witness produced on the part of the plaintiffs, being first duly sworn, deposes and says:

Examination by Mr. Foster.

I. You may state your name, residence, age and occupation? A. August A. Balluff; residence, Davenport, Iowa; age, 47; occupation, Cashier Citizens National Bank.

I. I will show you what purports to be a promissory note, dated November 1, 1904, signed by the Whitehead Machinery Company by A. L. Hageboeck, Treasurer, and endorsed by W. W. Whitehead, A. L. Hageboeck, Waldo Becker, Oswald Schmidt, and Paulo Roddewig, and ask you what that paper is? A. That paper is a note made by the Whitehead Machinery Company to myself, in my capacity as Cashier of the Citizens National Bank.

I. For what sum? A. Ninety-two hundred and fifty dollars, with interest from date at the rate of six per cent.

I. Can you tell when that note was paid? A. It was paid on the fourth day of October, 1905.

I. By whom was the stamp placed on the note indicating that it was paid? A. I think in this instance it was by myself, but usually it is by the clerks, but I think in this transaction I did it myself.

I. By whom was that note paid? A. Dr. A. L. Hageboeck, Waldo Becker, Oswald Schmidt and Paulo Roddewig, in equal proportions.

I. I will ask you whether this note was an original transaction or whether, if you know, it was a renewal of a previous note or notes? A. It was a renewal of them all.

I. Four notes? A. I am not positive as to the number. It was not an original transaction.

I. Did these notes aggregate this amount? A. Yes, sir.

I. What was the exact amount due you on that note and the amount paid? A. $9,388.75.

I. How much of that was accrued interest? A. $138.75.

I. Do you remember how the note was paid? A. Some of the parties gave their checks for their proportion and I think part of it was by an individual note of one of the endorsers for part of it.

I. I will show you a check dated October 3, 1905, apparently signed by Paulo Roddewig and marked "Exhibit P 8" in this case, and another check for the same amount, dated October 4, 1905, purporting to have been signed by Oswald Schmidt and designated in this case as "Exhibit P 7," and will ask you what reference these have to this case? A. These two checks represent the proportionate payment of this note due from Paulo Roddewig and Oswald Schmidt, under the division of the indebtedness as it was due on October 4, 1905.

I. Do you remember how Dr. A. L. Hageboeck paid his proportion? A. My opinion is that we made a charge against the Iowa National Bank for the amount due from him under a telephone message from the Cashier of that bank, but I am not certain. Dr. Hageboeck wasn't present at the time the note was paid, but his share was paid. I can find that out for you if you wish.

I. And Waldo Becker's proportion was paid how? A. I think by a note of $2,300 and the balance in cash—either $2,200 or $2,300 in a note and the balance in cash.

I. Has that note been paid? A. Long since.

I. So that the Citizens National Bank received $9,250 and all interest from date of note? A. Yes, sir.

New Jersey State Library

Cross-examination by Mr. Haynes.

I. This note wasn't due at the time it was paid? A. No; it appears not.

I. It had nearly a month to run? A. It had nearly a month to run.

AUGUST BALLUFF.

Sworn and subscribed before me
the 26th day of May, 1906.

C. W. JONES,
Commissioner.

WALDO BECKER, a witness produced on the part of the plaintiff, being duly sworn, deposes and says:

Examined by Mr. Foster.

I. You may state your name, residence, age and occupation? A. Waldo Becker; 42 years old; Davenport, Iowa; lawyer by occupation.

I. Do you occupy any official position in the city of Davenport, and if so, what? A. Yes; Mayor of the city of Davenport.

I. I will ask you, Mr. Becker, whether you are a stockholder in the Whitehead Machinery Company of Davenport, Iowa? A. Yes.

I. Were you interested in any way in the purchase of some property referred to in these depositions as being the Edison Electric property, on 80th street, in the City of New York? A. Yes.

I. Will you tell how this transaction came about? A. When I bought stock in the company—ten shares—a long time after its incorporation, at a meeting, the Manager, Mr. Whitehead, and the President, Dr. Hageboeck, reported an opportunity to buy some second-hand machinery from the Edison Company and thought it would be a good thing. The company had no money with which to purchase machinery to the extent this would necessitate, so we all thought it would be a good thing to help the

company along and buy this machinery. Mr. Whitehead said we could get it at a low rate and he thought we could turn it over in 60 days, and not to exceed six months, at a good profit. We were stockholders in the company and wanted to help it out and help the dividends, and we thought to benefit the company. We heard the machinery could be purchased for $7,000 and $500 commission and we concluded upon $2,500 to $3,000 to remove it to Jersey City, so that the whole proposition would involve an expenditure of $10,000. So we agreed to endorse to allow the company to buy this machinery. On the strength of that understanding between the parties there, the notes commenced to come in in amounts that were necessary from time to time until endorsements covering the purchase and removal, aggregating $9,250, which we all endorsed.

I. Was this note of $9,250 a new note or the aggregate of some original notes? A. There were four notes, the largest of which was $5,000, and this was the aggregate of them and was put in the place of the four.

I. Was there any agreement between the parties you have named as to how these notes were to be paid which were in the bank? A. Yes; Mr. Whitehead, the manager, said it would not take over 60 days, or at the most six months, to turn this machinery over, saying that the price was about junk value and we could make a good thing on the machinery, and that as soon as he could sell this machinery—which consisted, I think, of seven engines—the money would be applied on the payment of these notes, thereby eventually wiping them out.

I. Well, what was the result as to the speedy sale of this property? A. Well, it didn't consummate into any sale, though he seemed to make con-

siderable effort to sell it and had "things working," as he termed it, toward sales. The notes began to come due and all the time he was in expectation of selling and thought there would be no trouble about it. And that is how we happened to go into this new note of $9,250.

I. I will show you a note, dated November 1st, 1904, for $9,250, and ask you if that was the final renewal note which grew out of this transaction? A. My answer is, yes. it was.

I. Is that your endorsement? A. Yes, sir.

I. It seems to have been paid on the fourth day of October, or about 26 days before it was due; do you know of any reason why it was taken up at that time? A. The Cashier of the bank notified us that he wanted the money when due, and also personally told me that they wanted the money; that the note was coming due—as is the practice in the banks here to tell a man before a note is due. And it seems to me I talked with some of the endorsers on this note and also the manager of the company; and it seemed that Mr. Murphy, of Murphy & Susemihl, represented some creditors who had claims against the company for damages—not for goods sold but for damages, with reference to contracts for putting up machinery. My idea was to save the company and not get it in any embarrassment and to reduce the liability of the company, this being classed as a liability of the company. The commercial agencies knew of the liabilities of the company and by reducing this it would put us in better shape, and none of us—at least, I didn't—intended to endorse a renewal. I refused to go into any renewal or extension of this note. We simply bought this machinery for the amount of this note, paid off this note, took a bill of sale for the machinery. This reduced the indebtedness of the Whitehead Machinery Company a corresponding amount.

I. By taking a bill of sale, do you mean the paper which I now show you, signed by the Whitehead Machinery Company, by W. W. Whitehead, manager, and dated October 2d, 1904? A. Yes, sir; this is the bill of sale, which was the manner in which they did business, and which is marked "Exhibit P 5 "

I. I will ask you whether special counsel was called in and consulted as to the validity of this sale? A. Yes.

I. What was done in this regards? A. Judge Waterman, of the firm of Lane & Waterman, was consulted by the machine company, as I understood it, and he advised that the transaction was perfectly legitimate and lawful, and we especially asked him as to any fraud, and he said there was no fraud about it; we were paying out this money to pay this note for the machinery, and it was just the same as though anybody else bought it, and he said to draw up an ordinary invoice and turn it over to us.

I. Who is this Judge Waterman you refer to as having been called in by the company? A. He is a member of the firm of Lane & Waterman, of this city, and was originally a member of the Supreme Court.

I. What is his reputation as a lawyer, in this city and State? A. He is regarded as a high class attorney, and a lawyer of high acumen.

I. I will ask you whether this property was purchased by you, Hageboeck, Roddewig and Schmidt —whether you believed the Whitehead Machinery Company was a solvent corporation or otherwise? A. Yes; I did so; otherwise I would never have gone into that tranaction.

I. When did you first learn that there had been a levy made in New Jersey against this property? A. My recollection is that that was some weeks after the attachment was levied before I found it out.

I. The attachment, according to the record in this case, was levied on the seventh day of October? A. I believe that is the date.

I. And if I understood your statement, you didn't hear of this attachment until long after that time? A. Long after that time I heard of that by getting a postal card from Mr. Whitehead, showing a sale of the property.

I. Did you pay a portion of this note? A. I paid my one-fourth portion of it.

I. Was any part of this note paid by Mr. Whitehead? A. We chipped in each one-fourth; Mr. Roddewig, Mr. Schmidt, Dr. Hagebock and myself each paid one-fourth; Whitehead paid nothing; neither did the Whitehead Machinery Company.

I. At the time of the payment of this note, had there been anything said about the company making an assignment to a trustee or any kind of an assignment? A. No, sir; not at all.

I. When did you first learn that an assignment was to be made, or had been made, to a trustee for the benefit of creditors of the company? A. When I noticed it in the daily press—in our evening papers here.

I. Do you know how long it was after you received title to this property? A. It seems to me it was about a month or more.

I. Were you at any time an attorney of this company? A. No.

I. Explain, if there is anything to explain, about the directors of this company. A. When I purchased my stock, I was called to a meeting of the stockholders and they voted me as a director. There was another meeting in a short time after that—this is speaking of the date and the time I purchased my stock, two years ago last February. It turned out that I could not be elected a director under the articles of incorporation, which provided for three

directors, and they attempted to increase it and have five directors. I didn't know anything about it, not having read the articles of incorporation, but when I read them I noticed there was provision for but three. So that, while I was elected director, I never served in that capacity. .The only way in which I could have been a director would have been through an amendment to the articles. So that matter was dropped and I never have been a director. Paulo Roddewig was the man they attempted to elect with me.

I. I will ask you, Mr. Becker, if there was ever an assignment for the benefit of creditors in the affairs of the Whitehead Machinery Company, under the statutes of the State of Iowa? A. No, there never was. There was simply an agreement, as I found out afterwards, between the company and the creditors of which I knew nothing until I saw in the paper that they had agreed upon Mr. Burmeister, as and for a trustee for the company.

I. Who were the officers of the company during the time you have been connected with it? A. Dr. A. L. Hageboeck was President and Mr. W. W. Whitehead was Manager.

I. Who was Treasurer? A. Dr. A. L. Hageboeck was Treasurer.

I. I will askyou, if you know, as a matter of fact, that any of the articles of incorporation or by-laws include the powers of a manager? A. All I know is, that the articles of incorporation provide for duties as manager. At the first meeting after I purchased my stock, I was advised that Mr. Whitehead had absolue power.

MR. HAYNES—I move that the answer be stricken as not the best evidence.

I. I will ask you, Mr. Becker, if you are familiar with the transactions of the corporations in the

State of Iowa as to the power assumed and exercised by general managers generally? A. Yes, sir.

I. What is that with reference to buying and selling? A. Generally it is done entirely by the manager; the practice here is that the affairs of a mercantile corporation are conducted by a manager who is selected by the board of directors, and who has full power to carry on the business of the corporation; in this case the only curtailment of power given to Mr. Whitehead was that no checks could be paid except by the signature of the President; that is how the business of this corporation was carried on; when I got into the business there, I noticed that Mr. Whitehead would get a chance to get a second-hand piece of machinery, and he would first consult with Dr. Hageboeck, the President, and the purchase would be made in that manner without consulting any other person.

I. After you purchased this machinery, in connection with your associates, what did you do, if anything, with reference to giving notice of your ownership of this property? A. I went in company with the manager, Mr. Whitehead, to the office of C. E. Adams, who was agent for the Pennsylvania Road in this city, and we notified him, that is, us four, that we had purchased this machinery which was on this pier in Jersey City; he took down the names of the parties and said he would notify the general office.

I. How soon was this after you purchased? A. That was right away.

I. On the same day? A. On the same day.

I. How long have you been an attorney and counsellor at law? A. Fifteen years.

I. Are you a graduate of a law school? A. Yes; State University of Iowa.

I. I will ask you if you are familiar with the decisions of the Supreme Court of the State of Iowa

with reference to the legality of purchases by directors and stockholders from the company in which they are directors and stockholders, assuming that such purchases are for a valuable consideration and in good faith? A. Yes.

I. Can you briefly state the volume and the name of the case and page at which it may be found, of any decision of the Supreme Court so holding? A. In the case of Garret, Trustee, vs. Burlington Plow Company et al., 70 Iowa, 697; see page 701: Beck, Justice, used the following language: "We understand that he (a director) may become a creditor of the corporation; may advance it money or sell it property, and obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position from that of any other creditor. And if the debt which he holds was contracted in good faith and there is an absence of fraud on his part, he may take security or payment, though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim." The foregoing proposition is sustained in the following cases: Buell v. Buckingham, 16 Iowa, 284; Farmers and Merchants Bank of Lyneville v. Wasson, 48 Iowa, 336; Hallen v. Indianola Hotel Co., 56 Iowa, 178, and many other decisions to the same effect.

In the case of Warfield, Howell & Co. v. Marshall County Canning Co. et al., 72 Iowa, page 666, the Court, through Seevers, Judge, used the following language on page 670: "Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals (Code, Section 1059). Such is the rule in the absence of a statute, and therefore it has the right to prefer one creditor to another (2 Mor. Priv. Corp., Section 802)."

This case was referred to and affirmed in 80 Iowa, page 386; on page 386, in which the following language was used by the Court: "It was held in Warfield v. Canning Co., 72 Iowa, 667, that a corporation may prefer its own stockholders and directors to other creditors, and that a mortgage given to secure an officer and stockholder was valid even though it was authorized by his own vote." And further states from Garrett v. Plow Co., supra: "No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent in a fair and honest way, take its property in security."

The same doctrine is declared in Re-assignment of Woolen Mills, 101 Iowa, 189, in which Deemer, Judge, used the following language: "Another point made is that the beneficiaries in the mortgage are directors of the corporation, and that as such they could not take security to the prejudice of other creditors. This question seems to be settled adversely to appellants in the cases of Garret v. Plow Co., 70 Iowa, 702 (29 N. W. Rep., 395); Warfield v. Canning Co., 72 Iowa, 670 (34 N. W. Rep. 467), and Rollins v. Carriage Co., 80 Iowa, 386 (45 N. W. Rep., 1037)."

As late as the case of First National Bank v. Garretson, 107 Iowa (see bottom of page 200), the following language is used by the Supreme Court: "It is well settled in this State that an insolvent corporation may make payment of its debts or give property in security therefor, just as a natural person may do, and it may prefer one of its creditors over another."

The Court further states in Manton v. Seiberling, 107 Iowa, 531, that there are no decisions, to its knowledge, conflicting, criticizing or overruling the cases referred to.

I. I will ask you, Mr. Becker, to state whether

or not the foregoing answer is the usual construction of the statute of the State of Iowa with reference to corporations? A. It is.

I. Has it ever been overruled, to your knowledge? A. Not to my knowledge.

I. I will ask you if the Supreme Court of Iowa is the highest legal tribunal in this State? A. It is.

I. What constitutes the laws of the State of Iowa? A. The Code of Iowa of 1897 and the subsequent Session Laws since the passage or adoption of the Code.

