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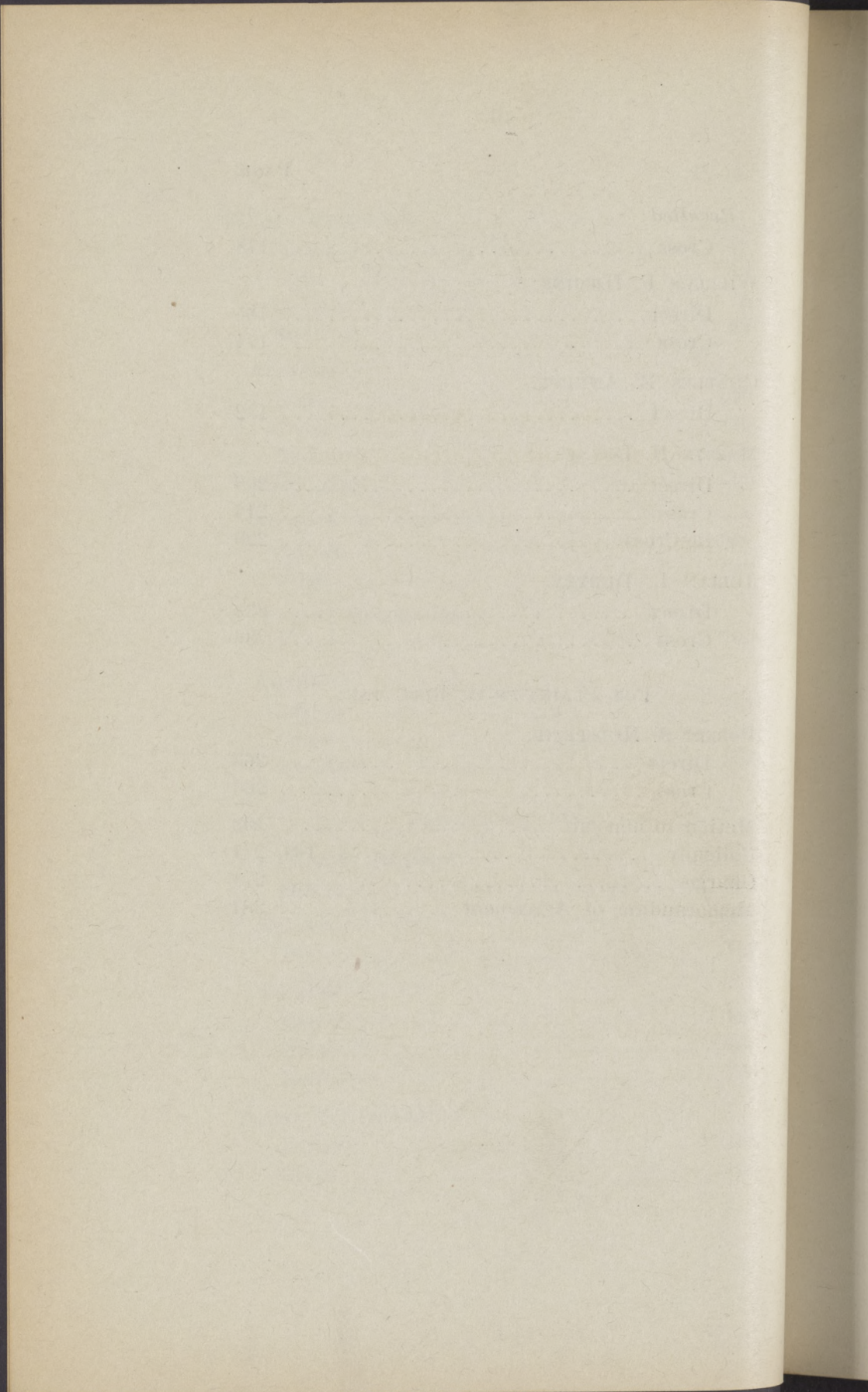
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Notice of Appeal.
Filed March 27, 1913
Hudson County Circuit Court.

10

HUDSON MILLING Co., a corpora-
tion,

Plaintiff,

v.

WILLIAM F. HIGGINS,

Defendant.

On Contract.
Notice of
Appeal.

20

To Hudspeth, Rysdyk & Garrison,
Attorneys of Plaintiff.

TAKE NOTICE, that the defendant appeals to the
Court of Errors and Appeals from the whole of
the judgment entered in this cause.

ROBERSON & DEMAREST,
Attorneys of Defendant. 30

Service of a copy of the within notice is hereby
acknowledged this 22nd day of March, 1913.

HUDSPETH, RYSDYK & GARRISON,
Attorneys of Plaintiff.

40

Grounds of Appeal.

WILLIAM F. HIGGINS,
Defendant and Appellant.

1. The court overruled the following question to the witness Julius Berghoff.

2. The court held that the contract between Berghoff and Doyne, whereby Berghoff, through his agent Weller, agreed to purchase the stock of the Doyne Lumber and Milling Company held by Doyne, to form a corporation and cancel any indebtedness of Doyne to the insolvent company did not operate as an estoppel, and that notwithstanding Berghoff's contract, the claim against the defendant passed by bill of sale from Weller to the Company.

“Did Mr. Doyne at that time, at the time the account began, tell you to charge to his, Doyne’s account and credit on the Higgins account the amount that Doyne would be indebted to Mr. Higgins for certain work that Mr. Higgins was to do for him?

Grounds of Appeal.

4. To the remarks of the court during the examination of Rose Reilly, accusing counsel of uttering a falsehood.

5. To the court's refusal to non suit at the conclusion of the plaintiff's case.

6. The court overruled the question put to the witness William Doyne.

"Did you have any talks with Mr. Annett while he was the Receiver of the Company?" 10

7. The court overruled the question in direct examination put to the witness Charles E. Annett,

"What was the conversation you had with him?"

8. The court allowed Isaac F. Goldenhorn to testify to transactions with Doyne after it was shown that the transactions took place while he was Doyne's attorney. 20

9. The court overruled the question upon the cross examination of Julius Berghoff.

"And the item at the top of page 85 where this Higgins account is charged off first to Mr. Doyne and then to profit and loss and your account for materials due to the Doyne Lumber and Milling Company amounting to \$3200 are both taken off on the same day, aren't they?"

10. That the court overruled on the direct examination of the witness Rose Reilly the following question, 30

"What position did Mr. Doyne occupy in the Doyne Lumber and Milling Company?"

11. That the court overruled upon the direct examination of the witness Rose Reilly, the question,

"Do you know what his office was?"

12. That the court overruled upon the direct 40

Grounds of Appeal.

examination of the witness Rose Reilly, the question,

“Who sold the goods?”

13. That the court overruled the question and struck out the answer to the question asked of the witness William Doyne,

10 “Was it actually charged off on the books, do you know?” (Answer) “Yes.”

14. That the court overruled the question and struck out the answer to the following question of the witness Martin Doyne,

“What was said at the time about this Higgins account?” (Answer) “Well, my father and Mr. Simon Doyne, who was a partner there—my father told him that this work was to be done on our house, and—”

20 15. Because the court overruled the question put to the witness Julian L. Duryea under direct examination,

“Do you remember whether Simon Doyne at that time was still an officer of the company?”

30 16. Because the court, upon the application for a Rule to Show Cause why the verdict should not be set aside, reserving to the defendant all exceptions taken on the trial, refused so to do and therefore said verdict is opposed to the instructions of the court and the weight of evidence in the following respects;

(a) That the evidence shows without contradiction that William Doyne had authority to make the contract alleged by the defendant, namely; that the amount which should become due to the defendant for labor and materials furnished to the house of William Doyne’s wife should be set off against and credited on account of the amount
40 due from the defendant to the Doyne Lumber and Milling Company for goods purchased.

Grounds of Appeal.

(b) That the evidence shows without contradiction that the defendant agreed with William Doyne that the amount due to the defendant for labor and materials furnished to the house of Doyne's wife should be charged to William Doyne upon the books of the corporation and credited to the account of the defendant with the corporation.

(c) That the entire transaction between the defendant and William Doyne, as above stated, was brought to the notice of the directors of the Doyne Lumber and Milling Company and acquiesced in, and is uncontradicted and the verdict is therefore opposed to the undisputed evidence. 10

(9) Because the agreement between Doyne and the defendant above set out was completed before the assets of the corporation were transferred to Weller and therefore the account did not, by sale from the receiver, pass to weller which is uncontradicted by the plaintiff and therefore contrary to the weight of evidence. 20

ROBERSON & DEMAREST,
Attorneys for Appellant.

Judgment Record.**Declaration.****Hudson County Circuit Court.**

HUDSON MILLING COMPANY,

Plaintiff,

v.

WILLIAM F. HIGGINS,

Defendant.

Action at
Law.

10

William F. Higgins the defendant in this cause was summoned to answer unto Hudson Milling Company plaintiff therein in an action at law upon the following complaint.

20

William F. Higgins, the defendant in this suit was summoned to answer unto Hudson Milling Co. a corporation, the plaintiff herein, in an action upon contract, and thereupon the said plaintiff by Hudspeth, Rysdyk & Garrison, its attorneys, complains.

30

For that whereas heretofore to wit, on the first day of May, Nineteen hundred and ten at Jersey City in the County of Hudson aforesaid, the said defendant was indebted to the Doyne Lumber & Milling Co., a corporation, in the sum of Two thousand dollars \$2,000, for the price and value of goods sold and delivered by the said Doyne Lumber & Milling Co. to the said defendant at the latter's request; and in the like sum of money for the price and value of goods bargained and sold by the said Doyne Lumber & Milling Company to the said defendant at the latter's request; and in the like sum of money for the price and value of work done and materials furnished and

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provided by the said Doyne Lumber & Milling Co.

Jurgment Record.

for the said defendant, at the latter's request; and in the like sum of money for money loaned by the said Doyne Lumber & Milling Co. to the said defendant at the latter's request; and in the like sum of money for money received by the said defendant for the use of the said Doyne Lumber & Milling Co.; in the like sum of money for moneys paid by the said Doyne Lumber & Milling Co. for the use of the said defendant at the latter's request; and in the like sum of money for interest due from the defendant to the Doyne Lumber & Milling Co. for the Doyne Lumber & Milling Co. having forborne moneys due from said defendant to said Doyne Lumber & Milling Co. at the said defendant's request for a long time then elapsed; and in the like sum of money found to be due from the defendant to the said Doyne Lumber & Milling Co. on an account then and there stated between them; and the said defendant afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said several sums of money to the said Doyne Lumber & Milling Company on request;

For that whereas, also, thereafter a bill of complaint was filed in the Court of Chancery in New Jersey in a certain cause wherein Stephens & Conrow Company was complainant and said Doyne Lumber & Milling Co. was defendant and such proceedings were taken therein that said Doyne Lumber & Milling Company was by a decree in said cause, decreed to be insolvent, under the terms and provisions of an act of New Jersey entitled "An Act Concerning Corporations (Revision of 1896)" and that Charles E. Annett was appointed receiver and by an order in said cause duly made on or about March 31, 1910. Said receiver, Charles E. Annett in consideration of the

Jurgment Record.

sum of Twenty thousand dollars (\$20,000) paid to him by Charles H. Weller did on or about the twenty-third day of April, Nineteen hundred and ten, bargain and sell and grant and convey unto said Charles H. Weller, his executors, administrators and assigns, by an instrument in writing a copy of which is hereto annexed and made a part hereof and hereby brought into court all the

10 goods and chattels belonging to or connected with the business and plant of said Doyme Lumber & Milling Company as well as and including all bills receivable or payable to said Doyme Lumber & Milling Company and any and all contracts and orders for lumber or material and all rights and causes of action and contingent interests of said Company of every nature and description whatsoever, including the said cause of action herein-

20 above set forth against the said defendant. And the said Charles H. Weller did thereafter by bill of sale in writing bearing date April 23, 1910, a copy of which is hereto annexed and made a part hereto and hereby brought into court, bargain and sell, grant and convey, unto the said plaintiff, its successors and assigns, all of the goods and chattels, sold to him by the said Doyme Lumber & Milling Company as aforesaid, including all bills receivable or payable to said Doyme Lumber, &

30 Milling Company and contracts or orders for lumber and materials and choses of action and rights and interests of said Company of every nature and description including the chose in action against said defendant herein as above set forth; and thereafter on the 25th day of April, 1910 at Jersey City in the County of Hudson aforesaid, in consideration of the premises the said defendant promised to pay to the said plaintiff the said

40 several sums of money on request and by means of the premises and action hath accrued unto the

Judgment Record.

said plaintiff to have and recover of said defendant the sum of Two thousand dollars (\$2,000).

AND FOR THAT WHEREAS WHEREOF, to wit, on the twenty-fourth day of February, Nineteen hundred and twelve at Jersey City, in the County of Hudson aforesaid, the said defendant was indebted to the said plaintiff in Two thousand dollars (\$2,000) for the price and value of goods sold and delivered by the said plaintiff to the said defendant at the latter's request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at the latter's request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendant at the latter's request; and in the like sum of money for money lent by the plaintiff to the defendant at the latter's request; and in the like sum of money for money received by the defendant for the use of the plaintiff, and in the like sum of money for money paid by the plaintiff for the use of the defendant at the latter's request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards (to wit) on the day and year last aforesaid, in the county aforesaid, in consideration of the premises respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded said promises and has not paid any of the said moneys or any part thereof to the said plaintiff, nor to the said Doyne Lumber

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Judgment Record.

& Milling Co., nor to the said Charles E. Annett, Receiver nor to the said Charles H. Weller, whereby and by means of the premises, an action has accrued to the said plaintiff to have and receive of the said defendant, the said sum of Two thousand dollars (\$2,000) damages, and thereupon the said plaintiff brings its suit, &c.

10

HUDSPETH, RYSDYK & GARRISON,
Attorneys of Plaintiff.

Notice.

TO THE WITHIN NAMED DEFENDANT:

TAKE NOTICE that the following is a bill of particulars on demand upon which the within declaration is founded. That the said demand was founded on a book account of which a true copy is hereto annexed.

20

That judgment will be claimed and entered for the sum of Seven hundred and ninety-one dollars and thirty cents (\$791.30) with interest thereon from January 1st, 1909 besides costs of suit to be taxed.

HUDSPETH, RYSDYK & GARRISON,
Attorneys of Plaintiff.

Bill of Particulars on Demand.

30

KNOW ALL MEN BY THESE PRESENTS: That I, Charles E. Annett, Receiver of the "Doyne Lumber & Milling Company" a Corporation of the State of New Jersey, of the City of Bayonne, in the County of Hudson, and State of New Jersey, party of the first part, for and in consideration of the sum of Twenty thousand dollars (\$20,000), lawful money of the United States, to me in hand paid at or before the ensealing and delivery of

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these presents, by Charles H. Weller, of the City of Jersey City, in the County of Hudson, and

Jurgment Record.

State of New Jersey, party of the second part, the receipt whereof is hereby acknowledged, have bargained, and sold and by these presents do grant and convey, unto the said party of the second part, his executors, administrators and assigns, all the goods and chattels heretofore belonging to or connected with the business and plant of the said "Doyne Lumber & Milling Company", and more particularly described as follows, that is to say: 10
all and singular the goods, chattels, stock in trade, lumber, building materials, boiler, engines, machinery, shafting, pulleys, belts, and all connections, horses, wagons, stable utensils all buildings and structures whatsoever, which are not part of the freehold, and all other personal property appertaining to, or in anywise, connected with the "Doyne Lumber & Milling Company," and its milling plant, or its business heretofore carried on at the City of Bayonne, in the County 20
of Hudson and State of New Jersey, and whereof Charles E. Annett, as receiver is possessed or in anywise entitled to, as well as the good-will of the said business, and including any and all bills receivable or payable to the said "Doyne Lumber & Milling Company," or the undersigned as such receiver, and any and all contracts or orders, for lumber or materials, together with all moneys coming into the hands of the said Receiver or to which 30
he is entitled as such, less the sum of One thousand Dollars (\$1,000) allowed and to be paid the said Receiver as, and for his Receiver's fees, and to be paid the said Receiver, and the further sum of One thousand Dollars (\$1,000), as for a counsel fee and to be paid the counsel of the said receiver said sale and transfer is made by the undersigned as such Receiver, under and by virtue of an order of the Court of Chancery, of New Jersey, dated Thirty-first day of March, 40

Judgment Record.

10 A. D. Nineteen hundred and ten, made in the cause pending in said Court of Chancery, entitled Stephens & Conrow Co., et als., Complainants, and "Doyne Lumber & Milling Company" et als., Defendants, by his Honor The Chancellor of the State of New Jersey, and which sale was by the undersigned, as such Receiver, duly reported to the said Court of Chancery of New Jersey, and confirmed by the said Court, together with all rights, causes of action, contingent interest and property of every nature and description whatsoever, belonging to, or in, or to which the said "Doyne Lumber & Milling Company" was interested or had or possessed any estate, either vested or contingent, as well as had or possessed by the said party of the first part as the Receiver of the said "Doyne Lumber & Milling Company."

20 TO HAVE AND TO HOLD, the same unto the said party of the second part, his executors, administrators and assigns forever. AND I do for myself, my heirs, executors and administrators, covenant and agree to, and with the said party of the second part, to warrant and defend the sale of the said business, good-will and assets of the said "Doyne Lumber & Milling Company", hereby sold unto the said party of the second part, his executors, administrators and assigns, against all and
30 every person and persons whomsoever, to the extent that I am empowered and possess under my said Receivership, and as such Receiver, under the said order, to sell as aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the twenty-third day of April in the year of our Lord, One thousand Nine hundred and ten.

CHARLES E. ANNETT,
Receiver.

Judgment Record.

Signed, sealed and delivered in the presence of
Horace Roberson.

KNOW ALL MEN BY THESE PRESENTS, That, I,
CHARLES H. WELLER, of the City of Jersey City,
in the County of Hudson and State of New Jer-
sey, party of the first part, for and in considera-
tion of the sum of One Dollar, (\$1) and other
valuable consideration, lawful money of the United
States, to me in hand paid, at or before the
ensealing and delivery of these presents, by "Hud-
son Milling Co." a Corporation of the State of
New Jersey, of the City of Bayonne, in the Coun-
ty of Hudson and State of New Jersey, party of
the second part, the receipt whereof, is hereby
acknowledged, have bargained and sold, and by
these presents do grant and convey, unto the said
party of the second part, its successors and as-
signs, all the goods and chattels heretofore belong-
ing to or connected with the business and plant
of said "Doyne Lumber & Milling Company", and
more particularly described as follows,—that is to
say; all and singular, the goods, chattels, stock in
trade, lumber, building materials, boilers, engines,
machinery, shafting, pulleys, belts and all con-
nections, horses, wagons, stables utensils, all build-
ings and structures whatsoever, which are not
part of the freehold, and all other personal prop-
erty appertaining to, or in anywise connected
with, the "Doyne Lumber & Milling Company",
and its milling plant, or its business heretofore
carried on at the City of Bayonne, in the County
of Hudson, and State of New Jersey, as well as
the good will of the said business, and including
any and all bills receivable or payable to the said
"Doyne Lumber & Milling Company" and had or
possessed by the said Charles H. Weller and any

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Jurgment Record.

and all contracts or orders for lumber or materials, connected with said business, together with all moneys assigned and turned over to the said Charles H. Weller, by the said Charles E. Annett, as receiver of said Doyne Lumber & Milling Company", as hereinafter stated, being the same goods, chattels, business, personal property etc., etc., sold, assigned and conveyed to the said
10 Charles H. Weller, by Charles E. Annett, as receiver of the "Doyne Lumber & Milling Company", under and pursuant to an order of the Court of Chancery of New Jersey made on the thirty-first day of March, Nineteen hundred and ten, and as evidenced by a certain Bill of Sale bearing date the twenty-third day of April, A. D. Nineteen hundred and ten, and made by the said Charles E. Annett, as receiver of the said "Doyne Lumber
20 & Milling Company," to said Charles H. Weller together with all rights, causes of action, contingent interest and property of every nature and description whatsoever, belonging to, or in, or to which the said Charles H. Weller has any interest or estate and acquired by him under the sale and conveyance made thereof by the said Charles E. Annett as Receiver of the "Doyne Lumber & Milling Company."

30 TO HAVE AND TO HOLD, the same unto the said party of the second part, its successors and assigns, forever. AND I do for myself, my heirs, executors and administrators, covenant and agree to and with the said party of the second part, its successors and assigns, to warrant and defend the sale of the said business, good will, and assets of the said "Doyne Lumber & Milling Company," hereby sold unto the said party of the second part, its successors and assigns, against
40 all and every person and persons, whomsoever, to the extent, I have and possess any title or estate

Judgment Record.

of, in and to the same, under the said Bill of Sale thereof made to me by such Receiver as aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the twenty-third day of April in the year of our Lord One Thousand Nine Hundred and ten.

CHARLES H. WELLER.

10

Signed, sealed and delivered in the presence of Isaac Gross.

Itemized bill of lumber delivered with credits for moneys paid and goods returned showing due (\$791.30).

Filed, Clerk's Office, March 27th, 1912, Hudson County, N. J.

JOHN F. CROSBY, Clerk.

20

Notice.**TO THE DEFENDANT:**

In case the within Summons and Declaration are served upon you personally, then take notice that if you intend to make a defense to this action you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your plea or demurrer within twenty days from the date of such service, and in default of the filing of such affidavit, plea or demurrer, judgment will be entered by default against you.

30

In case the within Summons and Declaration are served upon you by the leaving of a copy at your dwelling house or place of abode, then take notice that unless you appear and file a plea or demurrer within twenty days after the date of service hereof upon you, judgment will be entered by default against you.

40

HUDSPETH, RYSDYK & GARRISON,
Attorneys of Plaintiff.

*Judgment Record.***Plea.***Filed March 28, 1912*

The defendant answers as follows:

And the said defendant, by Roberson & Demarest, his attorneys, comes and defends the wrong and injury when etc., and saith that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained
 10 against him, and of this he puts himself upon the country, etc.

ROBERSON & DEMAREST,
 Attorneys of Defendant.

STATE OF NEW JERSEY, }
 County of Hudson. } ss.:

William F. Higgins, of full age, being duly sworn on his oath says, that he is the defendant in the above stated cause, and that the foregoing
 20 plea filed by him in the said cause is not filed for the purpose of delay; and he further says, he believes that he has a just and legal defense to the said action on the merits of the case.

WILLIAM F. HIGGINS.

Sworn to and subscribed before me }
 this 21st day of March, Nineteen }
 hundred and twelve. }

John J. Hickey,
 30 Notary Public, N. J.

The within plea and affidavit is taken and may be filed in lieu of separate affidavit of merits and plea called for by notice.

March 26th, 1912.

HUDSPETH, RYSDYK & GARRISON,
 Attorneys of Plaintiff.

Filed, March 28th, 1912.

40

JOHN F. CROSBY,
 Clerk.

*Judgment Record.***Specification of Defenses.***Filed May 22, 1912*

To Messrs. Hudspeth, Rysdyk & Garrison,
Attorneys of Plaintiff,

Sirs:

The following is a specification of the defenses intended to be made by the defendant under the plea of general issue filed by him in the above action.

10

First: The defendant did not make the contract with the plaintiff set forth in the plaintiff's declaration.

Second: The alleged contract set forth in the plaintiff's declaration was made, if at all, without the authority of the defendant.

Third: The goods, wares and merchandise set forth in the plaintiff's declaration and the bill of particulars annexed thereto have not been delivered to the defendant.

20

Fourth: The goods, wares and merchandise set forth in the plaintiff's declaration and the bill of particulars annexed thereto are not and were not delivered in a merchantable condition.

Fifth: The goods, wares and merchandise set forth in the plaintiff's declaration and the bill of particulars annexed thereto have been made and are of improper, unsafe, impaired and defective construction.

30

Sixth: The agent of the plaintiff, by and with the consent of the plaintiff, assumed the liability for the payment of the goods, wares and merchandise set forth in the plaintiff's declaration and the bill of particulars annexed thereto.

Seventh: The goods, wares and merchandise set forth in the plaintiff's declaration and the bill

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Judgment Record.

of particulars annexed thereto have been fully paid for by the defendant.

Dated, May 20, 1912.

Respectfully yours,
ROBERSON & DEMAREST,
Attorneys of Defendant.

10

Service of a copy of the within Specification of Defense is hereby acknowledged this 20th day of May, 1912.

HUDSPETH, RYSDYK & GARRISON,
Attorneys of Plaintiff.

Filed May 22, 1912.

JOHN F. CROSBY,
Clerk.

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*Judgment Record.***Notice of Defense.**

To Messrs. Hudspeth, Rysdyk & Garrison, plaintiff's attorneys:

PLEASE TAKE NOTICE that upon the trial of the above entitled cause, the defendant will, in addition to the defenses heretofore specified, offer in defence and move before the court to permit him to offer in defense, that the goods, wares and merchandise mentioned in the plaintiff's declaration, were sold and delivered to the defendant under an agreement that an account then due to the defendant from William Doyne was to be set off against said account and that said William Doyne was to become the substituted debtor of the Doyne Lumber & Milling Company instead of the defendant; that by the purchase of the assets of the Doyne Lumber & Milling Company by the plaintiff, it was agreed that all accounts due from William Doyne, including the account of this defendant assumed by him, were to be considered paid and cancelled. That the said contract was a part of the consideration for the assignment by William Doyne and other stockholders of the Doyne Lumber & Milling Company of their stock to the plaintiff and that said claim should by reason thereof be discharged and cancelled.

Respectfully yours,

ROBERSON & DEMAREST,
Defendant's Attorneys.

Service hereof acknowledged Jan'y 22, 1913.

HUDSPETH, RYSDYK & GARRISON,
Attorneys of Plaintiff.

*Judgment Record.****Transcript of Minutes.***

This action was tried before Judge William H. Speer, with a jury at the Hudson Circuit, on February 20, 1913.

The cause having been heard and submitted to the jury, they return their verdict as follows: They say they find the defendant guilty as in the
 10 plaintiff's complaint is charged upon it, and they assess the damages of the plaintiff on occasion of the premises at the sum of Seven hundred Thirty-nine dollars and thirty cents.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Seven hundred Thirty-nine Dollars and Thirty Cents (\$739.30) its costs which are taxed at the sum of sixty-six dollars and two cents (\$66.02) making in the
 20 whole the sum of Eight hundred and five dollars and thirty-two cents (\$805.32).

Judgment entered this February 20, 1913.

WILLIAM H. SPEER,
 Judge.

Attest:

JOHN F. CROSBY,
 Clerk.

(Endorsed.)

30 The answer of William H. Speer, Esquire Judge of the Circuit Court holden in and for the County of Hudson and within named, the entire record of the cause and all orders, proceedings and documents made, taken or filed therein, I send to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained, in a certain schedule to this Appeal annexed as within I am commanded, and according
 40 to the Statute in such cases made and provided.

WILLIAM H. SPEER,
 Judge.

Testimony.**Hudson County Circuit Court-**

HUDSON MILLING COMPANY,

v.

WILLIAM H. HIGGINS.

10

Tried Tuesday, February 11, 1913, before Hon. William H. Speer, Circuit Judge, and a jury.

Hudspeth, Rysdyk & Garrison, Esqs., for the plaintiff;

Roberson & Demarest, Esqs., for the defendant.

ROSE REILLY, called and sworn on behalf of the plaintiff, testified as follows:

20

DIRECT EXAMINATION BY MR. GARRISON:

Q. Where do you live? A. 33 West 31st Street, Bayonne.

Q. You were the bookkeeper for the Doyne Lumber and Milling Company? A. Yes, sir.

Q. During what period? A. About a year and a half.

Q. You made the entries in the books in your own handwriting? A. Yes, sir.

30

Q. Was there an account in those books against William F. Higgins? A. Yes.

Q. What book is this I now show you? A. That is the ledger, I believe; isn't it?

Q. Is that the ledger of the Doyne Lumber and Milling Company? A. No, this is—I don't know if this is the book; is it?

Q. Be sure. A. This is not my writing.

40

Rose Reilly—Direct.

MR. HUDSPETH: Can't we get an admission of the amount of this claim?

MR. DEMAREST: I am afraid not. I would under ordinary circumstances, but I cannot in this case.

Q. What is this book I now show you? A. This is my book.

10 Q. Will you turn to the account of William F. Higgins? I call your attention to page 133 of this book you have identified as the ledger of the Doyne Lumber and Milling Company? A. Yes, sir.

Q. The account of William F. Higgins'? A. M-m-m-m.

Q. The first entry is March blank, forward, 132. A. That is brought forward from here, I believe (indicating).

20 Q. This account commences then on page 132? A. Yes.

Q. And the first entry is November 16, 1908. \$1.25, and the last entry is August 10, 1909, of \$16.20. During that period what is the total amount charged against Higgins? A. I suppose that is the total amount (indicating).

Q. That is \$1284.31? A. Yes, sir.

30 Q. And the credits during that period amount to \$493.01? A. \$493.01, yes.

Q. Leaving a balance due from Higgins to the Doyne Lumber and Milling Company of \$791.30, is that correct? A. It seems to be.

MR. GARRISON: I offer this ledger.

MR. DEMAREST: I object to it until I cross examine on it. Are you through with your examination of the witness?

40 MR. GARRISON: Well, if you are only going to cross examine as to the ledger.

Rose Reilly—Cross.

MR. DEMAREST: As to the ledger.

CROSS EXAMINATION BY MR. DEMAREST:

Q. When did you first become the bookkeeper of the Doyne Lumber and Milling Company? A. In the latter part of 1908.

Q. Before the beginning of that account? A. Yes.

10

Q. Are all the entries in that ledger in your handwriting? A. Yes, sir.

Q. How long did you continue as bookkeeper? A. About a year and a half.

Q. With the Doyne Lumber and Milling Company? A. Yes.

Q. And did you have that book in your possession after the year and a half that you were with the Doyne Lumber and Milling Company? A. Yes, sir.

20

Q. Who had possession of the ledger at that time? A. At what time?

Q. After you say you were—after the end of the year and a half that you served as bookkeeper for the Doyne Lumber and Milling Company? A. Why; the Hudson Milling Company took possession of the books then.

Q. And you had possession of that ledger during that time? A. Yes.

30

Q. I call your attention to the fact that the page of the ledger where this account appears has evidently been cut out or torn out and put back into the book. A. Yes.

Q. Was the book in that condition at the time you were the bookkeeper of the Doyne Lumber and Milling Company? A. No, sir, it was not.

Q. Do you know how that page came to be cut out of the book? A. No, sir; it was not cut out the last time I seen the book.

40

Rose Reilly—Cross.

Q. I notice that on the credit side of this account, the items on that side of this account, apparently, on page 133, which appears to be the last page of the account, total \$1284.31. A. Yes.

Q. And I notice that the credits on the credit side of the account also total the sum of \$1201.91. A. Yes, sir.

10 Q. Were these credits in this book, in this ledger, when you last saw it? A. Yes, sir.

Q. Where is there anything in that book then that shows the balance of seven hundred and thirty odd dollars due from Mr. Higgins? A. There is not anything due from Mr. Higgins.

Q. Is there anything in that book that you have produced and identified and which you say is in your handwriting, which shows that there is any money due from Mr. Higgins? A. Well, I
20 cannot say that there is anything due from him.

Q. And are these items on the credit side of page 133 credits relating to the Higgins' account? A. Yes.

MR. DEMAREST: I object to the offer of the book as evidence of the indebtedness.

THE COURT: What is the point of your objection?

30 MR. DEMAREST: The witness has identified credits on that account that equal the debits and she says that by that book there appears nothing due from the defendant to the plaintiff.

THE COURT: Why do you object to it then?

MR. DEMAREST: Well, it is offered.

THE COURT: It is offered, yes—

40 MR. DEMAREST: Never mind. I will let it go in as evidence of payment.

Rose Reilly—Cross.

Page 133 of the ledger designated Exhibit
1.

BY MR. DEMAREST:

Q. When was the last you saw that book, Miss Reilly? A. Why, it was in about August, I believe, 1910; some time around that.

Q. 1910? A. Yes, sir.

Q. And at that time the page had not been cut out from the book? A. No, sir; the book was perfect. 10

Q. But the list of credits that appears on page 133 were all there as they are today? A. Yes, sir.

BY MR. GARRISON:

Q. I notice that the last item on the debit side is June 14, William Doyne, J-85, \$708.91. Do you know what that item is? A. I did not put that item in the book. 20

Q. Do you know who put it in? A. I believe the bookkeeper did.

Q. All of the other items with the exception of that item of \$708.91 are in your handwriting? A. Yes.

Q. Have any of the credit items which appear in this book been charged off to profit and loss?

A. Why, I believe \$701.91— 30

MR. DEMAREST: One moment. I object to that question. There is nothing there showing a profit and loss entry.

MR. GARRISON: I have asked her to explain what these items are. There is nothing to explain in the book.

A. I have not anything to do with that —

MR. DEMAREST: One moment. 40

Rose Reilly—Cross.

10 THE COURT: He simply has asked her whether any of those items have been charged off to profit and loss. I presume if they have been they will appear as a charge in the profit and loss entry, but Mr. Demarest's objection is that she cannot state that fact; if it is in the book the book is the best evidence of it so far as this witness is concerned; and I think that is true.

Q. In what book will the profit and loss charges appear? A. Most likely in the journal.

Q. Is this the journal (indicating)?

20 THE COURT: You see, Mr. Demarest, I have not passed upon any question, because you have not raised it, with respect to the admissibility of this book, because it does not contain the whole account as it runs through all the books. I was going to rule—however, you admit the book by consent, so there is no question about that.

Q. Is this the journal of the Doyme Lumber and Milling Company? A. Yes.

BY THE COURT:

Q. Is that the profit and loss account?

30 MR. DEMAREST: No; here is the item (indicating).

BY MR. GARRISON:

Q. Is this the profit and loss account on page 85 of that journal? A. Pardon me just a minute.

THE COURT: Did you make these entries?

A. No, sir.

40 Q. Who made these entries? A. The bookkeeper, I presume.

Q. Mr. Workmeister? A. Yes, sir.

Rose Reilly—Cross.

MR. GARRISON: I offer the—

MR. DEMAREST: I—

MR. GARRISON: No; I do not offer it.

Q. Do you identify this book?

MR. DEMAREST: What are you offering?

THE COURT: He withdrew what he was going to offer.

10

A. I presume it is the salesbook.

Q. Well, do you know? A. Yes.

Q. This is the salesbook of the Doyme Lumber and Milling Company? A. Yes.

Q. Will you turn to the account, if any, of William F. Higgins in that book? A. There is one (indicating).

BY THE COURT:

20

Q. Did you make these entries in the sales book? A. Yes.

Q. Now won't you tell us, just to get the thing straight, what was the system of bookkeeping which you had there? When sales were made they were reported to you and entered in the sales book? A. Yes; slips were made out.

Q. You took the slips and entered them in the sales book and then destroyed the slips? A. No; we keep the slips.

30

Q. From the sales book into what book did you carry the account? A. Into the ledger.

Q. And what effect had the journal in your system of bookkeeping? You had nothing to do with that at all? A. Well, no, not concerning this case I did not have anything to do with it.

Q. Well, concerning the general course of bookkeeping there while you were bookkeeper, what function had the journal in the system; what did

40

Rose Reilly—Cross.

you do with it? A. Just made different memorandums in it—charges.

Q. Then the journal was no part of the general system of bookkeeping; that was simply for memorandums with respect to the company's business?

A. Yes.

BY MR. GARRISON:

10 Q. Are all the entries in this journal in your handwriting? A. In this book?

Q. Yes.

MR. DEMAREST: Do you refer to the journal or sales book?

Q. I mean the sales book? A. Yes. Those are (indicating).

Q. From pages 1 to 375 are all in your writing?
20 (No answer).

MR. GARRISON: I offer this sales book so far as it contains entries relating to the account of William F. Higgins.

THE COURT: I suppose there is no objection to that?

MR. DEMAREST: No, no objection to that. Designated Exhibit P-2.

MR. DEMAREST: That only relates to the
30 sales?

Q. This only relates to the sales?

THE COURT: Yes; she says they handed her slips with the sales accounts on them and she entered those sales in the sales book and kept the slips.

MR. DEMAREST: I only wanted to know if that was the proper book.

THE COURT: That is the proper book,
40 the sales book.

Rose Reilly—Cross.

Q. And the entries in this journal from pages 1 to—A. I had nothing to do with this here (indicating).

THE COURT: She did not write those at all.

Q. This is in your handwriting, (indicating)?
A. That is, there (indicating).

Q. And it is all in your handwriting down to number—A. Not any of this (indicating). 10

Q. That is not in your handwriting? A. No, that is not mine.

Q. Down to page 84 inclusive it is in your handwriting? A. Yes.

MR. GARRISON: I offer this book so far as pages 1 to 84 are concerned.

THE COURT: Well, if there is nothing in the book with respect to this charge except those items which are entered in somebody else's handwriting, the book would not be admissible for that purpose; and furthermore I do not think the journal would be admissible anyway under our rules. I understand our rules as laid down in *Oberg v. Breen*, 21 Vroom, which is the leading case on the subject, to be that the books of account of original entry are evidence of the fact of the sale of goods or of the rendition of services and their price, but they are not evidence of credits, and they are not evidence—except as against interest—Mr. Demarest might offer them—but they are not evidence of credits and they are also manifestly not evidence of a bookkeeping function whereby something on the notion of the party was charged to profit and loss. 20 30 40

Rose Reilly—Cross.

MR. DEMAREST: I am not objecting to the offer of the journal.

THE COURT: All right; then let it go in. I thought you objected. I would not have wasted so much time talking about it if I had known you did not object.

10 Book from pages 1 to 84 inclusive designated P-3.

Q. What is this book?

MR. DEMAREST: That is your ledger?

A. Yes.

MR. GARRISON: It is marked "Journal."

THE COURT: All three books are in now by Mr. Demarest's consent.

20 THE WITNESS: I never had anything to do with that book (indicating).

MR. DEMAREST: Only the journal from page 1 to page 84, as I understand it.

CROSS EXAMINATION BY MR. DEMAREST:

Q. Will you kindly turn to this ledger? I call your attention to the items on page 133, the item of June 14, William J. Doyne, J-85, \$708.91. Did you make that entry? A. No, sir.

30 Q. That entry balances the account?

MR. HUDSPETH: I object. That book will show for itself.

THE COURT: It will show for itself. If you want her to point out the place where any balancing of account is made on the book you may do so and let the jury see it.