I. How often does the Legislature meet in this State? A. Once in every two years.

I. At the time of the purchase by you and your associates of this property, early in October, 1904, I will ask yon whether or not, in your opinion, the Whitehead Machinery Company was a solvent or insolvent corporation? A. I considered it solvent, and the fact of this sale didn't make it any different. I considered it even after this sale to us.

I. I will ask you whether, in your opinion, at the time you purchased this property, taking into consideration all the knowledge which you obtained, whether you paid a fair and adequate consideration for the property? A. I so considered it.

I. Since that time what have you found out? A. There are different opinions as to what it is worth. I am of the belief that we will eventually get our money out. Of course, that is problematical. Business in that line is still, and we have got to wait for a customer. It is heavy machinery.

I. Do you think the machinery is worth more than you paid for it? A. No, sir.

Cross-examination by Mr. Haynes.

I. How long did you act as a de facto director? A. I didn't act at all.

I. You attended meetings of the corporation,

did you not? A. I was elected director, and at the next meeting I was notified that I was not a director; that the articles of incorporation provided only for three directors.

I. How many shares of stock did you have? A. Ten shares. I paid one hundred dollars a share for it.

I. Did you own any other stock? A. No, sir; only these ten shares.

I. Don't Murphy & Susemihl represent the Whitehead Machinery Company as attorneys? A. They did at first; they were stockholders in the company and represented the company at first. That is how they got into the preliminary part of this Jersey City litigation.

I. You stated that one of the reasons for taking up these obligations was to reduce the liabilities so as to secure a better report from the mercantile agencies; would not that reduce your assets just so much? A. Yes, sir; but the liability would not appear in the mercantile agencies' reports. That is one of the benefits, that the liabilities in the mercantile agencies would be reduced.

I. The only bill of sale that you got was this invoice that is marked Exhibit P 5? A. Yes, sir.

I. Upon what did you base your opinion that the company was solvent? A. Upon statements from the President and the Manager, and my own observation of what property we had around town and from what they called the stock book.

I. What do you mean by stock book? A. I mean a book containing a minute description of all property of the company and showing what the company paid for it. It is a sort of running inventory, up to date all the time.

I. What did you consider this property worth at the time you bought it? A. We considered we

would get our money out, with interest. Otherwise we never would have gone into it.

I. Now, at the time you bought this property, did you have a purchaser or did your associates have a purchaser for any part of the property? A. Not to my knowledge. We expected to put it on the market and get as much out of it as possible.

I. Did you state to Mr. Adams that you had a purchaser for part of the property at Grand Haven, Michigan, and expected to ship it within a few days? A. No, sir.

I. What do you know about it? A. Mr. Whitehead told him, in that conversation, that some of the property would be moved soon.

I. Did you hear Mr. Whitehead say what he expected to get for that property? A. No.

I. Were you present at a meeting of the directors after you ceased to be a director? A. No.

I. Were you present at a meeting in the summer of 1904 when they had a conference with the creditors? A. Not that I remember of.

I. Were you consulted about the appointment of this trustee at all? A. No, I was not.

I. You stated it is the custom for corporations to have a general manager to run things and he has absolute control; is there any provision to that effect in the Statutes of Iowa? A. No, sir; except to provide by the articles of incorporation.

I. The articles of incorporation don't provide for any such powers to the manager? A. The articles show that he was to act as manager until the next general meeting.

I. But don't state his powers? A. No; only the general statement that he was to be manager.

I. As a matter of fact, you say you considered, at the time of the transfer, the company was solvent; as a matter of fact it was insolvent?

MR. FOSTER—Plaintiff objects to the question as being incompetent and immaterial and irrelevant.

A. No; I never considered it insolvent.

I. As a matter of fact, it was insolvent, was it not? A. No, it was not. I could not say that.

I. It is insolvent now, is it not? A. I don't know.

I. You don't know whether it will pay its debts and shareholders? A. No.

I. Do you know how much was sold by the trustees? A. No, sir.

I. Now, how much was got for it? A. No, sir; no, I don't.

I. Did you ever hear of this rule, in Iowa, which you have testified to as never having been criticized, criticized by any of the Courts of Iowa? I refer to the rule as laid down by Judge Beck in the case of Garrett vs. Burlington? A. No, sir; not to my knowledge.

WALDO BECKER.

Sworn to and subscribed before me this May 28th, 1906.

C. W. JONES.
Commissioner.

T. A. MURPHY, a winess produced on the part of the plaintiff, being duly sworn, deposes and says:

Examined by Mr. Foster.

I. You may state your name, residence, age and occupation. A. T. A. Murphy; 44 years; Rock Island, Illinois; lawyer.

I. Where do you do business at as an attorney? A. Davenport, Iowa.

I. For how many years have you practiced law here? A. Since 1888.

I. Were you acquainted with the officers and

directors of the Whitehead Machinery Company during the years 1904 and 1905? A. Yes, sir.

I. I will ask you to state whether you was a stockholder in that company? A. I was.

I. Were you ever an attorney for the company in any manner? A. Yes, sir.

I. I will ask you whether, during the year 1905, you represented any claims against the company? A. Yes, sir.

I. I will ask you if you and your partner, Mr. Susemihl, are the attorneys for the commercial agencies of Bradstreet and Dunn & Co.? A. We represent R. G. Dunn Co.

I. What was the aggregate amount of collections which you had against the Whitehead Machine Company in the year 1905?

MR. HAYNES—I object to that.

A. A matter of a few hundred dollars. Not very much. Perhaps a thousand dollars, all told.

I. Are you familiar with the proceedings for the appointment of the trustee? A. In a general way.

I. I will ask you to state, in a general way, if the Whitehead Machinery Company made an assignment, under the laws of the State of Iowa, for the benefit of its creditors? A. No, sir.

I. What was the nature of the transaction? A. They appointed a trustee and transferred all property to him, and the receipts by him was to be divided among those who came in, and thus save the expense of closing up matters.

I. I will ask you, Mr. Murphy, whether that assignment was in pursuance of an agreement participated in by the representatives of certain creditors and of the officers of the Whitehead Machinery Company? A. Yes, sir,

I. Did you participate in and advise that? A. Our firm did; yes, sir.

I. Do you remember a transaction of Becker, Roddewig, Schmidt and Hageboeck buying some property in the State of New Jersey? A. Yes, sir.

I. Did you know of the transaction about the time it occurred? A. I learned of it after it had been consummated.

I. I believe it is practically conceded that the money went to pay off a note in the Citizens National Bank? A. Yes, sir; I know of it personally. From my connection with the Citizens National Bank.

I. Are you their attorney? A. I represent them occasionally.

I. Was the sale satisfactory to those concerned? A. Yes, sir; it was eminently satisfactory to all concerned. It sold for as much as it cost. and the company's obligations were reduced to that extent.

I. Was the sale satisfactory to the creditors, so far as you know?

MR. HAYNES—We object to that.

A. Yes, sir; and to me as stockholder.

Cross-examined by Mr. Haynes.

I. What do you mean by "preliminary negotiations?" A. It was a matter which was discussed by some stockholders and officers with me in my capacity as stockholder and in my capacity as attorney for creditors.

I. Do you know of your own knowledge that this note was paid? A. No, sir; I saw the notes and I was advised by the Cashier, within an hour after it was closed, and he showed me the clean-up.

I. Do you know when that was? A. I could not say the date.

I. Do the statutes of Iowa provide a different method of assignment other than what would be termed a common law assignment to trustee? A. There are statutory provisions.

I. Are they not the same? A. No, sir. If you

make an assignment under the statute, you are in court, and everything is in accordance with the orders of court, a notice having to be filed and other steps taken.

I. These proceedings that they have adopted would not bar their creditors from pressing claims against the company? A. No, I don't know as it would.

I. How many creditors were represented at that meeting which decided to make an assignment to the trustees? A. I don't think any creditors were present.

I. You were present, were you not? A. I wasn't present at the meeting of the Board of Directors. It had been discussed by the officers and the creditors who were right here and who were represented here.

I. Your firm is attorney for the trustee? A. Yes, sir.

I. Do you know how much of the stuff has been sold? A. Yes, sir; all of it.

I. How much was it sold for? A. I could not say.

I. How much, in a general way? A. I think five thousand dollars. It may be a little more or a little less.

I. Do you know how much this will pay? A. The trustee will be able to pay the creditors who have come into the assignment twenty cents on a dollar.

I. To whom has the trustee sold the property—in lump or to various persons? A. To various persons.

T. A. MURPHY.

Sworn and described before me,
May 28th, 1906.

C. W. JONES.
Commissioner.

ALPHONS L. HAGEBOECK, a witness produced on the part of the plaintiffs, being duly sworn, deposes and says.

Examined by Mr. Foster.

I. You may state your name, age, residence and occupation? A. Alphons L. Hageboeck; 39; Davenport; physician and surgeon.

I. Did you have any connection with the Whitehead Machinery Company, doing business in this city recently? A. Yes, sir.

I. For how long a time were you connected with that corporation? A. Ever since it began.

I. That was about when? A. I could not tell you the exact date, but from the beginning I have been President of it.

I. What, if any, position did you hold therein? A. I was President of it and a member of the board of directors.

I. I assume you are a stockholder? A. Yes, sir.

I. Did you occupy any other position than that of President? A. I was Treasurer also.

I. I will ask you whether there was any authority, by constitution, by-laws or articles of incorporation, fixing the duties of the various officers? A. Yes, sir.

I. Was it by by-laws or constitution? A. We had a set of by-laws fixing the duties of the officers. They provide that the duties of officers shall be the same as are usual in other associations.

I. Is there any especial provision stating the duties and powers of general manager? A. I am not certain about that.

I. You don't remember about that? A. No.

I. Well, as exercised, and permitted by the officers and directors of the company, what were the powers of the general manager? A. They were about as follows: He was to make purchases, sub-

ject to the control of the board of directors; he was to make sales, subject to the same board of directors; he was not to issue any checks or sign any notes except as they were countersigned by the Treasurer. His duties and powers were limited in these respects.

I. Do you remember, in the month of October, 1904, of an indebtedness existing—of certain notes in the Citizens National Bank—which were endorsed by certain officers and stockholders of the Whitehead Machinery Company? A. Yes, sir.

I. How was that? A. I went East with Mr. Whitehead in February, 1903. I am not certain about the date, but think that was it. While in the East Whitehead found a very nice assortment of machinery at second-hand which he thought could be purchased at a reasonable figure. I recommended to the board of directors that the purchase be made. Whitehead's representation being that there was a large profit possible, and my knowledge of the finances of the corporation being that there wasn't money enough to take care of it, a scheme was arranged that Whitehead, Waldo Becker, Oswald Schmidt, Paulo Roddewig and I should raise the money for the purchase of this particular machinery. The purchase was to be made and we were to be reimbursed as the property was sold, and the profits, after our original investments were returned, were to go to the Whitehead Machinery Co. We had no funds, and this machinery was reported to be worth two or three times what we could buy it for and we men thought to put up this ten thousand dollars. The money was loaned at the Citizens National Bank by five of us, who endorsed that note, with the understanding that any money received for sales of this machinery was to be kept out of the general fund and used to pay off the note, and whatever was over was to be profits for the

Whitehead Machinery Company. We thought it a particularly good bargain and had no funds in the corporation's treasury.

I This was what is known as the Edison machinery on 80th street in New York City? A. Yes, sir.

I. I will ask you what the general manager said—what report he made, if any, as to the length of time when this machinery could be realized on?

MR. HAYNES—That is objected to as irrelevant, incompetent and immaterial.

A. He reported to us that he could probably give back our money in the space of six months.

I. What was the result when these notes became due in the Citizens National Bank? A. We were called on for payment.

I. Did you pay? A. We did.

I. How was it as to the first notes? A. The notes were issued from time to time. I don't know how many. This payment wasn't all made at once.

I. Do you know anything about the renewal of the small notes? A. I don't know anything about the details.

I. I will show you a note signed by the Whitehead Machinery Company, by A. L. Hageboeck, Treasurer, for $9,250, and endorsed on the back by W. W. Whitehead, A. L. Hageboeck, Waldo Becker, Oswald Schmidt and Paulo Ruddewig, and ask you if that has any relevancy to this transaction? A. Yes, it was one of the notes issued for this specific purpose.

I. Do you know whether it is the aggregate of the small notes? A. I can't remember; I don't recall.

I. Do you remember the manner in which this note was taken up? A. The note was finally taken up

by each one of us taking up his share, excepting Whitehead.

I. Then yourself, Becker, Roddewig and Schmidt paid each the fourth of this note, face and interest? A. Yes, sir.

I. I will ask you what occurred with reference to the transfer of this Edison Machinery? A. The general plan was this particular piece of property, when it was bought, was a separate deal and was to stand as security for the notes we had endorsed and when we found that the Whitehead Machinery Company was not in any better shape to pay the note when it was matured than at first, we decided to take the machinery.

I. I will ask you if you remember, in connection with this, of special counsel being called in to advise with you with reference to the legality of it? A. That was delegated to several of us and some of the best legal talent in the city was consulted.

I. Who was consulted? A. Judge Waterman was one.

I. What was his advice? A. To do as we did; I think Murphy & Susemihl were also consulted in connection with it.

I. I have here a paper—a receipt and invoice—which has been marked Exhibit P 1, of the machinery; does that represent the transaction of the transfer of this property to you? A. Yes, sir.

I. I will ask you, at the time of the transfer of this property to you and your associates and the payment of this note at the Citizens National Bank, if you had a belief as to the solvency or insolvency of the Whitehead Machinery Company? A. Yes, sir

I. What was that belief? A. I believe it was solvent; in fact I endorsed paper for the company after that.

I. How long was it after the payment of this

note, which bears the stamp of October 4th, that you first heard of the appointment of a trustee to wind up the company? A. I could not tell.

I. Had it been discussed at that time? A. No, sir.

I. To refresh your memory, Doctor, I will show you what purports to be the proceedings of a special meeting of the Whitehead Machinery Company which took place October 30th, 1905, and which has been introduced as Exhibit P 3?, A. Yes, I remember that transaction.

I. Is that your signature? A. Yes, sir.

I. That was attested by Mr. Whitehead? A. Yes, sir.

I. On the next page, referring to what is designated as Exhibit P 4, what do you find there? A. "A meeting of the Board of Directors of the Whitehead Machinery Co., composed of A. L. Hageboeck and W. W. Whitehead, the resolution passed by the stockholders of said company at the stockholders' meeting held October 30 was received and in accordance with such resolution the board of directors selected J. E. Burmeister, Cashier of the First National Bank, as the trustee to whom the assets and property of the Whitehead Machinery Co. should be assigned and transferred, pursuant to the resolution referred to, and after receiving the consent of said Burmeister to act as such trustee, the board of directors instructed the proper officers of said Whitehead Machinery Co. to execute the necessary instruments in writing to carry out the purpose of said resolution. Dated at Davenport, Iowa, November, 1905."

I. Is that signed by you? A. Yes, sir.

I. Is that your signature? A. Yes, sir.

I. And attested by the signature of the Secretary? A. Yes, sir.

I. I will ask you whether these pages are the

original minutes of these meetings? A. Yes, sir.

I. There is no bound book in which they are recorded? A. No, sir.

I. These were always kept in Tatem's Loose Sheet Letters?

MR. HAYNES—We object to the question.

A. Yes, sir.

I. Having refreshed your memory from the record of the Whitehead Machinery Company, I will ask you now what your best judgment now is as to when the matter of the appointment of a trustee was first discussed?

MR. HAYNES—We object to the question.

A. The best recollection I have is that it was at this meeting, on the thirtieth of October.

I. A month after the sale of this property, nearly? A. Yes, sir.

I. At the time of the sale of this property, did the directors and officers all participate in the transaction? A. I think so.

I. You were President and Treasurer? A. Yes, sir.

I. And Secretary? A. Yes, sir.

I. Mr. Whitehead was general manager? A. Yes, sir.

I. You and Mr. Whitehead and Oswald Schmidt were directors? A. Yes, sir.

I. And all participated in that proceeding? A. Yes, sir.

I. So that there was not either officer or director that did not participate in the transaction? A. There was not.

I. When did you first learn that a judgment had been levied against this property in the city of Jersey City? A. I could not tell.

I. Was it before or after the transfer of this prop-

erty to you and your associates? A. Quite a while afterwards.

I. I will ask you whether any officer participated in any discussion relative to appointment of a trustee to take possession of the property and wind up the affairs of this company?

MR. HAYNES—Objected to as irrelevant, incompetent and immaterial, and as the witness cannot state as to what other officers did.

A. No, sir.

I. Did I understand you to say that you afterwards endorsed for the company? A. Yes, sir.

I. After you secured this property? A. Yes, sir.

I. Why didn't Mr. Whitehead pay a portion of that note? A. He didn't have the money. You asked me about endorsing notes, a while ago. I do remember that Hansen telephoned to me about two days after this agreement was made and I did guarantee some of their bills.

I. Who was that? A. Hansen's Sons.

I. In this city? A. Yes, sir.

I. This note, with interest of $138.75, appears to have been paid on the fourth day of October, or about a month before the maturity of the note; do you remember how that happened to be done? A. I don't remember anything about that.

I. You have answered that you are a physician and surgeon; I will ask you if you are a busy practitioner.

MR. HAYNES—Objected to, as irrelevant and immaterial.

A. Yes, sir.

I. I will ask you if you paid special attention to the details of the business of the Whitehead Machinery Company? A. I did; yes, sir.

Cross-examination by Mr. Haynes.

I. This property which you bought from the Whitehead Company—which you and your associates are alleged to have bought from the Whitehead Machinery Company—was never an asset of the business? It was never moved from the pier in Jersey City where you bought it? A. I don't know about it.

I. You know it was never moved, don't you? A. I don't know.

I. Do you know that one of those engines was sold? A. I don't know anything about that, either.

I. That invoice and receipt marked Exhibit P 5, is the only bill of sale or evidence of transfer that you and your associates received from the Whitehead Machinery Company? A. I can't tell you. I don't know.

I. You don't remember seeing any other? A. I don't remember seeing any other; I don't know.

I. Whom did you consider directors of this company at the time of the transfer of the property from the company to you and Mr. Becker and others? A. The only real acting directors were Mr. Whitehead and myself.

I. Mr. Schmidt wasn't acting? A. He had resigned, I believe.

I. Was Mr. Schmidt taking an active interest in the concern? A. Yes, sir.

I. And Mr. Roddewig? A. Yes, sir.

I. And Mr. Becker? A. Yes, sir.

I. Wasn't this corporation at the time of the transfer insolvent? A. No, sir.

I. Subsequent developments have shown that it was? A No, sir.

I. As a fact, isn't it insolvent? A. No, sir.

I. Did it acquire any assets after the transfer or incur any more liability? A. I don't know.

I. Do you know whether it acquired assets after-

wards? A. Yes, sir; they bought material. I know I guaranteed stuff purchased after that.

I. To what amount? A. I don't know.

I. Amounting to $500? A. I don't know.

I. How much was it? A. I don't know; I haven't looked at the books since then, and don't know.

I. Do you know what the trustee has procured on the sale of this property? A. No, sir.

I. Do you know he has sold it? A. I don't know.

I. Do you know to whom he sold it? A. No, sir.

I. Do you know Mr. Rosenthal? A. Yes, sir.

I. Do you know that he sold part of it to Mr. Rosenthal? A. I don't know anything about it.

I. Mr. Whitehead testified this morning that you were to endorse twenty-five hundred dollars paper after this transfer, and directly before the assignment to the trustee; do you recall why you didn't endorse that paper? A. I don't remember the incident.

I. How long before the transfer had the company ceased to do business, or practically ceased? A. It hadn't ceased.

I. They were not doing any active business? A. Yes, sir.

I. In what way? A. I don't know.

I. Did you ever consult with Mr. Dorrance about his claim against the company?

MR. FOSTER—I object on behalf of the plaintiffs to the interrogatory as being improper cross-examination, irrelevant, immaterial and incompetent.

A. Why, I had an informal conference with Mr. Dorrance about this claim in Chicago.

I. How long before the transfer? A. I suppose about a year.

I. How much did you consider this property worth that you are alleged to have bought from the company? A. I considered it worth a whole lot more than we paid for it.

I. You thought you were getting it at a bargain when you and Mr. Becker and the rest of you got it by paying off this note? A. I considered, when we originally bought this material, that we were getting a bargain, but afterwards, because of slackness in the market, it showed we didn't get as good a thing as I thought.

I. Do you know of any attempt to sell this property to some one in Grand Haven, Michigan? A. I don't know anything about it.

I. Now, Doctor, you know, at the time of this transfer, that the company had been pressed by claims; that for some time creditors had been pressing the company? A. Yes.

I. The company didn't have funds to pay them? A. We had funds.

I. Why didn't you pay them if you had the funds?

MR. FOSTER—That is objected to as irrelevant and immaterial, and not proper cross-examination.

A. I wasn't actively engaged in it; I don't know.

I. Do you know how much the liabilities of the company were at the time of the transfer? A. No, sir.

I. Can you state, generally, what your opinion is, or what, to the best of your knowledge, the liabilities were? A. I cannot.

I. Then, we understand that you had very little participation in this transfer and in the assignment, because of illness? A. At that particular time; yes, sir.

Re-direct examination by Mr. Foster.

I. For what length of time before the assignment was made to Mr. Burmeister were you ill? A. I can't tell definitely, because I have no memorandum of the dates with me.

I. A day or two or a week or two? A. I was in bed in October for two or three weeks. I was down at the meeting where the transfer was made from the company to certain stockholders.

I. You mean this New Jersey machinery? A. Yes, sir. And from that day to the time of the assignment to Burmeister I wasn't sick; I was down town.

ALPHONS HAGEBOECK.

Sworn and subscribed before me this 26th day of May, 1906.

C. W. JONES,
Commissioner.

STATE OF IOWA, }
SCOTT COUNTY, } ss.

I, C. W. JONES, a Notary Public in and for the County and State aforesaid, hereby certify that in pursuance of the annexed stipulation, the foregoing depositions of W. W. Whitehead, Clarence E. Adams, Oswald Schmidt, Paulo Roddewig, August A. Balluff, Waldo Becker, T. A. Murphy and Alphons L. Hageboeck were correctly and fully written down by me in shorthand at suite 450, 451 and 452 Hageboeck Building, Davenport, Scott County, Iowa, on the 25th day of May, 1906, beginning at 10 o'clock A. M., and such notes were afterwards correctly transcribed by me in the foregoing pages, and such transcript was afterwards read by the respective witnesses and sworn to and subscribed in my presence and before me.

I further certify that before taking such deposi-

tions I took and subscribed to an oath to fairly and impartially take the testimony of said witnesses, and I certify that the foregoing is a fair and impartial report of the testimony and shows all stipulations made or objections interposed by either party.

In testimony whereof, I have set my hand and affixed my notarial seal, at Davenport, Scott County, Iowa, this May 31st, A. D. 1906.

My commission expires July 4, 1906.

C. W. JONES,
Commissioner.

HUDSON COUNTY CIRCUIT COURT,

APRIL TERM, 1906.

OSWALD SCHMIDT ET ALS.,
vs.
JOHN ZELLER, SHERIFF, ET AL.

This case came on to be tried before HON. CHARLES W. PARKER, Judge, and a jury, on Wednesday, June 6, 1906.

APPEARANCES:

GEORGE W. RURODE and M. T. ROSENBERG, Esq., for plaintiffs.

Messrs. TENNANT & HAIGHT, (by Mr. Tennant) and RANDOLPH PERKINS, Esq., for defendants.

A jury is duly empaneled and sworn.

MR. ROSENBERG opens case for plaintiff.

MR. ROSENBERG—If your Honor please, the plaintiff's case has been taken by depositions, under the Evidence Act, and those depositions I have here. The first witness for the plaintiff was William W. Whitehead.

Mr. Rurode reads the direct examination, and by consent, Mr. Rosenberg takes the stand and reads the answers of the witness.

Mr. Tennant takes the stand, representing the witness Whitehead under cross-examination. Mr. Perkins reads the cross-examination, and Mr. Tennant the answers of the witness.

On re-direct examination, Mr. Rosenberg re-rumes the stand, representing Mr. Whitehead. Mr. Rurode reads the questions, and Mr. Rosenberg the answers.

MR. TENNANT—This is the re-cross-examination. The jury will understand that Mr. Whitehead is now being cross-examined further.

Mr. Rosenberg retains the stand. Mr. Tennant reads the questions and Mr. Rosenberg the answers.

MR. RURODE—This is a deposition of Clarence E. Adams, a witness for the plaintiffs.

THE COURT—I think we may probably improve the situation by considering Mr. Rosenberg, the witness, throughout and let Mr. Tennant ask the questions on cross-examination.

Mr. Rurode reads the question on direct examination, and Mr. Rosenberg reads the answers. Cross-examination by Mr. Tennant, Mr. Rosenberg reading the answers.

OSWALD SCHMIDT, a witness for the plaintiffs.

Mr. Rurode reads the questions on direct examination, and Mr. Rosenberg the answers.

On cross-examination, questions read by Mr. Tennant, Mr. Rosenberg reading the answers.

On re-direct, questions read by Mr. Rurode and the answers read by Mr. Rosenberg.

PAOLO RODDEWIG, a witness for the plaintiffs.

Direct examination, questions read by Mr. Rurode, and the answers read by Mr. Rosenberg.

Cross-examination, questions read by Mr. Tennant, and the answers read by Mr. Rosenberg.

AUGUST A. BALIFF, a witness for the plaintiffs.

Direct examination, questions read by Mr. Rurode and the answers by Mr. Rosenberg.

Cross-examination, questions read by Mr. Tennant, and the answers read by Mr. Rosenberg.

WALDO BECKER, a witness for the plaintiffs.

Direct examination, questions read by Mr. Rurode.

MR. ROSENBERG—May we suspend this examination? Judge Smith is here and wishes to get away as soon as possible.

THE COURT—If you will just come up here and present that paper, I think you can get away very soon (to counsel). Do you want him sworn?

MR. TENNANT—No. I will admit that Mr. Smith received that letter (referring to Mr. George T. Smith.)

MR. ROSENBERG—And that was the letter mentioned in the depositions? (To Mr. G. T Smith). You produce that from your files?

MR. G. T. SMITH—From my office file.

THE COURT—What is this other one you have?

MR. GEORGE T. SMITH—The copy served on me last night.

THE COURT—You can leave this with us? We can send it back to you.

MR. G. T. SMITH—Yes; I can leave it.

THE COURT—Mark it in evidence. It is admitted that Mr. Smith received that letter in the regular course of mail. I presume it is also admitted that the letter itself is genuine?

MR. TENNANT—I do not know anything about it.

Letter dated October 4, 1905, produced by Mr. Smith. Marked P 20, and copy read into the testimony.

Mr. Rosenberg resumes the witness stand.

Mr. Rurode reads further questions in direct examination of Mr. Waldo Becker, and Mr. Rosenberg the answers.

Cross-examination—Questions read by Mr. Tennant and the answers read by Mr. Rosenberg.

T. A. Murphy, a witness for the plaintiffs.

Direct examination—Questions read by Mr. Rurode and the answers read by Mr. Rosenberg.

Cross-examination—Questions read by Mr. Tennant and answers read by Mr. Rosenberg.

Dr. Alphons L. Hageboeck, the witness for the plaintiffs.

Direct examination—Questions read by Mr. Rurode and answers read by Mr. Rosenberg.

Cross-examination—Questions read by Mr. Tennant and the answers read by Mr. Rosenberg.

Re-direct—Questions read by Mr. Rurode and the answers read by Mr. Rosenberg.

MR. ROSENBERG—That completes the testimony, with the offer of that letter of Judge Smith.

Mr. Rosenberg reads letter marked P 20, dated Davenport, Iowa, October 4th, 1905. (Mr. George T. Smith, agent, etc.).

PLAINTIFFS REST.

RECESS.

AFTERNOON SESSION.

MR. ROSENBERG—I would like to know if this bill of sale and transfer has been marked in evidence. I had intended to offer it.

THE COURT—The Court held that it would be admitted and its effect considered later.

MR. TENNANT—May it please the Court, I move for a non-suit in this action, on the ground that it appears that the four plaintiffs in the case who claim title by this alleged transfer of this property were four directors of the company and that such a transfer to them is illegal and absolutely void. Second, that they have not shown any proper authority on the part of this corporation to have made such a transfer to these plaintiffs; that the by-laws of the company nor the certificate of incorporation which the plaintiffs say provided for some such authority of the manager have not been admitted in evidence, and that therefore there is no legal evidence to show that the manager who made this alleged transfer had any authority to do so. I respectfully submit that there should be a non-suit in the case.

THE COURT—The motion will be denied.

DEFENDANTS' EVIDENCE.

RANDOLPH PERKINS, called and sworn for defendants, testifies as follows:

Direct examination by Mr. Tennant.

Q. You are a lawyer by profession? A. I am.

Q. And also a Mayor, are you? A. Yes.

Q. You are the auditor in the attachment suit of Dorrence and others against the Whitehead Machinery Company, are you? A. Yes.

Q. Do you remember when you were appointed—some time in the year 1905?

MR. ROSENBERG—I object, that the record is the best evidence in the case.

Q. Do you remember about when you were appointed? A. I remember that in October last year I was given a certified copy of an order of the Court, appointing me auditor in the attachment suit against the Whitehead Machinery Company.

Q. And immediately upon being appointed auditor did you go over and take into possession the property? A. I took into my possession, as much as any man could take into his possession, five or six engines—large engines.

Q. Where was the property? A. On one of the piers of the Pennsylvania Railroad, North River.

Q. Your are one of the defendants in this suit? A. Yes, sir.

Q. And live where? A. Westfield, Union County, New Jersey.

Q. Did you live there in October last? A. Yes, sir; five or six years.

Q. You have been a resident of the State of New Jersey for how long? A. All my life.

Q. And you are now? A. Yes, sir.

Q. Do you know John Zeller, the then Sheriff of Hudson County, at the time of your appointment? A. Yes, I knew him very well.

Q. Do you know where he lived in October last? A. I know generally that he lived in Hudson County—the northern end of the County.

NO CROSS-EXAMINATION.

FREDERICK P. BUDDEN, called and sworn for defendants, testifies as follows:

Direct eaamination by Mr. Tennant.