Q. Does that item balance the account, Miss Reilly?

40

MR. HUDSPETH: I object. That calls for

Rose Reilly—Cross.

a conclusion of the witness. The figures indicate that they are the same on one side as the other, but a credit—

THE COURT: If there is anything inscrutable about it or anything you think the jury does not understand, you may have her explain it to them, but it does appear and she has already testified that it does balance the account, that it is there, that the credit is exactly equal to the debit. That is what she said, so there is no need asking it again. 10

Q. Did you ever render any statements to Mr. Higgins of this account while you were with the Doyne Lumber and Milling Company as bookkeeper? A. No.

Q. Why not? A. Well, there was an agreement between Mr. Doyne and Mr. Higgins— 20

MR. HUDSPETH: I object as calling for a conclusion of this witness.

THE COURT: Objection sustained. You may state what was said between Mr. Doyne and Mr. Higgins.

Q. Did you hear any conversation between Mr. Doyne and Mr. Higgins?

MR. HUDSPETH: I object as not proper cross examination. 30

MR. DEMAREST: It is proper cross examination of a bookkeeper to show their condition, I think.

THE COURT: I do not think that tends to show the condition of the books. Manifestly it does not, because your question was whether she ever rendered a statement. She says she did not, and you asked her why 40

Rose Reilly—Cross.

not and she went off to tell of an agreement. I sustain the objection.

Q. Did you ever hear any conversation between Mr. Doyne and Mr. Higgins regarding this account? A. Yes.

Q. What position did Mr. Doyne hold at that time with the Doyne Lumber and Milling Company? A. He was manager.

Q. Any other office?

MR. HUDSPETH: I object.

A. Vice President.

MR. HUDSPETH: One moment. That is asking for a conclusion of this witness.

THE COURT: It is asking for a conclusion. You may state in what capacity he acted and show how he acted and the jury determine what his capacity was, but I presume if he was a general manager he was appointed so by some resolution. You would have to prove it that way.

Q. What position did Mr. Doyne evidently exercise while he was with the Doyne Lumber and Milling Company?

MR. HUDSPETH: I object.

THE COURT: Objection sustained. What did you see him do there?

Q. What did you see him do there? A. He did everything; he had management of the plant and took care of everything.

Q. It was a milling concern, wasn't it? A. Yes.

Q. Did he direct the work in the mill? A. Yes.

Rose Reilly—Cross.

Q. Did he direct the bookkeeping? A. Well, he looked after it too.

Q. Give you instructions? A. Yes.

Q. Pass upon credits? A. Yes.

Q. Tell who you were to give credit to and who you were not to give credit to? A. Yes.

Q. Sell goods? A. Yes.

Q. How long did he continue to do that? A. 10
As long as we were there.

Q. As long as you were employed by the Doyne Lumber and Milling Company? A. Yes.

MR. HUDSPETH: I object to this as not proper cross examination,—as tending to explain the book itself by this witness' characterization and description of what Doyne did and did not; that it can have no other purpose than to show that that account is paid by the entry in the book, and it is a matter of defense. 20

THE COURT: I suppose that he would have the right to show that that item of seven hundred dollars and odd cents was entered there if he had already shown that Mr. Doyne was the general manager of the company who directed the entries in the book; he would have a right to show that he expressly directed her to make that entry. 30

MR. HUDSPETH: That is so, but my point is this, that on the books, so far as this examination of this girl is concerned, that account is squared, and that until I show to the contrary we are bound by those books and there is nothing to cross examine about.

THE COURT: He is anticipating his defense. I think that is very likely true, Mr. 40
Demarest. Until he does something to over-

Rose Reilly—Cross.

10

come the apparent balance of that account you have nothing to do, but you stand with the account paid on the face of things. Now when he attempts to show that that account in the book is wrong and that there actually is something due, why then he has got to show it by certain witnesses. Now if you desire to have him ask that this witness who is now on the stand shall remain for further cross examination, that may be done.

MR. DEMAREST: I want that opportunity.

THE COURT: But I think his objection is good, that you are anticipating the defense.

MR. DEMAREST: If that develops I should like the right to continue the cross examination.

20

THE COURT: All right. (To the witness): You will not go away until we have gotten through?

THE WITNESS: No.

30

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John Workmeister—Direct.

JOHN WORKMEISTER, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. GARRISON:

Q. What is your position with the Doyne Milling and Lumber Company, if anything? A. I was not employed with them.

Q. With the Hudson Milling Company? A. 10
Bookkeeper.

Q. For how long? A. Well, from June, 1910, till about January, 1911; then I was away for a while and was back since October, 1911.

Q. Will you refer to page 133 of the ledger that has been offered in evidence? A. This is 133 of the ledger (indicating).

Q. And tell me in whose handwriting the entry of June 14, William Doyne, J-85, \$708.91, is? A. 20
It is in my handwriting.

Q. At whose direction was that entry made by you? A. I cannot just clearly recall the facts. I can give you an idea; I can tell you as far as I can recollect.

Q. Give me your best recollection as to who directed you. A. My best recollection, why, this was an account that was standing on the books and one evening after all had gone home Mr. Doyne asked me to take it off, and I charged it 30
up to William Doyne. He said it was something that he had to do with Mr. Higgins and he objected to me charging it off to Mr. Doyne. He said it should be charged off as a loss that was uncollectable, and I then made an entry profit and loss, but I did not post it further.

John Workmeister—Cross.

CROSS EXAMINATION BY MR. DEMAREST:

Q. At the time you say that this occurrence took place you were working for the Hudson Milling Company, were you not? A. Yes.

Q. And the Hudson Milling Company had in its possession this book? A. Yes.

10 Q. It was the book of the Doyne Lumber and Milling Company? A. Yes, sir.

Q. Isn't that right? (No answer).

Q. Did you know Mr. Berghoff? A. Yes.

Q. What position, if any, did he hold with the Hudson Milling Company, do you know? A. President.

MR. HUDSPETH: This is not proper cross examination, and I object.

20 THE COURT: That does not appear to be. This is simply a mere transaction between Mr. Doyne and this man, in which Mr. Doyne requested him to do a certain thing, which he did, on the book. Now all that is open to cross examination, whatever that may be.

30 Q. Isn't it a fact that Mr. Berghoff, and not Mr. Doyne, instructed you to make that entry? A. I cannot—it is too long ago for me to recall all the facts, but I recall the fact that we were in the office one night after all had left and Mr. Doyne asked me to wipe off that entry.

Q. You did not charge it up at that time on that book to profit and loss, did you? A. No, sir; I left it open because I did not know what to do, in fact—

Q. You charged this off to William Doyne, didn't you? A. I did; and he objected to it.

40 Q. Isn't it a fact that Mr. Berghoff and Mr.

John Workmeister—Cross.

Doyne were together in the office and in your presence discussed that item? A. No, sir.

Q. And that Mr. Berghoff instructed you to charge off that item on the books to William Doyne? A. Positively not. There was nobody present but Mr. William Doyne and his son the night that I made that—charged that off to profit and loss.

Q. Did Mr. Doyne tell you to make that entry charging him with it as it apparently does? A. No, he did not just tell me; he said it was an account that I believe he owed Higgins or Higgins owed him, and I made that entry and he said, "No, don't charge it up to me; charge it up to profit and loss"; and I made another entry, I believe it is the second entry in the journal, charging it to profit and loss. I did not post that entry; I simply left it.

10

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BY THE COURT:

Q. Why didn't you cancel it on the ledger? A. I did not really know what to do. Mr. Doyne always was—

Q. As I understand it, you were the bookkeeper for the Hudson Milling Company? A. Yes, sir.

Q. And that was an account apparently on the book of the Hudson Milling Company now but that they had taken over from the Doyne Company, wasn't it? A. I could not say that. I know it was in this book. I do not know whether it was brought forward or not.

30

BY MR. DEMAREST:

Q. Those are the old Doyne Lumber and Milling Company books? A. These are the old Doyne Milling and Lumber Company books.

40

John Workmeister—Cross.

BY THE COURT:

Q. I understand, but that book purported to be an account on those pages between Higgins and the Doyne Lumber and Milling Company? A. Yes.

10 Q. And this claim which you say was put down there was a claim which was owing from Doyne himself to Higgins, wasn't it? A. The way I understood.

Q. Yes, the way you understood. Then why did you charge that account on that book against the Doyne Lumber and Milling Company when it was Doyne's individual account? A. I believe I first made an entry charging Doyne's individual account and I believe it was on that entry that he objected.

20 Q. Well, what did he say? A. He says that it was—he was not to pay it, that it was uncollectable, that Mr. Higgins was not to pay it.

Q. What I want to get at is, how in the world you came to put it down against the Doyne Lumber and Milling Company anyway if it was Doyne's individual account either to be charged off or was uncollectable or not? A. Doyne has an individual account in this book.

30 Q. But that is not the account in front of you? A. No; this is the Higgins account.

Q. And that is the Higgins' account to the Doyne Lumber and Milling Company? A. Yes.

Q. Then why did you charge it up that way on the account between the Doyne Lumber and Milling Company and Higgins if it was Doyne's individual account? I do not quite see the point. A. I charged it this way. I thought that the account was due from William Doyne.

40 Q. And you understood it was Doyne's individual account? A. And I charged it up—I credited

John Workmeister—Cross.

Higgins and charged it to Doyne, and then Mr. Doyne objected to it.

Q. Then you misunderstood the nature of the account in the book? A. I do not know whether I just misunderstood it. That is what he first told me. As far as I can understand, he says there is something there that Higgins owed him, or he owed Higgins, and then I charged it up to William Doyne and I credited him, and I believe you will find William Doyne in here where he is charged for this amount, but Mr. Doyne objected to that, he says it was to be charged off to profit and loss, and there is another entry in the journal charging that off. 10

Q. Did you think that Doyne sold Higgins anything individually? A. I do not know; I did not question it.

Q. You do not know that at all? That is what I want to get at. 20

BY MR. DEMAREST:

Q. What does the J-85 refer to in the ledger? A. Journal, 85.

Q. Have you journal, page 85, here? A. I guess we have.

Q. Look at that. Do you find an account on page 85 of the journal that is referred to in this ledger account? A. Have you got the journal? I guess she used the other book. 30

Q. This one (indicating)? A. I used one journal as a sales book, if I am not mistaken. I believe that is the sales book (indicating).

BY THE COURT:

Q. It is in the front, isn't it? A. I can tell in a minute. Yes, that is the sales book.

Q. Page 85? A. No; it was the sales book too. Here it is. There it is. 40

John Workmeister—Cross.

MR. HUDSPETH: How is that entered?

A. It is first William Doyne, and then he objected, he said it should be charged to profit and loss, and it is profit and loss then.

BY MR. DEMAREST:

10 Q. Is that the item on page 85 of the journal that is referred to in the ledger? A. Yes, sir.

Q. And is the item on page 85 of the journal in your handwriting? A. Yes, sir.

Q. Is William Doyne, which is crossed out, in your handwriting? A. Yes, sir.

Q. When did you make that entry on page 85 of the journal? A. June 14, 1910.

20 Q. And did you cross out the William Doyne and enter profit and loss? A. I believe I did, because the profit and loss is in my handwriting

20 Q. When did you do that? A. That day, that night.

Q. How came you to make that entry to William Doyne in this book and afterward change it to profit and loss? A. I told you that before, that he said he had some work that Higgins done for him and from that I took that he owed it.

30 Q. What position, if any, did Mr. Doyne at that time have in the Hudson Milling Company? A. He ran the mill.

MR. HUDSPETH: I object to that as a conclusion of this witness.

THE COURT: Well, that is a conclusion of the witness, that he ran the mill.

40 Q. Do you know what work he did there? Just tell the character of the work he did there? A. He got the work out, superintended the mill, I would say; saw that the men did the work, got the work out; he figured on the estimates.

John Workmeister—Re-Direct.

Q. Did Mr. Berghoff at that time or any time speak to you about this entry? A. No.

Q. You never had any authority from Mr. Berghoff to make that entry? A. I do not recall any.

Q. Are you sure you did not have any? A. I don't remember having any instructions; I never gave it any thought after that night.

Q. How did that page come to be cut out of that ledger, do you know that? A. I do not know. 10

Q. Was it cut out at the time you made this entry? A. No, I do not think it was.

Q. Are you still employed by the Hudson Milling Company? A. Yes, sir.

Q. How long has that page appeared in that condition? A. Well, if I recall right, I found it—well, I might say maybe between October and January of last—between October of 1911, and January of 1912. 20

Q. Do you know who cut it out? A. No, sir.

Q. Do you remember a conversation one afternoon about the 14th of June, the date that that entry bears date, when Mr. Berghoff, Mr. William Doyne and Mr. William Doyne's son were present, when Mr. Berghoff had a talk with Mr. Doyne and agreed to have that entry made in that book and you instructed to make it? A. I do not recall it. 30

RE-DIRECT EXAMINATION BY MR. HUDSPETH:

Q. When do you say you discovered that page was extracted? A. It was between October, 1911 and January, 1912; I could not say exactly.

Q. And you made this entry in the journal in 1910, didn't you? A. Yes.

Q. And it was after you had made the entry you discovered the extraction of that leaf? A. Yes. 40

John Workmeister—Re-Direct.

Q. After you discovered the extraction of the leaf did Doyne come to the factory? A. I do not think so; I could not say.

Q. About when was it he stopped coming there? A. Which Mr. Doyne?

Q. William J. A. I believe he left the Hudson Milling Company in October, 1911. He did leave
10 in October, 1911.

Q. And that is about the time you discovered that leaf had been extracted? A. I would not say I discovered it in October.

Q. Well, about that time? A. I might have discovered it in January when I got at the books.

Q. Was it about that time, about the last time Mr. Doyne came to the mill? A. I could not say sure.

20 Q. What? A. I could not say positively.

Q. Was it about the time that you last saw him at the mill you discovered the extraction of that page? A. Well, I could not say if I discovered it first or after. I could not just recall that.

Q. But you remember the time he last appeared at the mill? A. That was in October, 1911, in the month of October, 1911.

Q. And you made the entry in the journal in June, 1910? A. In June, 1910; I know that posi-
30 tively.

Q. Who first called your attention to the extraction of the page from the ledger? A. I do not know; I think I—I really could not say how I first came to notice it now.

Q. Mr. Berghoff spoke to you about it, didn't he? A. He might have told me in making up the Higgins' account—I might have discovered that.

40 Q. You remember him trying to get at the

Julius Berghoff—Direct.

Higgins' account after Doyne left? A. Yes, he told me to make it up.

Q. And then you found the leaf had gone? A. I found the leaf in that condition.

Q. And he asked you how that was? A. Yes, sir.

JULIUS BERGHOFF, called and sworn on behalf of the plaintiff, testified as follows: 10

DIRECT EXAMINATION BY MR. HUDSPETH:

Q. What, if any, connection did you have with the Hudson Milling Company? A. I was the president.

Q. The Hudson Milling Company succeeded what company, if any? A. Well, we bought the assets of the Doyne Lumber and Milling Company. 20

Q. When you say, "We", you mean the Hudson Milling Company? A. The Hudson Milling Company.

Q. What, if any, connection did W. J. Doyne have with the W. J. Doyne Milling Company? A. With the Hudson Milling Company?

Q. No, the Doyne Milling Company? A. Well, I do not know; all I know is what he said. 30

Q. Well, what did he say? A. He was the president.

Q. Do you remember about what time the Hudson Milling Company took over the assets and good will of the Doyne Lumber and Milling Company? A. I could not say for the dates.

Q. I show you a bill of sale of Weller to the Hudson Milling Company. Will that refresh your recollection as to about the time? A. Yes. 40

Julius Berghoff—Direct.

Q. That is April 23, 1910; is that correct? A. Yes.

Q. Now after the Hudson Milling Company went into business did William J. Doyne have any connection with it? A. He has.

Q. What? A. Well, he was manager of the mill.

10 Q. Who was the chief executive officer of the Milling Company? A. I was.

Q. You? A. I was.

Q. And under whose orders and directions was W. J. Doyne? A. Under mine.

Q. And did that continue down to the time that he severed his connection with the Hudson Milling Company? A. Yes.

Q. Did he receive a salary? A. Yes.

20 Q. How much per week? A. First he got thirty five dollars the first year, and the second year fifty.

Q. Do you know anything about this Higgins' account? A. Yes.

Q. Did the Hudson Milling Company claim that account—

MR. DEMAREST: Did the who? The Hudson Milling Company, you say?

30 MR. HUDSPETH: Yes.

MR. DEMAREST: I object to that.

THE COURT: The question is not fully asked yet.

MR. DEMAREST: I thought it was finished.

Q. —under the bill of sale made by Charles H. Weller that I have just shown you?

40 MR. DEMAREST: I object to that. No matter what they claim. What passed to them, that is the question. They might claim anything.

Julius Berghoff—Direct.

MR. HUDSPETH: I withdraw the question.

Q. I show you again a bill of sale dated the 23rd day of April, 1910, made by Charles H. Weller; do you recognize that? A. Yes.

Q. Is that the bill of sale that was delivered to the Hudson Milling Company? A. This is the bill of sale turned over by Charles Weller to the Hudson Milling Company. 10

MR. HUDSPETH: I offer that in evidence.

MR. DEMAREST: I object to it as yet. You have not shown your receivership or anything else.

MR. HUDSPETH: Withdraw that. I offer in evidence the order appointing the permanent receiver in the suit of Stevens and Conroy Company et al., complainants, and the Doyne Lumber and Milling Company et als in the court of chancery of this state, dated the 29th day of November, 1909. 20

MR. DEMAREST: No question about that.

Marked Exhibit P-4.

MR. HUDSPETH: I offer the order of the Court of Chancery, directing the sale of the goods, chattels and assets of the insolvent corporation, the Doyne Lumber and Milling Company, dated the 31st day of March, 1910. 30

Marked Exhibit P-5.

MR. DEMAREST: Do you want it in evidence—If you do I will admit it,—that there was a bill of insolvency filed against the corporation, in which these orders were made?

MR. HUDSPETH: Then I offer in evidence the bill of sale of the receiver of the Doyne Lumber & Milling Company, the insolvent 40

Julius Berghoff—Direct.

corporation, to Charles H. Weller, of the goods, chattels, assets and so forth of the Doyne Lumber and Milling Company.

MR. DEMAREST: I admit it.

Marked Exhibit P-6.

10 MR. HUDSPETH: I offer in evidence the bill of sale of the said Charles H. Weller to the Hudson Milling Company of the same property.

Marked Exhibit P-7.

MR. HUDSPETH: Then it is admitted that there was a bill filed at the suit of these complainants against the said Doyne Lumber and Milling Company and others, in the Court of Chancery of New Jersey, to have such corporation declared an insolvent and for the appointment of a receiver.

20 And I offer in evidence the certificate of incorporation of the Hudson Milling Company, dated March 8, 1910.

Marked Exhibit P-8.

Q. Now after the delivery of the bill of sale that I have called your attention to from Weller to the Hudson Milling Company did you do anything in connection with the bills payable to the company? A. We had a bookkeeper; I did not—

30 Q. Speak out. A. We had a—I do not know what he was, an accountant or a bookkeeper, starting the books for us. I do not remember the gentleman's name; and he is the one that drew out all the accounts payable—due to the Hudson Milling Company.

Q. The Doyne Milling Company? A. The Doyne Lumber and Milling Company.

40 Q. And what was done then by your company, the Hudson Milling Company, after you got this

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statement made by the accountant? A. Well, we tried to collect it.

Q. And amongst those bills payable to the Doyne Lumber and Milling Company at the time the Hudson Milling Company received the bill of sale from Charles H. Weller was included what?

MR. DEMAREST: I think that the bill of sale which is in evidence will speak for itself in that respect. 10

THE COURT: If it appears in the book and the book is in evidence and all of them were conveyed, I suppose that is plain enough, but I see no objection to your asking it.

Q. Was this Higgins' account included? A. Yes.

Q. Now after the Hudson Milling Company 20 took over this Higgins' account, did you see the debtor, Mr. Higgins? A. I have not—I think I seen Mr. Higgins afterwards. In fact I did not know that this—that Mr. Higgins was the one that owed that account. There was lots of accounts over there.

Q. Was the claim of the Hudson Milling Company against Higgins ever paid? A. Not as I—I do not know if it was. It has never been, not to my knowledge. 30

Q. I call your attention to the entry upon the journal at page 85; when was your attention first called to that,—fifty eight, W. M. Doyne, erased or scratched out, profit and loss, \$708.91, June 14, 1910? A. I do not know. I think it is the latter part of November last.

Q. Did you know of the entry in this journal at the time it was made, or about the time of this item? A. I did never know it until about during 40 the month of November last.

Julius Berghoff—Direct.

Q. Did you ever give any directions to make such entry? A. I did not.

Q. Did you ever make any such settlement on the part of the company or agree to any such settlement? A. I did not; I did not.

10 Q. Did you ever authorize William J. Doyne to make any such arrangement in regard to the Higgins' account or the settlement of the same or to have any such any such entry made? A. I did not.

BY THE COURT:

Q. Who had charge of the financial operations of the Hudson Milling Company? A. I signed all the checks.

20 Q. And who had charge of the allowance of credits and matters of that kind? A. Well, anything—any subject which has been brought before me, why, I ruled on it, but I seldom was there, I was only one or two hours—

Q. But who was the man in the—A. Mr. Doyne. He was the man that stayed there all the time.

Q. He stayed in the place, but who had charge of the financial operations of the company? A. I did.

30 Q. Doyne's job was purely mechanical, running the plant; he did not run the finances at all? A. Well, he did run it, but without authority.

Q. Without authority? A. M-m.

BY MR. HUDSPETH:

Q. I understand Mr. Doyne was connected with the Hudson Milling Company? A. Yes.

Q. You never were connected with the Doyne Lumber and Milling Company? A. Never.

Julius Berghoff—Cross.

CROSS EXAMINATION BY MR. DEMAREST:

Q. When you first came into this matter the Doyne Lumber and Milling Company was an insolvent corporation in the hands of a receiver, wasn't it? A. I think so, yes.

Q. And you had some negotiations with Mr. Doyne and with Mr. Annett, the receiver of the Doyne Lumber and Milling Company, in relation 10
to the purchase of the assets of the Doyne Lumber and Milling Company and the stock of that company, didn't you?

MR. HUDSPETH: I object as immaterial and irrelevant and it is testimony tending to contradict the written bill of sale.

Objection sustained.

Q. You entered into a written contract with Mr. Doyne and his wife about the 8th of March, 20
1910, whereby you agreed to do certain things and they were to do certain things, did you not?

MR. HUDSPETH: I object as not the best evidence. The written contract is evidence of what he states.

THE COURT: He simply asks if he entered into a written contract, without stating the contents. He may state if he entered into a contract. 30

A. I signed a contract.

Q. Now you were served with a subpoena to produce that contract? A. Yes.

Q. Have you it here? A. Yes.

Q. Let us have it.

MR. HUDSPETH: I object, that that is a matter of defense. It is not proper cross examination. 40

THE COURT: I do not know what it is

Julius Berghoff—Cross.

yet. Nobody can tell what it is until we see it. It may not be a matter of defense. It may be a complete confession of the whole business you are claiming, for all I know.

The Court examines the contract.

10 THE COURT: I overrule that, Mr. Demarest. That is not a contract on behalf of the Hudson Milling Company at all.

MR. DEMAREST: If your Honor will bear with me a minute I will show you it is relevant. I refer to Exhibit P-5 which has been put in by the plaintiff;

Mr. Demarest reads Exhibit P-5.

20 THE COURT: I see absolutely nothing in that relevant to this contract; absolutely nothing.

MR. DEMAREST: Now, to go further than that, the testimony of Berghoff is—

MR. HUDSPETH: I do not think this is fair. If he wants to make an offer, all right, but he makes a speech as to what the alleged contents of these papers are, and that will go to the jury box.

30 THE COURT: The paper he has read now is already in evidence, so that is in the jury box any way.

40 MR. DEMAREST: Now Berghoff on the stand has testified that these assets of the corporation were transferred by the receiver of the Doyne Lumber and Milling Company to Weller, and my purpose is now to examine him and find out whether or not he did not agree to incorporate the Hudson Milling Company,—whether he did not incorporate it.

THE COURT: Suppose he did?

Julius Berghoff—Cross.

MR. DEMAREST: And whether he did not make an agreement with Doyne to incorporate it upon certain considerations expressed in a written contract, and that is the contract I am now asking him about.

THE COURT: Suppose he did; what interest has Mr. Higgins in that transaction or contract between Mr. Doyne and Mr. Berghoff? 10

MR. DEMAREST: I hope to develop that in this way: The point is this, I want to show by the cross examination of this witness that while the Doyne Lumber and Milling Company—

MR. HUDSPETH: I object, unless the Court wants to hear it. It is unfair, it is not a proper offer to prove certain things. 20

MR. DEMAREST: I want the Court to hear it. If you object to the jury hearing it, withdraw your jury for a moment, I am perfectly sincere in urging it.

THE COURT: Go ahead. I do not think it will hurt the jury.

MR. DEMAREST: This is what I expect to show by the cross examination of this witness,—

THE COURT: I do not care what you expect to show. I want to know what you offer. Almost every lawyer who expects to show something by the witness meets with disappointment, because the witness does not always measure up to his expectation; but if you have an offer I want to hear it. 30

Q. Have you the contract made by William Doyne on the 8th day of February, 1910?

MR. HUDSPETH: I object. 40

Julius Berghoff—Cross.

THE COURT: I sustain the objection on the ground that the contract is utterly immaterial and that it is what is known in the law as *res inter adias acta*. It is a transaction happening between entirely different persons than those who are parties to this issue.

10 Q. Were you one of the incorporators of the Hudson Milling Company? A. I really—

MR. HUDSPETH: I object. The certificate of incorporation is in evidence and is the best evidence.

THE COURT: I think the objection is well taken.

MR. DEMAREST: All right; I call for its production.

20 MR. HUDSPETH: It is right there.

MR. DEMAREST: Oh, here it is,—P-8.

Q. Do you know Charles H. Weller? A. I do.

Q. Where is Mr. Weller employed?

MR. HUDSPETH: I object as immaterial and irrelevant and not proper cross examination.

30 THE COURT: It would appear on the face of it to be improper, but what is the point?

Q. Was Mr. Charles H. Weller your agent?

MR. HUDSPETH: I object as immaterial and irrelevant.

THE COURT: His agent for what? I think the question is entirely too broad.

40 Q. Was Charles H. Weller your agent, Mr. Berghoff, in purchasing the assets of the Doyne Lumber and Milling Company?

MR. HUDSPETH: I object to that as im-

Julius Berghoff—Cross.

material and irrelevant. It is a matter of defense and not proper cross examination.

THE COURT: (After argument): If you can show—it seems to me this is the only possible theory of materiality or relevancy—if you can show that while Mr. Weller, if he was the agent of Mr. Berghoff, was actually the owner of this plant and assets, Mr. Berghoff was under the obligation to do this thing, that is to cancel this debt, and that he actually did cancel it, then I will permit you to do it. 10

MR. DEMAREST: That is exactly it.

THE COURT: Outside of that I cannot see a possible ground of relevancy. I suppose there is no objection to that.

MR. HUDSPETH: No.

20

Question repeated.

MR. HUDSPETH: I do not understand your Honor allows the question in that form.

THE COURT: I simply put it down as to whether or not Weller purchased the plant at Mr. Berghoff's direction for him, and that what appears on the face of the bill of sale as the purchase of Weller was really the purchase of Berghoff; that I will permit him to prove, and then I will permit him to show if he can that while Weller thus held the property for Berghoff that Berghoff agreed to and did cancel the debt. That is the extent to which I will permit the witness to go. Mr. Demarest says he is going to prove there was an actual contract between Berghoff and Doyne whereby Berghoff agreed to cancel and did cancel this particular debt. That is what Mr. Demarest agrees to prove, as I understand it. 30 40

Julius Berghoff—Cross.

Of course if that is so, if Weller was simply a figurehead in holding the property and Berghoff was the real owner, he indubitably had the right to cancel that debt.

MR. HUDSPETH: Yes.

10 THE COURT: Now Mr. Demarest says that having that right he exercised it and did cancel the debt for a consideration.

MR. HUDSPETH: Isn't that a matter of defense?

THE COURT: I suppose that bears upon the item on the book and he intends to connect up the fact of the entry on the book with the direction that was given to cancel it.

20 MR. DEMAREST: Exactly. That is my intention.

Q. You say you know Mr. Charles H. Weller?
A. I do.

Q. Where was Mr. Weller employed in March, 1908? A. In Judge Hudspeth's office.

Q. And was Judge Hudspeth your counsel at that time? A. He was.

30 Q. Did you know of Weller taking a bill of sale from Charles E. Annett for the assets of the Doyne Lumber and Milling Company? A. Well, I knew he was—I knew of that—something of that kind.

Q. Didn't you request that title to the assets of the Doyne Lumber and Milling Company be taken in Mr. Weller's name? A. Well, I could not say whether I requested it. I know it was done. I cannot remember the transaction. I was entirely under the advice of my counsel.

40 Q. Weller took that bill of sale for you in furtherance of a contract that you had made with Mr. Doyne, didn't he?

Julius Berghoff—Cross.

MR. HUDSPETH: I object. The contract is the best evidence.

THE COURT: I think that is true.

Q. Did Mr. Weller take title to the assets of the Doyne Lumber and Milling Company at your request? A. Well, I presume so; I could not say.

Q. And he was acting as your agent in that purchase, wasn't he? A. Yes, sir. 10

Q. You had at that time purchased the claims against—that is, the debts of the Doyne Lumber and Milling Company, hadn't you? A. All the assets of the Doyne Lumber and Milling Company.

Q. Had you agreed to purchase the assets of the Doyne Lumber and Milling Company yourself? A. Personally? Well, I really do not know but that it was in the name of the Hudson Milling Company. 20

Q. And you caused the Hudson Milling Company to be incorporated, didn't you? A. Yes.

Q. And became a stockholder in the Hudson Milling Company immediately after its incorporation, didn't you?

MR. HUDSPETH: I object. It is not proper cross examination and he is making the witness his own, so that when he comes to me I can cross examine him. 30

MR. DEMAREST: I do not want to get beyond the scope of a proper cross examination and be bound.

THE COURT: Then you don't want to do it.

MR. DEMAREST: I think I am entitled to go a considerable way.

THE COURT: You go ahead and when the time comes and Judge Hudspeth objects I 40

Julius Berghoff—Cross.

will tell you what I think about it, but I am not going to tell you in advance what I think so as to give you a sort of tip as to what I will rule when the time comes.

Q. Were you an officer of the Hudson Milling Company? A. Yes.

Q. In June, 1910? A. Yes.

10 Q. Do you remember a conversation about the 14th day of June, 1910, in the office of the Hudson Milling Company at which Mr. Doyne and his son were present, when Mr. Doyne called your attention to the Higgins' account and asked you to have that account ruled off the books of the Doyne Lumber and Milling Company—of the Hudson Milling Company—and that you at that time agreed to have that account taken off the books?

20 A. No, Mr. Doyne—

MR. HUDSPETH: Yes or no?

A. No.

Q. Did you ever have any conversation with Mr. Doyne in regard to this Higgins account?

Q. I could not say whether it was Mr. Higgins' account. I could not mention and could not say whether it was this particular account.

30 Q. About the time that the assets of the Doyne Lumber and Milling Company were transferred by the receiver of that company to Mr. Weller by the bill of sale which has been shown to you, did you not have conversation with Mr. Doyne with regard to this Higgins account? A. No, sir.

Q. Did you at that time have certain papers which showed the live accounts of the Doyne Lumber & Milling Company? A. No, sir.

40 Q. I show you a paper and ask you whether you have ever seen that paper before? A. I could not say; I do not think that I did.

Julius Berghoff—Cross.

MR. DEMAREST: I would like to have it marked for identification.

THE COURT: He does not identify it.

THE WITNESS: I do not identify it.

THE COURT: You want it marked as the paper which you show him?

MR. DEMAREST: Yes.

Marked D-1 for identification.

10

Q. I show you a typewritten list which please examine and tell me whether you have ever seen that before or had it in your possession? A. I could not remember if I did.

Q. You could not identify it?

No answer.

MR. DEMAREST: I ask to have that marked for identification.

20

Marked D-2 for identification.

Q. I show you that paper and ask you if you ever remember seeing that or having had it in your possession? A. I do not remember any such paper as that.

Q. Whose handwriting is that in, do you know? A. I do not know.

Marked D-3 for identification.

30

Q. Do you know whose handwriting was on those yellow sheets of paper, marked D-1 for identification, the first ones of the three which I showed you? A. No, I do not.

Q. You do not know the handwriting? A. No, sir.

Q. You say you were president of the Hudson Milling Company? A. Yes, sir.

Q. How soon did you become president of that company after its incorporation? A. Well, I think immediately after it was incorporated.

40

Julius Berghoff—Cross.

Q. And you have remained president ever since that time, haven't you? A. Yes.

Q. And were you a director? A. I presume so; I was one of the directors.

Q. Did you hold any other office in the company besides director and president? A. No.

10 Q. Who was the general manager, if you had any? A. Well, Mr. Doyne acted as general manager.

Q. Of the accounts and books and finances? A. Well, I acted for the financing, but Mr. Doyne assumed a great deal, because I was there very little in the office.

Q. And did Mr. Doyne have authority to assume it? A. He had no authority.

20 Q. So that you were the financial director although Mr. Doyne did pretend to exercise that authority? A. Yes.

Q. Now didn't you and Mr. Doyne at the time that Mr. Weller was acting as your agent and before the bill of sale was given by Mr. Annett, Receiver, to Mr. Weller, go over the live accounts of the Doyne Lumber & Milling Company to find out which were good and which were bad? A. Before? Well, such thing is possible, I do not remember.

30 Q. You did not ask Mr. Weller, as your agent, to buy the assets of the Doyne Lumber & Milling Company without making an inquiry as to what those assets consisted of, did you? A. Well, all that we had no way of knowing, just what he said. There was absolutely no other way of knowing but just what he said.

Q. Did you go over the books of the Doyne Lumber & Milling Company, while Mr. Weller was acting as your agent, to find out just how much was due that company on its books? A. I did not.

40

Julius Berghoff—Cross.

Q. Did you cause anybody to do that for you?
A. No, sir.

Q. Wasn't there a slip, a list, a written list, made up of the accounts which appeared on the Doyne Lumber & Milling Company's books, which they considered good, and which was given to you? A. The only list that I have ever seen was one that Mr. Goldenhorn gave over at the Union Trust Company. 10

Q. Didn't you at the time that Mr. Weller was acting as your agent in the purchase of the assets of the Doyne Lumber & Milling Company have in your possession this paper which I have shown you and which is marked D-1 for identification? A. I never had it in my possession; I never had any of those papers in my possession.

Q. Didn't you agree with Doyne that any and all accounts of the Doyne Lumber and Milling Company which should be chargeable to him should in that purchase to Weller be cancelled off the books? A. Mr. Goldenhorn, before the consummation of the contract, mentioned there may be some accounts of minor amounts on the books of the Doyne Lumber & Milling Company against Mr. Doyne which Mr. Doyne don't want to be collected. 20

Q. Didn't you agree that any and all accounts chargeable to Doyne should in that transfer be considered paid? A. Chargeable to Doyne—no, there was no such thing mentioned as chargeable, he simply said there were some small items against Mr. William Doyne on the books and of course Mr. Doyne don't expect to pay that, and I did not object, and the rest of them present did not object to it. 30

Q. And while Weller was acting as your agent didn't you and Doyne have a conversation with 40

Julius Berghoff—Cross.

Mr. Annett at which it was explained to you that the Higgins account was one which Doyne owed and Higgins did not owe, and that that was to be crossed off the books? A. Never. There was no such thing, because I did not have such a thing. I did not know about Higgins owing anything. I did not know Higgins. I did not know of the account.

10 Q. And didn't you, after the formation of the Hudson Milling Company, and after you became president of that company, at the request of Mr. Doyne, order that entry charging the Higgins account to Doyne to be made on the books of the company? A. I did not.

Q. The Hudson Milling Company had transactions during the year 1910, didn't it? A. Yes, I think so, yes.

20 Q. And it owed Higgins five hundred and some odd dollars, didn't it,—nearly six hundred dollars? A. I do not know. He has done, I understand, lots of work, but I never knew that Mr. Higgins was connected with that account at all. At the time I never knew until the end of about—About the end of November.

Q. You did not know Mr. Higgins was connected with this account? A. This is the same—

30 Q. What did you mean by that? A. I knew at the time—never knew until it was drawn to my attention last November by an expert accountant.

Q. You did not know that the Higgins account was on the books of the Doyne Company, you mean? A. I never seen those books afterwards. They were put away and we opened new books.

40 Q. Didn't the Hudson Milling Company after it purchased the assets of the Doyne Lumber & Milling Company from the receiver attempt to collect the bills that were owing to the Doyne Lumber &

Julius Berghoff—Cross.

Milling Company? A. Well, we attempted to collect. That is about all we have done.

Q. And didn't you find the Higgins account among those accounts on the books? A. I—yes, that was one of the accounts.

Q. And you knew in 1910 that the Higgins account was on those Doyne Lumber & Milling Company books, didn't you? A. I knew there was an account against Mr. Higgins at that time. 10

Q. Your concern paid Mr. Higgins for what you owed for work done in 1910, didn't you? A. We paid Mr. Higgins right along for work.

Q. How did you come to pay Mr. Higgins for the work if Mr. Higgins was at that time the debtor of the Hudson Milling Company to the extent of nearly eight hundred dollars? A. When those accounts were shown to me by the expert accountant I did not know Mr. Higgins. There was lots of accounts over there. I did not know Mr. Higgins started to buy stuff a few months afterwards. I never knew whether this was the Mr. Higgins. I simply knew there was lots of accounts standing out at that time, and when I met Mr. Higgins I never knew he was connected with any of these accounts. I did not know it was the same person. I did not know that was the Higgins—I did not know the name. 20

Q. When did you first know who the William F. Higgins mentioned in those accounts on the Doyne Lumber & Milling Company books was? A. That it is the same Higgins? 30

Q. Yes. A. Knew that when it was mentioned to me, when the Union Trust Company called my attention to that, given to them by the expert accountant some time last November.

Q. In November last? A. Yes; it must have been last November, yes. 40

Julius Berghoff—Cross.

Q. November, 1912? A. No; a year ago last November.

Q. Oh. Then at the time that Higgins was doing business for you in 1910, and received upwards of six hundreds of dollars from you, from your company, you did not know it was the same Higgins?

A. I did not know that Higgins owed us a dollar at that time.

Q. Your agreement with Doyne about the time that Weller was acting as your agent was that he should sell the stock of the Doyne Lumber & Milling Company to you, wasn't it?