Q. Were you a constable of Hudson County in October last? A. Yes, sir.

MR. ROSENBERG—Are you trying to prove he made the attachment? We admit the attachment.

Q. Were you the special Deputy Sheriff who executed the attachment in the case of Dorrance & Company against the Machinery Company? A. Yes.

Q. You made the return of attaching the property? A. Yes.

Q. The property replevined in this action? A. Yes; that is my writing (referring to paper produced.)

MR. TENNANT—I offer now the record in evidence, showing the filing of the writ, the issuing of the attachment—

THE COURT—All the proceedings in the action which you have in your hand there? They will be admitted in evidence.

NO CROSS-EXAMINATION.

WILLIAM F. PARISH, called and sworn for defendants, testifies as follows:

Direct examinntion by Mr. Tennant.

Q. Where do you live? A. Chicago, Illinois.

Q. Did you have a claim against the Whitehead Machinery Company in October last? A. I did.

Q. Were you one of the applying creditors in this attachment suit which Mr. Perkins was appointed auditor in? A. Yes, sir.

Q. Did you know Dr. Hageboeck, the President of the Whitehead Machinery Company? A. Yes, sir.

Q. When did you become acquainted with him? Some time in 1905.

Q. And have you been doing business with the Whitehead Machinery Company since 1904 or 1905? A. The spring of 1904.

Q. So that you had been doing business with the company before you knew Hageboeck? A. I had.

Q. Did you know Mr. Whitehead? A. Yes, sir.

Q. When did you first become acquainted with him? A. In the spring of 1904.

Q. Did you know anything about the purchase by the Whitehead Machinery Company of the machinery which was down on one of the piers of the Pennsylvania Railroad Company in Jersey City? A. After it was made I did.

Q. Did you have anything to do with that machinery? A. That machinery was placed in my hands to sell.

Q. And did you try to sell it? A. I did.

Q. What was your connection with the company at the time? A. I was looking for business for it.

Q. What is your business? A. Machinery.

Q. In Chicago? A. In Chicago.

Q. Did you buy and sell any machinery for the Whitehead Manufacturing Company? A. I did.

By the Court.

Q. On commission, I suppose? A. On commission.

By Mr. Tennant.

Q. Do you know anything about the financial condition of the Whitehead Manufacturing Company, during the summer of 1905? A. Yes, sir.

Q. What is the source of your knowledge on that question? A. I had taken a great many contracts for them to fill. I bought machinery for them. I had made contracts with laborers and teamsters.

MR. ROSENBERG—We object, and ask that the answer be stricken out as not responsive to the question, as not showing any source of information.

THE COURT—The answer is competent, except that it does not tell us anything particular that would qualify him. (To witness). That is all you know?

THE WITNESS—I have done general business with them. They called on me to make contracts for them, collect and attend to their business, and in a general way they called on me to do everything they had to do in that line, in that vicinity and over different parts of the country.

Q. Do you know anything about a claim of the General Electric Company in Chicago, or Pekin, Illinois, that that company had against the Whitehead Machinery Company for collection?

MR. ROSENBERG—Let him state how he knows it. I object—

THE COURT—Yes, or no.

THE WITNESS—Yes.

Q. What is the source of your knowledge on that point? A. The original source of my knowledge came from the Cable-Nelson Piano Company of Chicago, Illinois.

Objected to as hearsay.

Q. Did you get any further information or hear anything about the company's connection with the General Electric Company, which informed you about the conditions? If so, state the source of your knowledge.

MR. ROSENBERG—Objected to as calling for hearsay evidence.

THE COURT—Mr. Tennant, how can you show anything by this witness as to the condition of the company, except admissions made by the company?

MR. TENNANT—I am going to get at that. I simply want to lead up to that.

Q. Do you know anything about a claim which the Electric Company had against the Whitehead Machinery Company? A. I did.

Q. What do you know about it? A. I made the contract with the Cable-Nelson Company and the Whitehead Machinery Company to fill that contract in part; during the filling of that contract one of the dynamos that they sent to South Haven, Michigan, was dead.

MR. ROSENBERG—Were you there and saw it?

THE WITNESS—No, sir.

MR. ROSENBERG—Very well; I object.

Q. Did you afterwards report that to Mr. Whitehead?

MR. ROSENBERG—I ask that that be stricken out.

THE COURT—I will have to strike that out as hearsay.

Q. Did you afterwards report the information that you had to the Whitehead Machinery Company? A. I did.

Q. Whom did you tell it to? A. I wrote to them and told the manager.

MR. ROSENBERG—Did you write a letter?

THE WITNESS—Yes, sir.

MR. ROSENBERG—I object to any oral evidence.

MR. TENNANT—Will you produce the letter; are the letters here?

MR. ROSENBERG—We have not been served with any notice to produce.

Q. Did you hear from Mr. Whitehead after that? A. I did.

Q. Did the Whitehead Machinery Company pay that?

MR. ROSENBERG—Did you have a letter from them?

THE WITNESS—Yes, sir.

MR. ROSENBERG—Then I object to any oral testimony.

Q. (Handing witness letter). I show you a letter bearing date the twenty-first day of March, 1905, addressed W. F. Parish, Chicago, Ill., and ask you if you have ever seen that letter before? A. I have.

Q. Where did you get it? A. By mail, at Chicago.

Q. Is that the kind of stationery and signed in the way that you had correspondence with the Whitehead Machinery Company?

MR. ROSENBERG—I object; that not the proper proof of the letter.

Allowed. Exception taken by Mr. Rosenberg.

A. Yes, sir.

Q. Was that letter received after you had written any letter to the Whitehead Machinery Company? A. Yes, sir.

Q. Did the Whitehead Machinery Company owe you any money at that time? A. Yes, sir.

Q. And had you written them any letter in reference to your account? A. Yes, sir.

Q. Is that the letter which you got in reply?

MR. ROSENBERG—I object; there is no evidence of any letter.

MR. TENNANT—He has not stated the contents of any letter he wrote.

MR. ROSENBERG—But in order to let him testify as to the letter that was a reply to, that letter should be produced.

THE COURT—What do you want to do, get this in evidence?

MR. TENNANT—Yes, your Honor.

THE COURT—Mr. Rosenberg, do you refuse to admit that as a letter of the Whitehead Machinery Company?

MR. ROSENBERG—I do, indeed.

MR. TENNANT—Do you deny it was written by them?

MR. ROSENBERG—I do not deny it or admit it. I would like you to prove it.

MR. TENNANT—I would like to withdraw this witness for a moment.

ARTHUR S. JOHNSON, called and sworn for defendants, testifies as follows:

Direct examination by Mr. Tennant.

Q. Where do you live? A. Chicago, Illinois.

Q. What is your business? A. Cashier, at present.

Q. Were you connected in any way with the Whitehead Machinery Company, in the month of March, 1905? A. Yes, sir.

Q. What was your position with the Whitehead Machinery Company, March 21, 1905? A. Stenographer, and general office assistant.

Q. When did you go to work for that company? A. The first of October, 1903.

Q. When did you leave that company? A. The last day of September, 1905.

Q. Did you continue in the employ of that company during all that time? A. Yes, sir.

Q. Were you at that time a stenographer? A. Yes, sir.

Q. And could you operate a typewriter? A. Yes, sir.

Q. Did you act as stenographer and operate a typewriter for the officers of that company during the time you were employed there? A. I did.

Q. Who was the office man of that company immediately above you? A. Mr. Whitehead.

Q. Who was the President of the company? A. Dr. Hageboeck.

Q. Did they have a Vice-President? A. Yes, sir; Mr. Oswald Schmidt.

MR. ROSENBERG—How do you know that?

THE COURT—Wait until the cross-examination, and then you can move to strike it out.

Q. While you were connected with the company, did you see Mr. Roddewig there? A. He came in the office occasionally.

Q. And Dr. Hageboeck? A. Yes, sir.

Q. And Mr. Schmidt? A. Mr. Schmidt, yes, sir.

Q. And Mr. Becker? A. Yes, sir.

Q. Did they attend any meetings of stockholders or directors of that company during the time that you were there? A. Yes, sir.

Q. Were those meetings held at the office where you did your work? A. Yes, sir.

Q. Did they all take part in the meetings that they attended there? A. Yes, sir.

Q. Did you have anything to do with the prep-

aration of the minutes of the company during that time? A. The minutes were dictated to me and I transcribed them on a typewriter, and filed them.

Q. Who dictated the minutes to you? A. They were dictated by different officers.

Q. Mr. Whitehead, sometimes? A. Yes, sir.

Q. Did Mr. Becker ever dictate them to you? A. No, sir; it was generally Mr. Schmidt, the Doctor, and Whitehead.

Q. Dr. Hageboeck? A. Yes, sir.

Q. They dictated the minutes to you? A. Yes, sir.

Q. In those dictations did they say who was present at these various meetings?

MR. ROSENBERG—I will have to object to Mr. Tennant asking leading questions.

Question withdrawn.

Q. In the dictation that you received from any of these gentlemen, please state whether or not it was stated who was present at any of those meetings? A. It was always stated who was present.

Q. And in those dictations will you please state who it was dictated to you, for you to transcribe, who were present?

MR. ROSENBERG—Did he transcribe them? If he did, his transcript is the best evidence.

THE COURT—I do not understand what you are trying to get.

MR. TENNANT—I want to show that all these men were present during all this time.

Q. Did you see those men there? A. I did; they were all present.

Q. And after seeing them there, were the minutes dictated to you? A. They were dictated at the last of the meeting.

Q. Do you know when this company was incorporated?

MR. ROSENBERG—I object; the certificate of incorporation will be the best evidence.

THE COURT—It is already in evidence, isn't it?

MR. TENNANT—It was 1902, I think.

Q. Were you a stockholder of the company? A. Yes, sir.

Q. You had some stock? A. Yes, sir.

Q. Did you pay for that stock? A. Yes, sir.

Q. How many shares did you have? A. Five.

Q. Did you pay for them in cash? A. Yes, sir.

Q. You are still a stockholder? A. I think so.

Q. You haven't got your money back, have you? A. I still have possession of my stock certificate.

Q. How much is the capitalization of the company? A. $25,000.

Q. How many shares? A. 250.

Q. $100 each? A. Yes, sir.

Q. The company's business was what? A. Buying and selling of second-hand machinery.

Q. You remember a meeting of the company's creditors during the year 1904? A. Yes, sir.

Q. Were you there? A. Yes, sir.

Q. Were these four plaintiffs there, the plaintiffs in this suit, Dr. Hageboeck, Schmidt, Roddewig and Becker? A. Yes, sir.

THE COURT—Are you sure about the year you are asking him in regard to?

MR. TENNANT—Yes, your Honor; 1904.

Q. Were they there then? A. Yes, sir.

Q. Were there any creditors of the company there or represented? A. Yes, sir.

Q. Why were the creditors there; do you know?

A. Because they were called; there was an order sent out to each creditor.

Q. What was that called for? A. For the purpose of gaining an extension of time.

Q. An extension of time for what? A. The payment of their indebtedness.

Q. To these creditors? A. Yes, sir.

Q. Was that extension given in 1904? A. A sort of a compromise.

Q. Do you remember when the company purchased this machinery, in the early part of 1904? A. Yes, sir.

Q. Where did they buy it? A. New York City.

Q. Where did they have it moved to? A. To a pier of the Pennsylvania Railroad Company, Jersey City.

Q. Did it remain there until you dissolved your connection with the company? A. All with the exception of one engine.

Q. What became of that engine? A. It was shipped to South Haven, Michigan.

Q. Do you know whether the Pennsylvania Railroad Company ever made any demand upon the Whitehead Machinery Company for freight or demurrage charges in Jersey City? A. No, sir.

Q. Do you know whether, in August or September, the creditors of the Whitehead Machinery Company were making any demand for payment of their bills? A. What year?

Q. 1905, last year? A. Yes, sir.

Q. Were you acquainted with many of the members of the bar in Davenport, Iowa? A. I know several.

Q. Do you know Murphy & Susmill, there? A. Very well.

Q. Did they have any claims against the Whitehead Machinery Company for collection?

MR. ROSENBERG—Objected to; how does he know?

Q. Do you know whether they did or not? A. I don't understand the question.

THE COURT—I suppose, Mr. Tennant, if you can prove anything, all you could do would be to prove that the claim was presented.

Q. Did you have charge of the mail of the Whitehead Machinery Company during the summer of 1905, and until you left there? A. I saw everything that came in.

MR. ROSENBERG—What do you mean by "charge of the mail?"

MR. TENNANT—Are you objecting to my question?

MR. ROSENBERG—Yes.

THE COURT—Make it more definite, Mr. Tennant.

Q. Did you see the mail that was received and sent out by the Whitehead Company? A. I did.

Q. Did you know anything in regard to the matters about which the company had correspondence at that time? A. Yes, sir.

Q. Did the company owe much money at that time?

MR ROSENBERG—I object, if your Honor please; it is leading.

Q. Do you know whether or not the company owed much money at that time?

MR. ROSENBERG—I object at this point; here is testimony calling for hearsay information; here is a man, nothing more than an office stenographer; the next thing,

I think, to an office boy in the place, and they try to prove by him as to whether the company owed money.

Q. What was your position there?

THE COURT—He has already testified; he said he was a stenographer and office man; isn't that what you said (addressing witness)?

THE WITNESS—I said stenographer and general office assistant.

Q. Did you have anything to do with the books of the company at that time—make entries in them? A. I didn't make entries, but I assisted at the books

Q. Under whom? A. Mr. Whitehead.

Q. Do you know whether the company owed any money or not at that time to creditors of the Whitehead Machinery Company? A. I do.

Q. Did you have any conversation with Dr. Hageboeck, the President of this company, in the month of August or September, 1905, in reference to the company's affairs? A. Yes, sir.

Q. Please state what that conversation was? A. The Doctor came to me and asked me if I was able and knew the condition of affairs to wind up the affairs of the company, as he was not satisfied with the condition of the company.

Q. Did he say why he was not satisfied? A. Because they were not making any money.

Q. Do you know whether there were many meetings of the Whitehead Machinery Company during the month of September, 1905?

MR. ROSENBERG—I object; that is a leading question.

By the Court.

Q. Do you know whether there were any meet-

ings in the month of September, 1905? A. There were several informal meetings.

By Mr. Tennant.

Q. Were those four directors present at all those meetings in September, 1905? A. Not together.

Q. At different times? A. At different times.

Q. Did they come there and talk with Whitehead about the company's affairs? A. Yes, sir.

Q. Did you hear any of the conversation they had with Whitehead? A. Sometimes.

Q. Did these men know—can you state what you heard, and if so, please state what you did hear—as to what these gentlemen, Hageboeck, Schmidt, Becker and Roddewig knew as to whether the company owed money to its creditors?

MR. ROSENBERG—I object as to what they knew; this witness cannot testify to it.

Question overruled.

Q. Did you hear any of the conversation between these men—Hageboeck, Becker, Roddewig and Schmidt, on one part, or any of them, with Whitehead in reference to the financial condition of the company? A. Yes, sir.

Q. Please state what you heard? A. Well, there was an inquiry as to the prospects of making sales, and he wished to know whether or not certain sales in prospect—

MR. ROSENBERG—I object to the answer, because he is evidently stating a conclusion of his own mind; he does not state the conversation at all.

Q. State what was said—what Whitehead said to them, and what they said to him?

MR. ROSENBERG—I ask that the previous answer be stricken out.

THE COURT—Strike it out.

Q. What did they say? A. They wanted to know why the company was not able to—

Objected to.

Q. Who asked this question, and of whom? A. Dr. Hageboeck.

Q. Asked it of whom?

MR. ROSENBERG—I ask that the previous answer be stricken out.

Motion granted.

Q. What did he say when he asked that question? A. He wanted to know why certain prospects didn't develop into sales.

Q. What did Whitehead tell him? A. He always held out encouraging words—

MR. ROSENBERG—I object to the answer and ask that it be stricken out.

THE COURT—Cannot you be more specific? I will have to strike the answer out.

Q. What did he say? A. I don't know as I can give it any more specific than I have; he inquired why certain prospects didn't develop into sales.

MR. ROSENBERG—I move to strike that out.

Q. Don't you know what the certain prospects were? A. There were several coming in; they were inquiries.

Q. What did they say was the trouble with the company; what did they say about that? A. They were much dissatisfied because—

Objected to, and motion made by plaintiff's counsel to strike out. Motion granted.

Q. What did they say; what were their words, as nearly as you can give them? A. Well, I can't

state it verbatim; I can only state of my own knowledge.

Q. As nearly as you can state, what did any of these four men say to Whitehead or he to them; please give it in that way? A. The Doctor told Mr. Whitehead if he was not able to do any business something would have to be done toward ending, winding up the affairs of the company; that is about the words he used.

Q. Was the company doing any business at that time? A. Very little.

Q. Did Whitehead say to you anything about the condition of the company. A. Very frequently.

Q. What did he say as to the then condition of the company, in August and September, 1905? A. He said if he was not able to land something very shortly he would simply have to quit.

Q. Did he say why? A. Because he was not able to meet the obligations of the creditors of the Whitehead Machinery Company.

Q. Is that what he said?

MR. ROSENBERG—That is what you thought he meant.

MR. TENNANT—Mr. Rosenberg, I am cross-examining this witness.

Q. Do you know how much money the company owed you at the time you left the company's employ? A. In the neighborhood of thirty dollars.

Q. Was there any machinery in Davenport that this company owned that could have realized that sum?

MR. ROSENBERG—I object, as being a leading question, and also as calling for an opinion of the witness.

THE COURT—You will have to ask what machinery there was.

Q. What machinery was there in Davenport, do you know? A. They had three or four Corliss engines?

Q. Do you know the value of them? A. I know the price they were trying to get for them?

Q. How much were they trying to get for them? A. We never asked for figures on the several engines collectively—individually—

Q. Separately, then? A. Well, the number of engines that we had there, would bring about—

MR. ROSENBERG—I object to the answer.

Q. What were they trying to get for them, if you know? A. About between $4,000 and $5,000 for the whole amount of machinery there.

By the Court.

Q. You say they had three or four Corliss engines, and were trying to get $4,000 or $5,000 for all of them; is that right? A. Yes, sir.

By Mr. Tennant.

Q. Do you know whether the company had any property elsewhere, outside of the Jersey City engines? A. Yes, sir.

Q. Where? A. Ansonia, Connecticut.

Q. Do you know whether there was anything due against that property in Ansonia, Connecticut? A. Yes, sir.

Q. What was there due against it? A. About a thousand dollars.

Q. For what? A. For the Corliss engines and some other machinery there; that is, a cash purchase.

Q. Do you mean to say that they owed a thousand dollars on that property? A. Yes, sir.

Q. Do you know of any arrangement that was made as to receipts of the company going to Dr. Hageboeck, and if so state what that arrangement

was and how it was carried out? A. Receipts?

Q. Yes; moneys due the company, claims due? A. I don't quite understand you.

Q. You know what receipts are? A. Yes, sir.

Q. You know that the company had some money due to it? A. Yes, sir.

Q. Of that money that was due to the company, did Mr. Hageboeck get any part of it? (No answer.

THE COURT—The money that was collected?

THE WITNESS—Yes, sir.

Q. What was that arrangement?

MR. ROSENBERG—What arrangement; who made it, and whom was it between?

Q. Between whom was the arrangements made that you now refer to? A. With the Doctor, wh made a number of the collections.

Q. Yes, who made that arrangemen? A. That arrangement was made at the creditors' meeting in 1904.

Q. Was that carried out during the year 1905? A. That agreement was not carried out.

Q. Did Dr. Hageboeck collect any part of the moneys which were due to the company before the proceeds went into the company's treasury? A. Sometimes.

Q. Did Whitehead know about that? A. Yes, sir.

Q. And did Whitehead do anything or say anything to you about moneys which were due the company; did you try to collect any money due the company? A. Yes, sir.

Q. Do you remember if any checks came there? A. Yes, sir.

Q. What did Whitehead tell you to do with those checks? A. I got them cashed; yes.

Q. What did you do; put them in the company's

account, or what did you do with them? A. Used them to pay off certain indebtedness.

Q. To whom? A. To the creditors in and about town.

Q. Did those checks go through the company's account, that is what I want to know; did you cash those checks? A. Yes, sir.

MR. ROSENBERG—I object to all this line of cross-examination; it is immaterial and irrelevant.

THE COURT—The question is as to the solvency of the company, I suppose, Mr. Rosenberg?

MR. ROSENBERG—If it has anything to do with the solvency of the company, it is so remote I can't see it.

Q. When those checks came in, what did you do with them? A. I had them cashed.

Q. Who cashed them? A. I cashed part of them.

Q. What was the purpose of your cashing those checks instead of having them put through the company's account? A. So the Doctor would not have to sign any checks; we used the cash to pay off certain indebtedness.

Q. Did the Doctor get any special privileges with the money that went into the company's treasury? A. Under the agreement it was agreed he was to receive fifty per cent. of the gross profits for advancing certain moneys.

Q. When you got these checks, under Whitehead's suggestion, instead of putting them in the company's credit you would go out and cash the checks; am I right? A. Yes, sir.

Q. And bring the money to Whitehead? A. Yes, sir.

Q. So that Whitehead or Hageboeck, the President, would not get the fifty per cent. of the receipts; is that right? A. Yes, sir.

Q. Why had you had so much trouble collecting moneys due the company at that time?

THE COURT — He has not said he had trouble.

Q. Did you have any trouble? A. Yes, sir.

Q. Why did you have any trouble? A. Because they were dissatisfied.

Q. You left the company, I understand, September 30th? A. Last year; yes, sir.

Q. Did you have a talk with Whitehead about October 2, 1905? A. Yes, sir.

Q. Did he tell you anything about what the directors then contemplated doing with the company? A. Yes, sir.

Q. What did he say they were going to do?. A. He said they intended to pay off the notes held by the Citizens National Bank.

Q. What did you tell him? A. I asked the object in paying the notes, since they were not due.

Q. What did he say? A. He said he wanted to get them out of the way.

Q. Did you tell Whitehead what you knew about it—when the notes became due? A. I told him they were not due as yet.

Q. Did you tell him when they were due—the notes? A. I didn't tell him so; no, sir.

Q. Did you know? A. Yes, sir.

Q. Had you seen that note when it was made? A. Yes, sir.

Q. How did you happen to see it? A. I brought it around to the different directors for their endorsement.

Q. After the note was made by the company? A. Yes, sir.

Q. You took it around to the various men, did you? A. Yes, sir.

Q. At the time you left the company did you know anything about any money which was due the bookkeeper of the company? A. Yes, sir.

Q. Who was that bookkeeper? A. He was an auditor by the name of Mr. Nast.

Q. How much did the company owe him? A. Thirty dollars.

Q. Do you know whether he had been making any efforts during the time you were there to collect that money? A. Yes, sir.

Q. What efforts? A. He had written letters requesting payment.

Q. Did you see letters come there? A. Yes, sir.

Q. Did they pay his claim up to the time you left there? A. No, sir.

Q. Why didn't they pay him? A. They didn't have the money.

Q. Do you know whether the company tried to get the money to pay him? A. Mr. Whitehead—

Q. Was he able to get it? A. He was trying to borrow money.

Q. To pay this young man? A. And other debts.

Q. Do you know whether any other money—did the company owe you in the fall of 1904, any money for wages—about the time of that creditors' meeting? A. Yes, sir.

Q. During the year 1905, up to the time when you left there, will you please state what your wages were, Mr. Johnson? A. My wages were $17.50 per week, until some time during the spring of 1905, when they were $20.

Q. Did you get paid every week regularly? A. No, sir.

Q. Why? A. Because they didn't have the money.

Q. Did you get anything on account? A. Occasionally.

Q. What was the method of paying you? A. I would get the money when they would have it.

Q. For six months prior to the time that you left there did the company do any actual business, buying new machinery? A. They made one purchase.

Q. Do you know why they didn't buy any other machinery? A. Because they didn't have the cash.

Q. Do you know of an engine at Pawtucket, Rhode Island, that they had? A. Yes, sir.

Q. How much had they paid on account of that engine, do you know? A. In the neighborhood of $500.

Q. Do you know whether the company made any efforts to get that engine up to Davenport, Iowa? A. It could not be moved because there was money still due on that engine.

Q. Did they have any tube boilers at Waterbury, Connecticut? A. They had some tubular boilers there, yes, sir.

Q. Do you know how much they owed on those boilers? A. Well, a thousand dollars.

MR. ROSENBERG—Mr. Tennant, are you putting this in for the purpose of showing fraud, or merely on the question of the solvency or insolvency of the corporation?

MR. TENNANT—I want to show by this witness that this company was absolutely insolvent for the whole of 1905?

MR. ROSENBERG—Then I object to this whole line of testimony on the ground that it is entirely immaterial and irrelevant, because it makes absolutely no difference, under the laws of the State of Iowa, whether or not this company was

solvent or insolvent. If that is the question—if the question is one of fraud, there might be something said about it; but on the question of insolvency I now object to the whole line on the ground it is immaterial and irrelevant whether this corporation was solvent or insolvent.

MR. TENNANT—I assure the Court, as an officer of the Court, and counsel, that the law is different than testified to by their witness.

THE COURT—I shall be entirely willing to accept that assurance; but if you have the law books here now why not let us have them?

MR. TENNANT—I am pretty nearly through with this witness and would like to do it in the regular order. I assure the Court that I will substantiate my statement that the law of Iowa is entirely different, in the respects to be applied to this case, than that stated in these affidavits by the Mayor of Davenport, Iowa.

MR. ROSENBERG—We have the Iowa cases here.

THE COURT—(To Mr. Tennant)—If you finish the testimony of this witness in five minutes, I will allow you to proceed.

Q. Do you know, in the cases where this machinery at Waterbury was, and at Ansonia, Connecticut, whether the parties who sold that machinery to the Whitehead Machinery Company, were making any effort to collect any balance due for the purchase price of that machinery. A. They were.

Q. Were they able to collect any of it? A. No, sir.

Q. And why? A. Because they didn't have the money to pay it.

MR. ROSENBERG—Will your Honor consider all this testimony as going in under my objection?

THE COURT—Yes. Of course, Mr. Rosenberg, if your decision is supported, the jury will be instructed to disregard it altogether.

Q. Had the company been trying to dispose of any of these machines for a year? A. Yes, sir.

Q. Had they been able to sell any of the machinery? A. Not those located at the points mentioned, namely, Ansonia and Pawtucket.

Q. Why didn't they sell it, if you know; could they sell it? A. They couldn't sell it at a profit.

Q. Were they able to sell it for the amount they paid for it? A. No, sir.

Q. Do you know Mr. Murphy, of Murphy & Susmill? A. I do.

Q. What is his business? A. Attorney.

Q. Was he employed by the Whitehead Machinery Company to do any of its business at the time you were there? A. Yes, sir.

Q. Did they continue to represent the company up until the time you left there? A. Yes, sir.

Q. Do you know Mr. Dorrance? A. Yes, sir.

Q. Do you know whether or not the company owed him any money? A. Yes, sir; I do.

Q. Do you know whether any effort was made for or in his behalf to collect any notes which he held of the Whitehead Machinery Company? A. Yes, sir.

Q. Did they collect them? A. They did not.

Q. Did you ever hear Mr. Whitehead, of the Whitehead Machinery Company, talking about the Dorrance claim? A. Yes, sir.

Q. What did he say about it? A. He said he would like to pay it if he was able to pay it.

Q. I show you a letter dated March 21st, 1905, addressed W. F. Parish, Chicago, signed Whitehead Machinery Company, W. W. Whitehead, General Manager, and ask if you will please state whether you have ever seen that letter before? A. (Witness looks at letter.) Yes, sir; I have.

Q. Did you write that letter on the typewriter? A. Yes, sir.

Q. Who dictated it? A. Mr. Whitehead.

Q. Is that his signature at the foot of the letter, or his stamp? A. Yes, sir.

Q. Did that letter go out in the usual course of mail? A. Yes, sir.

Q. Do you remember shortly before the time you left the company in September—shortly before you left the office of the company—seeing any attorney representing the Indianapolis Gas Company come there to the Whitehead Machinery Company? A. Yes, sir.

Q. Whom did he talk with? A. Myself.

Q. Was Whitehead there? A. No, sir.

Q. What did that man go there for, to the office of the Whitehead Machinery Company? A. For the purpose of collecting a note which the Whitehead Machinery Company owed the Indianapolis Gas Company.

Q. How much was that note? A. About $1,000.

Q. Do you know whether that attorney, while he was there, from Indianapolis, Indiana, talked with Dr. Hageboeck in reference to that indebtedness which was represented that by note? A. He told me he met the Doctor.

Objected to by plaintiffs' counsel and motion made to strike out. Granted.

Q. Did you see him talking with Hageboeck? A. No, sir.

Q. Did you see him talking with Whitehead? A. No, sir.

Q. Did you see him talking with either of these four men? A. No, sir.

Q. This letter which you say you wrote for Mr. Whitehead, do you know whether just before that letter was sent by the Whitehead Machinery Company to Parish, any letter had been received by the company from Parish? A. Yes, sir.

Q. Was any money due by the Whitehead Machinery Company to Parish at about that time? A. Yes, sir.

Q. What was that for? A. Commissions on sales and in regard to the purchaser.

Q. Do you know whether Parish had tried to get his money? A. Yes, sir.

Q. Had he been able to get? A. Part of it.

MR. TENNANT—I offer that that letter in evidence now.

MR. ROSENBERG—I have no objection.

Letter admitted and marked D 1.

Cross-examination by Mr. Rosenberg.

Q. Where do you live now? A. Chicago, Illinois.

Q. Whom do you work for? A. Maxwell-Briscoe-Chase Company.

Q. Who are they? A. Automobile makers.

Q. Is Mr. Moore connected with them at all? A. No, sir.

Q. Mr. Parish? A. No, sir.

Q. Mr. Dorrance? A. No, sir.

Q. How do you happen to come here all the way from Chicago to testify? A. On the train.

Q. Who asked you to come? A. Mr. Moore.

Q. You came to please Mr. Moore? A. I did.

Q. Are you related to Mr. Moore? A. No, sir.

Q. Why didn't you testify in Chicago when some other witnesses of Mr. Tennant testified in Chicago? A. I did testify in Chicago at one time.