MR. HUDSPETH: I object.

THE COURT: Question overruled. The agreement itself is the best evidence of the contract.

MR. DEMAREST: Have you got the agreement?

MR. HUDSPETH: You have it here.

MR. DEMAREST: No; I haven't got it. I served you with notice to produce it.

Q. Have you the original of agreement made March 8, 1910, Mr. Berghoff? A. Which is that, between—

Q. Between Doyne and yourself?

MR. HUDSPETH: I have discovered it.

A. Yes; it is all there.

Q. Is that the agreement (handing witness a paper)? A. I do not know; I guess so. That is the agreement.

Q. And under that agreement you agreed to purchase from Doyne a part of the stock of the Doyne Lumber & Milling Company, didn't you? A. I think so. I do not remember exactly.

Julius Berghoff—Cross.

MR. HUDSPETH: I object to this as a matter *res inter alias acta* and not binding upon this corporation. It is an agreement evidently between the witness individually and Doyne and his wife as individuals.

THE COURT: I have not seen the agreement yet. What do you claim the agreement will do?

10

MR. DEMAREST: The agreement will probably act as an estoppel. The agreement will show that Berghoff agreed to buy a—

THE COURT: Against whom will it act as an estoppel?

MR. DEMAREST: As against the Hudson Milling Company as the purchaser—

THE COURT: How can it act as an estoppel against the Hudson Milling Company if the agreement is the agreement of Mr. Berghoff personally?

20

MR. DEMAREST: Because he in that agreement agrees to form the Hudson Milling Company.

THE COURT: Suppose he does?

MR. DEMAREST: And pass over to the Hudson Milling Company what he purchased.

30

THE COURT: Unless the Hudson Milling Company adopts that contract as its own, it is not estopped by it. It is not estopped by negotiations and contracts and so on that are carried on by individuals prior to the formation of the corporation. The corporation is an entity entirely apart from Mr. Berghoff and the individuals who compose it, and the only thing that could bind the corporation would be an actual conscious adoption of what Mr. Berghoff had

40

Julius Berghoff—Cross.

10 done as it act. Unless you can show it, it would not estop them. And let us go a step further than that as a legal proposition; let us assume that it would estop Mr. Berghoff, surely it would not estop Mr. Berghoff in favor of Mr. Higgins, because Mr. Higgins did not change his position on the faith of what Mr. Berghoff did, and an estoppel must rest upon a change of position relying upon the act done by the party.

20 MR. DEMAREST: I want to show this, that while Berghoff was practically the owner of the assets of the Doyne Lumber & Milling Company, and before he turned the assets over to this new Hudson Milling Company that he had made an agreement with Doyne whereby the defendant in this suit, Mr. Higgins, was excused from the payment of this bill.

THE COURT: But that is not what you offer. You stated your offer in so many words to be an effort to estop the corporation. Manifestly this cannot be that.

30 MR. HUDSPETH: Even then, your Honor can see that it has no earthly bearing upon the agreement. Mr. Doyne owned this concern and there were outstanding debits and credits, and from this agreement it would appear that he wanted to try and get the Doyne assets turned over to the new company which Berghoff was to finance, and Berghoff was to pay all claims against the company.

40 THE COURT: What is there there that you claim actually erases or wipes out Higgins' claim? I do not see anything. Show me in the contract.

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MR. DEMAREST: First, the consideration—

THE COURT: I will assume there is a consideration. Show me the part that cancels the debt.

MR. HUDSPETH: He knows there is nothing like that.

MR. DEMAREST: "And it is further understood and agreed between the parties that any and all claims and demands found upon the books of the Doyne Lumber & Milling Company against the said William Doyne, one of the parties hereto, shall as soon as the new corporation secures control of the new company be cancelled and discharged so far as the new company may be able to cancel and discharge the same." 10

THE COURT: That is an agreement to do something by Mr. Berghoff, and it is an attempt on Mr. Berghoff's part to bind the corporation when it shall become the owner of an existing debt. Manifestly the language you have used indicates it could not be cancelled before, because you say "as soon as the corporation is formed it will cancel it upon the books of the company." Manifestly it would be alive until the company was formed, because it could not be cancelled after the company was formed unless it had lived up to that time. Now what you have now seems to me to be too clear for argument. What you have now, if this was a contract resting upon a valid consideration between Doyne and Berghoff, is a right of action against Berghoff for a breach of his contract with Doyne. That is what you have. 20 30

MR. DEMAREST: It seems to me it goes further than that; it seems to me that Berg- 40

Julius Berghoff—Cross.

hoff having made his contract with Doyme, the corporation which he formed and which obtained title by virtue of that document cannot obtain any better title than he himself got, and if he did not get good title—

10 THE COURT: He did get an absolutely indefeasible title by his bill of sale. He got a title from Annett to Weller and from Weller to the Hudson Milling Company. The mere fact that the order directing the sale declared a certain thing simply indicated that the Court of Chancery if it sees fit on a proper application for that purpose may give some relief against that bill of sale, but the title that was conveyed by the receiver, who, under the statute, is the owner of the assets—absolutely the owner—the

20 title that the receiver gave was a good title, and the company got it. Now then you are asking me to hold this thing,—which seems to me to be absolutely unsound—you are asking me to hold that every contract that a promoter makes is necessarily the contract of the corporation subsequently to be formed; and there is not a case on God's footstool that holds any such thing as that. The

30 only thing that can bind a company to the liability on a contract made prior to its organization is when the company adopts that contract. They do not call it ratification. It cannot be ratification, because you only can ratify when the principle is in existence at the time the contract is made, and the corporation was not existing at the time the contract was made. Therefore it cannot be a ratification. And the language of all the

40 scientific cases is that it is an adoption by

Julius Berghoff—Cross.

the corporation. Now you have got to show in this case that the Hudson Milling Company subsequently, and after Mr. Berghoff made this agreement, by some unequivocal act adopted the contract made by Berghoff with Doyne; otherwise you cannot erase this claim from the books. Now I will hold that consistently and constantly through this case, and for this reason, that prior to my getting on this bench I had occasion to try precisely this question at three times, and on two occasions the case went to the Court of Errors and was reversed without any opinion at all, I holding that there must be an adoption, and the Circuit Court judge in the Union Circuit ruling that an adoption was unnecessary, that the party having contracted on the part of the corporation bound the corporation, and in the second case holding that whereas the party who made the contract subsequently acquired the majority of the stock of the corporation, that therefore he was the practical owner of the corporation and that therefore the corporation was bound. Of course the latter proposition is perfectly laid down now in this case of *Clement v. Young and McShea*, where you will find it distinctly laid down that the director of a corporation has no authority as a director to act for the corporation except in his office as member of the board of directors. The director of a corporation acquires no additional authority to act for the corporation from the fact that he owns a majority of corporate stock. And both these principles have been recently affirmed in the Court of Errors and Appeals in a case brought in Trenton

Julius Berghoff—Cross.

10

and reported in next to the last pamphlet of the Atlantic Reporter, where the Mayor of Trenton attempted to take away the license to run one of the trolley cars because the trolley company had not complied with the ordinance of the City of Trenton with respect to carrying passengers for a certain amount of fare, and Chancellor Walker decided practically what you are asking me to hold, and the Court of Errors and Appeals decided that he was entirely wrong about it and that there could be no such binding effect on the corporation by a contract which was made before by a company which afterwards became a constituent of the corporation.

20

MR. DEMAREST: I do not want to worry the court with this proposition, but I think that this case is quite distinguishable from the other line of cases your Honor has cited, for this reason: In most of those cases the agreement has been made by a director of the corporation who attempted to act for the corporation and yet he did not have any authority.

30

THE COURT: The Trenton case was nothing of the kind; it was the case of a corporation that was running a road and subsequently the directors of the corporation created two other corporations, and they actually did have a contract, the very thing which the one company had contracted to do, and subsequently sought to act differently from that original contract, and the court held that the two companies which came in afterwards were absolutely unbound because it had not appeared that they had adopted the contract. I have no doubt about the principle.

40

Julius Berghoff—Cross.

MR. DEMAREST: This case is somewhat different from any of the cases you have cited because the bill of sale is not from Annett to the Hudson Milling Company at all, but first the contract of March 8th was made, and then the witness has admitted that Weller acted for him as his agent. Now the original bill of sale from Annett as receiver is to Weller, and the admission of this defendant is that Weller was at that time his agent. 10

THE COURT: Yes.

MR. DEMAREST: Now Weller afterward on the same date conveyed by a bill of sale to the corporation. That bill of sale is in evidence. Now if Weller were the principal of Berghoff, and Weller did not get title to this, or there were an estoppel at that time on the part of Berghoff or Weller according to their actions— 20

THE COURT: But the difficulty is that there is not any such thing in. You are asking me to assume a premise which by the very proof in the case you have disproven. You are asking me to assume that this company is estopped to assert that Berghoff cancelled that debt, whereas your own proof shows that Berghoff not only did not cancel the debt but his contract was that the debt should not be cancelled until the company was formed—then it should be cancelled, not on Berghoff's books, but on the books of the company. In other words, Berghoff was contracting that the company should do something after it should have been formed, and your claim now is the company did not do it; and the company stands up and says, "Well, we did not have 30 40

Julius Berghoff—Cross.

10 to do it because we never adopted Mr. Berghoff's contract, and we will not do it." Now I say that your remedy in the light of those circumstances is a remedy of a suit at law on the contract between Doyne and Berghoff, if Berghoff did not perform his contract, for damages for the non performance of the contract; and not only is that the legal situation, but you are asking me to go a step further even than that. You are asking me to hold that Mr. Higgins, who was not a party to the contract at all, and was no privy to the contract but just simply happened to have a claim, is entitled to advantage himself of the contract made between Doyne and Berghoff with which he had nothing to do.

20 MR. DEMAREST: That is so to date. The defense will show a different thing than that.

30 THE COURT: I cannot go beyond what now appears. Now those are the reasons, it seems to me, that make it utterly impossible for you to successfully assert against the Hudson Milling Company that Mr. Berghoff ever bound them or in any way that they have done anything which estopped them from asserting that this is a live claim which they are entitled to collect. I talk a lot like this always so that I can get right down on the record exactly what is in my mind, and if I am wrong the court above will have no doubt as to why I am wrong. I am perfectly willing to sit down and wrangle out any question.

40 MR. DEMAREST: I am perfectly willing to have your Honor wrangle it out so that I will know what you mean, and I know what

Julius Berghoff—Cross.

your Honor means. I ask your Honor for an objection in the nature of an exception.

THE COURT: Yes. I have planted the reasons right down there.

MR. HUDSPETH: We are rather far afield anyway. Even if Mr. Demarest is correct in his contention, the undertaking of Mr. Berghoff has to be construed according to the paper writing, and it expressly provides as to claims that stand against William Doyne. Now on the ledger, which existed at the time, the account is against William F. Higgins. 10

THE COURT: I am giving Mr. Demarest the benefit of the fullest possible advantage that the argument is capable of, and I say I assume that the claims are as he asserts, and I say in the light of that he has no right to claim that this company is estopped by anything that Mr. Berghoff has done, and I am saying furthermore that the facts in the case on the contrary establish the claims, because the very object of the contract was to keep the claims alive and not to kill them. 20

Adjourned to Thursday, February 13, 1913. 30

Trial resumed Thursday morning, February 13, 1913.

Julius Berghoff—Cross.

JULIUS BERGHOFF, resumes.

CROSS EXAMINATION BY MR. DEMAREST, continued:

Q. Mr. Berghoff, with the Hudson Milling Company what office, if any, did you occupy? A. President.

Q. Were you also general manager? A. Well,
10 I would hardly know whether to call it general manager. I took care of the finances.

Q. Did you exercise the functions of a general manager? A. Well, I suppose I did.

Q. Did you give credits? A. At first I did not, not the first year, because I did not know anything about the business nor the—

Q. Who was the man who gave the credits, who
20 passed upon the credits? I do not mean passed upon the financial condition of the party applying, but who was the man who finally determined whether or not credit was given?

MR. HUDSPETH: I object.

MR. DEMAREST: I want to find out whether Mr. Berghoff did not have authority to cancel this debt, and whether he did not have it cancelled on the books.

THE COURT: I will permit that.

30 Question repeated.

A. Well, I am the one that passed upon the credits.

MR. HUDSPETH: A little louder.

A. I am the one that passed upon the credits, but I had to leave a great deal of credits as far as selling merchandise is concerned, to Mr. Doyne, because I did not know anything about the cus-
40 tomers.

Julius Berghoff—Cross.

Q. You mean you had to get the information from Mr. Doyne as to whether they were entitled to credits? A. Yes.

Q. But after you had received this information from Mr. Doyne you had the right to give the credit? A. Yes.

Q. And did you have the right to make settlement of bills of the company? A. Yes, sir.

10

Q. Were you accustomed to doing that sort of thing, exercising that authority?

MR. HUDSPETH: I object. They have not shown any authority vested in him by corporate authority to do any of these things he is talking about.

THE COURT: I suppose the chief executive officer of the corporation, the man who had charge of the financial affairs, would have the indubitable right to take care of the financial affairs and settle its bills.

20

MR. HUDSPETH: I do not suppose he would have the right to cancel a debt.

THE COURT: He would not have a right to remit a debt without any payment, but I suppose he wants to show that there was a consideration somewhere moving to the corporation. He had not any authority to absolutely cancel it for the corporation. I will permit them to show what they can. I do not know what it is going to lead up to.

30

A. Well, I was accustomed to settle some bad accounts at a reduction now and then,—make allowances if we had an account that was not good.

Q. To settle some of the accounts that were on the books of the Doyne Lumber & Milling Company after you were the president and manager of the Hudson Milling Company?

40

Julius Berghoff—Cross.

MR. HUDSPETH: I object as immaterial and irrelevant.

10

THE COURT: I have not had a chance to look at this thing carefully, but my understanding of his contention now is that this debt was in effect paid by a consideration moving to the Hudson Milling Company, and that it was cancelled by the officer of the Hudson Milling Company who had authority to cancel.

MR. HUDSPETH: That is true, but their contention in the case from their pleadings is that this was entirely a matter of agreement.

20

THE COURT: Not entirely, because the original specification of defenses distinctly says that the goods, wares and merchandise set forth in the plaintiff's declaration and bill of complaint have been fully paid for by the defendant.

MR. HUDSPETH: That is true, but it is qualified by the amended specification, showing how they were paid for.

MR. DEMAREST: That is additional,—supplementary.

30

MR. HUDSPETH: He says they were paid for, and it cannot be otherwise, under an agreement, that an account then due from the defendant to William Doyne was to be set off against this said account and that William Doyne is to become a substituted debtor.

THE COURT: That is an additional specification of defense.

40

MR. HUDSPETH: I do not want to argue it, but my proposition is that the two propositions here are so inconsistent that one must fall as the other is sustained.

Julius Berghoff—Cross.

THE COURT: Not necessarily, because very often a man puts in a pleading covering all sorts of defences and makes good on the one that he can; and that, I presume, is what Mr. Demarest had in mind when he filed these various specifications of defenses. That is not the only inconsistent one; but he has a right to allege other specifications and make good on the one that he can establish by his proof. I will permit the evidence. 10

Question repeated. A. I think I did. I do not remember any such settlement was made,—one way or the other.

Q. Didn't you, after the Hudson Milling Company was formed, cross off and credit an account that you owed the Doyne Lumber & Milling Company yourself? A. No, sir. 20

MR. HUDSPETH: I object to this line of examination. This act of his, even if it were true in a special case, is not relevant or material in connection with any proposition contained in the specification of defenses.

THE COURT: I suppose the object is to show that he was in the habit of exercising, with the knowledge and consent of the corporation, the power to do this particular sort of thing. That he may show; but the mere fact that he crossed off a debt of his own, being a wrongful act, would not validate any other wrong he might do. 30

Q. I call your attention to page 85 of the Journal—

MR. HUDSPETH: I will admit—I am so clear as to my contention, I will admit that 40

Julius Berghoff—Cross.

this man had the power, so far as his connection with the corporation was concerned, to cancel debts, mark them off the books, direct them to be marked off the books.

THE COURT: All right.

Q. Look at the William Doyne account at the top of page 85. Who directed the scratching out—
 10 Did you direct the scratching out of the name of William Doyne, and the entry of profit and loss there? A. I do not know a thing about it. I do not know anything about this account. The book-keeper may know more about it than I do.

Q. Didn't you tell Doyne—A. What is this account?

Q. That is the Higgins account I refer to? A. No, I never did.

20 Q. Didn't you tell Doyne, in the presence of his son, after the Hudson Milling Company was formed some time about the month of June, 1910, I think it is, that the Higgins account should be taken off of the books of the Doyne Lumber & Milling Company? A. No, I never did.

Q. Sure of that? A. Sure.

Q. Do you say that you did not know that the William Higgins that you are suing was the same
 30 man who had done business with your concern for which you had paid him? A. Mr. Higgins—when the accounts were first taken over there, I did not know one person from another. I did not know any one. I knew there were lots of accounts due the Hudson Milling Company which has been taken over from the Doyne Lumber & Milling Company. I did not remember that particular name, Mr. Higgins. Then a week or so after we took charge of it the man that started the books had
 40 Mr. Doyne mark lots of accounts which he thought

Julius Berghoff—Cross.

good and bad, but I do not know anything of the account, did not know anything about it.

Q. This account was marked bad, was it? A. I do not know; I do not remember whether it was marked bad; I do not remember anything about it. It might; I do not know.

Q. Did you know Mr. Higgins personally before you discovered this account? A. What? 10

Q. Before you found this account was against him? A. Yes; I know him a number of months afterwards. I have met Mr. Higgins a number of times.

Q. It was in September or October, 1910, that the Hudson Milling Company did business with Mr. Higgins, wasn't it? A. September or October?

Q. Yes. A. That might be. 20

Q. And Mr. Higgins owned two lots adjoining the Hudson Milling Company in Bayonne, didn't he? A. I don't know; he might.

Q. Didn't you ask Mr. Higgins for leave to store lumber belonging to the Hudson Milling Company upon the lots? A. It may be. I do not remember. It is possible; I do not know.

Q. Don't you remember that Mr. Doyne took you to Mr. Higgins at the time you asked for the privilege to store lumber upon his lots, and told you that he was the Mr. Higgins who had done work for the Doyne Lumber & Milling Company, which work is credited on the Higgins account? A. I have never been in Mr. Higgins' place in my life. 30

Q. I did not ask you whether you were in Mr. Higgins' place, but I ask you whether Mr. Doyne did not introduce you to Mr. Higgins? A. Yes.

Q. And tell you at the time of the introduction that Mr. Higgins was the same man who had done 40

Julius Berghoff—Re-Direct.

the work upon the Doyne Lumber & Milling Company's plant that is credited on the account, for which you have charged him here? A. Nothing of the kind.

Q. Nothing? A. Nothing of the kind.

RE-DIRECT EXAMINATION BY MR. HUDSPETH:

10 Q. Now something has been said about your buying up the claims against the Doyne Lumber & Milling Company before the transfer was made by the receiver to Mr. Weller, and by Mr. Weller to you. You remember as to why you bought up those claims, do you not? You remember why you bought those claims? A. Yes.

Q. You remember it was in order to get the Chancellor to approve of a sale? A. Yes.

20 Q. So that the creditors would all be in court, you representing them by buying up the claims? A. Exactly.

Q. And that was to facilitate the sale and obtain the final turnover of the business as a going concern? A. Exactly.

Q. You did not know any of these creditors, did you? A. I did not know anybody.

30 Q. And at that time you did not know any of the debtors of the Doyne Lumber & Milling Company? A. I did not know a thing and never seen the books.

Q. After you secured the bill of sale from Mr. Weller—after the Hudson Milling Company secured the bill of sale from Mr. Weller, was there or not an expert obtained to go over the books of the Doyne Lumber & Milling Company, to ascertain what the outstanding bills were? A. Yes.

40 Q. And who was that bookkeeper, do you remember? A. I do not remember the man's name.

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Q. Did you see the result of his work after he finished? A. He gave us a list.

Q. Who did he deal with, do you remember, when he was going over the old books of the Doyne Lumber & Milling Company; where did he get his information from? A. From Mr. Doyne.

Q. And where was Mr. Doyne at the time?

MR. HUDSPETH: I object, unless he actually knows. **10**

Q. Do you know that he was gaining his information from Mr. Doyne? A. He and Mr. Doyne went over the books. I do not know a thing—

Q. Didn't you talk with Mr. Doyne about this man going over the books? A. Yes, and he talked with me about it. He said the man had suggested that he— **20**

Q. During the whole time that bookkeeper was going over the books did you have anything to do with him? A. No, sir.

Q. Who did? A. Mr. Doyne.

Q. Who had the books? A. Mr. Doyne.

Q. Where were the books? A. At the mill.

Q. When was it you first discovered that this claim of the Doyne Lumber & Milling Company which was turned over to the Hudson Milling Company and which the Hudson Milling became the owner of, was marked off on the journal as paid or settled? A. That was during the month of December, after the next expert went through the books. **30**

Q. That was during the month of December, 1910, is that right? A. 1910, no. It must have been 1911—1912.

Julius Berghoff—Re-Direct.

Q. If it was June 1st, 1910, it was entered on the book—A. Not until 1911.

Q. That is the first you heard it was marked off the books? A. The first I heard was at the Union Trust Company Building, at the bank, when he brought in his report and drew attention to it.

10 Q. When did you first learn that the bookkeeper had, on his own motion, or under the direction of any one, charged it up to profit and loss? A. Immediately after that I asked the bookkeeper why that has been done, and he said it had been done according to the direction of Mr. Doyne, and he said that he thought that he had full authority because he exercised such authority.

Q. When you found out that this claim against Higgins had been marked off the book as now indicated, did you see Mr. Higgins? A. I did.

20 Q. Did you have a talk with him about the claim? A. I talked with Mr. Higgins during the month of December, within a few days afterward.

Q. That is in 1911? A. Yes.

Q. What did you say to him and what did he say to you? A. I drew his attention, brought him in a piece of paper and asked him what is there about this account, to find the account, and he said this account has been settled with Mr.
30 Doyne for a claim that he said Doyne owed him.

Q. That is that the claim was settled by the offset which he had in the shape of a claim against Mrs. Doyne, and which she owed him, Higgins? A. Yes, that is right.

Q. Now what did you say? A. I told him, I said that he had—this will have to be collected—no, I asked Mr. Higgins if he could not bring me some—all the documents which he had in his office

Julius Berghoff—Re-Direct.

in respect to this, if he could not assist me in this way.

Q. What did he say? A. He said he would.

Q. What did he do? A. I seen nothing of him after that—that is, nothing has been done after that about the matter.

Q. Did you ever authorize to have any such substitution made of the claims as Mr. Higgins stated at that time? A. No, no. 10

Q. That is that his claim should be offset against Mrs. Doyne's and Mrs. Doyne's against his? A. Never.

Q. Did you ever authorize any such settlement to be made with Mr. Higgins? A. Never.

Q. And you never knew of any such settlement until December, 1911? A. That they settled it that way. 20

Q. Do you remember that during the negotiations that preceded the purchase by the Hudson Milling Company of this property meeting Mr. Goldenhorn and Mr. William F. Doyne? A. I do.

Q. Do you remember having an interview with them on one or more occasions? A. I do.

MR. HUDSPETH: When was this?

MR. DEMAREST: Prior to that sale to the Hudson Milling Company. 30

Q. Did Mr. Goldenhorn have any list—or did he have any purported list of the outstanding bills due the Doyne Lumber & Milling Company? A. He did.

MR. HUDSPETH: I object. The objection was made the other day that it appearing that there was an agreement of March 8, 1910, anything prior to that would be replaced by the agreement, by the written— 40

Julius Berghoff—Re-Cross.

THE COURT: What was the question?

Question repeated.

MR. DEMAREST: They have contended that this Higgins claim was taken off the books by an understanding between Mr. Berghoff and Mr. Doyne before the sale.

10 THE COURT: I know it. I will permit the question.

Q. What is your answer? A. He did.

Q. And did you go over the claims then with Messrs. Doyne and Goldenhorn? A. Well, I could not say whether he was present, but I went over with Mr. Goldenhorn and I think Mr. Doyne was there.

Q. Who represented you as your attorney at that time? A. Judge Hudspeth.

20 Q. Was he present at any of these interviews? A. Yes, yes.

RE-CROSS EXAMINATION BY MR. DEMAREST:

Q. Now, as to this book that you have just testified to, the journal, do you notice that page 84 is marked "February"? A. Yes, marked "February."

30 Q. With subsequent dates, apparently in February, is it not? A. Well, it looks that way.

Q. Do you notice that at the top of page 85 is the date June 14? A. Yes.

Q. And there appear no entries in this journal between the items evidently of February on page 84, and those of June 14, on page 85, do there? A. It don't look to me as though there was.

40 Q. And the item at the top of page 85 where this Higgins account is charged off first to William

Julius Berghoff—Re-Cross.

Doyne and then to profit and loss, and your account for materials due to the Doyne Lumber & Milling Company, amounting to thirty-two hundred dollars, are both taken off on the same day, aren't they? A. I do not know.

MR. HUDSPETH: I object to that because that is a matter of conclusion.

THE COURT: Objection sustained. He 10
says he was not present and does not know
anything about it.

Q. Now let me call your attention to the ledger. Look at the ledger. Do you notice that page 133 containing the account of William Doyne has been cut out of the book and pasted back there? A. Yes, I see that.

Q. And that is the ledger of the Doyne Lumber & Milling Company? A. Yes. 20

Q. Turn to page 176; and that is your account, isn't it? A. I do not know; I do not know a thing about it.

Q. Do you notice that it is marked "Charged to Berghoff," isn't it? A. Yes.

Q. That is your account? A. It must be.

Q. Do you notice that page 176, which is your account with the Doyne Lumber & Milling Company, has also been cut out of the book? A. It 30
must be referring to me.

Q. My last question is, do you notice that that page has also been cut out of the book and put back with fasteners? A. Yes, sir.

Q. Now will you kindly look at that ledger and tell the jury whether any other pages than those containing your account and those containing Doyne's account have been cut out of that ledger

Julius Berghoff—Re-Cross.

and put back in that way? A. Yes; there has another one been taken out.

Q. Who is that? A. A. Busten.

MR. HUDSPETH: Page 175.

MR. DEMAREST: Oh, no; that is his.

Q. Yours is cut out; Busten's is not cut out.
10 Will you look through there and find out if there are any other pages in that book, which is the ledger of the Doyne Lumber & Milling Company, besides your account? A. There is not, but I do not know——

Q. Do you know how those two accounts come to be cut out? A. I do not know a thing about it, never knew that they were cut out until it was drawn to my attention by the expert accountant.
20 I never knew they were cut out.

Q. Were the pages put in in this way at the time the expert accountant called your attention to it, or were the pages missing? A. They were that way, just as they are now.

Rose Reilly—Direct.

ROSE REILLY, recalled.

EXAMINATION BY MR. DEMAREST:

Q. Miss Reilly, I show you page 176 of the ledger of the Doyne Lumber & Milling Company, containing the account of Berghoff, and ask you whether that page had been cut out of the ledger when you saw it last? A. No.

10

Q. And the Higgins account had not been cut out of the ledger at the time you saw it last? A. No.

Q. Do you see any other accounts in that ledger that have been cut out and fastened into the book with fasteners?

THE COURT: Well, I suppose the jury can tell that just as well as she can. What is the use of wasting time?

20

Q. I show you the sales book of the Doyne Lumber & Milling Company. Are the entries in the sales book that contain the items forming the Higgins account in your handwriting? Will you look at the book?

MR. HUDSPETH: How is it material in whose handwriting the entries are? There is no dispute of the entries at all.

30

A. Yes, sir.

THE COURT: What is the point about it?

MR. DEMAREST: I want to find out who directed the entries to be made as they are made, charged in that way.

THE COURT: Directed the entries to be made in the sales book?

40

Rose Reilly—Direct.

MR. DEMAREST: Yes, the original book of account.

10 THE COURT: Why don't you ask her that? She has already told you she made the entries in the sales book and she has told you she made them from the slips, that the slips are saved, and apparently if you want to see them you can call for the slips and have them.

Q. Who directed the account to be entered by you?

MR. HUDSPETH: I object as immaterial and irrelevant.

THE COURT: This is the book of the Doyne Lumber & Milling Company?

20 MR. DEMAREST: Yes.

THE COURT: What difference does that make, who directed the entry to be made? If they bought the goods and if the account is apparently admittedly an account for goods sold and delivered, as it appears to be, to Higgins——

30 MR. DEMAREST: That is the point I am making, that we did not buy the goods. That is just what I am trying to prove.

THE COURT: You say in your specification of defense in effect that you bought the goods and that Mr. Doyne assumed this debt and became the substituted debtor for them.

MR. DEMAREST: That is what I want to show by this witness, and who instructed her to make the entry.

40 THE COURT: Then apparently you do not want to show what you alleged in the

Rose Reilly—Direct.

first place, because you first denied that Higgins ordered the goods.

MR. DEMAREST: I want to show by this witness, that this account was, by the instructions of Mr. Doyne, to her, charged to Doyne. This is part of the account they are suing for.

THE COURT: Go ahead, if you can show 10
that.

MR. HUDSPETH: But, may your Honor please, these goods were bought by Mr. Higgins before the Hudson Milling Company was formed at all, and Mr. Doyne had a perfect right to do as he chose then about his entries on his books, and give any orders, but they were not binding on the Hudson Milling Company.

THE COURT: But what he is trying to show is this, that this never became a debt due to the Doyne Lumber and Milling Company from Higgins. 20

MR. DEMAREST: That is it exactly.

THE COURT: Because before the charge was entered, Higgins and Doyne, representing the Doyne Lumber & Milling Company, had agreed that it should be charged on the books of the Doyne Lumber & Milling Company to Doyne and not to Higgins. That is what he is trying to show. 30

MR. HUDSPETH: Then I make the objection that there is nothing in this account to show that Doyne had any right to bind the Doyne Lumber & Milling Company, which was a corporation, by any such instructions.

THE COURT: Unless he shows that, why, 40

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I shall tell the jury that there is nothing in it. Of course he has to prove it piece by piece; he cannot put it all in one question. I will allow the question.

(Exception noted for the plaintiff).

A. You mean into this book?

10 Q. The original entry of the account when the account started? A. Mr. Doyne.

MR. HUDSPETH: What it that?

A. Mr. Doyne.

Q. What did he say at the time you first opened the account, what did Mr. Doyne say to you?

20 MR. HUDSPETH: I object as irrelevant and immaterial, a self-serving statement, no evidence showing that Mr. Doyne could bind the Doyne Lumber & Milling Company, which was a corporate entity.

30 THE COURT: You have to show that first, Mr. Demarest. The rule is perfectly settled, laid down in *Livingston v. Gifford*, 10 Stew., and in all the other cases, that you cannot show the authority of the agent by his declarations merely, and that you have to show his authority before you can show his acts under it. Now I am not going to relax that rule at all.

MR. DEMAREST: But this is the situation—of course the authority of Doyne must be proven by the defense, but they have put in here the books of account.

40 THE COURT: I am not going to permit you to anticipate the defense by lugging in the whole proposition. Now if you want

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to show that thing you have to show it as a defense in your defense.

MR. DEMAREST: Can't I show by cross examination of the bookkeeper, who swears she is the person who entered the account, how she came to enter that account against William Higgins, under what circumstances she did it?

10 •

THE COURT: You cannot show what Mr. Doyne said without showing that Mr. Doyne had some authority to say something in the premises.

Q. What position did Mr. Doyne occupy in the Doyne Lumber & Milling Company?

MR. HUDSPETH: I object.

Q. Do know what his office was?

20

MR. HUDSPETH: I object as incompetent for this witness to testify as to the position of Mr. Doyne.

THE COURT: Objection sustained. You may show what he did if you want.

Q. From whom did you take your orders to give credits when you were acting as bookkeeper of the Doyne Lumber & Milling Company? A. Mr. Doyne.

30

Q. From anybody beside Mr. Doyne? A. No.

Q. Who managed the mill? A. Mr. Doyne.

Q. — and looked after the work turned out in the mill by the company? A. Mr. Doyne.

Q. Who sold the goods?

MR. HUDSPETH: I object as not proper cross examination.

THE COURT: Objection sustained. I do 40

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not see what possible bearing that can have on the case, who sold the goods. It has nothing whatever to do with who kept the books or directed the entries in the books.

Q. Who directed the entries in the books while you were bookkeeper in the Doyne Lumber & Milling Company? A. Mr. Doyne.

10 Q. Did you take any orders respecting the books from any officer of the company excepting Mr. Doyne? A. No.

Q. What was the conversation between you and Mr. Doyne at the time this Higgins account was started?

MR. HUDSPETH: I object as immaterial and irrelevant.

20 THE COURT: Now I will permit it. Mr. Doyne constantly directed how the entries should be made on the book. The book is only prima facie evidence as to who was the purchaser of the goods and to whom the debt was to be charged, and the law is laid down in this state in a case to which I can direct your attention, if you desire, that before the books would be evidence against a third party of goods delivered to him, it would have to be shown that there was authority for the making of such an entry.

30

(Exception noted for the plaintiff).

A. Mr. Higgins and Mr. Doyne and I were in the office and Mr. Higgins was building some houses, and it was understood between——

MR. HUDSPETH: I object.

40

THE COURT: Objection sustained.

Q. What did they say? Not what was under-

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stood. What did each one say to the other and to you?

THE COURT: If you object to that, the objection is sustained.

Q. What did Mr. Doyne tell you to do? A. What did Mr. Doyne tell me to do?

Q. Tell you to do? A. Mr. Higgins was to get the goods and it was to be charged to Mr. Higgins, and he, Mr. Higgins, was to do work for the mill and different things around, and one account was to offset the other. 10

Q. Was there anything more than that? A. Well, if there was any difference between the accounts—

THE COURT: No; the question is what Mr. Higgins said to you about entering that account on the book. All else will be stricken out. 20

MR. DEMAREST: You mean Mr. Doyne?

THE COURT: Yes. All else will be stricken out that has already been said. The only thing this young lady can testify to is what was said to her by Doyne about the entry of that account. A lot of fugitive conversations that took place between Doyne and Higgins is as idle as the wind, and is irrelevant, immaterial and incompetent. 30

Q. Did Mr. Doyne at that time, at the time the account began, tell you to charge to his, Doyne's, account and credit on the Higgins account the amount that Mr. Doyne would be indebted to Mr. Higgins for certain work that Mr. Higgins was to do for him? 40

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MR. HUDSPETH: I object.

THE COURT: Objection sustained. The question is leading.

MR. DEMAREST: She is not my witness.

MR. HUDSPETH: Well, you are making her.

THE COURT: She is not your witness?

10

MR. DEMAREST: She is on cross examination.

THE COURT: She is not on cross examination in this particular.

MR. DEMAREST: That objection has not been raised yet.

20

THE COURT: It is your defense that you are trying to prove in the first place, and you are trying to show by a witness the whole of your defense, and it practically is absolutely new matter, and if this lady has any recollection of what was said let her say it and not act as a mere parrot or a phonograph to say yes after you have detailed what you think she ought to say. It seems to me this is the very crux of the case, and for you to put an answer in the witness' mouth and expect her to say yes, and then to hang on that as if your life was due to it,—I will not permit it.

30

MR. DEMAREST: Your Honor will allow me an exception?

THE COURT: Of course.

BY MR. HUDSPETH:

Q. How long had you been employed by the Doyne Lumber & Milling Company? A. About
40 a year and a half.

Rose Reilly—Direct.

Q. Did you continue in the employment of the Hudson Milling Company? A. For about a month or a month and a half.

Q. And were you discharged? A. No, sir.

Q. Was some one put in your place? A. I don't know; I left and there was a young man came there.

Q. How did you come to leave? A. I just took it into my head to leave. 10

Q. What young man came there? A. I do not just know his name, some bookkeeper; I believe he is here.

Q. You were a friend of Mr. Doyne's, weren't you? A. No, sir.

Q. Did not know him? A. I knew him, but—

MR DEMAREST: I object. She is his own witness. He cannot impeach her. 20

THE COURT: He is not trying to impeach her; he can show what her relationship is to one of the parties in order to show if she would be apt to be biased in her testimony or not. That is not inpeaching a witness.

Q. Do you mean to tell this court and jury that you left of your own accord? A. Yes; I left of my own accord. 30

Q. Weren't you charged by Mr. Berghoff after the Hudson Milling Company took hold with not being faithful? A. No, sir, I was not.

Q. And didn't he discharge you? A. No, sir, he did not.

Q. Weren't you discharged by the Hudson Milling Company? A. No, sir; I was not discharged, for I left myself.

Q. Now on your direct examination you said 40

Rose Reilly—Direct.

that the entries were made in your sales book or journal from slips; is that right? A. Yes, they were.

Q. And this account of Higgins covers a number of items, doesn't it? A. I presume it does.

Q. Now look, please. A. Well, you will have to go all through the book.

10 Q. Look and find out where that account commences.

MR. DEMAREST: November, 1908.

Q. You are not angry, are you? A. No, I am not angry, but I do not like to be accused of things I am not guilty of. There is the item right there, I believe, starting in.

Q. I beg your pardon, which is the item? A.
20 This one here, \$75.06.

Q. Is that the beginning of it? A. That is the first that I see.

Q. Well,—November. Now that is brought forward, is it not? A. Well, that is the amount brought forward from the page before, that is just carrying the amounts.

Q. What is that brought forward from? A.
30 This is just to keep a memo of the account for the month. This is by weeks.

Q. Let me see the beginning of the Higgins account. A. This is not Higgins' account here; this is the sales book.

Q. Where is the first item in the sales book that is embraced in this Higgins account, do you know? A. Here is one, \$1.25.

Q. Is that the first item in the account, is that when it was opened? A. Yes.

40 Q. Do you know what that was for? A. That was for some mouldings.

Rose Reilly—Direct.

Q. West 11th Street, wasn't it? A. Yes.

Q. Show me the next item. That is what date? A. November 16, 1908.

Q. The first item. What is the next one?

MR. DEMAREST: I think you will find one November 8th.

A. November 11th.

10

Q. November 11th, again West 11th Street. Several items there? A. Yes, sir.

Q. Show me the next one? A. Higgins (indicating).

Q. William F. Higgins, West 11th Street; that is the same date, several items. Will you show me an item where he has material for some other place than West 11th Street. A. I do not know whether he was doing any other jobs there. There is one (indicating). It was all about one job at that time.

20

Q. Won't the ledger give some information as to whether he had another job? A. He was building about ten or eleven houses there on 11th Street.