Q. Recently? A. I don't remember the date; probably a couple of months ago.

Q. You made an affidavit in Chicago—that is what you mean when you say you testified? A. Yes, sir.

Q. In a chancery suit? A. I believe so.

Q. You didn't testify last Saturday, did you, when testimony was taken in Chicago? A. No.

MR. TENNANT—No; he went to Davenport, Iowa, and we could not get him; that is what the record will show.

THE WITNESS—A week ago Saturday I was in Davenport.

Q. Mr. Moore is paying you for coming on to testify, is he? A. He pays my railroad fare.

Q. He pays your railroad fare and your expenses while you are here? A. Yes, sir.

Q. You remember this note for $9,250; you took it around and had these directors endorse it: Mr. Schmidt, Mr. Roddewig, Mr. Becker and Dr. Hageboeck—didn't you? A. Yes, sir.

Q. And you saw them endorse it? A. Yes, sir.

Q. And that note was taken in the renewal of the other notes which these gentlemen had given? A. Yes, sir.

Q. And those notes were given in connection with the purchase of this machinery from the Edison Company—wasn't that it? A. Yes, sir.

Q. And you know the fact to be, Mr. Johnson, that these four gentlemen pledged their credit to enable the company to purchase this machinery from the Edison Company; that is the fact, isn't it?

Objected to as not proper cross-examination.

THE COURT—This whole connection of these gentlemen with the company is a fair inquiry. (To witness)—Answer it.

WITNESS—Whether I know of their connection with it?

THE COURT—You knew that they went on the note to help the company purchase the machinery?

THE WITNESS—Yes, sir; that was for that purpose.

Q. During the time that you say they were trying to sell this various machinery, they then had this machinery at Davenport, at Ansonia, and at other places, which they were not able to sell? A. Yes, sir.

Q. That was the difficulty, wasn't it, that they were not able to turn it into money at once—wasn't that the trouble? A. They could not sell it; no, sir.

Q. It was a case where there was a deficiency of quick assets? You know what I mean by "quick assets," don't you? A. Yes, sir.

Q. Assets that could not be turned into cash at once; that was the whole trouble wasn't it? A. Yes, sir.

Q. You know Dr. Hageboeck personally? A. I know Dr. Hageboeck; yes, sir.

Q. Do you know his standing in Davenport? A. It is good, as far as I know.

Q. A physician of large practice, isn't he?

Objected to as immaterial and irrelevant.

THE COURT—I do not quite understand the purport of the witness' testimony which relates to the Doctor taking fifty per cent. of the receipts of some sale or

other; that was to secure himself for some advances he had made.

MR. ROSENBERG—It seems that Mr. Whitehead put some money through without having it go into the bank, so that Dr. Hageboeck would not get this fifty per cent., so that these people could get their salaries and they could pay their debts around town, and Hageboeck would not get in on this money, wasn't that it?

THE WITNESS—Yes, sir.

Q. How many rooms were there in the offices of the Whitehead Company. A. Four.

Q. How were they located with reference to each other? A. Two on one side of the hall and two on the other.

Q. Where was Mr. Whitehead's office? A. The room, the left door of the office; there are two doors; this was the left.

Q. Who was in that room besides Whitehead? A. I was in the room part of the time, except when he received callers.

Q. Where was your office? A. In the next room.

Q. So that you were not in the same room with Mr. Whitehead, were you? A. Not all the while.

Q. How did you happen to hear, then, the conversation which took place between Mr. Whitehead and the other people? A. I was in his room part of the time.

Q. What were you doing in the room part of the time? A. I was called in.

Q. To listen to those conversations? A. Sometimes.

Q. Why were you called in to listen to those con-

versations? A. I was called in to ask my advice on some subjects.

Q. What advice were you competent to give? A. Whether it was advisable to sell certain machinery at a reduced figure or not.

Q. And the conversations you have testified to were had at the times that you were in there, when you were called upon to advise as to the sale of certain machinery? A. Sometimes called upon; sometimes I was in and people came in.

Q. And sometimes you were in the other room and listened? A. Sometimes.

Q. When did you buy these five shares of stock that you own? A. The latter part of 1903.

Q. How much did you pay for them? A. $500.

Q. Par value? A. Yes, sir.

Q. And have you those five shares yet? Have you? A. I have.

Q. Whom did you buy them from? A. From Colorado.

Q. You left the company on the 30th of September, 1905, was it? A. Yes, sir.

Q. Why did you leave? A. Because I saw what was coming.

Q. Had you got your salary? A. Because the company was about to fail.

Q. At least you thought so? A. I knew it.

Q. Had your salary been paid you? A. Yes, sir.

Q. You did get your salary up to that time, did you? A. I did; I was fortunate.

Q. Then you went to Chicago? A. Yes, sir.

Q. Weren't you discharged? A. I was not.

Q. You did have a row with somebody there, didn't you? A. I did not.

Q. Sure of that? A. I know it.

Q. Not with Mr. Whitehead? A. Not with Mr. Whitehead.

Q. Not with someone else in the office? A. No, sir; I left there in a very pleasant time.

MR. ROSENBERG—I am prepared now to take up that question that your Honor spoke of, as to the materiality or importance of the solvency of the company.

MR. TENNANT—I submit I have a right to put in my case as I choose; I respectfully submit that I have that right.

THE COURT—No; you have not entirely the right to direct your own case, because the Court has the right to say that if any testimony depends on other testimony for its relevancy and materiality, the testimony on which it depends shall be offered first.

MR. TENNANT—May I answer that, if your Honor please? I assure the Court that I have prepared the case with certain facts which I want to present to the Court and jury; they have had their affidavits to show what the law of Iowa is, after presenting certain facts, and I now propose to do practically the same thing; I want to show the condition of the company, and then I desire by the law of Iowa—some of these books which they bring here—to show what the law of Iowa really is.

THE COURT—Are you going to show it by this witness?

MR. TENNANT—No, your Honor.

THE COURT—The Court is very anxious that you show it. I think you would better offer the law first.

Mr. Tennant reads in evidence letter admitted and marked D 1.

WILLIAM F. PARISH, resumed:

By Mr. Tennant.

Q. At that time, were you advised to present your claim against the Whitehead Machinery Company? A. I was.

Q. How much did the Whitehead Machinery Company owe you about that time?

MR. ROSENBERG—Will your Honor consider this all subject to my objection?

THE COURT—I suppose so, Mr. Rosenberg. I am very anxious to get through with this witness.

A. Something about $1,500.

Q. And the Whitehead Machinery Company owe you that sum? A. Yes, sir.

Q. Have you entered a judgment against the Whitehead Machinery Company for that sum? A. I have.

Q. Have you received any part of it? A. No, sir.

Cross-examination by Mr Rosenberg.

Q. This indebtedness to you was due before this letter that has been offered in evidence was written and they owed you money at that time? A. Yes, sir.

GEORGE H. CARR, called and sworn for defendants, testifies as follows:

Direct examination by Mr. Tennant.

Q. Judge, where do you live? A. I live in Des Moines, Iowa.

Q. That is the capital of the State of Iowa, is it? A. Yes, sir.

Q. Are you by profession an attorney and counsellor at law? A. I am.

Q. Practicing in Iowa at this time? A. Yes, sir.

Q. Have you held any public position in the State of Iowa? A. Yes, sir.

Q. And have been a member of the Courts of Iowa? A. Yes, sir.

Q. For how long were you a Judge of Iowa?

MR. ROSENBERG—Of what Court?

A. I was elected to the District Bench of Iowa in 1886, I think; I began my term the first of January, 1887, and served one term—in our State four years is a term; I was re-elected and served a part of the second term—about three years—and then I resigned to go back into practice.

Q. So that for seven years continuously you were on the Bench in Iowa? A. Yes, sir,

Q. Of what Court? A. The District Court.

Q. Where did you sit as a Judge? A. In the County seat of the various counties in my district; there were eight counties in my district.

Q. You resigned as Judge, I understood you to say, to again engage in the practice of law? A. Yes, sir.

Q. Did you take up the practice of law in Des Moinies? A. Yes, sir.

Q. Do you still practice law there? A. I do.

Q. Are you acquainted with the laws—both statutory and judicial decisions—of the State of Iowa? A. Yes, sir.

Q. Are you acquainted especially with the rules applicable to corporations of the State of Iowa making preferences to directors of corporations? A. I have had more or less information in regard to it, and have recently examined the cases that I find on the subject, which have been decided by our Supreme Court.

Q. Are you acquainted with the opinion in the case of Garrett vs. Plow Co., which has been read here to-day? A. Yes, sir.

Q. Has that ever been criticised in any of your Courts since it was determined? A. It has been.

Q. Will you state where? A. In the case reported in the 101st Iowa, entitled In re Assignment Woolen Mills; I have forgotten what town—Greenfield Woolen Mills, I think.

Q. Have you the page? If you can give it to me it will save a little time.

MR. ROSENBERG—Page 189.

Q. Have you read the testimony on commission in this case, on the part of the plaintiffs, of Mr. Becker, an attorney, and one of the plaintiffs in this case—an attorney of the State of Iowa? A. I heard it read, when it was read here in Court.

Q. Mr. Becker, in his testimony, says:

"The same doctrine is declared In re Assignment Woolen Mills, 101 Iowa, page 189, in which Deemer, J., uses the following language: 'Another point is made that the beneficiaries in the mortgage are directors of the corporation, and that as such they could not take security to the prejudice of other directors. This question seems to be settled adversely to the appellants in the case of Garrett v. Plow Co., and some other cases.'"

With the case of In re Woolen Mills now before you, and Judge Deemer's opinion, do you find anything further said, immediately after the paragraph which I have read, which in anyway qualifies it?

A. Immediately following the sentence which you have read, Judge Deemer, writing for the Court, uses this language:

"The writer of this opinion is inclined to doubt the correctness of the general rule adopted in these cases, but does not find it necessary to do more

than this, in this particular case, forthe reason that he thinks that under the facts disclosed it is a proper rule to be applied."

Q. Have you, in your knowledge and experience as a counsellor in the State of Iowa, and in your experience on the Bench, any expression to make as to the state of the Iowa law when a case next comes before these Courts, similar to the case of Garrett v. Plow Company?

MR. ROSENBERG—I object—that is an expression of a view.

MR. TENNANT—(To Witness). In view of the expression of Judge Deemer, to which you have just referred.

THE COURT—Do you mean you are asking the opinion of the witness as to what the Iowa Courts—

MR. ROSENBERG—As I understand it, Mr. Tennant is trying to get the witness to forecast an opinion of the Supreme Court of the State of Iowa which will come up hereafter.

THE COURT—If that is what Mr. Tennant wants to get from this witness, the question will be overruled.

MR. TENNANT—I am trying to get at what the Iowa law is.

MR. ROSENBERG—The best way to get it is from the volumes of reports.

MR. TENNANT—You did not seem to think so when you quoted it in your Western attorney's affidavit, leaving out an important part of the opinion.

THE COURT—This witness is here as an expert on the law. Why don't you ask him what the law is?

Q. Assuming that there is evidence that a corporation is insolvent, and that there are four or any number of directors of that corporation—can that corporation, under the laws of Iowa, prefer those directors as creditors; and if so, please state under what conditions and under what qualifications?

MR. ROSENBERG—I object, on the ground that the question has been determined by the decisions of the State of Iowa, and that this is calling for an opinion, when the question is a settled one in the decisions.

THE COURT—He may answer.

Exception taken by Mr. Rosenberg.

A. To answer the question very broadly, I would say that the Supreme Court of our State—which, of course, is the authority that we look to for the statements of the law—held in the case that has been referred to and reported in the 70th Iowa—namely the case of Garrett, Trustee, v. Burlington Plow Co.—that where the directors of a corporation are creditors of the corporation, where a bona fide indebtedness exists between the corporation and the directors, that is to say, where the corporation is the debtor and the directors are creditors of a bona fide indebtedness—the consideration for which indebtedness has gone to swell the assets of the corporation or has been used in the business of the corporation—that in the case of the insolvency of the corporation the director may take security, preferring himself to other creditors. Now, the same rule was announced in various cases or suits; so far as I am aware, the rule was never questioned in our State until the case referred to as the case of In re Woolen Mills, reported in the 101st Iowa. In that case Judge Deemer, after referring to the rule, and saying that it had been settled by these other cases,

went on to remark that so far as the writer of the opinion was concerned, he doubted the soundness of the rule, but that in that particular case he had no occasion to do more than that, and passed it by for the reason that in that particular case the indebtedness of these directors was secured by some property that was taken with the assent and knowledge—and, if I remember the facts correctly in the case—by the agreement of the creditors, the creditors at large, who were subsequently questioning the validity of the transaction. Now then, of course, I am not a prophet, and cannot forecast with any degree of certainty what the Supreme Court may hold when the question is again before them. So far as I know, the question has never, since the case reported in the 101st Iowa, been directly before the Supreme Court; but if I could give my opinion as to what the law of Iowa is today upon that subject, in the light of that criticism, and basing my conclusion, of course, in part on the principle involved and the authorities, and the great weight of authorities in our State, I would have an opinion as to what the Supreme Court would hold.

Q. Assuming, in a given case, that a corporation makes a note, has it endorsed by four of its own directors, and that a period of about three weeks or almost four weeks before that note becomes due, these four endorsers go the bank where that note is made payable, after having passed a resolution or made an arrangement with the General Manager of that company to buy a portion of the company's assets—for which the original note was given—will you please state whether, under the laws of Iowa, and under the case of Garrett v. Plow Co., and In re Woolen Mills which has been referred to by you, as well as any other case that you have in mind on the general law of the State of Iowa, the relation of debtor and creditor, so far as the company is con-

cerned, and those endorsers are concerned, exists in that case? A. As I understand, you put this question to me, as I may state it in the abstract. Where a corporation borrows money and its directors become either sureties or guarantors or endorsers upon the note—

THE COURT—May we have it a little broader than that? A corporation wishes to buy property but has not the money with which to buy it; the corporation makes its note for the value of the property, which is endorsed by the directors, discounts it, and the money is used to buy the property; subsequently the directors pay off the note before maturity, they being endorsers of it, and take over the the property in consideration of that payment by virtue of the agreement of sale, under those terms, with the General Manager of the corporation. Have I made it clear?

MR. TENNANT—Whether the relation of debtor and creditor has existed between the company and those endorsers.

THE WITNESS—In my opinion, the relation of debtor and creditor does not exist between the company and the directors, and this rule that we have been talking about, in my judgment, would not apply because that is based, is founded, upon the proposition or bottomed upon the proposition that there is an indebtedness existing.

Q. Is there any case in Iowa, to which you can now refer, which holds that sureties or endorsers are not creditors of the party to whom the debt is due? A. In the case of Dennison v. Soper, in the 33rd

Iowa, the principle is announced that a surety does not sustain the relation of creditor to his principal, and it is only after he pays—is called upon to pay—the debt that he owes to the party to whom the obligation is given—when he owes a surety—when the money is paid—then and only then does the relation of debtor and creditor arise between the surety and his principal; and that relation arises, as was held in another case—to which I can give you a reference, if you desire—not because of the written obligation, but because of the promise which the law implies in favor of the surety, growing out of the fact that he has paid, for the benefit of his principal, money.

Q. In the case of Garrett v. Plow Co., and In re Woolen Mills, to both of which cases you refer, does the question of good faith enter into the individual case passed upon by your Court? A. Very largely; and if permissible, I would like to quote the language.