Q. Then when these items refer to West 11th Street they refer to ten or eleven houses he was building on West 11th Street at that time? A. Yes, sir.

30

Q. All these items, and there were a great number, were there not? A. Yes, sir.

Q. For building material—and if they were ordered and sold to Higgins, slips would be made out, isn't that so? A. Yes.

Q. And from those slips would enter into the journal? A. Into the sales book.

Q. Into the sales book, at least. Now were any of those slips during all this period of time

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Rose Reilly—Direct.

this account was running made out in the name of William F. Doyne? A. No.

Q. The slips were made out in the name of Mr. Higgins as the purchaser? A. Yes.

Q. And the man that was getting credit? A. Yes.

Q. To whom the material was chargeable, isn't
10 that right? A. Yes.

MR. DEMAREST: I think that the whole examination so far—I have not objected to it—has been leading under the yes or no policy adopted by the court. This is your own witness.

THE COURT: The difficulty with the
20 situation is that you have not understood yet what the court ruled, and out of the abundance of your misunderstanding you are endeavoring to construct an edifice that has no foundation. I ruled that this witness was your witness with respect to the matter of the authority of Mr. Doyne to direct certain things to be done in this book. She is not your witness in respect to the fact of the entry, the time of making it and the circumstances under which it was made. That
30 is what I have ruled. I have never ruled yes or no to it, and if you so understood it you misunderstood it, and the difficulty is in your own brain and not in the ruling.

MR. DEMAREST: I think you misconceive my brain.

THE COURT: Possibly I do, but we are all liable to misconceptions, and inasmuch as you have just let loose one of them and indicated it with such clearness, I thought I
40 would call it to your mind.

Rose Reilly—Direct.

MR. DEMAREST: I merely intended to say that your Honor and I disagree as to your opinion.

THE COURT: But you said I had adopted a yes or no policy. That was an absolute falsehood. No such policy has been adopted by me in any part of this case, or any other case, and when you stated that, you stated an absolute falsehood, and therefore I think it necessary to indicate that it was false. 10

MR. DEMAREST: May I have an exception to the remarks of the court on the record?

THE COURT: Absolutely. You may have two exceptions to them if you want.

MR. DEMAREST: I should like an exception every time a remark of that sort is made. 20

THE COURT: You may have it.

Q. You have said that when this account was opened Messrs. Doyne and Higgins were present, and that Higgins wanted to buy material and that Doyne told you that he would pay for it by doing work around the place, is that so? A. Yes.

Q. Now that was the understanding and those were the instructions given you? A. Yes. 30

Q. That Mr. Higgins was to work around the place? A. Yes.

Q. Did he do any work around the place that you saw while you remained there? A. Yes, he did.

Q. What was it? A. He put in some pipes and fixed different things around the mill.

Q. Is there an account for it in these books? 40

Rose Reilly—Direct.

A. You mean in the Doyne Lumber & Milling Company?

Q. Yes. A. I did not enter it in the book.

Q. Have you got the Doyne Lumber & Milling Company books here? A. Yes, sir.

Q. Will you try and find any such account in those books? A. I did not enter it.

10 Q. Will you try and find any such account in these books? A. I do not think there is any in it.

Q. You know there is not any in it, don't you, for that work that you are speaking of? A. Well, we got a bill for it but I did not put it in the book, because the bill was standing there and it was a running account.

20 Q. You got a bill for alleged work by Higgins for the Doyne Lumber & Milling Company and you never put it in the books, is that right? A. Yes.

Q. Did you ever hear of the entry on June 1st, 1910, "William Doyne"—scratched out—"profit and loss \$708.91 to W. F. Higgins bill for plumbing done by Higgins for Mr. William Doyne's house"? When did you first know of that, if at all? A. I did not make an entry.

30 Q. You did not make the entries. What does William Doyne's house mean, for plumbing work? A. I did not make it.

Q. That is not his factory, is it? A. I did not have anything to do with it.

Q. That was not the factory, was it? A. No, it was not the factory.

BY MR. DEMAREST:

40 Q. Is the entry of August 21, in your handwriting, on page 23 of the ledger? A. Yes, sir.

Rose Reilly—Direct.

Q. And there is a credit there of \$427.26 with some lead pencil writing; is that your handwriting? A. No; I did not write that.

Q. Do you know what that \$427.26 item represents? A. No, I would have to look in the book.

Q. What book do you want to find that out?

A. There (indicating).

10

Q. Page 50 of your journal? A. Yes.

Q. Is this entry in your handwriting? A. That in my handwriting, yes.

Q. What is that credit of \$427.26 for? A. Debtor, to William Higgins, putting in sewer and improvement.

Q. Was that sewer and improvement put in at the works of the company? A. Yes, sir.

Q. Then you did credit Mr. Higgins' account with work he had done for the Doyne Lumber & Milling Company? A. Yes.

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BY THE COURT:

Q. I notice that this entry in the ledger is under date of August 21, 1909, and is part of the running account, isn't it? A. Yes.

Q. That is the fact? A. Yes.

Q. The entry in this journal, profit and loss entry, is under date of June 14, 1910, isn't it? A. Yes.

30

Q. And this entry of June 14, that you find on the ledger is meant to be June 14, 1910, isn't it? A. 1910.

Q. And it does not come in the regular course of entries on the ledger, does it? A. No.

Faeber Goldenhorn—Direct.

I. FAEBER GOLDENHORN, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. GARRISON:

Q. You are a member of the Bar of this State?

A. I am, yes, sir.

10 Q. Did you represent Mr. William Doyne, or the Doyne Lumber and Milling Company, in the transaction in which the company was turned over to Mr. Berghoff? A. I did, yes.

Q. Did you have in your possession a list of the debtors of the Doyne Lumber and Milling Company which were submitted in the course of those negotiations? A. I had a list and turned that list over to Mr. Doyne just before the conclusion of the—at the conclusion of the arrangements with
20 Mr. Berghoff.

Q. Have you made a search among your papers to find whether you have that list at the present time? A. I know positively that I turned that list over, including all my papers in the transaction, to Mr. Doyne, the day the matter was closed at Judge Hudspeth's office.

Q. Do you remember whether or not there was included in that list a claim against William F.
30 Higgins?

MR. DEMAREST: I object: If he were the attorney for Mr. Doyne at that time, I think we are getting dangerously close to the rule that he is precluded from testifying.

THE COURT: Does your client object to his testifying to it?

MR. DEMAREST: He does.

40

THE COURT: Very well, then I will sus-

Faeber Goldenhorn—Direct.

tain the objection on the ground that what he learned in his capacity as attorney is precluded.

MR. HUDSPETH: We demand of the other side to produce that list that Mr. Goldenhorn has referred to.

(Witness leaves the stand).

MR. DEMAREST: Now do you want the 10
list?

MR. HUDSPETH: Do you produce the list
now?

MR. DEMAREST: I produce a list.

MR. HUDSPETH: Mr. Goldenhorn, will
you go back to the stand?

MR. DEMAREST: I have produced the list
after Mr. Goldenhorn retired from the
stand. 20

MR. HUDSPETH: You are playing smart
and I will play smart.

Faeber Goldenhorn—Direct.

I. FAEBER GOLDENHORN, recalled.

BY MR. HUDSPETH:

Q. Upon my demand they have produced a list, I demanding the list you referred to. Is that it? (showing witness a paper).

10 MR. DEMAREST: I object. The court ruled the question out.

THE COURT: He is simply identifying a paper. If this is the list he wants to mark it for identification.

MR. DEMAREST: I withdraw the objection.

20 THE COURT: I will not let him put the contents in at all, but simply identify the paper.

A. This is not the list, no.

Q. What is that marked? A. Marked D-1 for identification.

PLAINTIFF RESTS.

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Motion to Non Suit.

MR. DEMAREST: I move for a non suit in this case. I recognize the principle laid down in *Oberg v. Breen*, but I think that the proof here in this case qualifies the rule as laid down in that case, and I cite the case of the *City of Bayonne v. The Standard Oil Company*, in which the Court of Appeals continuing the principle of *Oberg v. Breen*, lays down practically this principle, that although books of account are ordinarily prima facie evidence, that where they are questioned to any extent by testimony produced on the plaintiff's case so that there is a question respecting them, that there is not a prima facie case made out upon those books, and that a non suit should result. To make myself perfectly plain, that was a case where I unfortunately was the unsuccessful party above. The situation was this, the books of account were by stipulation admitted so that there was no question at all about their being in the case, and the bookkeeper under cross examination was cross examined as to the manner in which the items were made, and the question arose upon water meters—it was a measurement of water—whether or not water meters in all cases registered properly; and the reply of the witness who was called to testify as to the books was that they were not always accurate; and in that case the court said because of the inaccuracy of the meters upon which the items in the books depended, that the books were not prima facie evidence. Now it seems to me that in this case what has been brought out

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Motion to Non-suit.

by the plaintiff upon his own case destroys the validity of the books as prima facia evidence of the debt upon which they can stand and stand alone; that a prima facia case has therefore not been made out.

10 THE COURT: Well, I recognize to the fullest extent the rule laid down in the *Standard Oil Company v. Bayonne*, but I think it is totally inapplicable to this case. There the question was as to the propriety and authenticity of the entries, and the point made was that the entries did not correctly represent the fact because the meter did not, according to the testimony, correctly represent the measurement;

20 but in this case there is not any dispute whatever yet, but these entries absolutely correctly represent the goods sold and delivered by the Doyne Lumber and Milling Company to Mr. Higgins. The only possible ground that might have been urged against the propriety of these books would have been against their admission at all in the first place, and that upon the ground that they bear upon their

30 face some evidence of suspicion, but that ground has been swept away by the consent on your part that they be accepted in evidence. Now they are in, and the question as to the weight of them as evidence because of their having apparently been tampered with and subsequently put together is a question for the jury to pass upon in saying whether or not the entries are entitled to full credit or not; but

40 there is not any dispute yet raised yet

Motion to Non-suit.

but that every solitary item of goods sold and delivered by the Doyne Lumber and Milling Company was actually sold and delivered by the Doyne Lumber and Milling Company to Higgins; and indeed the further evidence in the case seems to indicate that those goods actually were sold and delivered and that the account was actually recognized, because the defense interposed by the defendant seems to be that that account thus standing without objection was transferred to Doyne and accepted by him, who had knowledge of the facts, and he became the substituted debtor; so it seems to me that the grounds upon which the *Standard Oil v. Bayonne* was decided is entirely wanting or lacking in this case, and therefore I deny the motion and let you have an objection in the nature of an exception.

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William F. Doyne—Direct.

WILLIAM F. DOYNE, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

MR. DEMAREST: I call for the minutes of the Doyne Lumber and Milling Company.

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MR. GARRISON: We have not any minute book.

MR. DEMAREST: There are a lot of sheets of minutes that were turned over to you.

MR. GARRISON: I have gone through our records and produced everything that we had.

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MR. DEMAREST: All right; I call for the production of the minute book of the Doyne Lumber and Milling Company, which the other side say they cannot produce. I ask to have that entered on the record.

Q. Mr. Doyne, where do you live? A. 66 West 27th Street, Bayonne.

Q. Were you an officer of the Doyne Lumber & Milling Company? A. Yes, sir.

Q. What was the business of that Company? A. A general planing mill, doing all kinds of work, mill work.

30

Q. Wood working concern? A. Wood working concern.

Q. In Bayonne? A. In Bayonne, East 15th Street.

Q. What office, if any, did you hold in that corporation? A. I was the vice president; I was the general manager, and I was a director.

40

Q. What were your powers as general manager?

William F. Doyne—Direct.

MR. GARRISON: I object to the question.

MR. DEMAREST: We called for your minutes.

THE COURT: As to what?

MR. DEMAREST: The Doyne Lumber and Milling Company.

THE COURT: They are not the Doyne **10**
Lumber and Milling Company; they are the Hudson Milling Company.

MR. DEMAREST: But I am calling upon the plaintiff to produce——

THE COURT: You have to show that he had them first.

MR. DEMAREST: I will withdraw the witness and take the stand myself.

(Witness withdrawn).

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Elmer W. Demarest—Direct.

ELMER W. DEMAREST, called and sworn on behalf of the defendant, testified as follows:

THE WITNESS: In the spring, I think, of 1910.

MR. GARRISON: I would like the witness to question himself.

10 THE COURT: You are entitled to have questions so that you may object to them.

BY MR. DEMAREST:

Q. Mr. Demarest, you are an attorney? A. I am.

Q. Were you the attorney for Charles E. Annett, the receiver of the Doyne Lumber & Milling Company, in the spring of 1910? A. Yes, sir, I was.

20 MR. GARRISON: I admit all that.

Q. Did you act for the receiver during the negotiations between the Receiver and Charles H. Weller for the sale of the assets of the Doyne Lumber and Milling Company to Charles H. Weller, as trustee? A. I did.

THE COURT: Where is there any bill of sale to Charles H. Weller, as trustee?

A. Charles H. Weller. Pardon me.

30 Q. Were you the solicitor in the suit of the Stevens and Conrow Company against the Doyne Lumber and Milling Company, in insolvency proceedings? A. I was.

Q. Did you have in your possession at that time the books showing the minutes of the board of directors of the Doyne Lumber and Milling Company? A. I did.

40 Q. What did they consist of? A. There was a minute book showing the initial meeting of

Elmer W. Demarest—Cross.

the stockholders and the meeting of the first board of directors, written in the book.

THE COURT: You mean the meeting of the first board directors or the first meeting of the board of directors?

A. The first meeting of the board of directors, written in the book. The other minutes appeared upon a number of yellow sheets of paper that were in the minute book, fastened together, I think in the corner, but not fastened so as to make any part of the book. 10

Q. Do you know what became of those minutes after the sale to Mr. Weller? A. I do. I turned over to Robert F. Hudspeth—or Hudspeth & Lane, who at that time were the representatives of the purchaser—the minute books and all other books of the Doyme Lumber and Milling Company which I had in my possession. 20

MR. DEMAREST: Cross examine.

CROSS EXAMINATION BY MR. GARRISON:

Q. Did you receive a receipt for them? A. I do not remember whether I did or not.

THE COURT: Well, if you did you have the receipt, haven't you? 30

A. I may have it or I may have passed it over to the receiver.

THE COURT: Then either you or he has it?

A. Yes, probably. I think I gave none, however,—or received none, however.

MR. DEMAREST: I served you with a notice to produce that. 40

William F. Doyne—Direct.

MR. GARRISON: I have a copy of the notice to produce it.

MR. DEMAREST: No; I mean have you the documents here at hand?

10 MR. GARRISON: No; I have not the documents. I have looked through the files of all the papers that we have of that reorganization, and I do not find any record of these books that they call for. If we had them we would certainly produce them.

WILLIAM F. DOYNE, recalled.

BY MR. DEMAREST:

20 Q. What were your powers as general manager? A. I had power to transact all kinds of business with the Doyne Lumber & Milling Company, with the exception of signing checks, I couldn't do that.

Q. Who looked after the mill work? A. I did.

Q. And who gave instructions as to credits? A. I did.

30 Q. And how long did you continue to do that? A. I continued while the Doyne Lumber & Milling Company was in existence.

Q. From the beginning until it went into the hands of a receiver? A. From the beginning until its death.

Q. Do you know Mr. Higgins? A. I do.

Q. Do you remember Mr. Higgins coming to you some time about November 1908? A. Yes,
40 sir.

William F. Doyne—Direct.

Q. Did you make any agreement with him at that time?

MR. GARRISON: I object——

A. I did.

MR. GARRISON: —as calling for a conclusion.

THE COURT: He does not ask him what it was. 10

Q. What was that agreement? A. I have entered an agreement with Mr. Higgins——

MR. GARRISON: I object to his telling the agreement.

THE COURT: Objection sustained. He can state the conversation, or if it was in writing he may produce the writing. 20

Q. What was this talk you had with Mr. Higgins, written or verbal? A. Verbal.

Q. And what was it, what did you say to him and what did he say to you? A. I asked Mr. Higgins, I heard he was going to put ten or eleven houses in a row on West 11th Street——

Q. Speak a little louder, the jury cannot hear you. A. I heard in the time Mr. Higgins was going to put up ten or eleven houses in West 11th Street, I think it was West. I went to see Mr. Higgins for the business, and I have told Mr. Higgins if he will give me that business I will have certain work for him to do at the mill and certain work to do at my own house, and I will give him materials for it, for the work, whatever he was going to do, and if one account won't balance the other we will pay each the other out. 30

(Answer repeated at the request of Mr. Demarest). 40

William F. Doyne—Direct.

Q. What were you to give him materials for,—
what work? A. I was supposed to give him
materials——

THE COURT: Never mind that. What
did he say to you?

Q. What work did you say you would give
him materials for? A. For the 11th Street
10 buildings.

Q. Oh, you would give him the materials he
wanted? A. What he wanted, yes.

MR. DEMAREST: Will you please repeat
his former answer?

(Answer repeated as follows: "I heard
in the time Mr. Higgins was going to put
up ten or eleven houses in West 11th Street,
I think it was West. I went to see Mr.
20 Higgins for the business, and I have told
Mr. Higgins if he will give me that busi-
ness I will have certain work for him to
do at the mill and certain work to do at
my house, and I will give him materials for
it, for the work, whatever he was going to
do, and if one account won't balance the
other we will pay each the other out").

Q. What do you mean by that, if one account
would not balance the other you would pay each
30 other out? A. Why, this——

Q. No, what was said about that?

THE COURT: If anything was said.

Q. If anything was said, what was said about
the accounts balancing? A. I do not understand
your question.

William F. Doyne—Direct.

BY THE COURT:

Q. You said if the accounts would not balance each other we would pay each other out. Was anything more said at that stage of the situation?

A. It was satisfactory to both of us.

Q. Was anything more said about that between you at that time? A. Well, he agreed—

Q. Never mind what was agreed. Was anything more said by you, and if there was, what was said? A. I told him to go ahead and do the work for me. 10

Q. Was anything more said as to fact if the accounts did not balance each other you would pay each other out? Was anything more said about that, or did you stop right there in your talk? A. Well, very likely we talked something else; I do not remember what was talked. 20

Q. You do not remember then. All right.

BY MR. DEMAREST:

Q. What accounts did you mention when you said if the accounts balanced,—if any? A. I meant the both accounts, the work which he has done for my own house and the work which he has done for the mill.

Q. Well, did you sell him lumber after that? A. I did. 30

Q. And did Mr. Higgins do work for the Doyne Lumber and Milling Company? A. He did.

Q. To what extent, what did his work amount to? A. Well, his work amounted in the neighborhood of a thousand or eleven hundred dollars, something like that.

Q. For the Doyne Lumber and Milling Company? A. No,—together. 40

William F. Doyne—Direct.

Q. You mean the work that he did for you—
A. Altogether.

Q. —and the work— A. Yes.

Q. Can you, by looking at the books of the Doyne Lumber and Milling Company, tell what the amount of the work that Higgins did for the Doyne Lumber and Milling Company was? A.

10 I do not understand bookkeeping very well.

Q. Did you give any instructions to Miss Reilly at the time you and Higgins had your agreement? A. I did.

Q. What were those instructions? A. I simply told her to charge out that account to William F. Higgins, and I will—I will credit that off with my own account across—

Q. When did you tell—

20

MR. HUDSPETH: What was that last answer?

(Answer repeated).

Q. When did you tell Miss Reilly that? A. Just at the beginning we commenced shipping goods.

Q. Do you know what the amount of Mr. Higgins bill was for the work that he did for you on your houses? A. Yes, sir.

30

Q. How much? A. \$732.62 or 82.

Q. Did you ever pay Mr. Higgins for the amount due for work done on your house? A. No, sir, I did not.

Q. Did you cause any statements of the balance of the account which appeared on the Doyne Lumber & Milling Company's books to ever be sent to Mr. Higgins? A. What is that?

40

Q. Did you cause any bills to be sent to Mr. Higgins? A. No.

William F. Doyne—Direct.

Q. Why not? A. Because it was simply charged off to—charged off to me.

Q. Was it actually charged off on the books, do you know? A. Yes.

MR. HUDSPETH: I object. The books show for themselves.

THE COURT: Objection sustained.

Q. Who were the other directors of the Doyne Lumber & Milling Company? 10

MR. HUDSPETH: I object. The minutes are the best evidence.

MR. DEMAREST: We have gone all through that while you were out of the room.

MR. HUDSPETH: Then I withdraw the objection. 20

Q. Who were the other directors? A. I was, my wife was. Simon Doyne was. His wife was.

Q. Did you attend any meetings of the board of directors of the Doyne Lumber & Milling Company? A. I did.

Q. Did the directors of the Doyne Lumber & Milling Company know of the agreement that you had made with Higgins? A. They did. 30

MR. HUDSPETH: I object as immaterial, irrelevant and incompetent.

THE COURT: Objection sustained to the question as it is now put.

Q. Was the matter of this account between you and Higgins ever discussed at any meeting of the directors of the Doyne Lumber & Milling Company? 40

William F. Doyne—Direct.

MR. HUDSPETH: I object as immaterial and not the best evidence.

THE COURT: What is the point of the objection. The minutes are proven to have been deposited with you.

MR. HUDSPETH: With me?

10

THE COURT: With your firm; and a notice to produce has been proven, or admitted to have been given, for their production, and they are denied to be now in your possession.

MR. HUDSPETH: What is the reply to that?

20

THE COURT: Mr. Garrison says he has searched diligently, and that they are not anywhere amongst the papers in reference to this matter in the office.

MR. HUDSPETH: I so say.

THE COURT: He says that.

MR. HUDSPETH: Before they go into that question I would like to ask permission to examine as to the minutes.

30

THE COURT: Mr. Demarest has already testified that he had the minutes, that he got them from the receiver or from some other concern while he was attorney for them, and that the minutes consisted simply of the first meeting of the board of directors in the book, and that thereafter there were a lot of yellow sheets upon which the minutes in a fragmentary manner were written down, and that those things he delivered when Mr. Weller became the purchaser, to your firm.

40

MR. HUDSPETH: Mr. Doyne says that?

THE COURT: Mr. Demarest says it.

William F. Doyne—Direct.

MR. HUDSPETH: I say it is not so.

MR. DEMAREST: Then I am a liar for the second time this morning.

MR. HUDSPETH: I say it is not so.

THE COURT: Do you want to examine Mr. Demarest on that?

MR. HUDSPETH: No.

MR. DEMAREST: I offer myself for cross examination now. 10

MR. HUDSPETH: I want to cross examine this man to show that there are no such minutes.

THE COURT: Mr. Demarest is the man who says there were, and he had them.

MR. HUDSPETH: Oh! Well, I do not want to get into any controversy with Mr. Demarest over the minutes. 20

MR. DEMAREST: If you want to cross examine me I waive the fact that I have left the stand and will let you do it.

MR. HUDSPETH: Well, I would like some information about something I do not know anything about.

30

40

Elmer W. Demarest—Cross.

ELMER W. DEMAREST, recalled.

CROSS EXAMINATION BY MR. HUDSPETH:

Q. Did you see the minutes of the Doyne Lumber & Milling Company prior to the— A. I did. I had them in the office and used them during the progress of that case for some months.

10 Q. Prior to the turnover to the Hudson Milling Company? A. Yes.

Q. What did they consist of? A. There was a minute book that had the organization meeting in, that is the stockholders meeting.

Q. Was that in typewriting? A. No, I think it was written out. It may have been written—I remember it was prepared in our office; whether it was typewritten or written in by hand I have
20 forgotten.

Q. Your firm incorporated the company? A. They apparently did. I had nothing to do with the incorporation.

Q. Well, as a matter of fact, your firm incorporated the Milling Company? A. I do not know.

Q. And also organized it? A. I do not know. I think they did, from the minutes.

30 Q. Wasn't the minute of the organization of the company in typewriting? A. I am not sure whether it was or not. I did not pay much attention to that part of it.

Q. Do you know whether— A. But there was also a meeting—

Q. One moment—do you know to what particular point the minutes were kept up in the book itself? A. To what particular point they were
40 written up?

Elmer W. Demarest—Cross.

Q. In the book itself? A. Yes, it covered the first meeting of the Board of Directors.

Q. Do you remember who constituted the board of directors? A. Not all of them. I remember Simon Doyme was one and William Doyme was another.

Q. Do you know who else? A. No. Most of the family were the other directors. I know Doyme's wife was a director. 10

Q. Do you know who the officers were? A. William Doyme was their president or vice president, I have forgotten which. The other officers I do not remember.

Q. Do you remember whether those minutes you now recall were in typewriting or longhand? A. I think they were typewritten; I am not certain about that, no. 20

Q. You are not very clear about that? A. No. I am not very clear about that.

Q. Now after the formal part of the minutes were not kept in the book, in what form were they kept? A. There were a lot of yellow slips of paper fastened in the corner containing not minutes written up but memoranda of occurrences at the meetings.

Q. Did you go through them? A. Yes, sir, a number of times I went through it. 30

Q. In whose handwriting were they? A. I do not know the handwriting.

Q. Did you authenticate those memoranda at all as being truthful, bona fide? A. Yes, I inquired from Doyme whether they were the minutes and whether they were all the minutes, because I wanted to use them on several occasions.

Q. Do you recall now any special matter in any of this memoranda that you recall used for 40

Elmer W. Demarest—Cross.

any purpose whatsoever? A. Yes; I remember what I went through the memoranda for.

Q. Well, do you recall any special matter that you required to look through those memoranda to ascertain? A. Yes.

10 Q. What? A. Why, one of the things was whether Simon Doyne had ever paid for his stock, whether he could be held by the receiver as a subscriber to stock which had not been paid for.

Q. Did you have to go through the memoranda for that purpose? A. Yes; I went through the minutes to see if there was any mention of his having paid it.

Q. What did you do with that stuff? A. I turned it over to your firm.

20 Q. To whom? A. I think to Mr. Lane. Lane and I had most of the—so did you—you had something to do with it—but Lane and I did most of the work, he representing the purchaser, and I representing Mr. Annett.

Q. When did you turn it over to Mr. Lane? A. As soon as the bill of sale had been signed.

Q. You turned it over with the bill of sale? A. Yes, sir.

30 Q. And you have not seen them since? A. No, sir.

BY THE COURT:

Q. What did you find in the minutes about whether the man paid for his stock? A. I wanted to see the consideration——

40 THE COURT: I know, but what would you find in the minutes as to whether a man paid for his stock or not?

A. I wanted to see if there was a resolution

Elmer W. Demarest—Cross.

there for any property purchased or anything of that sort.

Q. Well, was there? A. No.

BY MR. HUDSPETH:

Q. That would be in the formal organization part of the minutes, wouldn't it? A. It might be.

Q. It usually is, isn't it? A. It usually is, but it might have occurred later, and I do not know but what he got more stock later. 10

Q. Was there a stock book, a stock ledger? A. I do not know whether you would call it a stock ledger or not. There was a stock transfer book which I have seen here in court this morning, with nothing in it.

Q. Don't you know as a matter of fact that at the time you were making the examination, or had these minutes, that there never was any stock issued from the Doyne Lumber & Milling Company to anyone? A. No, I do not. 20

Q. Didn't Mr. Doyne tell you that there never had been a share of stock issued to any one by them? A. I do not remember his ever telling me anything like that.

30

40

William F. Doyne—Direct.

WILLIAM F. DOYNE, recalled.

(Question repeated as follows: "Was the matter of this account between you and Higgins ever discussed at any meeting of the directors of the Doyne Lumber and Milling Company?").

BY MR. DEMAREST:

10

Q. Was it discussed? A. Yes.

Q. Were the books of account of the Doyne Lumber & Milling Company containing the Higgins account ever before the board of directors?

A. Yes, sir.

Q. Was that account examined at any meeting of the board of directors? A. We was looking into the books, talking over about it.

20

Q. Talking about this Higgins account? A. Yes.

Q. And what was said at that time? A. It was agreeable I should give the credit to Mr. Higgins, for all the goods he got.

Q. For all the goods he got; you mean credit on the goods he got? A. Yes, for my—for the work which he has done at mine house.

30

Q. Do you know whether any resolution or any motion was ever passed at any directors' meeting? A. What?

Q. Do you remember whether there was any resolution or any motion regarding that agreement passed at any of the directors' meetings? A. I do not know what you mean.

Q. Did they ever take a vote in the directors' meeting upon any action concerning that Higgins account? A. Yes, we voted upon.

40

Q. What? A. To pass it—to let it go the way it was.

William F. Doyne—Direct.

Q. What did you explain to the board of directors at that meeting? A. I explained the way I entered the contract with Mr. Higgins, I should furnish him materials for his houses and he should do work for my house, and do some work for the 15th Street mill, and he should get credit for the material——

Q. For the material? A. —which he delivered to us. 10

Q. And by "us" you mean whom? When you say "us" you mean whom? A. I mean the Doyne Lumber and Milling Company.

Q. And anybody else? A. And Higgins.

Q. Now you say "the material that he delivered to us;" who do you mean by "us"? A. I mean by us the Doyne Lumber & Milling Company plant, and I mean my own house; that is what I mean; that is practically Rachael Doyne's house. 20

Q. Was this account torn out of the ledger of the Doyne Lumber and Milling Company at that time? A. No, sir.

Q. Was Mr. Berghoff's account torn off at that time? A. No, sir.

Q. Or replaced back in the book as it now appears? A. No, sir.

Q. Now, what became eventually of the Doyne & Milling Company? A. The Doyne Lumber and Milling Company went into the hands of a receiver. 30

Q. Who was the receiver? A. Mr. Charles E. Annett.

Q. Did you have any talks with Mr. Annett while he was receiver of the company? A. Yes.

MR. HUDSPETH: I object as immaterial and irrelevant. 40

William F. Doyne—Direct.

10 MR. DEMAREST: It does seem to me that any representations made by Mr. Doyne to Mr. Annett, who was the receiver and became the corporation, because the board of directors had then been wiped out, would be in exactly the same condition as any talks he had with the board of directors. Annett then was the corporation.

THE COURT: He was the court officer. This man could not direct him or order him or control him in any way.

MR. DEMAREST: What effect had this talk with Annett? I would like to see the point.

MR. DEMAREST: Not to control him, no.

20 THE COURT: What effect had this he talked with Annett, explaining this transaction and showing that there was nothing due from Higgins to the Doyne Lumber and Milling Company, and Annett acquiesced in that before the sale of the assets of the corporation to Weller for Berghoff, that that would stand in exactly the same position as his talks with the directors of the corporation regarding that account.

30 THE COURT: I do not think so. I overrule that.

Q. Was there an account of Julius Berghoff on the books of the Doyne Lumber and Milling Company?

MR. HUDSPETH: I object as immaterial and irrelevant.

40 THE COURT: What is the point about this?

William F. Doyne—Direct.

MR. DEMAREST: To show that these two accounts were in the same condition so far as bookkeeping was concerned at the time the books of account were turned over by the Doyne Lumber & Milling Company, or the receiver, to the Hudson Milling Company.

THE COURT: Were in the same condition as to what? 10

MR. DEMAREST: As to payment or non payment. I want to show both accounts were opened in exactly the same way. The books now show they were closed in the same way.

MR. HUDSPETH: It is not said at all that there was any arrangement made with the directors of the Doyne Lumber and Milling Company, as he claims now whereby that account was to be settled in any way or marked off of the books. 20

THE COURT: What effect do you claim the condition of the Berghoff account had on the condition of the account between Mr. Doyne personally on the books of the Doyne Lumber and Milling Company, and Higgins?

MR. DEMAREST: That question is asked as to the condition of those books, the fact that both those pages are cut out, the fact that both of them were then opened, and are now closed. 30

THE COURT: The jury can see that, can't they?

MR. DEMAREST: All right.

Q. Now, before the assets of the Doyne Lumber and Milling Company were turned over to Mr. 40

William F. Doyne—Direct.

Annett, the receiver, to Mr. Weller, did you have any talks with Mr. Berghoff? A. Yes, sir.

MR. HUDSPETH: I object.

Q. Did you ever examine the books with him?
A. Yes, sir.

10 MR. HUDSPETH: I object as immaterial and irrelevant, and not binding on the Hudson Milling Company.

THE COURT: The object is not to show that they are binding upon the Hudson Milling Company, the object is to show that some talk was had before the assets were turned over to Weller, which talk afterward ripened into some action on the part of Berghoff before the assets were
20 turned over from Berghoff to the Hudson Milling Company, and therefore that the state of the account when it was turned over to the Hudson Milling Company was a state of payment.

MR. HUDSPETH: I may be wrong in my theory, but it seems to me that their contention now is that this account of Higgins was wiped off, offset against the Doyne account, by consent and with the knowl-
30 edge of the board of directors of the Doyne Lumber and Milling Company.

THE COURT: That is one contention. Now if that is true, then manifestly there was not any asset for the receiver to turn over. Now I presume he further claims that assuming that barrel misses fire he uses the other barrel to show that Berghoff dealt with the claim and treated the claim as
40 being a claim which he, considering it alive, would put the quietus to; in other

William F. Doyne—Direct.

words, they are two utterly contradictory situations, but he is going to prove that, I presume, and he cannot possibly prove the second one without showing that Mr. Doyne must have considered that the claim that he now claims was closed then was not closed at all, but he was dealing with it as if it were open with Berghoff; in other words, he is going to contradict, as I understand it—contradict the witness now by showing that that which was closed was open; and if that can be done I will permit it. 10

Q. When did you first find out—

MR. HUDSPETH: What was the last question? 20

(Question repeated).

THE COURT: I admitted the question to the effect as to whether or not Mr. Doyne had ever had any conversation with Mr. Berghoff prior to the transference of the assets from Annett, Receiver, to Weller. That is the question I admitted. Now apparently Mr. Demarest waives that question and wants to ask something else. 30 If you have any other object it may be that I will think it is inadmissible on that object. I presumed that was the object.

MR. DEMAREST: My object is to show the conversation between Berghoff and Doyne. It was explained to Berghoff before he purchased the assets that this account was a dead account.

THE COURT: Yes, but that, Mr. Demarest, clearly and absolutely contradicts the 40

William F. Doyne—Direct.

10 attitude that was assumed on Tuesday night when the contention was absolutely made,—and I wrote it down here at the time it was made in order to give it consideration—that there was a contract made between Doyne and Berghoff, and which was actually executed between the parties at the time that Berghoff agreed to cancel and did cancel this debt.

MR. DEMAREST: I am not going to run counter to that at all.

THE COURT: Then you do not contend that, as I understand it?

MR. DEMAREST: Yes, but the one is not inconsistent with the other.

20 THE COURT: How could he cancel a debt that was not existing?

MR. DEMAREST: I intend to show that it was brought to Berghoff's notice before the purchase, that while that account stood open on the books it had been closed, and was not a live account of the concern, and that Mr. Berghoff had agreed to see merely that it was cancelled on the books, that is all.

30 THE COURT: Then you do not claim that this was a live claim at all, or that Berghoff had anything whatever to do with killing it or putting the quietus on it? The only thing you contend is, not that there was a contract on Berghoff's part to remit the debt, but simply that there was a contract on Berghoff's part to wipe it off the books?

40 MR. DEMAREST: Yes.

THE COURT: If that is what you con-

William F. Doyne—Direct.

tend, that is quite a different thing, and I understand now; but that was not the contention Tuesday night, because I put it down in exactly the words of counsel, and I wrote it down for the purpose of considering the legal aspects of it, and I have it in your own words, that you claimed that he was to cancel the debt, and that there was consideration given to him by Doyne for that purpose. That was the contention. 10

Q. Did you know that the balance on the Higgins account appeared open on the books of the Doyne Lumber and Milling Company? A. Yes.

Q. When did you find that out? A. I knew that right along.

Q. Did you ever give any instructions to have that charged to your account, to your bookkeeper? A. No. 20

Q. It was left in that condition? A. In that condition.

Q. And was in that condition at the time the books were before the board of directors? A. Exactly.

BY THE COURT:

Q. When was it the books were before the Board of directors? A. While we were in operation. 30

Q. I understand, but when? A. Well, we had in May, I think,—May or June——

Q. In 1910? A. In 1909; I think it was 1909.

Q. May, 1909? A. Yes. It was just after we had organized. We had several meetings at my office, I think it was in 1910. 40

William F. Doyne—Direct.

Q. How long after you were organized was it you had this talk? A. About half a year after that.

Q. You mean by just after you were organized, half a year? A. After we were running half a year.

Q. Then you had your talk with the board of
10 Directors? A. Yes.

Q. When were you organized? A. We were organized in the spring, I guess.

Q. Of what year? A. I guess we were organized in—we were organized in the fall.

Q. Fall of what year? A. 1908.

Q. About what month in the fall? A. I cannot remember—November or December, something.

Q. November or December; then you mean to
20 say that in either May or June—A. Yes.

Q. —this talk was had between the directors at which it was decided to allow Higgins credit for goods furnished to you personally at your house? A. Yes.

Q. Or at your wife's house, Rachael Doyne's house? A. Yes.

Q. All right. Now we understand.

30 BY MR. DEMAREST:

Q. At the time this account was brought before the board of directors do you know whether or not it appeared in the book as it does to-day? A. What do you mean by that?

Q. Do you know whether at that time you had furnished all these goods to Higgins? A. Yes.

Q. For which the Doyne Lumber & Milling Company charged you? A. Yes, sir.

40 Q. Do you know whether at that time Higgins had done the work for the company? A. Yes, he did.

William F. Doyne—Direct.

Q. And do you know whether at the time you had the meeting of the directors he had completed the work on your houses? A. Oh, yes, yes.

Q. Now were those matters discussed at the meeting of the board of directors? A. Yes.

Q. The amount that appeared on the Higgins account due to the Doyne Lumber and Milling Company was discussed? A. Yes.

10

Q. And the amount of the Higgins work done for the Doyne Lumber & Milling was discussed? A. Yes.

Q. And you discussed the amount of your bill due to Higgins? A. Yes, sir.

Q. And after you had agreed with Higgins that the amount of his bill should be offset against your bill? A. Yes: I had the bills in the Doyne Lumber & Milling Company's office right along.

20

Q. Was it anything unusual to examine the accounts of the Doyne Lumber and Milling Co., at their meetings of the board of directors? A. Was it unusual? A. No; we—

THE COURT: Don't you make any movements with your head down there, young man. Just understand that. You keep your head still.

Q. And before the receiver was appointed for the Doyne Lumber and Milling Company, before it became insolvent, were the books and assets of the Doyne Lumber and Milling Company examined and considered by the board of directors? A. Before what?

30

Q. Just before the appointment of a receiver, before you went insolvent, were those accounts gone over? A. Before we went insolvent, by who, by the board of directors?