Q. Will you please refer to the volume before you and point that out?

THE COURT—Is there any question on the other side that the existence of good faith is material to the validity of the transaction?

MR. ROSENBERG—I suppose the existence of good faith, is certainly—I suppose everything must be in good faith; good faith is presumed in every case.

THE COURT—The question now being addressed to the witness, is whether the element of good faith must be considered to be present.

MR. ROSENBERG—Then, if that question is put, I would like to know just exactly

what is meant by good faith. What is the meaning of good faith?

THE COURT—I do not know that there has ever been any definition of good faith, any more than there has been a definition of fraud.

MR. ROSENBERG—Then, suppose the witness says what good faith means in those cases. If good faith is synonmous with fraud, if that is the point, then I think that is true; there must be no fraud in it.

THE WITNESS—I can say to counsel that I can quote the language used by Judge Beck, in speaking of what he considers good faith.

MR. ROSENBERG—Suppose you read the case in the 70th Iowa. I am perfectly willing to rest upon Garrett v. The Plow Co., and would be very glad to have you read it.

A. (Book handed witness.) Speaking in the opinion, as to this rule we have been talking of, he continues by saying:

"Counsel for defendants admit this proposition with the exception, in the case of the insolvency of the corporation, they insist that the directors of an insolvent corporation cannot take from its security, by mortgage or other conveyance creating a lien upon it, property even though given in good faith and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor, free from any

claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in good faith and on an honest presumption. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security. If the property, money or other consideration of the debt was fairly used for the benefit of the corporation, and was added to its assets or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors"—

I may say that this question arose on a demurrer to the answer.

THE COURT—In equity?

THE WITNESS—No; in a suit at law, if I remember right, your Honor. (Continuing.)

"It is not shown, in the answer of defendants, that there was any bad faith or dishonest practice on the part of the creditor for whom plaintiff is trustee, in becoming creditors of the Plow Company, and taking security from it. It is true that the courts will scan with care, and even with suspicion, such transactions, and demand that they be accompanied by the utmost good faith. This answer makes no charge," etc.

That is the language used by Judge Beck in defining what our Courts meant at that time as good faith—that they would scan the transaction "with care and even with suspicion."

Q. Now, Judge, under the laws of Iowa and the decisions as you understand them, suppose it were proven that the company were insolvent; that its directors were resolved practically within a very short time to go out of business; that a note which the company had executed, about a year prior to that time, had been endorsed by them; that three or four weeks before that note became due they made an arrangement, with the General Manager of that company, to take over $10,000 worth of its property in a foreign city; that to pay for that property they went to the bank at which the note to which I have referred was discounted, paid the indebtedness to the bank, then took a receipted bill for that machinery—in the given case which I have placed before you, please state, under the laws of Iowa, whether the question of good faith is one to be determined in that particular case, according to all the circumstances in that case, by the fact-determining body?

MR. ROSENBERG—I object to that question as indefinite, and moreover, as improper; and lastly, as in the other, immaterial, because all evidential questions must be determined by the law of the forum. Now, as to who is to determine such a question in the State of Iowa is utterly immaterial; we determine the question for ourselves.

Question overruled.

THE COURT—Do you maintain that there is a question of good faith?

MR. TENNANT—I want to show, under their

decisions, that it becomes a question of good faith to be determined by the fact-determining body of the Court, whether or not good faith was exercised in the transaction.

THE COURT—Is there any question about that, Mr. Rosenberg?

MR. ROSENBERG—I do not know—

THE COURT—(Addressing Mr. Rosenberg.) That is not a matter to go to this jury, that good faith was exercised?

(Mr. Rosenberg repeats his contention, that it is a question for the forum.)

THE COURT—I will warn you at this time, that I expect to tell this jury, that under the circumstances, they must consider all the facts and determine from them whether the plaintiffs in this case exercised good faith.

MR. TENNANT—If your Honor states that, I will not press my question; that is all I want in this case.

Q. In the case put to you in the hypothetical question, as to the liability of these four directors as endorsers, do you or do you not find, under the laws of Iowa, a relation of debtor and creditor existing?

THE COURT—He has already said he did not.

MR. TENNANT—I do not think he answered it specifically.

A. No relation of debtor and creditor at any time or during any stage of the transaction, as I regard or understand the law of our State.

THE COURT—And after they had paid the note; how as to that?

THE WITNESS—As I understand the law of our State to-day, it would not create the relation of debtor and creditor, because, as I understand the question, the money was paid for the machinery which they had expected to use in payment of the note—the consideration for money which they paid into the bank, and which was the transfer of the property to them; that is why I made the distinction.

Q. In other words, this money has got to go into the treasury of the company to swell its assets; am I right? A. Well, of course the relation of debtor and creditor might otherwise arise; but what I had in mind, in speaking about the necessity of the money going into the company to swell its assets—that is necessary, under the rules announced by Judge Beck, to make the transaction a good faith transaction.

Q. Is there any provision under the laws of Iowa, as to how the powers of a General Manager of a corporation may be determined, or are determined? A. I know of no law peculiar to the State of Iowa, in which such a question is determined.

Q. If you were organizing a corporation, looking into the affairs of a corporation, how would you determine, under those laws, the powers of a General Manager? A. Well, I perhaps would examine their articles of incorporation, their by-laws, if they had any; their proceedings of their Board of Directors.

Q. Is there any provision by the laws of Iowa in reference to the amount with which a company may become indebted? A. There is.

Q. Will you please state what that law is? A. The statutory law of the State of Iowa fixes that,

and I suppose speaks for itself. It provides that the indebtedness of a corporation shall be limited to two-thirds of its capital stock, which means its actually-issued and paid-for capital stock, and not its authorized capital stock.

Q. If, then, a corporation is capitalized at $25,000, the limit of its indebtedness—that is to say, the amount to which they can owe—would be limited to two-thirds of $25,000; am I right? A. Yes, sir.

By the Court.

Q. What becomes of creditors who loan them more than that? A. The indebtedness is valid.

Q. What is the effect of the limitation? A. It is a limitation that is placed upon a corporation; if a corporation exceeds its limit it cannot be held to say it does not owe the debt because the limit is exceeded; but we have in our State, if I may be allowed to state—there is a provision now in our statutes or in our code—which, by the way, I might say has been passed since the decision of the Plow Company case, and may or may not affect the rule—to the effect that a director of a corporation knowingly assenting to the creating of an indebtedness in excess of the limit fixed by law, becomes individually and personally liable to the creditor for the entire excess.

MR. ROSENBERG—An appropriate action has to be brought.

THE WITNESS—I don't know any way you can realize on it without suing for it. There is no way that a corporation can repudiate its indebtedness, of course, simply because it has gone beyond the limit fixed by law.

By Mr. Tennant.

Q. So, then, Judge, as I understand you, the prime thing in all these so-called preferences to directors is, first, good faith on the part of those that created them? A. There must be an indebtedness that has been created in good faith, or the consideration for which has gone into the business or assets of the corporation.

Q. And the facts involved in reference to the transfer of the property—have those to be examined in like manner to find a question of good faith? A. Yes; the whole question becomes one of good faith, and I may say that, as I understand the law of Iowa,—I do not think at this moment I can call attention to a decision;—but, as I understand the law, where this fiduciary relation is shown—upon that being shown, the burden is upon the party seeking to uphold the transaction, to see that it was free from actual fraud.

By the Court.

Q. You practically read that out of the decision, "to scan with care and even with suspicion?" A. Yes; I think the effect of that would be to shift the burden.

By Mr. Tennant.

Q. I do not think the jury could hear you. You say that the burden would be upon the four directors in this particular case to show their good faith? A. The parties seeking to uphold the transaction—after it was once shown that the transaction took place, then the burden would be upon them to show that it was in good faith.

Q. If, added to the hypothetical case which I put to you a few moments ago, of these four men making this preferential assignment of large pieces of property to themselves, it appeared that at the

very time they took over that property they had arranged to sell it themselves—would that be an additional question which your Courts would look into, as to whether or not they were acting in good faith? A. Well, I can only express an opinion on it. I would not have any doubt that they would consider that as a circumstance.

By the Court.

Q. You certainly would? A. I certainly would, if I were on the bench or before the Court.

Cross-examination by Mr. Rosenberg.

Q. I suppose everything that happened at that time would enter into—— A. I think all the transactions would be taken into consideration and carefully scrutinized.

Q. Now, Judge, when you say that the consideration should have been something—a consideration which swelled the assets of the corporation—that would mean, of course, either money or property, wouldn't it? A. I did not quite confine it that way; I said—and I was only quoting in that particular Judge Beck's language—it must go to swell the assets or be used in the business—it must become useful to the corporation.

Q. And it really does not make any difference whether that is money or property? A. Oh, I think not.

Q. It makes no difference, then, whether I give the corporation the benefit, we will say, of a thousand dollars in cash, or give the corporation the benefit of a thousand dollars in property; the result is the same, isn't it? A. I would think so.

Q. Now, you say, assuming that no debtor and creditor relation existed at the time of the transfer of this property and the payment of this note at the bank—then you say the whole transaction resolved itself simply into a sale of this machinery? A. I

do not quite say that, if you are quoting me. I said that in my judgment the relation of debtor and creditor did not arise out of the transaction.

Q. Then it follows that the transaction was a sale, in consideration of these people paying the company's debt? A. I would understand the transaction so to be, as the facts stated that the directors simply used this money to pay off this debt on which they were contingently liable, and a consideration for which was the sale or transfer of the property.

Q. So it was a transfer of the company's property? A. It looks very much like it.

Q. It was either one of two things: it was either a sale of this company's property to these directors, or else it was giving it to them as a preference, one or the other?

(No answer.)

Question withdrawn.

MR. ROSENBERG—If your Honor please, on the question of insolvency, I contend that it is absolutely immaterial, under the decisions of the State of Iowa, whether this corporation was solvent or insolvent.

(Counsel argue as to the admissibility of the evidence of solvency or insolvency.)

MR. TENNANT—I would like to call Mr. Moore.

THE COURT—If you can close the case in ten minutes I will let you put it in.

MR. TENNANT—I think I can do so, your Honor.

MR. ROSENBERG—I object, in a general objection, to all this line of testimony, for the purpose of saving time.

THE COURT—Let it be entered.

OLIVER B. MOORE, called and sworn for defendants, testified as follows:

Direct examination by Mr. Tennant.

Q. Where do you live? A. Chicago.

Q. Are you engaged in business for Mr. Dorrance? A. I am.

Q. Have you had anything to do with the collection of these notes? A. I have.

Q. Did you know Dr. Hageboeck, the President of the Whitehead Machinery Company? A. I do.

Q. Did you meet him in September, 1905, and talk to him about the condition of the company of which he was President? A. Yes, sir.

Q. What was said about the Dorrance claim at that time? A. He said he could not pay it at that time, and that Dorrance would have to wait.

Q. Did he say anything about the financial condition of the Whitehead Machinery Company? A. He said, "We are hard up."

Q. Did he say whether they had any money at that time? A. Yes; he absolutely said he could not see any way out—

Q. Did he say anything about what the creditors of the Whitehead Machinery Company were doing to the company at that time? A. He and Mr. Whitehead both said at that time that every creditor they had seemed to be pressing them all the time for their money.

Q. Did you have a conversation with Mr. Whitehead in Davenport, Iowa, about the 17th of March last year? A. Yes, sir.

Q. Did you talk with him about the condition of the company's affairs? A. Yes, sir.

Q. Did he state that the company had gone out of business? A. Yes, sir.

NO CROSS-EXAMINATION.

TESTIMONY CLOSED.

MR. ROSENBERG—Before Mr. Tennant goes on I would ask your Honor to direct a verdict for the plaintiffs. In the first place, may I ask what does your Honor rule as to the evidence of insolvency; will you let it in or exclude it?

THE COURT—I will allow the evidence to stand as to insolvency, but will treat of it in the charge.

Counsel for plaintiffs prays an exception.

MR. ROSENBERG—I ask your Honor to direct a verdict on this ground: That under the laws of the State of Iowa the corporation had a perfect right to transfer to the defendants this property; that if it was a preference, it was a preference authorized by the laws of the State of Iowa; if not a preference, it was a sale for a valuable consideration, and therefore, on the question of good faith, it has been shown that the property was sold for a valuable and an adequate consideration; that either there was an existing indebtedness or there was an actual valuable consideration. On either ground, I think there is nothing to go to the jury, and I ask your Honor to direct a verdict.

Counsel argue the point.

Adjourned until to-morrow, June 7, 1906, at 10 A. M.

SECOND DAY.

Thursday, June 7, 1906.

Met pursuant to adjournment. Appearances as before.

Mr. Tennant further states his contention to the Court, citing the cases of Redmond vs. Dickinson; Stockton; Gardiner vs. Butler, 3 Stewart, Elkins vs. Camden-Atlantic Railroad, 9 Stewart, p. 470; Savage vs. Miller; Taylor vs. Gray, 59 N. J. Equity; Stewart vs. Lehigh Valley R. R. Co., and other cases.

MR. TENNANT—I move now that the Court direct a verdict in favor of the defendants, on the ground that the transaction was absolutely void; that the directors who brought about this alleged transfer of property in question to themselves, could not in law do so; that there was no consideration passing to the company for the alleged purchase; that it is clear that the alleged tansfer was made at a time when the company was insolvent, and was therefore void.

Mr. Rosenberg replies.

THE COURT—I think I will direct a verdict for the plaintiffs in this case, and I suppose it would be as well to state the reasons on which that verdict is directed. They grow out of the original transaction between the parties, which is not impugned or questioned in any way.

This company was short of money in 1903 and wanted to do business but did not have the capital to support it. There was an opportunity to buy this machinery; it was necessary to put up about $9,000 or $10,000 to get it. The plaintiffs in this case and Mr. Whitehead, five of them, in order to facilitate the operation of the company, endorsed these notes and discounted them, and became themselves liable contingently to pay for the machinery; that is what it amounted to. Joined with this arrangement was the further agreement that the proceeds of any sales of the machinery should be used in satisfaction of the note, as far as they would go. It is true it appears that one sale of machinery was made without the proceeds being so used, but I do not know that that has any probative force as against the assertion of all these witnesses that that was the original arrangement, because it might very well have been and probably

was the situation, that the company needed the money for other purposes and these plaintiffs chose to let it go to those other purposes, possibly considering that the property was still good for the debt. I do not think the jury would be entitled to find that any other contract was made than that which these plaintiffs have set up—that the proceeds of the sales of the machinery were to be applied to the payment of the debt; that seems to be important as bearing on later developments.

The company held this property for two years or over; no more of it was sold; the company had no money to pay the notes, which were finally merged in one note, with the same endorsements upon it. It was the company's debt in the first instance, as I have already said; these endorsers were contingently liable. The final arrangement was that the endorsers should pay off the note, take it up and turn it over to the company, and that in view of that fact, and in view of the cancellation and wiping out of all indebtedness, actual or contingent, of the company, to themselves upon that note, because they had endorsed it, or because they were holders of it, or were to become holders of it, this machinery was to be turned over to them.

The company may or may not have been insolvent at that time. If it was not insolvent it would not be necessary, perhaps, to resort to the Iowa law except so far as concerns the right of a director to have business transactions with a company of which he is a director, but if it was insolvent the Iowa law seems to be ample to sustain the right of directors to take the company's property in satisfaction of debts owed to them by the company, provided the transaction is made in good faith.