40

Q. Yes; did the board of directors go over these

William F. Doyne—Direct.

accounts at about the time that a receiver was appointed and the concern went insolvent? A. Yes; we went over several claims.

Q. And was the Higgins account then on the books? A. Yes; the Higgins account was on the books.

Q. Now before Mr. Weller took the bill of sale
10 for the business did you and Mr. Berghoff have any talks about the books? A. Yes, sir.

Q. Did you examine them? A. He did.

Q. For what purpose? A. Oh, he looked around the plant; he looked around the mill; he looked around the books; every thing. I have shown him everything before he entered that deal with the Hudson Milling Company.

Q. Was there anything said by you to Mr.
20 Berghoff about this Higgins account? A. I just told him this is an account which I have taken goods for it from the—from Mr. Higgins, and I am supposed to pay that account with—for the goods.

Q. Did you have any list of the accounts made up from the books, showing the live accounts? A. We did, yes.

Q. And were they shown to Mr. Berghoff? A.
30 Yes, sir.

Q. Did you ever see these before? A. I did.

Q. When? A. Before the—at that time when we were talking—when we were speaking about organizing the new company.

Q. What does it represent? A. That represents the stock, whatever we had, and liabilities.

Q. Did Mr. Berghoff ever see that? A. Yes, he did. He went over that account.

40 Q. He saw this paper that you hold here? A. Yes.

William F. Doyne—Direct.

Q. Does the name of William Higgins appear upon these accounts shown on that statement?

THE COURT: Oh, what is the use of wasting time? If you are going to offer it in evidence the jury can see if it appears there, or if it does not.

MR. DEMAREST: I offer it.

MR. HUDSPETH: I object to it as immaterial and irrelevant and not binding on the company. 10

THE COURT: I will permit it as against Berghoff, that is all.

(Exception noted for the plaintiff).

Q. Do you recognize that paper, D-2 for identification? A. Yes, sir.

Q. What was that? A. This is accounts payable. 20

Q. Well, look through the rest of it. A. This is from the receiver. This is the liabilities—what you call assets.

Q. When did you first see that list?

MR. DEMAREST: Have you a list there I called for of the assets?

MR. GARRISON: No.

MR. DEMAREST: Mr. Berghoff, have you got it? I subpoenaed you to produce it. 30

A. I think after we was in the receivership.

Q. At the start? (No answer).

Q. Did Berghoff ever see that list you have in your hand? Do you know? A. I presume he did.

Q. Well, do you know whether he did? I do not want your presumption. A. He did. 40

William F. Doyne—Direct.

MR. HUDSPETH: Is that offered?

MR. DEMAREST: Yes,—P-2.

Q. At the time you and Berghoff talked about the accounts and about Higgin's claim, that was before he received the bill of sale? A. Yes, a month before, two months before.

10 Q. And what did you say to him at that time? A. I explained to him the whole thing, how it was, whatever we got and whatever we figured it is worth, and he promised me if we will organize a company he will take that account off from the books.

Q. You made an agreement on the 8th of March, 1910, with Berghoff, did you not? A. Yes.

20 Q. Is that the agreement (indicating)? A. This is an agreement, yes.

Q. Did you afterward at any time convey to Mr. Berghoff the stock that you agreed to give him? A. I did.

Q. And Rachael Doyne—Rachael Doyne was your wife, wasn't she? A. Yes.

Q. Did she convey her stock to Mr. Berghoff? A. Yes, sir.

30 Q. Did she give the mortgage for five thousand dollars on her property that she was called upon to give? A. She did.

Q. Did Mr. Berghoff form a corporation? A. He did.

MR. DEMAREST: This is not the agreement. I will ask that this be marked instead of the other, D-3. They gave me the wrong paper.

40 Q. And how long did you remain with the

William F. Doyne—Direct.

Hudson Milling Company that was organized? A. A year and a half, about a year and a half.

Q. What office did you hold? A. With who, with the Hudson Milling Company?

Q. Yes. A. I was manager for them, general manager.

Q. Did you have any talk with Mr. Berghoff, about June, 1910, about this Higgins account? 10
A. I did.

Q. Who was present at the time? A. I was, and Mr. Berghoff was, and my son was. I wanted him to take that off from the books the way he promised me.

Q. Hadn't you asked him before that time to hae the account taken off? A. I asked him several times. He promised me he would do it as soon as he got a chance. 20

Q. Why didn't you have the account taken off the books at the time you and Berghoff first had your talk before the bill of sale to Weller? A. He told me so soon he will be there and he will be the president he will take it off the of the book, the way he promised me.

Q. Why didn't you have the account taken off the books, while Mr. Annett was there? A. Oh, I couldn't do that. 30

Q. Did you explain to Mr. Annett whether the account was a live one or a dead one? A. I explained to Mr. Annett the whole situation of the whole case and he was satisfied it was so.

Q. In June 1910, when you had this talk with Berghoff regarding this account, what did you say to him and what did he say to you? A. I asked him to take it off from the book, and he ordered the bookkeeper to take it off from the 40 books.

William F. Doyne—Direct.

Q. And was it taken off then, did you see him take it off? A. I seen him take it off, yes.

Q. Who took it off? A. The bookkeeper.

Q. Is he in the court room now? A. Yes, sir, he is; right there.

Q. The young man who testified day before yesterday? A. Yes.

10 Q. And was it taken off in the name of William Doyne, or profit and loss as it appears there? A. I could not tell you, I could not understand how it was taken off; I merely seen him directing him to take it off from the books. I was there and I saw there. I could not understand very much bookkeeping.

Q. Did you afterward, make any attempt to find out whether it had been taken off? A. I
20 did.

Q. Do you know whether any bills were ever rendered to Mr. Higgins for this balance either by the Doyne Lumber and Milling Company or by the Hudson Milling Company? A. It was not.

Q. Why not? A. Well, because there was no account.

Q. What do you mean, there was no account?
A. It was understood that Higgins does not
30 owe us the money, it was all settled. The account came out after I left.

Q. How long did you remain with the Hudson Milling Company? A. About a year and a half or a year and three quarters, something like that.

Q. When you left there what business did you go in? A. The same line of business.

Q. In another company? A. With my son.

Q. In Bayonne? A. In Bayonne.

40 MR. HUDSPETH: I object as immaterial and irrelevant.

William F. Doyne—Direct.

MR. DEMAREST: I think it is material to show that his claim was not enforced as against Higgins until after Doyne went into an opposing business, for the purpose of establishing the account as against Doyne.

MR. HUDSPETH: I will withdraw my objection.

THE COURT: I do not see any relevancy 10
about it, but go ahead; the other side does not object. I do not see what possible relevancy it has, but go on.

Q. Did any representative of the Doyne Lumber & Milling Company or the Hudson Milling Company insist that this was a live account before this suit was brought against Mr. Higgins? A. Never heard of it.

Q. Were you ever present at a meeting between Mr. Higgins and Mr. Berghoff at Bayonne? 20
A. Yes.

Q. When? A. Well, right as soon as he started out—at the time the Hudson Milling Company started out in business. I introduced Mr. Higgins to Mr. Berghoff, and I explained “This is the Mr. Higgins we have been dealing with,” and he wanted to get permission from Mr. Higgins to use his lots and I introduced Mr. Higgins to Mr. Berghoff, and he did give him permission to use the 30
lots.

Q. And when was that? A. Oh, that was in the beginning of the spring, I think.

Q. Of what year? A. Of 1910, I believe.

Q. What? A. 1910. I believe.

Q. What dealings had you been having with Mr. Higgins at that time that you referred to?

A. Well, we had been doing some business to- 40

William F. Doyne—Cross.

gether; I had several contracts with him after it.

Q. With the Hudson Milling Company? A. Yes, with the Hudson Milling Company. I ordered Mr. Higgins to do certain plumbing work for the Hudson Milling Company.

10 Q. At first, after the incorporation of the Hudson Milling Company, where were the books of the old Doyne Lumber and Milling Company kept? A. Well, I—they were kept in the safe. Sometimes they were kept in his own office in Jersey City,—Mr. Berghoff's office.

Q. Were the bookkeepers of the Hudson Milling Company attending to their bookkeeping in Mr. Berghoff's personal office in Jersey City? A. Yes, yes.

20 Q. Then the books were taken away from Bayonne and brought to Jersey City— A. Their office

Q. —and there were worked upon? A. Yes.

Q. By whom? A. By Mr. — by his bookkeeper, Mr. Workmeister.

CROSS EXAMINATION BY MR. HUDSPETH:

30 Q. Mr. Doyne, let me understand again. When was the Doyne Lumber and Milling Company formed? A. The Doyne Lumber and Milling Company was formed in—I presume in 1908.

Q. How long had it been in business before it failed? A. I think a year or a year and a half.

Q. A little over a year and a half, wasn't it? A. Something like that.

40 Q. Wasn't it over two years? A. I do not remember; I think it was over a year and a half.

Q. Before it failed? A. Before it failed.

William F. Doyne—Cross.

Q. And the Doyne Lumber & Milling Company succeeded what company? A. The Doyne Lumber & Milling Company succeeded William Doyne.

Q. Then you had a company by the name of William Doyne Company before the Doyne—
A. No; it was William Doyne.

Q. Oh, you carried on business in your own name? A. Yes, William Doyne. 10

Q. And the Doyne Lumber & Milling Company succeeded William Doyne? A. Yes.

Q. In the same place? A. Yes.

Q. And the same business? A. Yes.

Q. And the Doyne Lumber & Milling Company was composed of yourself, your brother Simon, your wife and his wife? A. Not a brother, a cousin.

Q. Yourself, your cousin Simon Doyne, your 20 wife and his wife? A. Yes.

Q. That was a pretty close corporation, wasn't it? A. I do not know what you call that.

Q. Well, there were no strangers in it? A. No, there were no strangers, no.

Q. And when you were incorporated Judge Roberson incorporated the company, did he not? A. Yes.

Q. And he organized that company in his office 30 at Bayonne, didn't he? A. The first meeting, yes.

Q. And the officers and directors were elected? A. Yes.

Q. And he wrote the minutes for you, didn't he? A. Yes,—not him.

Q. Well, some one in his office? A. Yes.

Q. And he got a seal for you, didn't he? A. 40 Yes.

William F. Doyne—Cross.

Q. And he turned over the minute book as written up in his office, and the seal, to you, didn't he? A. Yes.

Q. Did you ever hold a meeting after that, of you four directors? A. We did.

Q. Did you ever keep a minute of any meeting held after that by you four directors? A. When
10 we had the meetings we did.

Q. When did you hold the first meeting after the organization meeting in Judge Roberson's office? A. What was your question?

(Question repeated).

A. I presume it was about two or three months after.

Q. When was the second meeting? A. That was
20 the second meeting.

Q. When was the third meeting, if you held a third meeting? A. Well, perhaps half a year later.

Q. H'm? A. Perhaps it was a half year later.

Q. Perhaps it was half a year later? A. Yes.

Q. Now those were all the meetings, were they? A. We had several meetings, we did not
30 took no minutes.

Q. Did not take any minutes? A. No.

Q. You did not have any formal meetings except the three you have spoken of, the organization meeting and two others? A. We had meetings, but we did not keep any minutes.

Q. Do you know what the second meeting was called for? See if I cannot refresh your recollection.

40 Do you remember geeting some land from Tremley? A. No.

William F. Doyne—Cross.

Q. Wasn't it for that? A. No.

Q. What was it for? A. The second meeting I presume was called to raise money.

Q. Was it called for that purpose? A. Was it called for that purpose?

Q. Yes. A. I couldn't tell you.

Q. Why did you say you presume it was to raise money? A. I know we spoke about. 10

Q. Was it or was it not called to raise money? A. I could not tell you if it was called purposely for that only purpose, but we was speaking about money to run the business.

Q. Well, did you have a meeting for that purpose? A. Well, we discussed that matter at that meeting.

Q. Did you discuss anything else? A. I do not remember, perhaps we did. 20

Q. It was called, wasn't it—you were hard up at that time and you wanted to raise some money and you called a meeting to try and get some notes discounted, didn't you? A. Hard up, no.

Q. Simon and you wanted some money for the purposes of business, didn't you? A. Not me; Simon suggested it, not me.

Q. Why were you trying to raise money? A. 30 Well, I presume we were short of funds and he suggested that we should go and raise money to run the business.

Q. And you did do it? A. I did not; he did.

Q. In the Mechanics' Trust Company, of Bayonne? A. I do not know very well.

Q. Don't you know he did? A. I cannot tell you what bank; he went to raise money. 40

William F. Doyne—Cross.

Q. Well now, he did raise it, didn't he?

MR. DEMAREST: I object to that as not proper cross examination.

THE COURT: I will permit it.

Q. He did not raise it, did he? A. I guess he did.

10 Q. Well now, don't you know? A. Yes, he did.

Q. He did? A. Yes, he did.

Q. And that tided you over for a little while? A. What?

Q. That put you over for a little while, that kept you in money for a little while? A. Well, I did not handle the money.

Q. The Company? A. I did not have anything
20 to do with the money part.

Q. That kept the company in business for a little while, didn't it? A. I could not answer you that because I did not handle that part of it.

Q. Well, you got hard up again, didn't you, the company got hard up again? A. We was always short of money.

Q. Yes; and you tried to raise money again,
30 didn't you, and held a meeting for that purpose? A. I do not remember that.

Q. Now don't you remember that the bank with which Simon was negotiating, required a resolution passed by your board of directors and the making of a note in order to raise some money? A. That was at the second meeting.

Q. Isn't that so? A. That was at the second meeting.

40 Q. And you held two meetings for that purpose?

William F. Doyne—Cross.

A. Only one meeting. That was at the second meeting.

Q. The third meeting, what was that called for?

A. The third meeting was called—I guess we wanted some more property then, or something else. I could not recollect exactly what it was.

Q. Called for some special purpose? A. No, not exactly special purpose. I know we were 10 trying to buy another piece of land next door.

Q. Is that the Tremley land? A. The Tremley land or something else.

Q. Now the meeting was called for that purpose? A. I do not know if the meeting was called for that purpose.

Q. Do you believe it was called for any other purpose? A. We had several business transactions to talk about; I do not remember exactly 20 what it was.

Q. Do you remember anything that was talked about at the third meeting except the question of land? A. I do not.

Q. Now you have spoken of all the meetings, haven't you? A. Yes.

Q. Yes. Now you said a little while ago when Mr. Demarest asked you, that these books were before the board of directors right up to the 30 time the company went into the hands of a receiver? Is that so? A. What?

Q. These books, this— A. I could not understand your question.

Q. You said to Mr. Demarest a little while ago that these books of account were before the board of directors right up to the time the company went into the hands of a receiver. Is that so? A. I could not understand you. 40

Q. Did the board of directors have before them

William F. Doyne—Cross.

these books right up to the time of the receivership? A. We had the books, yes, sir; we had the books in the office.

Q. And did they go over them at the meetings? A. Yes.

Q. Sure of that now? A. Yes.

Q. And you had meetings of the directors right
10 up to the time of the receivership, did you? A. Not exactly meetings, we did not have no minutes, but we went over the books—of course, several times.

Q. When did Simon Doyne flee from the State of New Jersey? A. When did Simon Doyne flee?

Q. Yes. A. I could not tell you that.

Q. How long before the receivership? A. Oh, about two months or a month.

20 Q. Wasn't it a little more than two months? A. No, it was not.

Q. What? A. About two months or a month.

Q. Wasn't it more than two months? A. I do not think so.

Q. When was the receivership? A. The receivership was appointed in December, I think, I believe in December.

Q. And didn't he go away in August? A. No,
30 he did not.

Q. What month did he go away? A. I could not tell you that.

Q. Didn't he go away in the summer? A. He went away after—about a month after the Jewish holidays.

Q. And didn't his wife go away with him? A. No.

Q. What? A. No.

40 Q. She did not? A. No.

William F. Doyne—Cross.

Q. Did you have a meeting of the board of directors at any time after Simon Doyne went away? A. Oh, at that time he was not connected any more, at that last moment he was not connected.

Q. Who took his place? A. I took his place.

Q. You and your wife took his place, didn't you? A. Yes.

10

Q. Did you have any one else in that board of directors besides you and your wife? A. Me and my wife and my son.

Q. Your son, when did he come in? A. He was in there right along.

Q. When did he first come in? A. He came in the month it was organized, but his mother took his—his mother took his—got charge of his stock.

20

Q. Yes, and his mother became the director, didn't she,—your wife. A. What?

Q. Your wife became a director? A. She was a director right along, yes.

Q. Was your son a director right along? A. Until he became twenty-one years he was not.

Q. When was that? A. That was three years ago.

Q. Three years ago, 1909? A. Yes, 1909 or 1910.

30

Q. How did he become a director, do you know? A. He had stock in the beginning.

Q. I understand; you say he did, but how did he become a director? A. What do you mean?

Q. You say he was a director; how did he get to be a director? A. Well we passed through the—we passed him to be a director.

Q. How did you beg him to be a director? A.

40

William F. Doyne—Cross.

We did not beg him to be a director; he had stock; he had to be a director.

Q. How did he become a director? A. I am telling you.

Q. How? Did you just simply ask him to be a director? A. I do not remember exactly what I asked him, but we made him as a director.

10 Q. Don't you know after your cousin Simon went away that you just carried that business along as though it belonged to yourself? A. Yes, for a while, I did.

Q. Yes— A. For a while.

Q. And you were the whole thing? A. For a while, yes.

Q. Yes, up to the time of the receivership? A. That was about a month or two.

20 Q. Up to the time of the receivership? A. Yes.

Q. Now you say you entered into this agreement with Mr. Berghoff as to the taking over of the Doyne concern from the receivership, forming this new company, the Hudson, and you going in with him, and as one of the considerations he was to cancel, or see that the new company to be formed, which was the Hudson Milling Company, was to cancel any debt on the books
30 against you? A. Exactly.

Q. That was the understanding, wasn't it? A. Yes. My contract provides for that.

Q. Did you talk about what debts were on the books against you which were to be cancelled? A. I have explained several times.

Q. I am asking you again? A. I did.

Q. What accounts were on the books against you at the time you made that agreement? A.
40 Which accounts it was against me on the books?

William F. Doyne—Cross.

Q. Yes. A. That was the Higgins account.

Q. Was that against you on the books? A. Not exactly against me, but it was meant me, and I have explained it to you.

Q. Well, outside of your explanation and outside of what was meant, as you say, what account on that book or on any of the books were against you in your name? A. I do not remember any accounts except this. 10

Q. There was not any, was there? A. Perhaps there was; I did not keep the books, Judge.

Q. You represented, did not you, to Mr. Berghoff, in the presence of Mr. Hudspeth, that there was some little claim against you for something you had got from the mill, that you did not intend to pay for, didn't you? A. What is that?

(Question repeated).

A. I did not hear you. 20

(Question again repeated).

A. I do not remember.

Q. You do not remember it? A. No.

Q. Wasn't your wife present when you closed this contract? A. Yes she was.

Q. And didn't you both say to Mr. Berghoff in Mr. Hudspeth's presence, "Now the little claims against me I do not intend to pay, and I want that in this contract?" A. I do not remember that Judge. 30

Q. And didn't you point out items and didn't Mr. Berghoff say to you, "they are so small we will not have any bother about them?" A. I do not remember that.

Q. Where is your wife? A. She is not here.

Q. Is she home? A. She is home.

Q. Now you say that about six months after this company formed that is the Doyne Lumber 40

William F. Doyne—Cross.

& Milling Company, your board of directors met and you talked over the Higgins matter? Is that right? A. Yes sir.

Q. And it was understood between you and the board of directors that Mr. Higgins should have credit for material, is that right? A. Yes, whatever I am going to take, yes.

10 Q. And that he would do certain work for you on your or your wife's house; is that right? A. Yes.

Q. And that one should balance the other? A. I do not remember saying that.

Q. Or one should be charged against the other; is that right? A. Yes; I think it is so.

Q. Was that the understanding with the board of directors? A. Yes, yes.

20 Q. That was the sole understanding as to Higgins getting goods from your concern on credit, and how they should be paid for? A. Yes.

Q. You are sure of that now? A. I am.

Q. And that was about six months after your company formed? A. Six or eight months, I cannot say exactly.

30 Q. Now Simon Doyne was interested in your company at that time, wasn't he? A. Yes.

Q. Held one half the stock, he and his wife? A. Yes.

Q. And expected to get one half the profits? A. Yes.

Q. And you and your wife were to get the other half? A. Yes.

40 Q. How much credit was Higgins to get at that time, where you were to have the advantage of his doing work on your wife's house? A. What?

William F. Doyne—Cross.

Q. How much credit was he to have? A. I do not understand you.

Q. How much material was he to have in dollars and cents, a thousand, two thousand, three thousand, four or five? A. I never mentioned it that way.

Q. No limit put at all, that is right, isn't it; and Simon was there and agreed to that, did he? A. Yes. 10

Q. Sure of that? A. Yes—I am almost sure of it.

MR. DEMAREST: What is that?

(Answer repeated).

MR. DEMAREST: "I am almost sure."

Q. And you never had any agreement with Simon as to how much credit Higgins was to get, did you? A. We never spoke about the amount. 20

Q. Nor how much work he was to do for you or your wife on her house? A. Never spoke about how much.

Q. Now, Mr. Doyne, if this was the agreement as to what credit Higgins was to get and how much your wife and you were to have, how is it this matter of work done on the factory by Higgins is marked paid for by material he got, how does he get credit for that? A. Well, I did not handle the books Judge. 30

Q. Well if your agreement was simply that he was to do work on your wife's house and get materials to offset it, how is it that what work he did on the mill is given him credit for on that account? A. I do not understand your question.

MR. BOTZONG: I object to this line of testimony, Mr. Doyne said it was for work Higgins was to perform for the com- 40

William F. Doyne—Cross.

pany as well as on his house. The Judge is trying to make him say something he did not say on his direct examination.

THE COURT: He has a right to do that, if he can, on cross examination.

MR. HUDSPETH: Repeat the question, please.

10 (Question repeated).

A. I did not have the books; and I could not answer it.

Q. That is your answer, is it? (No answer).

BY THE COURT:

Q. Do you deny that you directed the book-keeper what entries to make on the books? A. I did direct her.

Q. You did direct her? A. Yes.

20 Q. And any entries that appear on the books here were entries that were directed by you, weren't they? A. Yes, I presume so.

Q. Were the goods delivered on your house, or your wife's house, furnished at the same time as the goods were that were delivered to or the work done for the mill? A. About the same time.

30 Q. If you directed the entries and they were both furnished at the same time, how is it that you did not direct her to enter the item for work done on your wife's house at the same time that you directed her to enter for the work done on the factory? A. I wanted to keep that matter separate.

Q. You wanted to keep it separate, why? It was to be charged wasn't it, against your account? A. It was to be charged against my account, and the company— especially against my account.

40 Q. But it was to be against the company and was to set off the company's debt against Higgins? A. Yes.

William F. Doyne—Cross.

Q. Then why didn't you direct this young woman to enter that charge against the company on the books of the company at the same time that you did direct her to enter the charge against the company for the work done for the company? Why didn't you do it? A. I don't understand what you mean.

Q. The first item here the 21st of August, 1909, that was for work done for the company, \$404.26, and for the work done at the same time on your wife's house no entry was made until June 14, nearly a year later. How do you account for that? A. If I can recollect, Judge, I had Higgins to do some more work on my house. I think I was speaking to Mr. Higgins to put in some steam heat. I think that was it.

Q. But this job on your house was completed, that you had ordered to be done at that time, wasn't it? A. I do not remember exactly, Judge. I think it was our conversation to do more work. I had intended to put in some more steam heating.

Q. That is your explanation then that the reason you did not enter that charge against the company in Higgins' favor was that you expected at some later time to do some more work on your wife's house? A. I think that is it.

Q. And you were going to charge that other work against the company in Higgins' favor? A. If the directors would permit me, I would.

Q. You have already told Judge Hudspeth that the amount of the credit that was to be given to Higgins was unlimited? A. I said it was never spoke about any amount, I did not say unlimited, but I said there was no amount spoken of.

Q. If no amount was spoken of, then you had a right in your judgment to go as far as you

William F. Doyne—Cross.

wanted to, didn't you? A. Yes, It could not amount to thousands of dollars, because it was a small transaction.

Q. Why couldn't it amount to thousands of dollars if nothing was said about the amount? A. It is only a small piece of property and I could not do very much work on it.

10 Q. Then your idea is that the amount of work to be done by Higgins on your property and charged to the company was only limited by the size of your property? A. I thought it would not amount to more than a thousand dollars or eight hundred dollars.

Q. Well, it didn't, did it? A. It did not.

Q. Don't you see it did not? You say you do not think it amounts to more than a thousand. There is the charge, \$408.91. If you thought it
20 would amount to a thousand dollars why didn't you go on and add the rest? That is almost six hundred dollars shy of a thousand dollars. A. I did not want to take so much money away from the company.

Q. Oh then if you did not want to take so much away from the company what made you think you wanted some more work done on the house by Mr. Higgins? A. I knew I had intention to do
30 some more, but I did not want to put it all in the one lump to make so much ex—so heavy—so much expense.

Q. Then what do you mean when you said a moment ago you did not think it ought to go above a thousand dollars? A. I said I meant to do certain work about a thousand dollars.

Q. You did not do it? A. No.

Q. You did only \$408.75 worth of work, isn't
40 that so? —\$408.91? A. I think the charge was more than that.

William F. Doyne—Cross.

MR. DEMAREST: That is the work done by Higgins for the company.

Q. That is the work done for William Doyne, journal, p. 85, \$408.91. That is again right, and Mr. Demarest is again wrong, isn't he? A. I think it is more than that, Judge.

Q. That is the amount charged at your direction on the books of the company? A. Yes. 10

Q. And you can take the other book there at p. 85, where you see the bill for plumbing done by Higgins for William Doyne's house; you see that? A. Yes.

Q. Here you have it charged \$708.91. How do you account for that? (No answer).

Q. How do you account for that? A. I could not answer it, Judge. I could not understand it exactly.

Q. You do not know how it is? A. I could not understand the question right, Judge. 20

Q. What is it you do not understand?

MR. DEMAREST: Now let us get at this. Will you bear with me a moment? If you compare that figure there with this one, I think there is no doubt it is a seven.

THE COURT: Yes, that is correct. Mr. Demarest is correct there. That is apparently a four but it is really meant for a seven. See, \$708.91. So that it does correspond with this book here, with the journal? 30

A. Yes.

Q. Now you have told us you thought you could go up to a thousand dollars? A. I said I had some work to do, but I thought I would stop for a while so we will get on our feet a little more then as to the balance. 40

William F. Doyne—Cross.

Q. That is the only explanation you can give of that; you wanted to wait until you got on your feet some more? You thought that the company was in need of money, didn't you? A. The company was in need of money right along.

Q. All the while? A. All the time.

10 Q. And Higgins had gotten goods from the company for which money was due; that is right isn't it? (No answer).

Q. And while the company was in need of money and while it had furnished goods to Higgins for which money was due you claim that the board of directors authorized you to set off a claim of yours personally against Higgins? A. Your Honor, I have taken—I entered that agreement with Mr. Higgins in the beginning that way.

20 Q. I understand, but you say that the company agreed while it was in need of money, that you might set off a claim of yours personally against the debt of Higgins? A. That was understood between us; it was satisfactory.

Q. You say that was done? A. Yes, it was done.

30 Q. At the time the board of directors agreed, as you say they did, that this claim of Higgins should be off set by the claim for the work done on your house as well as for the work done for the company, did the company owe you anything, the Doyne Lumber & Milling Company? A. All what I could tell you I have been only getting fifteen dollars a week from the Doyne Lumber and Milling Company, that is all I was getting.

40 Q. That is all you were getting, and you were getting it, weren't you? A. I was getting what?

Q. You were getting it every week? A. Yes.

William F. Doyne—Cross.

Q. And that was the agreement between you and the company, that you were to have fifteen dollars a week, wasn't it? A. It was not said anything about any wages; I simply took it.

Q. But the books were always before the directors, you have said, at these meetings, and your charges of fifteen dollars a week were on the books, weren't they? A. I presume so.

10

Q. So they knew you were getting fifteen dollars a week, and that was all you were authorized to take from the company? A. Yes.

Q. And when the company agreed, as you say they did, at the board of directors, meeting, that your debt of the Higgins should be offset by the debt of Higgins to the company, did the company owe you anything? A. Well, the—

Q. Did the company owe you anything? It is as plain as a pikestaff. A. I do not think they did.

20

Q. Will you kindly tell us what account you had with the company this debt of \$708.91 of yours was to be set off against?

(No answer).

Q. How was the Doyne Lumber and Milling Company to pay itself, so far as you were concerned, \$708.91 of their debt which you had attempted to assume? A. Because everything what was—the Doyne Lumber and Milling Company possessed—it belonged to William Doyne. I had everything before the Doyne Lumber and Milling Company organized. Everything was my own personally.

30

Q. But you transferred it to the company, didn't you? A. I transferred it to the company.

Q. And it belonged to the company? A. It belonged to the company.

40

William F. Doyne—Cross.

Q. And the company did not owe you anything, did they? A. No, not according—

Q. They gave you stock for what you had put in? A. Yes.

Q. So that you were paid by stock for property turned over? A. Yes.

Q. And company owed you nothing. Now I
10 ask you what debt the Doyne Lumber and Milling Company owed to you you say this \$708.91, was going to be set off again? A. They did not owe me anything.

Q. They did not owe you anything? A. So far as this is concerned.

Adjourned until 2:15 P. M.

20

AFTERNOON SESSION.

BY MR. HUDSPETH:

Q. Now under the agreement of March 8th, Exhibit D-3, it is provided, among other things, that all claims and demands found upon the books of the Doyne Lumber and Milling Company against you, should, as soon as the new corporation secured control of the company, be cancelled and discharged as far as the company might
30 be enabled to cancel and discharge the same. Were there any other claims that you recall that you claim were to be cancelled under that agreement than the Higgins one? A. Was there any more?

Q. Yes. A. I do not remember.

Q. You do not remember. Now try and charge your recollection whether there were not any other claims besides the Higgins? A. I do not remember.

40

Q. What? A. I do not remember.

William F. Doyne—Cross.

Q. Why, it was rather important to the Doyne Lumber and Milling Company and the stockholders just what amount you were to get the benefit of, wasn't it?

(No answer).

Q. I say, it was rather important to the Doyne Lumber and Milling Company, and the stockholders as to just what amount you were to get the benefit of? A. I could not understand your question. 10

Q. There must have been some limit as to what you were to have the benefit of wasn't there, in dollars and cents? A. I do not know what you mean.

Q. Were you to have any claim that you saw fit on the books of the Doyne Lumber and Milling Company, and which was owing the Doyne Lumber and Milling Company, cancelled, if you wanted it? A. I do not think so, no. 20

Q. Well, what claims were you to have cancelled, in your judgment? A. I remember the Higgins claim.

Q. Well, was there any other? A. I do not remember any others.

Q. Well, how about Boorstein; haven't you claimed since the receivership that you were entitled to have cancelled on the books the claim against Boorstein? A. I do not remember that? 30

Q. You do not remember it? A. No.

Q. Didn't you try to cancel it on the books? A. I do not remember that.

Q. You do not remember? A. No.

Q. Didn't you try to cancel it on the books? A. I do not remember.

Q. Do you know Boorstein? A. There are several Boorstetins. 40

William F. Doyne—Cross.

Q. H. Boorstein? A. I remember H. Boorstein, yes.

Q. Well he owed the company something when it went into the hands of a receiver, didn't he? A. I do not remember that. There were several people owed money—

10 Q. Oh yes, a great many people owed the company money, but didn't H. Boorstein owe the company money? A. Perhaps he did.

Q. And didn't you claim you had the right to cancel that off the books under this agreement with Mr. Berghoff? A. I do not remember; I do not remember that.

Q. Well, if it was one hundred dollars it was important enough for you to remember, wasn't it? A. I do not know anything about it.

20 Q. Now when you made this agreement of March 8th, Exhibit D-3, you knew the Higgins claim was on the books, didn't you? A. I did.

Q. What? A. I did.

Q. And you knew it amounted to over seven hundred dollars? A. Yes.

30 Q. Well, why didn't you mention it in that agreement then, that the Higgins claim amounting to seven hundred and some odd dollars was to be cancelled? A. It was understood between me and Mr. Berghoff that this is a claim which it means me, and I stated to Mr. Berghoff about that thoroughly several times and—

Q. Why didn't you mention in the agreement that the Boorstein claim was to be cancelled? A. I do not remember anything about Boorstein at all.

Q. Now did you and Berghoff have a falling out? A. Not that I know of.

40 Q. Well, you disagreed, didn't you, shortly

William F. Doyne—Cross.

after the Hudson Milling Company took charge?

A. I do not think so.

Q. You did not pull well together, did you? A. We did.

Q. Didn't you very frequently have wrangles over the business and didn't you threaten to withdraw from your service there on more than one occasion? A. I did not. I left Mr. Berghoff on very good terms. 10

Q. Will you tell us when you made this agreement on March 8, 1910, and you knew in your mind, because it was understood between you and Berghoff that the Higgins claim was to be cancelled when the Hudson Milling Company took hold on the 23rd day of April, the month following, you did not have cancelled on those books this claim of Higgins but waited for more than a year before you marked it on the journal or had it marked on the journal as carried over to profit and loss? 20

MR. DEMAREST: I object to that for the reason that the record shows on your case the appointment of a receiver for the Doyne Lumber and Milling Company, and it is perfectly apparent that he could not order the receiver, who is an officer of the Court of Chancery, to make the cancellation, and that the receiver was in there for a great many months. 30

MR. HUDSPETH: That cannot be so because the agreement was made on the 8th day of March, 1910, and the bill of sale was made in April, and it was confirmed the same month, and the company took possession the same month, and he did not have the entry made or participate in the 40

William F. Doyne—Re-Direct.

making of the entry in the journal until June 14, 1910.

MR. DEMAREST: Oh, you refer to after?

MR. HUDSPETH: Yes.

10 MR. DEMAREST: I object then on the ground that he has already testified that he upon several occasions requested Berghoff to cancel it and could not get him to do it until June.

Q. I am asking again, if in your mind when you made this agreement of March 8th and you knew it also when the Hudson Milling Company took over the property in April, following, that the Higgins claim was to be cancelled under that agreement you made with Berghoff, why didn't you have it so cancelled then on the books? A.
20 Mr. Berghoff promised me he would do it.

RE-DIRECT EXAMINATION BY MR. DEMAREST:

Q. You mentioned Simon Doyne in response to Judge Hudspeth's question, and said he was your cousin? A. Yes.

Q. What position did Simon Doyne occupy with the Doyne Lumber and Milling Company? A. He was the president of the concern.

30 Q. And also a director? A. Yes.

Q. Was his wife a director? A. Yes.

Q. You and your wife were directors? A. Yes.

Q. And those were all the directors of the company? A. Yes.

Q. When did Simon Doyne resign as president of the company? A. Simon Doyne resigned—I do not remember the date.

40 Q. About how long before the company went

William F. Doyne—Re-Direct.

into the receiver's hands? A. Oh, about two months, something like that.

Q. Did he still hold his stock? A. Who? Simon Doyne?

Q. Yes. A. No, he didn't.

Q. Did he transfer it? A. He transferred it to me.

Q. Now did Simon Doyne's wife hold her stock? 10
A. No everything was transferred to me.

Q. When did she transfer her stock to you?
A. At the same time when Simon Doyne did.

Q. Then you and your wife for about two months before Mr. Annett was appointed receiver of the company were the sole stockholders of the company? A. Yes.

Q. Had Simon Doyne while he was president of the company, used the company too for the payment of his personal debts? A. Oh, yes, many things, yes. 20

Q. He had done so? A. Oh, yes, a good many of it.

Q. Who drew the agreement of March 8th, between you and Berghoff? A. In Judge Hudspeth's office.

Q. Do you know who dictated it? A. Judge Hudspeth. 30

Q. And who did Judge Hudspeth represent? A. Mr. Berghoff.

Q. He did not represent you, did he? A. No.

Q. Do you remember any meeting at which Simon Doyne and his wife, and your wife attended some time prior to the time that Simon Doyne transferred his stock to you, at which this account was mentioned?

MR. HUDSPETH: I object as a matter 40

William F. Doyne—Re-Direct.

that has already been fully threshed out by your own direct examination.

MR. DEMAREST: Not this meeting.

MR. HUDSPETH: Yes.

MR. DEMAREST: All right; we will have to wait for the court.

10 MR. HUDSPETH: Go ahead; I simply want the objection on the record.

MR. DEMAREST: I want the objection ruled on.

MR. HUDSPETH: I withdraw the objection.

Q. Do you remember that meeting? A. I do.

Q. The Doyne Lumber and Milling Company had sold these things to Higgins? A. What.

20 Q. Was it before or after you had sold this lumber to Higgins? A. It was after.

Q. Was it before or after Higgins had done the work for the company? A. It was after.

Q. Was it before or after Higgins had done his work upon your house? A. It was after.

Q. Was this book present at that meeting, at that time, the ledger? A. It was.

30 Q. Was that account examined? A. We went over it in the office.

Q. What was the purpose of going over it at that time? A. Oh, we wanted to know where we could get money and where we would stand, and different things.

Q. And were there on the books at that time certain moneys that were apparently due the company but had been applied to Simon Doyne's personal accounts? A. What is that?

40 Q. Strike that out. Were there accounts on

William F. Doyne—Re-Direct.

the books of the company at that time which had been used by Simon Doyne in payment of his debts?

MR. HUDSPETH: I object because the books are the best evidence and show for themselves.

MR. DEMAREST: I will withdraw the question.

10

Q. Do you know of the Mercantile Trust Company of Jersey City? A. I do.

Q. Were there any notes signed by the Doyne Lumber and Milling Company either as maker or endorser in the hands of the Mercantile Trust Company?

MR. HUDSPETH: I object as immaterial and irrelevant and no earthly bearing on this issue.

20

(Question withdrawn).

30

40

Colloquy.

MR. DEMAREST: We call for a statement showing the accounts—

MR. HUDSPETH: Doyne?

MR. DEMAREST: No; Hudson; we demand it.

MR. HUDSPETH: We never heard of such a book.

10 MR. DEMAREST: With all the accounts drawn off, showing which were good accounts and which were bad accounts—a trial balance book. We subpoenaed you to produce it.

MR. BERGHOFF: We haven't it here.

MR. DEMAREST: Send for it, will you? We served you with notice to produce it. Do you admit that this (indicating), is a
20 copy of the trial balance—

MR. HUDSPETH: I will admit that, if it is admitted that the bookkeeper made out the book he speaks of, the statement, under Mr. Doyne's direction. If you will admit the book was made out under the direction of Doyne, I will admit this is a transcript of it.

MR. DEMAREST: It was not Doyne. Then
30 you do not admit it?

MR. HUDSPETH: No, I cannot.

William F. Higgins—Direct.

WILLIAM F. HIGGINS, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Where do you live? A. 135 West 34th Street, Bayonne.

Q. What business were you engaged in in the year 1908? A. Plumbing business and construction. 10

Q. And are still engaged in the same line of business? A. Not at present. I am not in the plumbing business any more, I am in wholesale plumbing.

Q. Do you know William Doyne? A. Yes.

Q. Did you talk with Mr. Doyne, about the month of October, 1908, I think it is, before this account was started? A. Yes, Mr. Doyne came to me— 20

MR. HUDSPETH: I object to anything in the way of a conversation.

THE COURT: If Mr. Doyne was acting for the Doyne Lumber and Milling Company in making this contract with this man, I suppose the terms of the contract as they appear on the books, with respect to the person to whom the goods were to be furnished, would be evidence. I will permit it. 30

(Exception noted for the plaintiff).

(Question repeated).

A. Mr. Doyne came to me in the fall of 1908. He had been informed I was about to erect several buildings, and he asked me if I would be willing to purchase material for them, if they would give me work to counteract the account. Previous to that I had done no business with the 40

William F. Higgins—Direct.

10 Doyne Lumber and Milling Company; I had done business with the Consumers' Coal and Ice Company and A. W. Booth. I told them I would consider the matter. I first asked him what, about, he wanted me to do. He said he did not know just then about what he had to do, but if I would go with him to the house he would explain about what would be done at his premises, also about what he wanted done at the mill. I went with Mr. Doyne to his place, and also to the mill, looked over the situation, told him I would be perfectly willing to enter into an agreement of that kind, which I also did.

Q. And did you then purchase goods from the Doyne Lumber and Milling Company? A. Yes, very shortly after that the account began.

20 Q. Did you do any work, plumbing work, for the Doyne Lumber and Milling Company? A. Yes, I did.

Q. And you are credited with the work that you did for the company on the books, are you not? A. It appears that way on the books.

Q. Did you do work upon the Doyne's house? A. Yes, I did.

30 Q. Between what dates did you procure the materials from the Doyne Lumber and Milling Company? A. Between the latter part of the year 1908, and up, I guess, until about June, 1909.

Q. When did you do the work for the Doyne Lumber and Milling Company that you are credited with? A. During the same period; the work was going on at the same time, vice versa.

Q. And when did you do the work upon Doyne's house? A. At the same time, at different periods during the same six months.

40 Q. You made payments on account of the claim

William F. Higgins—Direct.

of the Doyne Lumber and Milling Company against you, did you not? A. Yes, I did.

Q. You gave them a note? A. I gave them a note for a thousand dollars.

Q. And that note was paid? A. That note was paid, yes.

Q. Did you after the Hudson Milling Company had begun to operate the business, have any dealings with them? A. Yes, sir; I did. 10

Q. To what extent? A. The amount of six hundred and forty odd dollars.

Q. Upon their premises? A. Upon their premises.

Q. Did they pay you for that? A. Yes they did.

Q. When was the first that you ever received a claim, a bill, from either the Doyne Lumber and Milling Company or the Hudson Milling Company? A. I never received a bill until I received a summons from Hudspeth, Rysdyk and Garrison; that the only bill that was ever presented to me. 20

Q. When was that summons served upon you? A. About this time a year ago.

Q. Then from the fall of 1908 until some time in 1912, you never received any bill for this balance? A. Never received a bill outside of a request from the receiver; at the time the receiver was appointed he wrote me a letter, and I went around to see him and I explained the situation to him, and that was the last of it that it was mentioned. 30

Q. Did you enter Doyne's personal bill on your accounts? Have you your books of account here? A. Did I enter his bill?

Q. Yes. A. Why, I kept the account running, 40

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the two accounts practically separate, to show—every account was itemized, and every account showed the different places it was done, all done under the name of the Doyne Lumber and Milling Company.

MR. HUDSPETH: I move to strike that out.

10 THE COURT: I will strike that last part out because the books are the best evidence of how he entered them, but the first part may stand.

Q. Who was present, if any one, when you and Doyne had your final agreement whereby this account of Doyne was to be set off against the bill that you were to purchase from the Doyne Lumber and Milling Company? A. I do not quite
20 understand.

Q. Who was present when the conversation took place? A. His son.

Q. Was anybody other than Doyne's son present at any time when you talk with Doyne about how this account was to be paid for and contracted? A. Not that I remember, in person, no, outside of some one hearing the conversation. There is nobody that I remember except the book-
30 keeper.

Q. Do you remember having any conversation in the office? A. The bookkeeper in the office might have heard the conversation.

Q. Do you remember if she was there? A. She was there, yes, but I would not say she heard the conversation.

Q. Did you hear Doyne give the bookkeeper any instruction as to charging off this account? A. I do not know really what he did say to the
40 bookkeeper. He did say something, but I did

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not hear it because there was a noise in the mill.

Q. When did you first know Mr. Berghoff? A. I first knew Mr. Berghoff a short while after he took over the Hudson Milling Company, within probably two months.

Q. Who introduced you to him? A. Mr. Doyne.

10

Q. What was said at the time he introduced you to Mr. Berghoff? A. Mr. Berghoff—Mr. Doyne introduced me to Mr. Berghoff as Mr. Higgins, the man who had done business with the Doyne Lumber and Milling Company, and at that time they asked me for permission to place lumber on the property which I owned adjoining the Hudson Milling Company.

Q. Have you seen Mr. Berghoff frequently from that time on? A. Yes, Mr. Doyne left at that moment and Mr. Berghoff and I continued our conversation, and Mr. Berghoff began to tell me that he wished me to continue to do business with the Hudson Milling Company as I had done previously with the Doyne Lumber and Milling Company.

20

Q. Was there anything said at that time about your account? A. Nothing whatever.

Q. Have you talked with Mr. Berghoff about your account at any time? A. Never have, never mentioned it.

30

Q. Did Mr. Berghoff come to you in December, 1911, and present you with a bill for this merchandise? A. No, sir; I was in Mr. Berghoff's office when he paid me the balance of his account in December, 1911.

Q. Did you ever have the conversation with Mr. Berghoff that he testified yesterday that you

40

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did have with him? A. Never, never had a conv—the bill was never mentioned.

Q. What work was the work you were to do on Mr. Doyne's house, mentioned at the time you agreed to purchase this lumber from the Doyne Lumber and Milling Company? A. Mr. Doyne wanted me to put on all new leaders and gutters around his houses, and also to renovate the two
10 bathrooms, put in some iron enameled sinks, and work of that character.

Q. Did you do all of that work? A. I did it all at different times when I was not busy.

Q. Did you talk about doing any work that was not done by you? A. Yes; Mr. Doyne wanted me to go in further. He wanted me to give him an estimate on installing a steam plant in his house.

Q. And did you ever put that in? A. Never
20 done that work, no. I gave him the price and it was considered a little bit too much.

Q. What was the amount of work that you did on Doyne's house? A. Seven hundred and thirty odd dollars.

Q. Were any of the goods you purchased from the Doyne Lumber and Milling Company returned by you? A. Yes, sir.

Q. Have you received credit for all that you re-
30 turned? A. No, sir, I did not.

Q. How much did you return? A. I returned in the neighborhood of fifty-two dollars and some cents.

Q. With which you are charged? A. With which I am still charged.

Q. And those goods were returned by you to them? A. Yes sir.

Q. And accepted by them? A. Yes sir.

Q. Have you anything which shows the amount
40 of those items? A. No; I lost the slip. They

William F. Higgins—Cross.

gave me a slip when I returned the goods; they gave it to my driver. They were a lot of doors which were an inch and a quarter and should have been an inch and a half and I never got a credit on the books of the company for the return.

CROSS EXAMINATION BY MR. HUDSPETH:

10

Q. You say you returned to the Doyne Lumber and Milling Company some material? A. Yes, sir.

Q. Was that after you got through doing work for the company and Doyne's house? A. Yes, about the same time.

Q. And what month and year was that? A. That was about June, I should judge.

Q. And you were somewhat interested in your account, as to how you stood at that time? A. Was I interested in the account? 20

Q. Yes. A. Certainly.

Q. You wanted to know whether it was paid or not? A. It did not worry me whether it was paid or not.

Q. But you were interested, having in your mind to see whether it was paid or not paid? A. Yes, sir, I was interested in the account, but I knew that my account counteracted his account. 30

Q. You are a business man? A. Yes.

Q. Keep books of account? A. Yes.

Q. Where are your books of account? A. Here.

Q. Have you the books showing these different accounts you speak of? A. Yes.

MR. DEMAREST: Do you want to see them?

MR. HUDSPETH: Never mind. 40

William F. Higgins—Cross.

Q. Who keeps those books? A. At that time I did, part of them, and my sister did some other of it.

Q. In whose handwriting are they, yours? A. No; my sister's.

Q. Is your sister here? A. No.

Q. Where is she? A. Home in Bayonne.

10 Q. You say that before you got any material for the 11th Street houses you had this talk with Doyne about the terms upon which you would buy and deal? A. Yes sir, I did; that was the only reason I went to him, because he was the man that made the proposition. As I stated, I had never done business with him prior to that.

Q. Yes, you said that a little while ago. And you commenced after the talk with Doyne, to buy material, didn't you? A. Yes, sir.

20 Q. When? A. I think I began in about the same year, in the latter part of 1908.

Q. November, it appears here on the books. A. Yes, the latter part of 1908, yes.

Q. The first substantial item, November 11th, Seventy-five dollars. A. Yes, about that time.

Q. When did you commence doing work about the factory and premises? A. I done it, I guess, in January and February of the same year.

30 Q. January and February of the same year? A. December—

Q. The same year? A. Of 1911—1909. I think I started in December, 1908. When I started the work the weather got bad and I continued some of the work in 1909, in January and February. The work continued from December probably up till May.

40 Q. What kind of work was this you did about the yard? A. I done work on the engine. I put

William F. Higgins—Cross.

on a new roof over the mill; I put in a sewer and water line from it, from a private line across the street; I put in a water closet; I put in a basin and done work throughout the mill.

Q. You did that work a year after? A. No, sir.

Q. You commenced in November, 1908? A. Yes.

10

Q. And you did not commence this work on the mill until the fall of 1909? A. No, I did not say that.

Q. I understood you to say that. A. No.

Q. When did you commence it? A. In December, 1908.

Q. Oh, December, 1908. And how long did it take you to do that work? A. Oh, I was probably four or five months on it.

20

Q. And it amounted to \$427.26, didn't it? A. Yes sir, around that.

Q. When did you complete it? A. I guess it was not what you would call complete—there was little small things to be done—probably up until May.

Q. Well, substantially completed the following spring? A. Yes, sir; in May or June, I guess.

Q. In March? A. No; it was not done in March; it was done as late as May, and June, and in fact there was work done later than that, small jobs.

30

Q. You had done pretty near all of the work by the spring of 1909? A. No sir, I did not.

Q. But you said a few minutes ago there were only some few odd things to be done. A. I said up until May.

Q. But you had a substantial part of it done early in the spring of 1909, hadn't you? A. I had it started, yes sir.

40

William F. Higgins—Cross.

Q. You had a substantial part of it done? A. I had it started, if that is what you would call a substantial part. I had the work started.

10 Q. Will you tell us if you had a substantial part of that work done, and your idea in buying from them was to offset one against the other, why it was that in March you should pay them \$980. on account of material gotten from them from November up to that time? A. I had received more material from them than the work I had done, and naturally I was expecting—

Q. Did you have \$980. more material than work you had done? A. About that.

Q. Did you figure up at all? A. No sir, I knew my—

Q. What—

20 MR. DEMAREST: Let him answer.

A. I knew where my account was and where their account was.

Q. How did their account stand when you paid them a thousand dollars in March? A. There was about eleven hundred dollars difference.

Q. Well, the total account was seventeen hundred dollars in March, and you paid one thousand and thirty-nine dollars? A. Yes sir.

30 Q. How did you arrive at the figures then? A. That was not the total amount; the books are wrong.

Q. These are the books. The books are wrong? A. I received all the materials from the month of November, 1908, until June or July, of 1909; all that material was received in a period of about six months.

40 Q. Now if the work was not all done early in the spring but went on into the summer, did you have any idea how much the work was going to be

William F. Higgins—Cross.

in total when it was completed? A. Yes; I knew before I started.

Q. And how much was it to be? A. I told Mr. Doyne that the work—

Q. How much was it to be in dollars and cents when you started? A. I told Mr. Doyne I would not run over seven hundred and fifty dollars on his premises.

10

Q. Oh, you mean to tell us you arrived at a figure of seven hundred and fifty dollars for doing the variety of work you have mentioned? A. Yes; I knew within ten dollars when I started.

Q. Putting on roof? A. Yes sir.

Q. Doing plumbing work? A. Yes.

Q. Setting up a water closet? A. Yes.

Q. All those things you agreed on when you undertook that work? A. Yes; I told him roughly what it was going to be, because I went and figured it.

20

Q. Do you mean to tell us you had that all lumped when you first started it? A. Yes.

Q. And you did not add anything during the term? A. Yes, sir; there was small items added, that is all very true, but I knew the amount in bulk, about what it would be because I had gone over it. I stated that at the beginning.

Q. Now, as I understood your statement of a little while ago, you said that Doyne said that if you would deal with them they would give you work? A. Yes sir.

30

Q. He did not say what work or when he would give it to you, did he? A. I explained to them that—

Q. Yes or no, please. A. Yes, I went to his house. I found out what the work was to be.

Q. Did he then and there agree as to the ex-

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William F. Higgins—Cross.

tent of the work and you should go ahead at once?

A. No, sir; I told you I told Mr. Doyne I would consider it, which I did.

Q. I am not asking you about that. I am asking about when you undertook to do the work, was it understood you would go to work at once, and as to the work you would do? A. I did not give
10 Mr. Doyne an answer for a week or two. Afterwards when I gave him an answer I told him I would do it.

Q. Didn't you say a little while ago you were going to do this work at odd times and when you had a chance? A. I did do it.

Q. Did you say that? A. I did not say anything of the kind.

Q. You said nothing like that? A. I told I had done the work during the time I was not
20 busy, but I had said nothing to Mr. Doyne about it. I agreed to do the work.

Q. There was a variety of this kind or work done upon these premises, these factory premises, covering a number of different items— A. I beg pardon, I am not talking about the factory.

Q. —covering a number of different items, which you say you agreed upon practically as to a lump price—

30 MR. DEMAREST: I object, the testimony is not to that effect.

THE COURT: Wait till the question is out.

Q. —is that so?

MR. DEMAREST: I object. The witness has testified that he figured up the value of the work on Doyne's house, not on the
40 factory.

(Former testimony repeated).

William F. Higgins—Cross.

THE COURT: You see, Judge Hudspeth is right. I will permit the question.

Q. Did you agree upon this work to be done upon the factory premises, as to just what that work was to be and the approximate cost? A. No; I did not give him any figure on the factory work.

Q. Then you did not know what was to be done? 10
A. He did not know himself exactly what was to be done at the factory, but he knew what was to be done on his own premises.

Q. And you did not know how expensive that work was on the factory? A. No.

Q. That would be developed from time to time?
A. From time to time.

Q. But you had done nearly four or five hundred dollars worth, \$427.26 worth of work early 20
in the spring of 1909? A. Yes sir.

Q. And about that time you had already done the work on Mr. Doyne's house? A. I was doing it at the same time.

Q. You finished it at the same time, you said?
A. Well, probably—they finished up I said, I think, probably June or July, when they were practically finished.

Q. Which did you finish first, the factory or the Doyne house? A. I think the foctory was completed first. 30

Q. Do you know which, can you recall? A. My recollection is the factory was completed first.

Q. Then the total amount of work would be for both places over eleven hundred dollars? A. Yes.

Q. And notwithstanding you were doing work which aggregated about eleven hundred dollars and which was nearly completed in the spring of 40

William F. Higgins—Cross.

1909, you paid them a thousand dollars March 4th, on account of their bill; is that so? A. Yes.

Q. Afterwards you sent some stuff back? A. I sent the stuff back during the time the work was going on.

10 Q. Did you get statements from the Doyne Lumber and Milling Company? A. I never got a statement from the Doyne Lumber and Milling Company, never got a bill.

Q. Did you make any request for a statement? A. Never did.

20 Q. Did you try to make a settlement with the Doyne Lumber and Milling Company for your account and their account? A. I did not attempt to make a settlement until the latter part of the year. I thought the account would run to the latter part of the year and close them both up.

Q. That would be the latter part of 1909, wouldn't it? (No answer).

Q. What settlement did you make? A. I did not make any settlement. The first thing I knew the company went into the hands of a receiver before I knew about it.

30 Q. Then you did not pay any attention to your bill, hey? A. I could not pay any attention then because it was up to the receiver. They had no authority.

Q. Well, you have not paid the Doyne Lumber and Milling Company's bill in full, even if you are allowed the amount of \$708.91, have you? A. My bill was \$730.52.

Q. Where is your bill, is it on these books at all? A. I do not know. I sent them a bill.

40 Q. The bookkeeper testified it was not and you had no bill against Mrs. Doyne or William F. Doyne? A. I had no bill, no.

William F. Higgins—Cross.

Q. How did the Doynes know what work you were doing if you did not give them a bill? A. I had rendered them a bill, yes; I had rendered them a bill.

Q. Did you render Mrs. Doyne a bill? A. No sir.

Q. It was her house? A. I did not know anything of the kind. I did not know it was Mrs. Doyne's house at all. 10

Q. You knew Mrs. Doyne? A. Yes.

Q. You had no talk with her? A. I had no talk with Mrs. Doyne at all.

Q. And Doyne never told you it was his wife's house? A. No, never did. He led me to believe all the time—

Q. When did you know this account was settled on this journal as it is now? A. I never knew it was settled in any shape or form at all. 20

Q. You say you never got any account or claim from Berghoff or the Hudson Milling Company? A. Never a word said about it.

Q. How many letters did you get from Mr. Hudspeth requesting you to pay this claim? A. I got one letter from you requesting me to call and I wrote you back I did not owe the Hudson Milling Company anything.

Q. When was that? A. About this time a year ago. 30

Q. It was February, 1912? A. I think it was February, 1912.

Q. Then you got a letter at that time from Mr. Hudspeth, saying the Hudson Milling Company had a claim against you for seven hundred and some odd dollars? A. Yes.

Q. And then you were saying you did not recognize the Hudson Milling Company? A. I 40

William F. Higgins—Cross.

wrote you that I did not owe the Hudson Milling Company anything in my judgment.

Q. There were two letters sent *you*, weren't there? A. From your office?

Q. Yes. A. No sir, there was only one.

Q. You saw Mr. Doyne about that letter that Mr. Hudspeth sent you? A. Did I see Mr. Doyne
10 about it? I do not think so.

Q. Well, did you or did you not? A. No sir, I do not think I did.

Q. You never saw him or spoke to him— A. I did see Mr. Doyne afterwards, but I never spoke to him about getting that letter.

Q. And after getting that letter and notice to the effect that there was an open account against you for seven hundred and some odd dollars, you
20 did not do anything at all to see whether it was straightened up on the books as between you and the Doyne Milling Company and the Hudson Milling Company? A. Did I do anything to see?

Q. Yes. A. I did.

Q. What did you do? A. About a month afterwards when I went to Mr. Doyne's place—probably two weeks—I told Mr. Doyne the circumstances, that I had received a letter from you, and I asked him what about it, if he knew any-
30 thing about it.

Q. Then about two weeks after Mr. Hudspeth sent you the letter you went down to see Mr. Doyne to find out something about it? A. About two weeks after I received your letter I called on Mr. Doyne.

Q. You were not very anxious about it? A. There was no reason to be anxious about it.

Q. You just happened in there to make the inquiry? A. I was down there on business.
40

William F. Higgins—Cross.

Q. Didn't you see Mr. Doyne frequently? A. No sir.

Q. Hasn't he a mill right down where you are doing business? A. No sir.

Q. How far is he away from you? A. About a mile from me.

Q. Do you call that a long distance in Bayonne? A. I do not see him sometimes for two weeks, 10 but I do business with him.

Q. You have done business with his mill? A. Yes.

Q. You have seen him, haven't you? A. I have seen him at different times.

Q. That is not a matter that is rare, your meeting Mr. Doyne or has not been for the last two years, is it? A. I see Mr. Doyne sometimes once a week, and sometimes I do not see him once a month, or sometimes in two months. 20

Q. You said you did not know Mrs. Doyne owned that house? A. I did not know Mrs. Doyne owned that house, no sir; no reason to know it at all.

Q. Did Doyne live in a house of yours? A. No sir.

Q. Hasn't he lived in a house of yours? A. No sir.

Q. Not a tenant of yours? A. No sir, Mr. Doyne has been no tenant of mine. Mr. Doyne's son has leased property off of me where he has erected his mill, that is all. 30

Q. That is where Doyne's present mill is? A. That is where Mr. Doyne's present mill is.

Q. He is on some land you own? A. On a railroad siding which I own, yes.

Charles E. Annett—Direct.

CHARLES E. ANNETT, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Where do you live? A. Bayonne, New Jersey.

10 Q. What is your business? A. Real estate and insurance.

Q. And Court House Commissioner? A. Incidentally, yes.

Q. Do you know Mr. Berghoff? A. Yes.

Q. And do you know Mr. Doyne? A. Yes.

Q. Were you the receiver appointed by the Court of Chancery of the Doyne Lumber and Milling Company? A. Yes sir.

20 Q. And during your course as receiver did you collect any of the assets of that company, any of bills that were owing to it? A. All I could, yes sir; I have forgotten the amount ;a considerable amount.

Q. Did you notice the account of Mr. Higgins on the ledger? A. Yes sir.

30 Q. By the by, was that ledger in that state at the time you were receiver, was the Doyne page cut out? A. No, the ledger was not mutilated when I had it.

Q. And did you have any conversation with Mr. William Doyne respecting that account, as receiver? A. Yes sir, I did.

Q. What was the conversation you had with him?

MR. HUDSPETH: I object, as immaterial, irrelevant, incompetent, and hear say, and not binding upon the defendant.

40 THE COURT: How do you claim that that is valid evidence?

MR. DEMAREST: At that time the evidence

Charles E. Annett—Direct.

shows that William Doyne had previously been vice-president of the company, and he became by virtue of the resignation of Simon Doyne as president, the head of the company.

THE COURT: I understand that.

MR. DEMAREST: And after the appointment of the receiver it seems to me that if the president of the company—the general manager of the company—admitted to the receiver that there was nothing due upon this account, that is a declaration against interest by which the present plaintiff is bound. 10

THE COURT: I do not think so. I do not know of any case that holds that at all. I think that once the company has passed into the hands of the receiver the right of the president to talk for the company has ceased. The very statute under which you are claiming this receivership to have originated—the insolvency part of the corporation act—is authority for the proposition that the company has absolutely no right to do any business except the right to preserve its assets, and the talk of the president would be mere hearsay, absolute hearsay. 20 30

MR. DEMAREST: I do not want to press it any further than is reasonable, but it seems to me the statute only bars the company from continuing to do business with the general public, but it does not seem to me the statute takes away from the president the weight that his admissions would have as against the company; in other words it seems to me that if the 40

Charles E. Annett—Direct.

company were not in insolvency at that time, an admission by the president regarding anything that would militate against the company would bind the company, and that that situation would remain—

THE COURT: If you show me one case that holds that, I will admit the evidence.

10

MR. DEMAREST: I have not looked it up.

THE COURT: If you will show me one declaration in any text book in evidence that states that, I will admit the evidence.

MR. DEMAREST: May I have an exception?

THE COURT: I would like to see the rule, because I would like to learn something.

20

MR. DEMAREST: I have not looked it up.

THE COURT: I am satisfied it is not the rule, and I will give you an exception to it. I would like to see that, because I have ruled again and again as I rule now, and I cannot see any possible ground upon which it can be admissable. It cannot be possible that after a company is enjoined by the Court of Chancery—an injunction against it to do business, that its president is given a license to run around talking and making admissions. That is what it amounts to. That cannot be the law.

30

Q. You made a sale of the assets of this company to Mr. Berghoff, or Mr. Weller? A. I made it to Mr. Weller.

Q. Did you have any talks with Mr. Berghoff before the sale? A. Why, I think I saw Mr.

40

Rose Reilly—Direct.

Berghoff two or three times during my receivership.

Q. Did Mr. Berghoff examine the books? A. Not in my presence.

Q. Did you have a conversation with Mr. Berghoff amount this Higgins account? A. No, I did not, with Mr. Berghoff.

Q. Or with any one representing Mr. Berghoff? 10
A. No, not Mr. Berghoff.

ROSE REILLY, recalled.

DIRECT EXAMINATION BY MR. DEMAREST:

Q. You say that Mr. Doyne gave you the instructions about the entries of this account of Mr. Higgins? A. Yes.

Q. What, if anything, did he say at that time 20
about the payment of the bill, to you?

MR. HUDSPETH: I object. This has all been gone over.

MR. DEMAREST: As your witness, yes. I am calling her as mine.

THE COURT: What is the point about what Mr. Doyne said as to the payment of of the bill?

MR. DEMAREST: I wish to show that the 30
word payment isn't exactly accurate—I wish to show by the witnesses what Mr. Doyne instructed her as bookkeeper of the concern to do regarding the payment of this Higgins' account.

THE COURT: The payment?

MR. DEMAREST: That is, how the books were to be kept or what he said about the transaction. 40

Rose Reilly—Direct.

THE COURT: If you want to show what Mr. Doyne instructed her with respect to the entry, you may do that. I will admit that; but you are asking her with respect—

MR. HUDSPETH: We went over all that.

THE COURT: No, this is a thing I stopped him on on your objection.

10 (Question repeated.)

THE COURT: The question I overrule, but the matter you want to ask about is admissible, and I permit it.

Q. What, if anything, did Mr. Doyne say to you about the entry of the Higgins' account? A. You mean in charging it?

Q. Yes.

20 THE COURT: Tell us all he said about the entry of the Higgins' account.

A. Well, Mr. Higgins and Mr. Doyne were in the office with me and the subject came up about the contract, and Mr. Doyne was to give Mr. Higgins lumber for ten houses or whatever it was he was building, and Mr. Higgins was to do work about the mill, and at his home, and one was to offset the other.

30 Q. You heard that conversation between Mr. Higgins and Mr. Doyne? A. Yes.

Q. How soon after that was the first entry made? A. Well, it was only a short time.

Q. Did you get any other instructions from Mr. Doyne or any other instructions regarding the account before you made these entries in the sales-book? A. I do not quite understand you.

40 Q. Any further instructions from Mr. Doyne as to how the account was to be handled and entered? A. No.

Rose Reilly—Direct.

Q. Did Mr. Doyne tell you how to enter it after you heard this conversation between him and Higgins? A. Yes; I was to charge off the slips into the sales book and then into the ledger.

Q. Did Mr. Doyne tell you to do that? A. Yes.

Q. Now, did Mr. Doyne at any time afterwards tell you what to do with the credits? A. Well, 10 as I got the credits I gave credit for them.

Q. Did you see the bill that Higgins rendered to Mr. Doyne for the work that he had done for Doyne on his house? A. Yes.

Q. Why didn't you enter that up? A. Why did I?

Q. Why didn't you? A. It was a running account and I did not know how long the account was going to run, and they intended to let it run until the end of the year, and at the end of the 20 year close off the account.

Q. How did you know they intended to let it run to the end of the year? A. They spoke to me about it.

Q. Who spoke to you about it? A. Mr. Doyne.

Q. Was Mr. Higgins by at that time? A. Yes.

Q. That was to the end of the year nineteen hundred and what? A. 1909. 30

Q. And before the end of the year 1909 Mr. Annett was appointed receiver, was he not? A. Yes.

Q. And that is the only reason why Mr. Higgins' account for work on Doyne's houses was not entered as a credit in Higgins' account? A. Yes.

MR. HUDSPETH: I object to her reasons or characterization of a contract.

Q. Was there any other reason, Mrs. Reilly, 40

Rose Reilly—Direct.

why you did not enter that credit of Higgins' bill against Doyne to the credit of the Doyne Lumber and Milling Company against Higgins? A. No.

Q. Now, in June, 1909, were you employed by the Hudson Milling Company? A. No, sir.

Q. Oh, 1910? A. Yes.

Q. Did you ever see this item on page 85 of
10 the ledger where the words "William Doyne" are struck out and "profit and loss" out in? A. Yes, sir.

Q. Was it at the time you saw it in the condition that it is now? A. No, sir.

Q. What was there at that time? A. It was William Doyne to William F. Higgins.

Q. Were the words profit and loss there as they appear in the book now? A. No, sir.

Q. And was the line across the name William
20 Doyne? A. No, sir.

Q. Were these three items following as to J. Berghoff in the journal as they appear on page 85 of the journal at that time? A. Yes, sir.

Q. You did not make the entry of this Higgins account on page 85? A. No.

Q. Nor in the ledger either, did you? A. No.

Q. Do you know who did that? A. I presume
30 the bookkeeper.

Q. Did you hear any instructions given by Mr. Berghoff to the bookkeeper regarding the entry of that credit? A. No, I was not there.

Q. Now, you acted as bookkeeper during the time that Mr. Annett was receiver for the Doyne Lumber and Milling Company, did you? A. Yes, sir.

Q. Keeping the books? A. Yes.

Q. Did you ever at that time see this paper,
40 marked in evidence D-2? A. This paper?

Rose Reilly—Direct.

Q. Yes. A. Yes.

Q. What does that paper represent?

MR. HUDSPETH: I object. It shows for itself.

MR. DEMAREST: It does not show for itself; it shows what is on it, but I do not know that it shows what it represents.

THE COURT: If it does not, how can she tell what it represents? Do you think she can put a construction on it? 10

MR. DEMAREST: I think she can testify where those items came from.

THE COURT: If she made it up she can say she made it up; if it was made up in her presence she can say it was made up in her presence.

Q. Did you make up any part of this paper? 20

A. I guess so.

MR. HUDSPETH: That is the typewritten part?

A. Yes.

Q. And what does that represent? A. Well, the assets and liabilities, good claims, different things.

MR. HUDSPETH: I object to her characterizing what it represents. It shows upon the face of it. 30

Q. What was it taken from? A. It was taken from the book.

Q. Of what company? A. Doyne Lumber and Milling Company.

Q. Did you afterwards see that paper in the possession of any one? A. I had it in the possession of myself, and most of the office had it while 40

Rose Reilly—Direct.

I was with the Hudson Milling Company; it was there.

Q. Were there any duplicates made up of it?

A. Yes.

Q. Do you know what became of the duplicates?

A. Of this one paper?

Q. Yes. A. Mr. Berghoff had a list of it, several of them, in the office.

10

Q. Did you see Mr. Berghoff have a list of it?

A. Yes.

Q. Where did you see him have it? A. Right in my presence.

Q. What was he doing at the time? A. Looking over the accounts, where he could collect money.

Q. This was before the receiver sold? A. It was while I was in the office and he was in it,—the Hudson Milling Company.

20

Q. Oh, in the Hudson Milling Company? A. Yes.

Q. That is the time you saw him have that?

A. Yes.

Q. Did you see him have it before the transfer of the assets by the receiver to Weller? A. No, I did not see any transactions then.

Q. I show you another paper, marked D-2, type-written; did you make that up? A. Yes.

30

Q. What did you take that from? A. From the ledger.

Q. Of what company? A. Of the Doyne Lumber and Milling Company.

Q. Did you make up more than one copy? A. Oh, there were several copies made.

Q. Did you ever see Mr. Berghoff with a copy of that? A. I presume he had one of them.

40

MR. HUDSPETH: I object and move to strike that out.

Rose Reilly—Cross.

THE COURT: That will be stricken out.

Q. Did you ever see him with a copy of that in his possession? A. Well, I cannot really say now, it is so long.

Q. Did you ever have a talk with Mr. Berghoff about the Higgins' account with the Doyne Lumber and Milling Company? A. With Mr. Higgins? 10

Q. With Mr. Berghoff? A. With Mr. Berghoff, no.

Q. Did you ever see Mr. Berghoff strike off the books of the Doyne Lumber and Milling Company his own account with that company?

MR. HUDSPETH: I object as immaterial and irrelevant.

THE COURT: I will permit the answer. (Exception noted for the plaintiff.) 20

A. I gave Mr. Berghoff a copy of the good claims, that were supposed to be good to the company, and his name was on there with an amount that he owed the Doyne Lumber and Milling Company, and I seen him scratch it off.

Q. Off that list? A. Off the list, yes, sir.

Q. Did you see him scratch it off the books? A. No, I was not there. 30

Q. Or give any instructions to have his account with the Doyne Lumber and Milling Company cancelled? A. I was not there.

CROSS EXAMINATION BY MR. HUDSPETH:

This statement, Exhibit D-1, that is the type-written part of it, you prepared, did you? A. Yes, sir.

Q. Under whose directions? A. Well, Mr. Doyne was there, and—I cannot just recall really 40

Rose Reilly—Cross.

who was there, it is quite some time now; I do not remember.

Q. But you do recall Mr. Doyne was there?
A. Yes.

Q. And the stataement in your presence was made from the books? A. Yes, it was taken from the books.

10 Q. And taken in what form, was it dictated to you or was it written first in longhand and then handed to you to copy in typewriting? A. Well, I just went over the book and marked each account, and marked the account down, and then—

Q. Mr. Doyne was with you at the time? A. Yes.

Q. Now this statement, D-1, was the first one
20 you prepared, was it? A. I presume it was.

Q. I do not want any presumption about it; what is your recollection? A. Well, it is really so long now I cannot recall everything.

Q. There is nothing to indicate by looking at it whether it is the first one prepared or not? (No answer.)

Q. H'm? A. Well, I cannot say.

Q. Do you know what it was prepared for?
A. I suppose it was just—
30

Q. Not what you suppose, do you know what it was prepared for? A. Well, it was to show—

Q. Show whom? A. The company, I presume.

Q. Not what you presume; what you know. A. Well, it was to show the company.

Q. Who told you so? Who told you so? A. I did not go into any details with any one; I was just told to do it and I did it.

40 Q. Never mind looking down there. A. I am not looking.

Rose Reilly—Cross.

MR. DEMAREST: She is not looking. Don't badger her.

Q. Who told you to do it? A. Well, I guess he did, I do not know; I cannot remember.

Q. Why did you leave off the Higgins' claim from this paper? A. Well, we knew that Mr. Higgins' account was settled.

Q. Who knew it? A. Everybody concerned 10 with it.

Q. There was not anything on the books showing it when you made that statement? A. Well, when we went—

Q. Yes or no? A. There was not any memorandum of it, no.

Q. No; that account was open on the books, when you made that statement, was it not? A. Yes. 20

Q. Yes; and you omitted the Higgins' account, didn't you? You omitted it, didn't you? A. It is not on there, I know.

Q. In whose handwriting is the paper in pencil attached to this exhibit? A. It is a party by the name of Duryea.

Q. Who is that? A. Well, he is a gentleman in Bayonne; he came to the office.

Q. To do what? A. To just look over the books. 30

Q. At whose request? A. I do not know who requested him.

Q. Don't you know he was a friend of Mr. Doyne's? A. I never knew anything connecting him and Mr. Doyne.

Q. You do not know that he was brought there by Mr. Doyne to do this work? A. I do not know who brought him? I saw him come in. I did not ask who brought him.

Q. Was Mr. Doyne there when he came in? A. 40

Rose Reilly—Cross.

I do not know if he was there when he came in or came in after, I cannot just say.

Q. This man coming in, a stranger, did you allow him to go through the books without any one instructing you? A. He did not go to work at the books until Mr. Doyne came.

Q. Until Mr. Doyne came, and then Mr. Doyne
10 put him to work, is that right? (No answer.)

Q. Now, this No. 2, is all in typewriting, isn't it? A. Yes, sir.

Q. All in your typewriting? A. Yes, sir.

Q. How long before or after No. 1, was this prepared? A. I do not know.

Q. Was it before or after? A. I could not tell you.

Q. Was it after? A. I do not know.

20 Q. You have no recollection of it at all, have you? A. No.

Q. Will you look at the claims due the company and tell me if you do not find William Higgins on that statement? A. I see it on there.

Q. What? A. I see it on there.

Q. Yes, for how much. A. \$791.30.

Q. Yes, and what is the heading of the list?
A. Claims due the Doyne Lumber and Milling
30 Company.

Q. Yes, and you prepared that, didn't you? A. Yes.

Q. But you did not have Higgins in first, did you, when you first typewrote it? A. Well, I do not know, Mr. Hudspeth, now.

Q. Well, now, just look at it and tell us what your recollection is about that? A. I cannot recall anything about it. I see Mr. Higgins' name
40 is on the list, but that is all I can see.

Q. Yes, and it is in a different typewriting,

Rose Reilly—Cross.

isn't it? A. I do not know; it looks all right.

Q. You do not know; isn't it apparent to you, different ink? A. I cannot recall anything about it.

Q. Isn't it apparent to you? A. Yes, yes.

Q. And below it there is another man there, Boorstein? A. Yes.

Q. That is another debtor of the company. 10
You did not have that on the first statement of the company, did you? A. No.

Q. That is put in there in different ink, different typewriting, isn't it? A. Yes.

Q. Who put that in, do you know? A. I cannot recall anything about it now.

Q. Don't you know it was put in so as to make it conform to these books, in that those claims were settled by being charged to Doyne, or that he collected them? Yes or no? A. I do not 20
know.

Q. You do not know; wasn't it put in after you prepared that statement? A. I cannot recall it now.

BY THE COURT:

Q. Let me ask you: Did you put it in yourself? A. I cannot really remember, because it is so long now I have forgotten all about it. 30

Q. When you prepared that paper what did you do with it first, give it to Mr. Doyne? A. Well, really I could not just say.

Q. Well, he got it? A. Yes, they had copies of it.

Q. They all had copies? A. Yes; I cannot recall it now.

Q. Did anybody compare that statement with the entries on the books with you? A. Yes, I believe we did go over them. 40

Rose Reilly—Cross.

Q. Who was the one that made this comparison with you? A. I believe this gentleman I have spoken of, Mr. Duryea.

Q. And he is the one whom you say was put to work there by Mr. Doyne? A. Yes, he is the man.

10 Q. Do you recall when you went over these names with Mr. Duryea, comparing them with the entries on the books, whether you compared the names of Higgins and this other man there? A. Well, I really cannot say that, but at the time I know that we went over them I know we discussed this Higgins' matter.