It has been said here that the relation of debtor and creditor did not exist at the time of the transaction; it was so stated on the witness stand by

Judge Carr. I think I understand what he meant in his testimony, but feel compelled to differ with him as to his conclusion. The transaction was not complete until these endorsers had taken up the note and were the holders of it, and in fact until they turned the note over to the company. At that time they were the holders of the note as against the company; they were its creditors; they had, to say the least, paid out more than $9,000 for the use of the company, and at its request and on any liquidation of its affairs would be entitled to have their claim audited for that amount. That being the case, the company turned over to them this machinery, and the only question that remains under the Iowa decision is that of good faith. When the law says, as it seems to say in this case, that a corporation may prefer a director as a creditor, or may prefer any person as a creditor, even when insolvent, by transferring to that creditor assets in satisfaction of its claim, provided the transfer is made in good faith, I cannot see that good faith means anything further than that a full, fair and adequate consideration is given for the property.

It is true that the burden of proof in this respect would be on the plaintiffs here, and the main hesitation this Court has had in disposing of this case in this way has been on that burden of proof; and yet, what have we?

The property was bought originally for something less than the amount of the note which these gentlemen endorsed; they also had, I understand, spent some more cash for it; at all events it about balances the account against it. The property had, with one exception, remained unsold, being in storage for more than two years. It was then under the control and subject to the lien of the Pennsylvania Railroad for storage charges and demurrage, and any transfer made of the prop-

erty would necessarily be made subject to that lien, and to the obligation to pay those charges later on.

These plaintiffs took their check books, drew their own checks, and paid their own money in cash, for the purpose of wiping out this debt; they paid their money for the company's benefit; they became creditors of the company; they took property which not only nobody else seemed to be willing to buy at any price, but they took property which it had been originally agreed should be applied in satisfaction of that note, and for the purpose of carrying out the original contract which was made involving its purchase; and so long as the law of Iowa allows directors to deal with a corporation in transactions of this kind, it seems to me the jury would not be justified, on any aspect of the case, in finding that there was any lack of good faith on the part of these plaintiffs.

I feel constrained to direct a verdict for the plaintiffs in this case.

To which ruling, the defendants pray an exception and the same is allowed and signed and sealed accordingly.

C. W. PARKER, J. [L. S.]

EXHIBITS.

EXHIBIT P 1.

DAVENPORT, IOWA, Nov. 1st, 1904.

$138.75
1,250.00

$9,388.75

One year after date Whitehead Machinery Co. promise to pay to the order of Aug. A. Balluff, Cashier, nine thousand two hundred and fifty dollars, at the Citizens National Bank, Davenport, Iowa, with interest from date at the rate of six per cent. per annum, payable January 1st and July 1st, and eight per cent. after the note becomes due and remains unpaid; also all reasonable cost of collection, including plaintiff's attorney's fees, if not paid when due. And it is agreed that any Justice of the Peace shall have jurisdiction to the amount of three hundred dollars if suit be instituted on this note.

Post Office.....

No. 21,957 due.....

WHITEHEAD MACHINERY CO.,
By A. L. Hageboeck, Treasurer.

(Stamped)
Citizens National Bank, Davenport, Iowa.
Paid Oct. 4, 1905. Aug. A. Balluff, Cashier.

(Endorsed on back of note as follows:) The endorsers, drawers and makers of this note severally waive presentment for payment, protest and notice of protest and non-payment of the same.

W. W. Whitehead,
A. L. Hageboeck,
Waldo Becker,
Oswald Schmidt,
Paulo Roddewig.

(Line drawn through each of above names.)

$92.50 interest paid to January 1, 1905.
$277.50 interest paid to July 1, 1905.
$138.75 interest paid to October 4, 1905.

EXHIBIT P 2.

THIS INDENTURE WITNESSETH:—That whereas the Whitehead Machinery Co. (incorporated) is indebted to various persons whose claims it is unable to pay with punctuality and on demand, and,

WHEREAS, It is deemed advisable to make suitable arrangement to preserve the assets of said corporation for the benefit of the various parties in interest. In consideration of the premises and for value received the Whitehead Machinery Co. (incorporated) does hereby sell, transfer and convey unto J. E. Burmeister as Trustee, and to his successors, all of the assets of every kind or nature wherever situated, consisting of machinery, tools, engine boiler, pumps, drive wheels, heaters, located at Iowa City, Iowa; Lexington, Kentucky; Elwood, Indiana; Pekin, Illinois; Chicago, Illinois; East St. Louis, Illinois; Ansonia, Connecticut; Waterbury, Connecticut; Pawtucket, Rhode Island; Cincinnati, Ohio, and Mermenteau, Louisiana, and specially described in separate bills of sales executed herewith. The property located at Davenport, Scott County, Iowa, and consisting of office fixtures and supplies at Suite No. 339 Hageboeck Building, and the following described machinery at No. 320 W. Front Street, Fifth and Iowa Streets, and at plants of Davenport Foundry and Machine Co., Davenport Locomotive Works and Peoples Light Co., as appear from the following description:

Here follows list of machinery.

Said J. E. Burmeister, being fully authorized to take possession of all of said property wherever

situated, and to sell and dispose of same and deliver full and complete title to the purchaser of any of said property, and said J. E. Burmeister being fully authorized to perform any and all acts in reference to said property and in the execution of this trust as he might do were he acting in his own behalf. Said J. E. Burmeister is authorized to collect all money due said corporation and receipt for same. And said J. E. Burmeister is authorized to distribute the proceeds arising from said assets of said Whitehead Machinery Company pro rata among all such persons who may prove themselves to be creditors of said Whitehead Machinery Co. within four months of this date, and who shall consent to the trust hereby created, such distribution to be made in proportion to amount of the respective claims of such creditors. After the payment of all such creditors, and all the expenses and legal services incidental to this trust, said J. E. Burmeister shall pay any balance remaining to the Treasurer of said W. W. Whitehead Co. (incorporated) for the benefit of the stockholders of said corporation.

This trust is intended and created for the purpose of expeditiously and effectually liquidating the affairs and assets of the W. W. Whitehead Machinery Co.

Witness our hands and corporate seal at Davenport, Iowa.

WHITEHEAD MACHINERY CO.,
by A. L. Hageboeck,
President.

W. W. Whitehead,
Secretary.

Corporate Seal.

Acknowledgment by Hageboeck as President and Whitehead as Secretary, taken before L. G. Susemehl on Nov. 2nd, 1904.

Acceptance of J. E. Burmeister of his appointment as Trustee, and acknowledgment.

Recorded in Book 20 of Chattels for Scott County, Iowa, page 16.

Certificate by Clerk of Record.

EXHIBIT P 3.

C. W. Jones, Com'r. May 25, 1906.

At a special meeting of the stockholders of the Whitehead Machinery Co., held October 30th, 1905, pursuant to a call by W. W. Whitehead, Secretary, issued October 24th, 1905, and sent to all stockholders of said company, the following proceedings were had:

Dr. A. L. Hageboeck, President, called the meeting to order, and the financial affairs of the Whitehead Machinery Co. were discussed by the stockholders present, whose stockholdings represented a majority of the capital stock of the corporation.

After discussion, it appeared to be the unanimous opinion of the stockholders present that, owing to the demands of creditors for payment of their claims, and the inability of the company to meet such demands, and its inability to borrow the necessary money to continue business, the company should go into liquidation. And thereupon, L. G. Susemihl moved that the stockholders of the Whitehead Machinery Co. direct and authorize the board of directors of the company to transfer by proper instrument all of the property and assets of every kind to a competent trustee to be selected by the directors for the purpose of disposing of all of the property of the company to the best advantage, and converting all of the assets into cash for the use and benefit of such creditors of the Whitehead

Machinery Co. as would voluntarily consent to such transfer in trust and would ratify the conveyance by the directors to the trustee. The motion was seconded by W. W. Whitehead, and after discussion was voted upon and carried unanimously.

And thereupon the meeting adjourned.

A. L. HAGEBOECK, Pres.,
W. M. Co.

W. W. WHITEHEAD,
Sec'y.

EXHIBIT P 4.

C. W. Jones, Com'r. May 25, 1906.

At a meeting of the Board of Directors of the Whitehead Machinery Co., composed of A. L. Hageboeck and W. W. Whitehead, the resolution passed by the stockholders of said company at the stockholders' meeting, held October 30th, was received, and in accordance with such resolution the Board of Directors selected J. E. Burmeister, Cashier of the Iowa National Bank, as the trustee to whom the assets and property of the Whitehead Machinery Co. should be assigned and transferred, pursuant to the resolution referred to, and after receiving the consent of said Burmeister to act as such trustee, the Board of Directors instructed the proper officers of said Whitehead Machinery Co. to execute the necessary instruments in writing to carry out the purpose of said resolution.

Dated at Davenport, Iowa, November 1905.

A. L. HAGEBOECK, Pres.,
W. M. Co.

W. W. WHITEHEAD,
Sec'y.

EXHIBIT P 5.

WHITEHEAD MACHINERY COMPANY.

Steam Power Equipment.

Steam Engines and Boilers.

Office: 58 McManus Building.

DAVENPORT, IOWA, Oct. 2, 1905.

Sold to Oswald Schmidt, Paulo Roddewig, Waldo Becker and A. L. Hageboeck.

Invoices Payable with Exchange. Our No. 1573.

One	22 and 42x48	Hamilton	Engine, Condenser, Heater	No. 317	$250.00
One	do	do	do	316	
One	do	do	do	350	
One	do	do	do	351	
One	20x42	do	do	366	

$250.00

This invoice embraces all material in storage which was removed from 80th Street Station, New York Edison Co.

On Storage P. R. R. Terminals,
Jersey City, N. J.

Paid Oct. 4, 1905.

WHITEHEAD MACHINERY COMPANY,
By W. W. Whitehead, Mgr.

EXHIBIT P 6.

POSTAL TELEGRAPH COMMERCIAL CABLES TELEGRAM.

NEW YORK, Oct 9–05.

20. CH. VR. K. 51 DH. DH.—Cntd.

C. E. Adams,
43 McManus Bldg.,
Davenport, Iowa.

See your letter Oct. 4th about machinery stored at Jc for the Whitehead Machinery co. of Davenport Ia this property has been attached by the sheriff, of Hudson county, N. J. and he will take possession of the property at once. Desk U—File 75938. G. T. SMITH. 3 22 P. M.

EXHIBIT P 7.

DAVENPORT, IOWA, Oct. 4th, 1905.

No. . . . . .

THE CITIZENS NATIONAL BANK OF DAVENPORT.

$2347.19

Pay to the order of Citizens Nat. Bk. Twenty three hundred Forty seven 19/100 Dollars.

OSWALD SCHMIDT.

EXHIBIT P 8.

DAVENPORT, IOWA, Oct. 3, 1905. No. 2.

GERMAN SAVINGS BANK,
of Davenport, Iowa.

Pay to Citizens Nat. Bk. or order $2347.19 Twenty three hundred forty seven 19/100 Dollars and charge to my account.

No . . . . . PAULO RODDEWIG.

EXHIBIT P 20.



UNION LINE,
PENNSYLVANIA COMPANY.

Pennsylvania Railroad Co.,
43 McManus Building,
Phone, North 935.

C. E. Adams, Agent.

DAVENPORT, IOWA, Oct. 4th, 1905.

Mr. Geo. T. Smith,
Genl. Agt. P. R. R.,
New York, N. Y.

Dear Sir:

Referring to your letter Aug. 8th, file 75938, regarding machinery stored at our Pier K., Jersey City, for Whitehead Machinery Co., Davenport, Ia., will say we are today advised by Mr. Whitehead they have disposed of same to the following Davenport parties:

Mr. Waldo Becker, Mr. Oswald Schmidt,
Mr. Paulo Roddewig, Mr. A. L. Hageboeck.

These gentlemen expect to arrange within a few days for shipping about one half of the machinery direct to a customer at Grand Haven, Mich., and the balance to Davenport, Iowa.

Yours truly,

C. E. ADAMS, Agent.

EXHIBIT D 1.

MARCH 21st, 1905.
10374.

W. F. Parrish,
Chicago, Illinois.

Dear Sir:

We are not able to say anything very encouraging concerning prospects of possible changes in our rating. Two years ago we had a rating of five to ten thousand with third grade of credit, and during the year in which this rating was effective we did more business than we have ever done in any other two years in our history. We do not take much stock in a rating so far as sales may go, since if we have the stuff and can deliver it ratings cut little or no figure. Of course we may be wrong, and

Chicago may be so peculiar a market that a high rating is almost necessary to either buy or sell. The probabilities are that somewhere along in the fall there will be a considerable change in our affairs. If this can be brought about so as to take advantage of the September issue of Dun's book we will of course do it, but the matter is at present too remote for any accurate forecast. We might, however, say this much, from ten to 15 thousand dollars sales of stuff which we actually owned and which we carry on our inventory would do everything that is required, i. e., it will reduce our Bills Payable, which forms a weak spot in our statement. It is proper that you should know that of the $20,000.00 Bills Payable we have out, $16,500.00 are held by our Directors, who are, of course, friendly to us; and this paper does not mature until the 31st day of December next, so that until that time there is nothing to worry about, and of course when these notes reach maturity such extentions will be made as may be desired.

Yours very truly,

WHITEHEAD MACHINERY COMPANY,

W. W. Whitehead,

General Manager.

EXHIBIT D 2.

Transcript of the Record and proceedings in attachment suit of Dorrance vs Whitehead Machinery Company in the Hudson County Circuit Court.

1905.

Oct. 7	Affidavit of Dorrance for $950. filed.	
" 7	Writ of attachment issued	
	" returnable Oct. 13, 1905.	
" 7	Property attached:- Included the property replevied in this suit.	
" 9	Affidavit filed by William F. Parish and rule admitting him as an applying creditor for $1500.00	
" 9	Affidavit filed by David Williams Co. and rule admitting it as an applying creditor for $463.79.	
" 13	Randolph Perkins appointed auditor .	
" 30	order to sell property as perishable.	
1906.		
Mar. 29	Judgments entered against Whitehead Machinery Co. in favor of Charles J.	
	Dorrance for	$ 981.22
	William F. Parish	1486.97
	David Williams Co.	489.29

ASSIGNMENTS OF ERROR.

Afterwards, that is to say, on the 5th day of July, nineteen hundred and six, in the New Jersey Court of Errors and Appeals in the last resort in all causes, comes John Zeller, Sheriff, and Randolph Perkins, Auditor, plaintiffs in error, by Tennant & Haight, their attorneys, and say that in the matters recited and contained in the bill of exceptions, and also in the giving of judgment, there is manifest error in this, to wit,

1. That upon the trial of said cause, the Judge before whom the same was tried directed a verdict in favor of the plaintiffs and against the defendants, although the same was duly objected to on the part of the said defendants.

Wherefore the plaintiffs in error pray that the judgment aforesaid, by reason of the error aforesaid, may be reversed and for nothing holden, and that the said plaintiffs in error, John Zeller, Sheriff, and Randolph Perkins, Auditor, may be restored in all things that they have lost by reason of said judgment, and that the said defendants in error may rejoin to the said errors.

TENNANT & HAIGHT,
Attorneys of Plaintiffs in Error.

COMMON JOINDER.

By

GEORGE M. RURODE,
Attorney for Defendants in Error.