Q. Well, then, if you did discuss it and you put that there you and he agreed that it should be there? A. I really do not remember how it came.

20

BY MR. HUDSPETH:

Q. Now, you say that on a given day in the spring of 1908, Mr. Doyne and Mr. Higgins came into the office and Mr. Doyne told you that Mr. Higgins was to get materials from the mill for the ten houses he was going to build in 11th Street and was to do work about the mill, and do work on Doyne's house, and one thing was to offset the other, is that right? Now, you are sure of that, are you? (No answer.)

30

Q. You are sure of that? A. Yes, that he was to do work at the house and at the mill, and that he was to get goods in exchange.

Q. And one was to offset the other? A. Yes.

Q. No amount was fixed at all that Higgins was to get or work that he was to do? A. I did not hear anything about that.

40 Q. What? A. I did not hear anything about that.

Rose Reilly—Cross.

MR. DEMAREST: Speak up a little louder.

A. I did not hear anything about that.

Q. And you opened the Higgins' account in the usual way, sales slips were made up and from the sales slips transferred to the journal, and from the journal to the ledger, and all in Mr. Higgins' name? A. Yes.

Q. So that the account on the books appeared against Higgins the same as all other running accounts against other debtors? A. Yes. 10

Q. Now you kept the books right along until you left? A. Yes.

Q. And when you opened that Higgins' account and while you were making those charges you knew that against those charges Mr. Higgins was to do work on and about the factory premises and upon Mrs. Doyne's house? A. Yes. 20

Q. Is that right? A. Yes.

Q. And that is the way he was going to pay for the material? A. Yes.

Q. Didn't you think it a little funny when he paid the thousand dollars in March on this material he bought? A. I did not have any reason to think it funny.

Q. Not at all? A. I did not think it was funny.

Q. But you entered a thousand dollars, giving him a credit for a payment, when you were under the impression that he was to wipe the whole thing off by work? A. I did not know that it was to be the total amount; I did not know how much it was to be. 30

Q. Was any explanation made to you when that payment was made by Mr. Higgins? A. No.

Q. And you did not ask anything about it.

THE COURT: You mean by Higgins or by Doyne? 40

Rose Reilly—Cross.

MR. HUDSPETH: By Doyne.

A. You mean the money from Mr. Higgins?

Q. How in the world were you going to keep tabs on Higgins' account unless you had the account for work done on the factory premises and upon Mrs. Doyne's house, and the amount of that work? A. Well, he gave that—I have the amount

10 there.

Q. Where have you anything on your books of Higgins against Doyne? A. Higgins against Doyne?

Q. Yes. A. That was not marked on there.

Q. None of your business, was it? None of your business, is that right? A. I do not know.

Q. You did not care anything about that part of the transaction, did you? (No answer.)

20 Q. What is your answer? A. I do not know really what to answer.

Q. You do not know. I guess not. You were not interested in this matter after you left, were you? A. No.

Q. Did you ever close up the Higgins' account? A. No.

Q. You left after June, 1909, didn't you? A. 1909? I left about the latter part of April.

30 Q. What year? A. 1910.

Q. And you were there after the work was completed on Mrs. Doyne's house, weren't you? A. Which work?

Q. Oh, the work it is said he did? A. I was where, at Doyne's house?

Q. At Doyne's office, in the Lumber Company? A. Yes, I called there.

Q. You were working there? A. No, sir.

40 Q. Weren't you working there at the time Mr. Higgins had finished the work on Doyne's house?

Rose Reilly—Cross.

A. I left there the latter part of April; I do not know whether the work was really finished then.

Q. Had you been told anything about it at all?

A. No.

Q. Had you been given any items at all to offset it at that time in favor of Higgins? A. I cannot recall it now.

Q. Had he done the work on the factory premises up to that time? A. Yes, the work was done there.

Q. When, when you left in April? A. There was a good bit of it done, I do not know if he did any more of it or not.

Q. You said it was done, didn't you? A. I know I seen the men working there. They had done a good bit, put in pipes—

Q. Was it or not done when you left?

20

BY THE COURT:

Q. Let me ask you something. You said you left in April, 1909? A. No, 1910.

Q. Well, the work was done on the factory property at that time, wasn't it? If you will look at the book you will see that. A. Yes, I have a charge there.

Q. Because you have it as done August 21, 1909. A. That is the time I made the entry.

30

Q. You heard Mr. Higgins testify that the work was finished about the same time, didn't you, at the house and at the factory? A. Yes, he worked between one and the other.

Q. Yes, between the two? A. Yes.

Q. Then according to that entry on the book there the work must have been finished at the house when you made the entry on the books that it was finished at the factory, wasn't it? A. Yes.

40

Rose Reilly—Cross.

MR. HUDSPETH: That is just what I was going to ask her.

THE COURT: She was confused about it. I could see that.

BY MR. HUDSPETH:

10 Q. Now, you say Mr. Berghoff had in his possession to your knowledge a copy of D-1, in type-writing? A. Mr. Berghoff asked me one day when he came to the office for a list of the accounts that were good, that they considered good, and I made Mr. Berghoff a copy and gave it to him.

Q. I did not ask you that. I asked you, did he have a copy of D-1 in his possession that you saw? A. I cannot really recall now.

20 Q. Did he have a copy of D-2 which is before you? A. I do not know.

MR. BOTZONG: He may have misled the witness. I think the testimony of Mr. Higgins was that the work was finished the last part of May or June, 1909, and this is entered in March.

30 THE COURT: It is entered in August. You are mistaken; the entry is the 26th of August, 1909. There is no question about that. It is written down in her own handwriting by her own admission, and that is before us here and there is no doubt about it.

BY MR. HUDSPETH:

Q. You left in April, you said? A. April, 1910.

THE COURT: And this date is August 26, 1909. There is no doubt about the thing. Mr. Botzong is mistaken, that is all.

40 Q. There is no doubt about the two months,

Rose Reilly—Cross.

August and June, being in 1909? A. This is not my writing here. This June is not mine.

THE COURT: The June is the young man's writing. The August is her writing. She says there is no doubt at all about August being her writing. This June 14, is June 14, 1910. You see that is a different year.

Q. One thing, and I am through with you, Miss Reilly. You were asked by Mr. Demarest—calling your attention to the journal account on page 85—as to whether you observed the account of William Doyme, profit and loss \$708.21, and you said yes, is that right? A. It is. 10

Q. You saw that before you left, didn't you? A. Before I left?

Q. Yes. A. Where do you mean, the mill?

Q. Yes. A. This account here? 20

Q. Yes. A. No.

Q. You did not see it before you left? A. Not while I was there.

Q. When did you see it? A. Afterwards.

Q. Where? A. In the office.

Q. Who showed it to you? A. I just happened to call in one day and they had the books there, and they just asked me to look over that account, and the book was open and I just looked at it. 30

Q. Who showed you that account to look over? A. Mr. Doyme and his son were in the office when I walked in.

Q. And it was only once, wasn't it? A. Yes.

Q. Now, young lady, aren't you a little mistaken? You said you saw that book first when the name of William Doyme was there and not scratched out, and then you saw it again and it was scratched out and profit and loss put in? 40

Rose Reilly—Cross.

A. I beg your pardon, I never seen the book scratched until I came here, and the book was scratched then.

Q. You were asked a little while ago by Mr. Demarest as to when you first saw that book with the name William Doyne down there and not scratched out and you said—

10

MR. DEMAREST: I object.

THE WITNESS: I misunderstood him then.
(Former testimony repeated.)

THE COURT: Now you are both wrong, and this is not the ledger, it is the journal.

Q. Didn't you say that when you first saw that account it was in the name of William Doyne and not as it is now? Didn't you say that? A. Yes.

20

Q. And didn't you say that when you again saw it the name William Doyne was scratched off and profit and loss put in as it is now? A. When I saw it here.

Q. Oh, when you saw it here? A. Yes.

Q. And you say you were simply asked to look at the book when you happened to drop down to the mill after you left, by Mr. Doyne? A. Yes.

30

Q. Did he tell you what he wanted you to look at the book for? A. No.

BY THE COURT:

Q. Won't you tell us what either Mr. Doyne, Sr. or Mr. Doyne, Jr., said when you say you just stopped in to look at that book; what did they say? A. They just said there was an entry made in the book, and they asked me if I would look at it; they said it was concerning the Higgins' account, and the books were there and I just turned to the book and looked at it, and that was all.

40

Rose Reilly—Cross.

BY MR. HUDSPETH:

Q. You turned to the books? A. The books were there on the desk and they opened to the account, and I looked at it.

Q. What account? A. At this page.

Q. And what other page? A. Well, I do not know; Mr. Higgins' account.

Q. Well, any other pages in any other books? 10
A. I cannot just remember.

Q. H'm? A. I do not just remember.

Q. Any other accounts? A. No.

Q. By the bye they wanted to call your attention to the striking out of the name of William Doyne? (No answer.)

Q. H'm?

MR. DEMAREST: I object to that. That 20
is a conclusion.

THE COURT: I will sustain the objection, but if you ask if they said that—

Q. Did they say that they wanted to call your attention to the striking out of the name of William Doyne? A. They did not mention the striking out of any name.

Q. They did not say anything about why they wanted you to look at that account? A. No, they 30
just asked me to look at it.

BY THE COURT:

Q. Did you gather from what they said any reason why they wanted you to look at it? What was the point, in other words? A. I took it for myself that it was taking this account off Doyne's shoulders as the agreement had been made between him and Mr. Berghoff when Berghoff came in. That is what I understood. 40

Q. That probably was a correct understanding,

Rose Reilly—Cross.

but what Judge Hudspeth wants to know is whether you gathered why they wanted you to look at it. Did you gather why they wanted you, who had no interest in it at all, and whose connection with these books as far as bookkeeping was concerned, was over, why they asked you to look at that entry? What possible good did you see in it? Did you see any reason for it? A. I really do not know.

Q. You could not see it? A. No.

BY MR. HUDSPETH:

Q. And while they were showing that did they say anything about the other books in this action, in regard to this matter? A. No.

Q. They did not say anything about the mutilation, the tearing out of the leaves? A. There was not any mutilation of the leaves.

Q. How do you know? A. Because I seen the account.

Q. Oh, did you look at the Higgins' account then? A. Yes, I did.

MR. DEMAREST: She has been saying that right along.

Q. In the ledger? A. Yes.

Q. Why? A. They just simply asked me.

Q. What was there about the Higgins' account that required you to look at the Higgins' account in the ledger? A. This entry here concerned Mr. Higgins.

Q. Well, that was in the journal. A. That had to be transferred to the ledger.

Q. But that is not transferred to the ledger? A. There it is, right there.

Q. That is not profit and loss, is it? A. There is Mr. Higgins' account, giving Mr. Higgins credit for that amount.

Rose Reilly—Cross.

Q. But that is not transferred to a profit and loss account, is it? That is transferred to a live account, isn't it? Yes or no? A. That is giving him credit.

Q. I understand, but that is transferred on this ledger, page 133, to a live account, isn't it? A. Yes sir.

Q. Not to profit and loss? A. No. 10

Q. Well, then, the entry in the journal had nothing to do with the ledger so far as your investigation was concerned, did it? A. The entry had nothing—?

Q. This entry had nothing to do with your examination of the ledger at all at that time? A. Well, I just happened to turn to page 133 and it was perfect.

Q. Yes, yes. That is all. 20

MR. DEMAREST: Have you the Hudson Milling Company ledger here? I do not want these loose leaves; I want the whole ledger; I want the ledger itself.

BY MR. DEMAREST:

Q. Now, Mrs. Reilly, at the foot of this page of statement D-2, which contains the Higgins and Boorstein accounts underlined apparently, which Judge Hudspeth called your attention to, will you tell me whose figures appear in lead pencil at the bottom of the column evidently as an addition? A. Those are my figures. 30

Q. And they do not correspond with the blue typewritten additions at the side, do they? A. No, these do not.

Q. Can you tell whether the difference between \$7,186.49 in lead pencil marks at the foot of the figures and the \$8,094.36 at the margin of the page— 40

Rose Reilly—Cross.

MR. HUDSPETH: That shows for itself.

MR. DEMAREST: Well, the difference is the amount of those two bills. Now I would like to have the ledger of the Hudson Milling Company which I called upon you to produce.

10 MR. HUDSPETH: They produced by mistake the loose leaves here, and he says that does not comply with his demand, and we cannot produce it until tomorrow.

MR. DEMAREST: I want the book. You not produce it?

MR. HUDSPETH: We haven't it, except the loose leaves.

MR. DEMAREST: We want another book; we want your ledger.

20 THE COURT: Well, you have the book from which the loose leaves came, I suppose?

MR. HUDSPETH: Yes, and we can produce it next time, if your Honor is going to give us any further time.

MR. DEMAREST: I prefer to have the book rather than to examine the witness on it, —the secondary evidence.

30 THE COURT: What is the point about it?

MR. DEMAREST: That there was a ledger of the Hudson Milling Company in which there appeared the accounts of the Doyne Lumber and Milling Company which were transferred—that in the ledger of the Hudson Milling Company the Higgins account does not appear, that is the point.

40 THE COURT: Have you the loose leaves here that show anything about that?

MR. HUDSPETH: No, there is no state-

Rose Reilly—Cross.

ment of the claims on those loose leaves. Evidently from what he says there must be a page or so in the ledger where they are carried over just as on that statement there for ready reference.

MR. DEMAREST: I want to show they were not transferred from the books of the old company to the books of the new.

10

THE COURT: Well, I am going to go on for a little while. I am not going to let this case go on for the rest of my natural life. We will let the case go on and hold it open only for the production of that book.

BY THE COURT:

Q. Did you keep the books of the Hudson Milling Company? A. No, I was there only for a short time.

20

MR. DEMAREST: For a while she did.

THE WITNESS: Just for a short time.

BY MR. DEMAREST:

Q. Did this figure 133 on page 85 of the journal appear there at the time you examined this book?

A. Yes.

Q. Then that refers to this ledger, doesn't it?

A. Yes.

30

BY THE COURT:

Q. That is the regular course of business in that journal? A. Yes.

Q. And where it is posted in the ledger the ledger page appears on the journal? A. Yes.

BY MR. HUDSPETH:

Q. You have got 58 in the same column, what does that refer to? A. I did not make that entry.

40

Martin H. Doyne—Direct.

Q. Who made it, do you know? A. The bookkeeper, I suppose.

Q. Do you know whose figures they are? A. The bookkeeper's.

Q. The 33 before William Doyne is stricken out; who made that? A. I did not have anything to do with that.

10 Q. Well, were they made before you made the entry 133? A. I did not make that entry at all; I did not have anything to do with it.

Q. Oh, I beg your pardon. Now, in reference to these claims that are shown on exhibits D-1 and D-2, you carried claims over from the Doyne Lumber and Milling Company's books, didn't you, before you left? A. Yes.

Q. Under Mr. Doyne's direction, is that right?
20 A. Yes.

MARTIN H. DOYNE, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. You are the son of William Doyne, who was the vice-president of the Doyne Lumber and Milling Company? A. Yes.
30

Q. Were you employed by the Doyne Lumber and Milling Company while they were doing business? A. I was, yes.

Q. In what capacity? A. As salesman.

Q. And were you afterward employed by the Hudson Milling Company? A. I was.

Q. Until what time? A. Well, until I—until last summer.

40 Q. 1912? A. 1912.

Q. Did you hear the conversation between your

Martin H. Doyne—Direct.

father and Mr. Higgins at the time Mr. Higgins agreed to buy this bill of goods from the Doyne Lumber and Milling Company? A. I did.

Q. Where did that conversation that you heard take place? A. Well, he happened to be—let me see—well, my father went up to see Mr. Higgins about it because he heard he was going to build his houses.

Q. Where did you hear the conversation? I do not mean what you did not hear or see; I want to know what you did? A. I could not say exactly whether it was in the office or in the street, but I heard it at one place.

Q. When did you become of age? A. About three years ago.

Q. And your mother held stock as trustee for you in the Doyne Lumber and Milling Company, did she not? A. She did.

Q. Were you at a meeting when Simon Doyne and his wife and your father and mother were present in the office of the Doyne Lumber and Milling Company? A. I was.

Q. Was that before or after Simon Doyne resigned? A. Before.

Q. And were the books of account present at that time? A. They were.

Q. How long before Simon Doyne resigned was it? A. Well, two months.

Q. Did you hear them at that time discuss this Higgins account? A. Yes, sir; I was present when they discussed it.

Q. And did they discuss any other accounts at the same time? A. Well, they were talking about who they thought they could get money from sooner.

Q. What was said at that time about this Hig-

Martin H. Doyne—Direct.

gins' account? A. Well, my father and Mr. Simon Doyne, who was a partner there—my father told him that this work was to be done on our house, and—

MR. HUDSPETH: I object to this.

THE COURT: Objection sustained.

10 Q. Your father told who?

THE COURT: Told him that the work was "to be on our house."

A. He told Simon Doyne, I said,—

THE COURT: I heard you.

20 Q. What conversation did you hear between your father and your mother, and Simon Doyne and his wife, at that time respecting the Higgins' account? A. This was the account that they talked about for the work that Higgins was to do, that when it would be finished it would be charged to my father's account for goods that they would give Higgins.

Q. Your father and mother and Simon Doyne and his wife at that time composed the board of directors of the Doyne Lumber and Milling Company?

30 MR. HUDSPETH: I object as leading.

THE COURT: Objection sustained.

Q. What did Simon Doyne or Simon Doyne's wife or your mother have to say at the time your father said that? A. They all agreed.

MR. HUDSPETH: I object.

Q. Did they say they agreed? A. They said it was all satisfactory.

40 MR. HUDSPETH: I object to your suggestion, Mr. Demarest.

Martin H. Doyne—Direct.

THE COURT: Objection sustained. The question and answer will be stricken out. This is your witness.

Q. What did they say? A. They said it was all right, it was satisfactory.

Q. Who said that? A. Mr. Simon Doyne and Mrs. Simon Doyne.

Q. What did your mother say, if anything? A. 10
She said it was all right, it was on her house.

Q. You are sure that was before Simon Doyne and his wife transferred their stock? A. Yes, sir.

Q. Now, did you hear any talks between your father and Mr. Berghoff while Mr. Annett was the receiver of the concern during the latter part of March or the early part of April, 1910? A. Yes, I was with them quite often when he spoke.

Q. What were they talking about at that time? 20
A. Mr. Berghoff was talking about buying the accounts and he wanted to know how much was good accounts receivable, and he wanted to know how much he owed and how much he could settle the claims for that he owed, and if he could settle them for fifty per cent. or not, or something or other, just to get rid of the accounts, and then father told him there was an account of William Higgins on the books for work that was done on his property, and it was understood between 30
Simon Doyne and his wife and my mother and himself that that account was to be charged to him, and that the time it was to be taken off would be at the end of the year when the accounts would be straightened out.

Q. Did they have any paper at that time? A. I saw Mr. Berghoff handle some papers, and my father had some also.

Q. Did you see what those papers had on them? 40
A. Yes.

Martin H. Doyne—Direct.

Q. What were they? A. Well, the live accounts of the Doyne Lumber and Milling Company.

Q. Do you know whether on the papers they had at that time the Higgins' account appeared?

A. It was not on.

Q. You are sure of that? A. I am.

Q. Was there one copy of the paper that was
10 mentioned at that time, or were there more, do you know? A. Well, there was a few copies of the papers, of the same thing.

Q. Was that conversation before the time that Mr. Annett gave to Mr. Weller the bill of sale?

A. Yes.

Q. Before the sale went through? A. Yes, sir.

Q. And what did Berghoff say? A. Why, he said he did not see anything about it, he would
20 take it off when he started off the Hudson Milling Company.

Q. Now, after the Hudson Milling Company took charge of the business did you ever hear your father and Mr. Berghoff talk respecting the Higgins account? A. Quite often.

Q. And what was the conversation regarding?
A. My father was urging him to take it off; take it off. He said he was pretty busy, he would take it off; he said he would stick to it, he said.
30

Q. Did you hear any conversation between them, about June, 1910? A. I was there present at the time they took it off. I was in the small office.

Q. Who were there besides yourself? A. Mr. Berghoff and the bookkeeper.

Q. Who took it off the books? A. The book-keeper.

Q. Which entry was made at that time? Will
40 you show us what entry was made on the books?

Martin H. Doyme—Direct.

A. It was in the ledger at 133, and in the journal, it is charged to William F. Higgins.

Q. Were the pages cut out, the ledger, 133, and the other page where Berghoff's account appears, at that time? A. Not when I saw it last.

Q. Was the name of William Doyme stricken out and the words "profit and loss" put in there?

A. No, sir.

10

Q. Who made that entry in the journal? A. Mr. John Workmeister.

Q. The young man who appeared here Tuesday? A. Yes, there he is (indicating).

Q. Did any one tell the bookkeeper to make that entry of payment in the books? A. Yes, sir. Mr. Berghoff was present when he had him take it off.

Q. Did any one tell Mr. Workmeister, or what- 20
ever his name is? A. Mr. Berghoff.

Q. And you and your father were then present? A. I was right there with my father.

Q. When your father and Berghoff were talking before the sale by the receiver to Weller, and had this list of accounts what was said by your father and what was said by Mr. Berghoff about the Higgins' account? A. Well, the list was never on the—Higgins' name was never on the list that he was presented with of the live accounts. It 30
was already understood the account was to be taken off.

Q. What did they say at that time about the Higgins account, if anything? A. At what time?

Q. When they were talking about it. A. Why, if Mr. Berghoff took the Hudson Milling Company—started a new corporation—the account of William Higgins would be off of the books, it was an account of William Doyme's. 40

Q. Who said that? A. Mr. Berghoff.

Martin H. Doyne—Cross.

CROSS EXAMINATION BY MR. HUDSPETH:

Q. You knew about the agreement, I suppose between your father and Berghoff? A. At what time?

Q. Before the new company was formed? A. Well, I knew of some parts of the agreement.

10 Q. You knew about the agreement that Mr. Hudspeth drew up? A. No, sir, I was not present.

Q. No; you saw it in your father's hands afterwards?

MR. DEMAREST: I forgot something.

MR. HUDSPETH: Go ahead.

BY MR. DEMAREST:

20 Q. Do you know whether while you worked with the Hudson Milling Company there was any ledger or book made up by the Hudson Milling Company, showing the live accounts of the Doyne Lumber and Milling Company? A. Yes, there was one made up.

MR. HUDSPETH: I object.

MR. DEMAREST: That is the book I called for the production of.

30 MR. HUDSPETH: It is calling for the conclusion of this witness as to the book made up by the Milling Company. He can tell who did make up a book, whose book that was—I mean that the book belonged to the Hudson Milling Company, or was one of the books kept by the Hudson Milling Company.

40 THE COURT: I will overrule this question because it indicates first of all that the book was made up by the authority of

Martin H. Doyne—Cross.

the Hudson Milling Company, and there is absolutely nothing in the case to show that this young man has any knowledge on earth about the matter of authority to make up such a book.

MR. DEMAREST: I withdraw the question and change it to another form.

Q. Do you know whether after the Hudson Milling Company began to do business there was in its office a book showing the list of accounts due the Doyne Lumber and Milling Company, which was not kept by the Doyne Lumber and Milling Company while it was running as a corporation? A. I do not understand the question. 10

(Question repeated).

A. Yes, sir.

Q. Do you know whether that book was in use by the Hudson Milling Company? A. It was. 20

Q. Did you see it used? A. Yes, sir.

Q. How were you employed by the Hudson Milling Company? A. Well, I was general superintendent on the outside, took care of all the measurements on the jobs, collections, sometimes helped on the books, in making out the bills, because the bookkeeper did not know the nature of the business, and I had to make out the bills, and I had to come in contact with the ledger, with the accounts. 30

Q. Were you familiar with the books that were in use by the Hudson Milling Company? A. Yes, sir.

Q. Did you make a copy of all the accounts that were carried over in the new ledger of the Hudson Milling Company from the Doyne Lumber and Milling Company books? A. Did I make—? Repeat that. 40

Martin H. Doyne—Cross.

MR. DEMAREST: Change that "copy" to list."

(Question repeated with the change requested).

A. I made the list from what the Hudson Milling Company had on its own books.

10 Q. That is what I asked you. Is that the list (indicating)? A. This is one of the monthly statements that we rendered to Mr. Berghoff to see exactly what he had outstanding, all the accounts he had outstanding, and sometimes we would have a statement of what people he owed.

Q. Did you make this up? A. I did.

20 Q. What from? A. From the book that I called the trial balance book, and also from the ledger; that was copied from the ledger.

Q. Taken from the ledger? A. Yes.

Q. Does the Higgins account appear on that slip?

MR. HUDSPETH: I object. The books are the best evidence, and we have offered to produce them.

MR. DEMAREST: I have called for it.

30 MR. HUDSPETH: All right. It is understood that they be produced.

MR. DEMAREST: I do not want to delay the case. If they will produce it, all right.

40 THE COURT: I understood they were going to produce it. If they want to wait and produce it—I do not know what the book contains—it may be you and Mr. Berghoff know what it does contain, and if it does not contain this list—

Martin H. Doyme—Cross.

MR. HUDSPETH: I have no objection to admitting it if they will admit that the things carried over in that book were carried over by the young lady as she testified to.

THE COURT: She swore to that. Is there any question about that?

MR. DEMAREST: I do not know that that 10
is true.

THE COURT: You can find out very easily if it is true.

MR. DEMAREST: I think the book we refer to was not made up by her.

THE COURT: She swears it was.

MR. DEMAREST: She did make up the trial balance book.

THE COURT: We are not talking about 20
the trial balance book at all. This notice to produce, which I understand you served, was a notice to produce the ledger. You objected to the production of the loose leaves of a ledger, and Judge Hudspeth said he would produce the ledger. Now you are trying to show that the trial balance does not contain the things——

MR. DEMAREST: I asked for the produc- 30
tion of all books.

THE COURT: But the only book you have asked for so far of Judge Hudspeth was a ledger——

MR. DEMAREST: I asked for the trial balance books while you were out.

MR. HUDSPETH: Here is the book you want.

Q. Is this the book you made the copy from? A. 40
Wait till I look at it.

Martin H. Doyne—Cross.

Q. Turn to the month of October, 1910. Look at the item. A. No; there was another——

Q. That is not the book then? A. No, sir; this is part of what he had, but there is another one besides this.

BY THE COURT:

10 Q. Did you ever see that book before? A. Yes.

Q. Did you see it down in the office of the company? A. Yes, sir.

Q. What book is that? A. That is a statement.

Q. Statement of what? A. What he would render Mr. Berghoff just to see how he was getting along every month.

20 Q. This is what you would call a trial balance book? A. Not exactly. He would have a separate book.

Q. Do you want to say the trial balance book contains any different entries from this book? A. Yes; it would enumerate every customer. He has it lumped here, but he does not have every customer separate.

30 Q. But this book will show each customer's account lumped won't it? A. No; it will show all the customers together, but not separately.

THE COURT: Well, do you know anything about the other book, Judge?

MR. HUDSPETH: I do not.

MR. WORKMEISTER: There is no such book.

40 THE COURT: Go on and prove it, if you want to. He says there is no such book, and consequently it cannot be produced.

Martin H. Doyne—Cross.

You may go on and prove what you want about this thing.

THE WITNESS: Oh, this is a late book—this is not the new one of the Doyne Lumber and Milling Company. There is one—

BY MR. DEMAREST:

Q. Wait a minute. There are some pages gone again. A. I want to see if October is here. Oh, this is not here. There is an October account. 10

Q. October of what year? A. Of 1910. This is 1912. There is only one—two—two trial balance sheets of 1910; but this is a 1910 transaction.

MR. DEMAREST: Here are twenty-six pages gone.

A. 1910: that is after I left. The 1910 transactions are torn out. 20

Q. Who made up this paper? A. I made that up.

Q. What did you make it up from? A. From the statement book, the trial balance book, which you care to call it.

Q. Where did you find that book? A. In the office.

THE COURT: You have gone over that a couple of times. What is the use? 30

MR. DEMAREST: I do not want to waste any time.

THE COURT: Then why ask questions? He has told you what the book was, where it was kept, who made the entries, that he made some of them, and all about it, and now you ask who made it up.

MR. DEMAREST: I expected to find it in that book. 40

Martin H. Doyne—Re-Cross.

THE COURT: It is not there.

MR. DEMAREST: No; I find that some of the pages are gone.

THE COURT: But you do not prove by that how the other book was made up.

MR. DEMAREST: I offer that slip in evidence.

10

MR. HUDSPETH: What is the purpose?

MR. DEMAREST: To show that they never carried the account over on their books.

MR. HUDSPETH: We will admit it was not carried over, and this girl was instructed not to carry it over. We will prove it.

RE-CROSS EXAMINATION BY MR. HUDSPETH:

20

Q. When did you make that statement out?

A. In October, 1910.

Q. How did you happen to think it necessary in October, 1910, to make a statement out like that? A. I had copies before October.

Q. Why did you make that particular one out in October, 1910? A. Father was interested, we wanted to see how we were getting along.

30

Q. How did that show how you were getting along? A. It showed how much money we had outstanding against what we owed.

Q. Is that what you made that statement out for? A. Yes, sir.

Q. How is it you took down claims formerly due by the Doyne Lumber and Milling Company? A. Because it was a copy of the book.

40

Q. Yes; and was it taken from a different book than that so-called trial balance book that has been produced here? A. That is not the book that I seen that that was in.

Martin H. Doyne—Re-Cross.

Q. Who was present when you made this statement? A. I think John was there.

Q. This bookkeeper? A. Yes, sir.

Q. And he saw you making the statement, making the transfer? A. He was right there.

Q. Now you have spoken about a meeting of the directors of the Doyne Lumber and Milling Company, at which were present your father, 10 your mother, Simon Doyne and his wife? A. Yes, sir.

Q. When this Higgins account was discussed? A. Yes.

Q. And was that before Higgins had got any material? A. Oh, no.

Q. That was a long while afterwards, wasn't it? A. Yes, sir.

Q. After he had commenced the work on the 20 factory premises? A. Pretty near—our job was finished at that time.

Q. He had finished the factory job? A. Our house also.

Q. Oh, your house also? A. Yes.

Q. And then this Higgins matter was discussed in your presence? A. Well, yes, we spoke about it.

Q. Yes; and it was said at that meeting that 30 Mr. Higgins got material, or could get material for the 11th Street houses? A. Oh, it was spoken of before also.

Q. I did not ask you about that. I am asking you about this meeting. A. Just explain it to me and tell me what you want.

Q. Was it stated at that meeting that Mr. Higgins was to get material at the mill for the 11th Street houses? Yes or no. A. Yes, that was the 40 account.

Martin H. Doyme—Re-Cross.

Q. And was it said how much in amount he was to get? A. A running account.

Q. Was it said how much he was to get in amount, sir? A. Did not say no sum.

Q. Then he was to have an unlimited credit? A. Yes.

10 Q. And there was no check upon what he was to do for your mother as to amount? A. Well, he estimated, he told us about exactly what it would be.

Q. How much? A. Over seven hundred dollars, I think he said.

Q. Was there any check as to the amount he was to do about the mill? A. Well, he did not say exactly; he did not know exactly what it would be, but he suggested what it would be.

20 Q. What did he say it would be? A. Well, over a couple of hundred dollars.

Q. Then there was about seven or eight hundred dollars for your mother's house, that was the amount he fixed for the house, and about two hundred dollars he was to do up on the factory premises? A. I did not say any amount—I said a couple of hundred.

BY THE COURT:

30 Q. What do you mean by that? A. He did not specify any amount.

Q. You mean by a couple of hundred, two hundred? A. Two hundred, three, four—I ain't specifying any amount.

Q. Why do you say a couple? A. He did not say—

Q. Don't you know a couple is two? A. Not all the time. You say a couple of houses, or

Martin H. Doyne—Re-Cross.

a couple of people were there—you don't always mean two.

Q. You mean you do not always mean two when you say a couple? A. I do not always mean two.

THE COURT: All right.

BY MR. HUDSPETH:

Q. At this time the company was pretty hard 10
up? A I do not know whether it was or not.

Q. Didn't you say at that meeting they were discussing ways and means to get some money?
A. No; they were looking over the accounts to see who they would select.

Q. Yes; they were trying to find some debtors they could reach and get some money from?
A. Yes.

Q. Yes; and they were a little short of money, 20
weren't they? A. I do not know whether they were or not.

Q. What in the world was this August body of directors, your father and mother, uncle and aunt, meeting and going over these accounts for if it was not to get money? A. It was not especially to get money.

Q. Well— A. Let me tell it.

Q. No, no, no; I cannot let you tell anything. 30

MR. DEMAREST: I object.

Q. I ask you was it for the purpose? A. No, it wasn't.

THE COURT: Look here, you answer questions.

THE WITNESS: I am answering questions. I want to explain.

THE COURT: He does not want explanations. 40
He wants answers.

Martin H. Doyne—Re-Cross.

Q. Was it to get money they met? A. No.

Q. What did they meet for? A. What they met for? Well, they wanted to see how we were getting along, if we were making any progress.

Q. Did they find out you were making progress?
A. Yes, sir.

Q. And you were doing a good business? A.
10 Yes, at that time.

Q. Plenty of money on hand? A. We always had enough to meet our bills.

Q. Never were in straits at all? A. Occasionally.

Q. Not at that time? A. I cannot recall the time.

Q. And in going over the accounts receivable they happened to speak of the Higgins account?
20 A. Yes.

Q. And said well, this account can be charged up against your father, William F.? A. Yes.

Q. Without limit? A. It amounted to seven hundred dollars for that job.

Q. Did they fix the seven hundred dollars? A. Mr. Higgins' account of the job.

Q. Did they fix it at seven hundred dollars?
30 A. They said the amount that job would cost.

Q. They said seven hundred dollars? A. My father told about what it was.

Q. At that meeting did they say seven hundred dollars? A. My father did.

THE COURT: Answer the question. Did they say at that meeting seven hundred dollars? Don't you understand English?

40 A. I certainly do.

THE COURT: Answer the question then.

Martin H. Doyme—Re-Cross.

Didn't they say at that meeting seven hundred dollars?

A. Yes, they did.

Q. And a couple of hundred dollars for the mill? A. Well, they said the mill was there also, the mill work there.

Q. A couple of hundred dollars for the mill? A. Yes, sir. 10

Q. You said a little while ago regarding these statements D-1 and D-2, that they were made up, that there were duplicates, and Mr. Berghoff had a copy, and that was before the receivership; that is right, isn't it? A. Yes.

Q. Now you are positive of that, young man? A. Mr. Berghoff had a copy.

Q. You are positive of that? A. Yes.

Q. Before the receivership? A. Yes. 20

Q. And the sale? A. Yes, sir.

Q. And it was while they were discussing— A. I beg your pardon. Did you mean before the receivership?

Q. That is what I said three times? A. I did not answer that. I will withdraw that question.

Q. Didn't you say a little while ago on your direct examination that Mr. Berghoff had a copy of these accounts which are outstanding, and try to get your father to go and settle for fifty cents on the dollar, and they talked about the accounts that were payable, and your father eliminated the Higgins account as one that was not going to show? A. That was after it was in the hands of a receiver. 30

Q. No, sir; before it was in the hands of a receiver, when they wanted to settle at fifty cents on the dollar? 40

Martin H. Doyne—Re-Cross.

MR. DEMAREST: I object to that. I do not think there is any foundation for it. I think he testified to the contrary.

THE WITNESS: (To the Court). You think I am not trying to answer the questions;—

10 THE COURT: If you think you will have a discussion with me by saying insulting things, I will put you in jail. Do you understand that?

THE WITNESS: Sure.

20 THE COURT: Then keep quiet about it. You are what I should consider a very fresh young man, and the first thing you know, if you want to have a discussion of this kind, I will give you time to think it over in a place where you will be cool, calm and collected, and solitary.

Q. Before this receivership you were engaged by the Doyne Lumber and Milling Company?

A. Yes, I was.

Q. And you remember your father treating with Mr. Berghoff to try and help him out in view of the apparent insolvency of the company? A. Mr. Berghoff spoke to father.

30 Q. And they were trying to arrange to buy up the claims, weren't they,—yes or no? A. He said——

Q. They were trying to arrange to buy up the claims? A. I guess that was about it.

Q. You heard that,—at fifty cents on the dollar? A. They did not say any amount at that time.

Q. When did they say they were trying to buy up the claims at fifty cents on the dollar? A.
40 After we went in the hands of the receiver.

Martin H. Doyne—Re-Cross.

Q. What claims did they have to settle after you went into the hands of the receiver? A. The claims we owed to people, that was the question.

Q. That was after you went into the hands of the receiver? A. Yes.

Q. And before the Hudson Milling Company formed? A. Yes, sir. 10

Q. And then these statements were made up, D-1 and D-2, and Mr. Berghoff had a copy of them? A. What do you ask me, what was made up?

Q. Mr. Berghoff had a copy of these statements at that time? A. When we were in the hands of a receiver.

Q. And before the sale? A. That is before the sale. 20

Q. You are positive of that, aren't you? A. Yes.

Q. Because before the sale they were trying to make a settlement with the creditors and buying them up, paying fifty cents on the dollar? A. As much as they could get.

Q. And then your father said there was one claim that couldn't be collected by the company, and that was the Higgins claim? A. No, on accounts payable he spoke about, but nothing about accounts receivable. 30

Q. He spoke about Higgins? A. Yes.

Q. He said he would not get the Higgins claim, because that was paid? A. That was the understanding; it was not paid, but that was the understanding.

Q. And that was before the sale? A. Yes.

Q. And when Mr. Berghoff had a copy of these 40

Martin H. Doyne—Re-Cross.

statements, D-1 and 2, in his possession? A. Yes.

Q. Now you are positive of that? A. That is so.

Q. And these claims were made up for that purpose, weren't they, to give notice to Mr. Berghoff, to give notice to him as to what the claims
10 were?

(No answer).

MR. HUDSPETH: Where is the other one?

MR. DEMAREST: You have two of them there.

A. This was at the time in the hands of the receiver.

Q. Yes, and before the sale? A. Yes.

20 Q. When they were trying to make a settlement? A. But the accounts receivable were itemized, all what he collected and what he thought he could collect, and the accounts payable, that were being paid out during that time——

Q. And these were got out in order that Mr. Berghoff could go out and try and make a settlement? A. Yes.

Q. Before the sale? A. Before the sale.

30 Q. Now aren't you very seriously mistaken about these exhibits? A. No, sir.

Q. Do you know that those exhibits show a condition of the Hudson Milling Company after they had purchased all of these assets and were a going concern? A. No, sir; those were given to them before.

Q. Is that so? Now just let us take one of them. This is headed "Hudson Milling Company," isn't it, and shows a statement as to the condition of that company? A. Yes.
40

Martin H. Doyne—Re-Cross.

Q. And shows part of the cash in the hands of the receiver still unpaid by him after the sale, as so much receivable by the Hudson Milling Company? A. Yes, accounts received good as per schedule.

Q. Yes; now haven't you stated an absolute untruth about that statement? A. I do not think so.

10

Q. Don't you know that your explanation as to that statement is absolutely untrue? A. I do not think so.

MR. DEMAREST: I object to that. I do not think there is any basis for that.

Q. Now let us look at No. 2; doesn't that show a condition of the Hudson Milling Company after the sale and shows what was in the hands of the receiver, and what the Hudson Milling Company owed the Union Trust Company? A. I did not say I saw this paper in the hands.

20

Q. Oh, you didn't? A. I said the first paper.

MR. DEMAREST: That is the defendant's case, I think. I would like that ledger which we called for.

THE COURT: He admits that there is nothing in it. What do you want it for? They have admitted that the account was not carried over, and it was not carried there because the young lady did not enter it.

30

MR. DEMAREST: All right.

DEFENDANT RESTS.

40

John Workmeister—Direct:

JOHN WORKMEISTER, called and sworn testified in rebuttal as follows:

DIRECT EXAMINATION BY MR. HUDSPETH:

Q. Young Mr. Doyne says, refering to this statement, D-3 for identification, that he made it in your presence; did he? A. I do not remember
10 him making it in my presence.

Q. Did you ever see him at work on any such statement in your office? A. I do not recall it.

Q. If he had done it you would have seen it, wouldn't you? A. I think I would.

Q. Now a book was presented here a few moments ago, which was called the trial balance book, and which they say was not what they
20 wanted, but it appears there are some pages torn out of there. Will you explain why those pages were torn out? A. I was the one that took them out.

Q. Why? A. Because they were my property.

Q. What right had you to take those pages out of that book? A. I simply made a trial balance for my own use to test if my books were accurate every month. I stayed there until January, 1911,
30 when I was taken sick. After I was taken sick they got several other bookkeepers in succession and the books went right right out of balance, so Mr. Berghoff requested me to go up there again and straighten out their cash account. After I had straightened them out I took these sheets out and I told Miss Maloney, "You may make a copy." I kept these sheets to show in case anything else ever came up in the Hudson Milling Company, that until I left the books they were
40 accurate and correct. I have those sheets still at home.

John Workmeister—Direct.

Q. Don't you think that is a pretty fine shape to leave our books in, tear those leaves out that way? A. It was not the Hudson Milling Company's book; it was a book I found there and kept these sheets for my convenience.

Q. Isn't that a book that belonged to the Hudson Milling Company in connection with its business? A. No, sir.

10

Q. What do you produce it for? A. He was the one that called for the trial balance book.

Q. Isn't that part of the Hudson Milling Company's system of bookkeeping? A. No, sir; I am the only one that makes trial balances.

Q. What is the use of a trial balance or book that would indicate or show a trial balance when you take part of it away or tear it out? A. Why, there is the exact copies of it.

20

Q. Where is the copy? A. Right here in this book.

Q. How do we know that is a copy? A. Miss Maloney can verify that fact.

Q. What you tore out, did it have anything to do with Higgins' matter? A. Absolutely no. The Higgins account was not on the ledger. It is just as you see it here.

BY THE COURT:

30

Q. You have those papers home, you say? A. Yes, sir; I can produce them.

THE COURT: Now this is rather an important point. I think I will adjourn the case and let those pages be produced.

THE WITNESS: I think I have them home in my drawer.

THE COURT: That would show whether or not the book has been mutilated, or whether it is just as the witness says.

40

John Workmeister—Direct.

BY MR. HUDSPETH:

Q. Will you produce those to-morrow morning?

A. Yes; I will look for them to-night. I think I have them all there.

Adjourned to February 14, 1913.

10

THE COURT: Do you gentlemen desire to proceed with eleven jurors? One of them seems to be absent.

20

MR. DEMAREST: I learned last night, what I did not know before, of two witnesses who are material to the defense in this case. I am going to ask the court to allow them to testify. Their testimony is very short. Would you prefer that I make that motion now and put them on before you go ahead with your rebuttal, or afterwards?

MR. HUDSPETH: I have no objection to your witnesses.

THE COURT: Then they will have to be put in before he starts his rebuttal.

(Defendant's case re-opened).

30

40

Julian L. Duryea—Direct.

JULIAN L. DURYEA, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Where do you live? A. 900 Boulevard, Bayonne, New Jersey.

Q. What is your business? A. Accountant, credit man. 10

Q. Did you do any work for the Doyne Lumber and Milling Company? A. I did.

Q. In what year was that? A. Why, I cannot exactly place it, it was just—it was before his receivership. I made out some statements for him. I was called in as an expert.

Q. Did you know Simon Doyne? A. I knew Simon Doyne.

Q. And did you know Simon Doyne's wife? 20
A. I simply met her that one night.

Q. One night? A. One night.

Q. And you knew William Doyne? A. I knew William Doyne.

Q. And William Doyne's wife? A. William Doyne's wife.

Q. Were you present at a meeting of the directors of the Doyne Lumber and Milling Company where those four people attended? A. I 30
was.

Q. Can you tell us about when that meeting took place? A. That was just before the receiver was appointed, as near as I can tell. I cannot remember the date exactly.

Q. Do you remember whether Simon Doyne at that time was still an officer of the company?

MR. HUDSPETH: I object. There is no 40
basis laid.

Julian L. Duryea—Direct.

THE COURT: Objection sustained.

Q. Do you know who were the officers of the company at that time? A. Simon Doyne and William Doyne.

Q. Anybody else? A. I cannot recall it just now. I know that they two were the officers.

10 Q. No, the directors, I mean. A. Well, the directors, they were, I understood——

MR. HUDSPETH: I object.

THE COURT: I will permit it to be answered yes or no. Do you know, or do you not? You say, yes, you do, or no, you don't.

A. I never saw the papers of incorporation. I judged that those who were there were the directors of the company. It was a company meet-
20 ing.

BY THE COURT:

Q. I understand your answer then to be, no, you do not know; is that it? A. Except from knowledge that they had a vote at the meeting. They all voted, that is all.

Q. You saw them vote? A. Yes.

30 BY MR. DEMAREST:

Q. Were the books of account of the Doyne Lumber and Milling Company present at that meeting? A. They were present.

Q. Do you remember what the purpose of that meeting was? A. It was to go over the statements that I had drawn, and make up a trading statement, and to get the books in proper shape, and also at the end of the meeting to transfer
40 Simon Doyne's stock to William Doyne, after the first part of the meeting was over.

Julian L. Duryea—Direct.

Q. Do you remember whether the account of William F. Higgins was referred to at that meeting? A. It was.

Q. Were any of the books containing William F. Higgins' account used at that meeting? A. They were there on the desk, yes, they were used.

Q. Opened? A. Yes, sir, they were opened. 10

Q. Were the books examined? A. I did the examination of the books and transferred it to paper.

Q. And were those papers used? A. Those papers were used.

Q. What, if anything, was said by those four people at that meeting about the William Higgins account?

MR. HUDSPETH: I object as immaterial 20
and irrelevant and not binding on the defendant, and what they said is entirely irrelevant unless this was at a meeting where the directors were discussing some matter or had passed some resolution; otherwise it is mere tittle-tattle talk, it has no binding force at all upon any one.

(Question allowed).

(Exception noted for plaintiff). 30

A. I asked Mr. Simon Doyne whether it was proper to charge that to William Doyne's account, and he said "Yes."

Q. Were the two wives present at that time?

A. The two wives were present at that time.

Q. Were there any votes taken at that meeting, do you remember? A. That I cannot remember. I wrote the minutes of the meeting. I cannot 40
remember though now accurately.

Julian L. Duryea—Cross.

Q. Do you remember whether there was any vote taken on this proposition or not? A. I do not.

Q. Now, Mr. Duryea, after the Hudson Milling Company was organized, did you do any work for them? A. The Hudson Milling Company?

Q. The Hudson Milling Company? A. Yes.

10 Q. What work did you do there? A. I opened the books.

Q. Opened the books of the Hudson Milling Company? A. Of the Hudson Milling Company, made the first entry.

Q. And did any one direct you as to the opening of those books? A. Yes.

Q. Who? A. Mr. Berghoff.

20 Q. Did Mr. Doyne ever give you any instructions as to the opening of those books? A. Mr. Doyne never gave me any instructions on any books.

CROSS EXAMINATION BY MR. HUDSPETH:

Q. At this conference or meeting of the two Doynes and their respective wives—

MR. DEMAREST: Just a minute.

30 THE COURT: Go ahead.

Q. —did they have a set of minutes there, do you know? A. I kept the minutes of the meeting.

Q. At that meeting? A. At that meeting.

Q. What became of the minutes? A. I could not tell you, sir.

Q. Were they taken down by you in shorthand or in longhand? A. Longhand.

40 Q. Were there any resolutions adopted? A.

Julian L. Duryea—Cross.

That I could not tell you without referring to the minutes. I did not pay any particular attention to it, except so far as the accounting went.

Q. Simon Doyne was about withdrawing, wasn't he? A. He did withdraw, yes.

Q. He was about withdrawing at that time? A. At that time.

10

Q. And his wife? A. That I could not say, whether that was in the paper or not.

Q. Simon was about turning over to William his stock? A. He was.

Q. William claimed that Simon had got away with something? A. I know nothing about that.

Q. You did not hear that talk? A. I know nothing about that.

20

Q. William had claimed, had he not, in your presence, that Simon had got away with assets, which had been means of wrecking the concern?

MR. DEMAREST: I object as not proper cross examination.

THE COURT: I permit it. The question is what anybody said there at that meeting.

30

A. I can tell you that Simon admitted to me that night after the meeting that he had done something that he ought not to have done.

Q. And was going to go away, get away? A. He was going to leave the concern.

Q. And did he tell you that in turning over his stock to William he was doing it without a cash consideration? A. He did not.

40

Julian L. Duryea—Cross.

Q. Did he tell you what the consideration was?

A. I drew up the paper.

Q. Do you remember what it was? A. The consideration was one dollar and other valuable considerations.

Q. Yes; and he turned over all his stock to Willim for one dollar and other valuable considerations? A. That is as near as I can remember it.

Q. And then said, "William, you can have this Higgins account?" A. No, sir; he did not. That was done before the stock was turned over, sir.

Q. Well, but at this same conference? A. After the stock was turned over.

Q. And then after that they went into insolvency and a receiver was appointed? A. I believe a receiver was appointed after that.

BY THE COURT:

Q. Do you mean what you said, Mr. Duryea that that was done after the stock was turned over? A. No; the conversation that I had with Simon Doyme was before the stock was turned over.

THE COURT: You have just said that it was afterwards.

THE COURT: (To the stenographer). Just read what he said.

(Testimony repeated).

BY MR. HUDSPETH:

Q. It was at the same conference? A. It was at the same conference, but it was before the stock was turned over, I should have said.

John Workmeister—Direct.

BY THE COURT:

Q. Well, then, as I understand it, Mr. Duryea, the practical object of this meeting was to settle the affairs between Simon Doyne and William Doyne so that Simon might go away, wasn't it? A. That, and to settle up the books to see if there was any profit in the business. It was a general meeting of the stockholders, and some 10 changes in salary were made at it. It is called a stockholders' meeting, that is what it is called.

JOHN WORKMEISTER, recalled, testified further in rebuttal, as follows:

BY MR. HUDSPETH:

Q. Did you, since last night find the torn leaves from the book that you had yesterday 20 before you? A. Yes, sir, I tried to find them.

Q. Did you find them? A. No, sir.

Q. Did you look for them? A. I certainly did, I as well as my wife looked for them.

Q. Well, where are they? A. Well, I took them home—I do not know—they were in a drawer, and I imagined they were in a certain package I had, but in looking at that it was not those 30 papers. I was mistaken.

Q. Did you only look one place for them? A. No; I have looked in several drawers.

Q. My dear sir, when you tore those out for the purpose of keeping them, why didn't you put them in a safe place? A. I only had interest in them so long until the accounting of the books in September, 1911—until he had rendered his statement.

Q. Will you swear positively that the book 40 here as it now exists in its mutilated form, con-

Julius Berghoff—Direct.

tains an exact transcript of what you took out?

A. Miss Maloney—I handed the original to Miss Maloney, and asked Miss Maloney—I said, “If you wish to retain a copy here at the mill, make them;” and she did. They are in her handwriting.

Q. Is that a copy that is now in this book in court? A. That is an exact copy of my original.

10 Q. A true copy? A. A true copy.

(No cross examination.)

JULIUS BERGHOFF, recalled, testified in rebuttal as follows:

DIRECT EXAMINATION BY MR. HUDSPETH:

Q. Did you at any time, at any place, in the
20 presence of Mrs. Reilly, say to Mr. Doyne that you understood and agreed to a cancellation of the account against Higgins? A. I never did.

Q. Did you ever say to Mr. Higgins, either to him alone, or in the presence of Mr. Doyne, or any one else, that you agreed and understood that his account was cancelled or paid? A. Never.

Q. Did you ever make any arrangement or agreement with Mr. Doyne or any one else on be-
30 half of yourself or the Hudson Milling Company to the effect that this claim against Mr. Higgins was cancelled, paid or adjusted in anywise? A. Never.

Q. Did you ever, in the presence of Mr. Doyne’s son, who testified here yesterday, admit or agree that the Higgins account was paid, cancelled or adjusted? A. Never have.

Q. Did you ever have any such conversation
40 in the presence of young Doyne? A. Never; not a word has been said.

Julius Berghoff—Direct.

Q. Did you have in your possession duplicates or copies of Exhibits D-1 and 2, which Doyne—
young Doyne—said yesterday you had copies of
and he saw in your possession? A. Never had.

Q. Were any such statements made out under
your direction and upon your orders as those two
statements, Exhibits D-1 and 2? A. Never; I
never saw them to my knowledge until yesterday.

Q. Did you before the sale of the receiver have
a conversation or conversations with William J.
Doyne at which and during which either you or
Doyne discussed the buying up of the claims and
the collection of the outstanding bills due the
Doyne Lumber and Milling Company, and during
which conversation or conference Mr. Doyne said,
or any one else said, that there was to be with-
held or eliminated from the bills due the Doyne
Lumber and Milling Company the Higgins claim? 20
A. No such thing.

Q. Did Mr. Doyne ever say to you that that
claim was settled in the way he has described
here before this court and jury? A. No, sir.

Q. When did you first learn that, when did
you first learn that this claim was settled by work
done by Higgins at the mill and at Mrs. Doyne's
house? A. From Mr. Higgins.

Q. When? A. About the following December, 30
when he left, that is the first time that I have
learned that he has done work for Mrs. Doyne.

Q. Was that after Mr. Hudspeth had sent him
a letter or letters? A. No, before.

Q. Was it before? A. Before.

Q. And then after you had learned it from Mr.
Higgins did you see Mr. Hudspeth? A. I did.

Q. And was it then Mr. Hudspeth wrote Mr.
Higgins? A. Yes, sir.

Q. Now as to the leaf or leaves in the ledger 40

Julius Berghoff—Direct.

that appear to have been extracted and put back again, did you do that? A. Never knew a th—

Q. Was it done under your directions or with your knowledge? A. Never knew a thing of it until the accountant drew my attention to that about the first of December, at the Union Trust Company.

10 Q. Now this book that was presented yesterday by the young bookkeeper, did you have anything to do with the extraction of the leaves from that book? A. Never heard of it until yesterday. I did not know there was any such book in existence.

Q. Did you ever see that book before yesterday? A. I might.

20 Q. Did you ever examine it before? A. I never heard of it until yesterday for the first time, that they took the leaves out.

Q. What is your explanation, Mr. Berghoff, as to your negotiations with Doyne in connection with taking over this Doyne plant?

MR. DEMAREST: I object as not proper rebuttal.

MR. HUDSPETH: Well, probably it is a little too general.

30 Q. When you had a talk, if you had a talk, with Mr. Doyne, regarding the taking over of the claims, and a settlement of fifty cents on the dollar, when was that, and for what purpose was that conversation or were those conversations? A. I could not say exactly when.

Q. Was it before the receiver was appointed? A. It was both before and after.

40 Q. Do you remember his negotiations with you before the insolvency? A. Yes; I brought him over to Judge Hudspeth's office, and when he

Julius Berghoff—Direct.

told me about the stock of Simon Doyne, after explaining it to me, I told him that I did not think that such thing could be done without going into a receiver first.

Q. In other words, Simon Doyne had stock as a stockholder, and was not a party to the negotiations, wasn't that the fact? A. Simon Doyne was not in existence then.

Q. And you would not take over without Simon Doyne's stock? A. Exactly; and I brought him over to Judge Hudspeth's office and I would not have it unless I could get hold of his stock; and he told me there has no stock been issued.

Q. Then you found out Simon Doyne did have some stock? A. At that time Simon Doyne—

MR. DEMAREST: I object as not proper rebuttal. I think he is going into a whole lot of new matter that has not appeared.

THE COURT: As against that objection I will permit it.

Q. Do you remember seeing Mr. Demarest,—Mr. Hudspeth and you seeing Mr. Demarest about that stock of Simon Doyne's? A. I could not say; I think I have seen—

Q. Do you remember Mr. William J. Doyne's talk with you about trying to gather in all the claims? A. He got—I do know that after we have taken over, there was not one half of the claims that he claimed there was there; it was not by half as large.

Q. Do you remember Mr. Goldenhorn being present during these negotiations in Mr. Hudspeth's office with Mr. Doyne?

MR. DEMAREST: One moment.

A. I do.

Julius Berghoff—Direct.

Q. What occurred at that time and occasion?

A. Well, we were over there I think two or three times—

MR. DEMAREST: I object. I do not think this is proper rebuttal examination.

THE COURT: I will admit it.

10 A. Well, we were negotiating for the liquidation of his company, and Mr. Goldenhorn suggested just before the articles were all—before we consummated the articles, or they were signed—that there might be some claims against Mr. Doyne which do not amount to much, and he would like to have that wiped out off the books after.

Q. And what did Mr. Doyne say as to the claims which were against him? A. I do not re-
20 member, but I—

Q. As to size or extent of them? A. I think that Mr. Goldenhorn has done all the talking, but he says they do not amount to much, small items.

Q. Did Mr. Goldenhorn have a list of claims or alleged claims with him then, due the Doyne Lumber and Milling Company? A. I could not say whether he had it at that time. I have seen it.

30 Q. Don't you remember the question was how much the assets of that concern were worth? A. Exactly.

Q. As against their liabilities? A. Yes.

Q. And don't you know Mr. Goldenhorn was there, stating what those assets were? A. He did, but I do not remember whether I have seen the list at that time.

Q. But he was there? A. Oh, he was there,
40 and did the whole thing.

Julius Berghoff—Cross.

Q. And didn't he give you a lump figure— A. Yes, sir; a big lump.

MR. DEMAREST: I object to the leading questions.

THE COURT: Objection sustained.

Q. And wasn't it in view of the suggestion of Mr. Goldenhorn that there were some small claims against Mr. Doyne which should be wiped out, that the paragraph was put in the agreement that you made finally. A. Exactly. 10

CROSS EXAMINATION BY MR. DEMAREST:

Q. Then before you made your agreement of March 8th, 1909, with Mr. Doyne and Doyne's wife, you did consider what debts were due the Doyne Lumber and Milling Company, and discussed the matter with Mr. Doyne? A. I have cons— Mr. Doyne spoke to me what the amounts due to the company and by the company was a number of times first before the receiver was appointed, and Judge Hudspeth— 20

Q. After the receiver was appointed and when you had your negotiations before the assets of the company were sold by the receiver to Mr. Weller, your agent— A. Yes.

Q. —didn't you and Mr. Doyne have a conversation to find out how much the company owed? Didn't you? A. Had it with Mr. Goldenhorn. 30

Q. Did you have any conversations with Mr. Doyne to find out how much the company owed? A. Such thing is possible, but I do not remember of any.

Q. Didn't you consult with Mr. Doyne as to how many of the debts of the company could probably be bought up for less than face value from the people to whom they owed money? A. All I 40

Julius Berghoff—Cross.

knew was what he said; he said that the claims could be bought at fifty cents on the dollar, all the claims that were not mentioned in the particular claim.

Q. Didn't you buy up the claims yourself and see some of the creditors of the company? A. Not one.

10 Q. And without talking with Mr. Doyne personally to find out how much the debts of the company were, you went into this contract of March 8th, 1909? A. We talked—the most of the talking was with Mr. Doyne's attorney, but his debts were much larger than he represented.

Q. And didn't you look into how much was due to the company? A. Yes, that is what Mr. Goldenhorn gave me, or wrote me.

20 Q. And didn't you look into the books? A. Never saw the books; never saw them.

Q. Did you have a statement of the accounts? A. The statement that Mr. Goldenhorn had, I seen the statement that he had.

Q. And a statement that you had did not contain the name of William Higgins, did it? A. Did not contain the name of William Higgins?

Q. Yes. A. Oh, yes it did.

30 Q. Are you sure of that? A. Quite sure.

Q. Did you ever have any statement at that time? A. Mr. Goldenhorn had it.

Q. Did you ever have any yourself? A. I never had any.

Q. Never given any statement? A. Never had one.

40 Q. And did you, Mr. Berghoff, go into this arrangement to buy the stock of the Doyne Lumber and Milling Company, to advance moneys to buy up the claims that it owed without examining the

Julius Berghoff—Cross.

books of the concern and how much was due to it? A. I never saw the books; I never saw the books until after I came over to the mill. I do know there was one claim against Roberson & Demarest amounting to a couple of thousand dollars, and afterwards it was denied.

Q. Then did you never inquire from Mr. Doyne how much the company owed and how much it would cost you to buy up the claims that the company owed,— A. Why, he— 10

Q. One moment. I am not through yet. —and how much there was due to the company on the other hand? A. Why, he had a statement—he had a list of accounts.

Q. I say, did you discuss it with him? A. Such thing is possible.

Q. And didn't you at that time discuss the Higgins account, and didn't he tell you there was nothing owing on it? A. Not a word. He tried to make out as large as he possibly could. 20

Q. You put a large amount of money in this thing to buy up the claims the Doyne Company owed? A. Yes.

Q. And you say you did that without having any talk with Mr. Doyne as to what accounts on the books of the company were good and what were bad, and how much it would cost you to buy up the claims that the company owed? A. I have done everything through Judge Hudspeth's office. In fact I paid—I was too busy—I done it through his suggestions and advice, and I—whatever he advised me to do, I took if for granted he knew all about it. 30

Q. Did you see Judge Hudspeth examined or do you know whether Judge Hudspeth examined the books to find out how much the assets and liabilities of the Doyne Lumber and Milling Com- 40

Julius Berghoff—Re-Direct.

pany were? A. I do not know whether he did or not. I know I never saw the books until after I got into the office.

Q. And then you, through Weller, as your agent, purchased the stock of the company thus expressed in the agreement of March 8th, and purchased the assets of the company from the
 10 receiver with only the knowledge of the debts and liabilities that you have just mentioned? A. I bought them just by the advice of Judge Hudspeth.

RE-DIRECT EXAMINATION BY MR. HUDSPETH:

Q. Mr. Berghoff, you were familiar with the plant, were you not? A. Yes, sir.

Q. You knew what this plant consisted of,
 20 the machinery and the yards and the capacity of business? A. Yes.

Q. And you were a practical man, were you? (No answer.)

Q. Now, the first step was to acquire that as a going concern, wasn't it, as a mill that was running? A. Well, now, I tell you, Judge, you see there was a consideration going—

Q. I do not care anything about that. The
 30 object was to get that plant as a going concern? A. Yes—start it going.

Q. And it was to be sold by the receiver? A. Yes.

Q. And everything was to be wiped out so far as the indebtedness was concerned, and you did buy it from the receiver, didn't you? A. Yes.

Q. And got the plant free and clear? (No answer.)

Julius Berghoff—Re-Cross.

RE-CROSS EXAMINATION BY MR. DEMAREST:

Q. Now that was not a going concern at the time you bought it, was it? A. Because the receiver stopped it for a little while.

Q. The receiver had shut down the business, hadn't he, shut down the mill? A. That is what I understood, that it was shut down for a short while.

10

Q. And the mill was not running at the time you, through Mr. Weller, bought the business, was it? A. Let me see; I think it was going; I think it was going when we bought it.

Q. Well, the receiver had kept it closed down, hadn't he? A. It was in the hands of the receiver, and I think they were running it.

Q. Now all that you bought was the claims against the company and the good will of the concern, and the books of account and machinery, and expected to start up a new business with that outfit, isn't that true? A. Please repeat that; I cannot follow it.

20

(Question repeated.) A. Well, I bought all the accounts that was on the books of the company.

Q. You bought out the business with the intention of decreasing its debts, starting with the plant that you had, and beginning a new business in the name of a new company, didn't you?

30

THE COURT: He could not answer that question because he did not buy the claims against the company at all; he bought the claims the company had against others. He did not buy the claims against the company.

MR. DEMAREST: I think your Honor is wrong about that.

40

Julius Berghoff—Re-Cross.

MR. HUDSPETH: He is not wrong.

MR. DEMAREST: The order confirming the sale I read the other day recites that Mr. Berghoff has purchased the debts of the company.

10

THE COURT: The claims that the company had against others, not claims against the company. What he bought is evidenced by the bill of sale, and that is the claims that were owing to the company against others.

20

MR. DEMAREST: No, the debts of the company to its creditors could not be passed by the receiver. What I am pointing to is that the order of the Court of Chancery, permitting the receiver to sell the assets to Mr. Weller, recites that Mr. Berghoff had already purchased the claims that the company owed for a less amount than they did owe,—less than their face.

MR. HUDSPETH: In other words they had to buy the creditors out in order to have them come in and say, "We are paid," and get the sale confirmed.

THE COURT: I understand.

30

40

I. F. Goldenhorn—Direct.

I. F. GOLDENHORN, recalled, testified in rebuttal as follows:

DIRECT EXAMINATION BY MR. HUDSPETH:

Q. Mr. Goldenhorn, you are the Mr. Goldenhorn referred to by the preceding witness, Mr. Berghoff, who attended at Mr. Hudspeth's office in connection with the negotiations he spoke of? 10
A. Yes.

Q. Who retained you? A. I was asked by Mr. La Maire to interest myself in behalf of Mr. Doyne to see what I could find out about the situation with respect—

Q. Who was Mr. La Maire? A. Mr. La Maire is a friend of mine who lived on Lembeck Avenue, in the Greenville section of Jersey City, where I lived. 20

Q. And he was a credit man, was he not; that was his profession? A. Yes.

Q. Did you take hold of the Doyne Lumber and Milling Company's business matters at that time under Mr. La Maire's directions?

MR. DEMAREST: I object on the ground that yesterday morning Mr. Goldenhorn was produced and testified he was the attorney of Mr. Doyne, and Mr. Doyne at that time objected to Mr. Goldenhorn's violating the confidential relations existing between them, and at that time your Honor ruled his evidence out. I think that should still stand. 30

THE COURT: Yes; I am going to admit it now because he took charge of it under Mr. La Maire's request. You may cross examine, if you wish, to find out if he then represented Mr. Doyne. 40

I. F. Goldenhorn—Cross.

MR. DEMAREST: I should like to, before he goes into it.

CROSS EXAMINATION BY MR. DEMAREST:

Q. Did you represent Mr. Doyne in any of these transactions? A. Mr. Doyne absolutely repudiated everything that I did, said that I was never
 10 his attorney, that he would not pay me, and that he did not want to have anything to do with me.

Q. Did Mr. Doyne retain you, as you thought, to do any work for him? A. No, sir.

Q. Never did? A. Never retained me, never gave me any money, and never told me to be his attorney. I was there all the time in the interest of Mr. La Maire, whom I supposed was a
 20 friend of his and wanted to see him out of his troubles.

Q. And you did not consider at any time during these transactions then, either before or after Mr. Doyne refused to pay your bill, that you were Mr. Doyne's attorney? A. I never considered that I was his attorney at all. I was acting as an intermediary to straighten him out; and I did.

Q. Did you ask Mr. Doyne to pay you for your services? A. I did.

30 Q. Well, then, if you thought you were not acting for Mr. Doyne why then did you render him a bill for services rendered by you? A. Because at the conclusion of all our controversies, which lasted a considerable time, and took an awful lot of time, day and night, Sundays and holidays, I thought in view of the fact that he was being put on his feet that he might at least do something for me, and he said, "I repudiate everything
 40 you have done. I never recognized you as my attorney; I never wanted anything to do with you.

I. F. Goldenhorn—Cross.

What you did you do for the Union Trust Company." I said, "I did not appear for the Union Trust Company, I appeared for Mr. La Maire to do what I could to help you, and now that I have successfully completed this work it seems to me you might do the right thing by me." He said, "I will have nothing to do with you."

Q. When Mr. La Maire engaged you, as you said he did, did you suppose he was engaging you to act for him or Mr. Doyne? A. Yes, I did. 10

Q. You did what? A. I understood Mr. La Maire was retaining me and that he, Mr. La Maire, was going to get rather a nice commission out of it if the thing went through successfully.

Q. I do not think you answer my question. Did you at that time when Mr. La Maire engaged you suppose you were being engaged for Mr. La Maire himself or Mr. Doyne? A. I supposed that I was representing both Mr. La Maire and to do what I could for Mr. Doyne. 20

Q. Did you think you were representing Mr. Doyne? A. I was looking after his interests, if you mean by representing him, that, yes.

Q. And did you think that looking after his interests was within the line of your employment in the matter? A. Why, it certainly was. I was there for that purpose; I was there for that purpose, to do all I could for him. 30

MR. DEMAREST: I object.

THE COURT: I overrule the objection. The relationship of attorney and client did not exist between Mr. Goldenhorn and Mr. Doyne, and apparently never did exist, and when it was claimed that it did exist it was expressly repudiated by Mr. Doyne; and a privileged communication that is 40

I. F. Goldenhorn—Cross.

ruled out is the communication that exists between an attorney and client, and that relationship only exists where there is a contract between the two. In this case it is perfectly manifest that there never was any and that Mr. Doyne himself expressly repudiated it.

10

MR. DEMAREST: I ask an exception.

THE COURT: Of course.

BY MR. HUDSPETH:

Q. In connection with the negotiations you met Mr. Berghoff, I understand? A. I did, yes, sir.

Q. Was Mr. Hudspeth present at any of these times? A. Yes numerous times. The president of the Union Trust Company was present; Mr. Doyne was present; Mrs. Doyne was present.

20

Q. Did you show Mr. Berghoff and Mr. Hudspeth a reputed statement of the assets of the Doyne Lumber and Milling Company? A. I did.

30

Q. Do you recall substantially what that statement contained regarding the bills payable to the Doyne Lumber and Milling Company? A. It contained a number of claims, Judge Hudspeth; I can remember the names of some of the people that were on that statement. I made up the statement numerous times and submitted it, and I tried to make the statement as big as I could, with the idea of inducing the Union Trust Company to take it over.

Q. Can you mention some of the claims of substantial amounts? A. Yes; there was a claim there of Roberson & Demarest—I think that was the largest. Then there was a claim of Cain and Dugan; then there was a claim of Higgins.

40

Q. Which Higgins? A. I do not know what his first name is; Higgins, that is all I know about

I. F. Goldenhorn—Cross.

it. Then there were a number of claims against small people. Then there were some other small personal claims of Mr. Doyne, and Mr. Doyne wanted me to get the purchaser to let up on those small claims, and Mr. Berghoff said that those small claims they would let up on.

Q. Those were claims he represented that were upon the books against William J. Doyne? A. 10
Personally.

Q. And did not amount to much, you say?
A. They were very small claims. I do not believe there was any of them over seventy-five or eighty dollars.

Q. Was anything said or suggested by Mr. Doyne or yourself that there was to be eliminated or charged off of the books a claim for seven or eight hundred dollars appearing against one William F. Higgins? A. Never. There could not 20
be anything like that because the Union Trust—

MR. DEMAREST: I think that is answered conclusively.

A. That answers it,—never.

CROSS EXAMINATION BY MR. DEMAREST:

Q. At what time was this employment? A. 30
It was in 1910—the last part of 1909 and the early part of 1910. I remember it took over the holiday period, and I think I gave up one holiday, whether it was Christmas or New Years, to it.

Q. Had the receiver at that time been appointed of the Doyne Lumber and Milling Company, do you know? A. Yes, the receiver had been appointed. You represented the receiver, Mr. Annett, and I was at your office a number of times about it, and got some statements from your office.

Q. Over what space of time did your services 40

I. F. Goldenhorn—Cross.

extend? A. I should think it took up to the early part of the month of March or the latter part of the month of February, 1910.

Q. And all this time you were representing Mr. La Maire? A. Well, he had asked me to intervene. I was appearing for him, and I assumed at that time if I made a success of the situation
10 that I ought to likewise look to Mr. Doyne for some compensation.

Q. I am not asking you about that. You were appearing for Mr. La Maire in this transaction—
A. I was doing all I could, yes, sir.

Q. —from the latter part of November or December, 1909, to about the first of March, 1910?
A. Generally about that time, I should say; yes, sir.

Q. Now did you have the books of account?
20 A. I did not, no. Mr. Doyne—

Q. You made up the list you say you had? A. Mr. Doyne made up the list for me; gave me the names and I wrote them down. I guess I must have written at least ten copies in lead pencil at different times; I would submit them to Mr. Ludlow, the president of the bank, and he would take them away. Then I would submit them to Judge Hudspeth, then I would submit
30 them to Mr. Berghoff, and I do not know how many times I wrote out those lists, and each time we tried to make the list as big as we could, as favorably as we could, with the view of inducing the Union Trust Company, through Mr. Berghoff, to take this plant over.

Q. Now, the negotiations ended at the first of March, 1910, didn't they? A. I am saying about that time; I am giving you my best recollection.

Q. You did not represent Mr. Berghoff or anybody else in the matter, after the deal between
40 Berghoff and Doyne had been consummated, or

I. F. Goldenhorn—Cross.

agreed upon? A. I was there at the time the deal was consummated. I was there that day when Mr. Doyne and his wife came down to sign over the stock. I was there the day Judge Hudspeth dictated the contract for the purchase of the plant. We were there three or four hours on a Friday afternoon, and on a Saturday morning Mr. Doyne came to my office and took all his papers away. 10

Q. Was Mr. La Maire there at that time? A. He was not, no.

Q. How many debtors of the Doyne Lumber and Milling Company appeared upon this list that you had? A. I think about seventeen or eighteen; that is my best recollection.

Q. About seventeen or eighteen? A. Yes.

Q. Have you a copy of that list you prepared? A. Every paper that I had in the matter, every single paper, including the envelopes or jackets in which the papers were, were taken from my office by Mr. Doyne. He has every one of them in my handwriting on yellow slips of paper, and on white slips of paper, and typewritten copies and everything. 20

Q. Then your recollection is that at that time, while the concern was in the hands of a receiver, this list of debtors of the Doyne Lumber and Milling Company amounted to only seventeen or eighteen in number? A. That is the list of those who owed money to the Doyne Lumber and Milling Company, yes, sir. The list of the other creditors, there were three or four sheets of those. I had those too. 30

Q. There were sheets, were there not, showing live claims, and sheets showing dead claims, with the names of the debtors of the company, of each class? A. No, there wasn't anything like that sir, no. 40

I. F. Goldenhorn—Cross.

Q. You put them all in as live claims, did you?

A. I put them all in the way Mr. Doyne told me to put them in for the purpose of inducing the Union Trust Company to buy the establishment.

Q. Now you remember the name of Higgins was there? A. I am positive about that sir, positive about it.

10 Q. On which side of the account was Higgins' name, as a debtor or creditor of the company?

A. That Higgins owed the Doyne Lumber and Milling Company money.

Q. How much? A. I do not recall the figures, Mr. Demarest, but my best recollection I can give you of that is that it was somewhere around five or six hundred dollars. That is my best recollection. Now, it may be less and it may be more. And I remember the claim of Roberson & Demarest. I made a remark about that. I can tell pretty near what that was.

20 Q. What was it? A. Around two or three thousand dollars; and I wondered how a law firm could owe so much money to a lumber company, and whether they were in the building business; and I had some other thoughts about it; and then there was the claim of Cain & Dugan—

Q. Wasn't the claim of Roberson & Demarest for two thousand dollars or thereabouts, a claim against the Doyne Lumber and Milling Company?

A. I could not say whether it was or not. I remember that there was a claim—

Q. Now you do not remember whether it was a debtor's claim or a creditor's claim, do you? A. Yes, I do. My best recollection is that you owed that money to the Doyne Lumber and Milling Company.

40 Q. For what? A. I do not know; that is—I had it in my mind; I do not recall what it was for. That was my best recollection, and I know

I. F. Goldenhorn—Cross.

it was due to the Doyne Lumber and Milling Company.

Q. Now you are testifying in this trial entirely from your best recollection, which is rather hazy, aren't you? A. I never admit haziness at any time.

Q. You are a very active practitioner, aren't you? A. I have never characterized myself as a very active practitioner. 10

Q. You are a busy lawyer? A. I do a little now and then, make a living.

Q. Are you able at this time to remember the details of these statements, and the names and amounts of the persons who owed the Doyne Lumber and Milling Company money? A. No; I cannot give them all to you, Mr. Demarest. In that respect my recollection is hazy. I can only give you my best recollection. 20

Q. Your recollection is hazy? A. I say with respect to all the figures. Now, there was the Cain & Dugan claim, and then there were some Polish names, which I could not think of remembering, nor could I think of remembering the amounts. I could only give you my best recollection of it.

Q. I show you a paper and ask you to look over the names on there—I do not ask you if that is the original paper you had, but a copy of it—but aren't those the names of the parties that appeared on the paper you mentioned, and the amounts? A. No, that does not appear to be the paper. That seems to me to be— 30

Q. Well, I do not ask you if that is the paper. A. That seems to be—

Q. Listen to the question, please. I ask you to examine the paper to see whether the names on that paper, and the amounts, do not, according to the best of your recollection, correspond with the 40

I. F. Goldenhorn—Re-Direct.

paper that you say you had in your hands at that time?

MR. HUDSPETH: If that paper does not contain the name of Higgins, or the two or three names he specially mentions, then I object to it as not serving any purpose, and as immaterial and irrelevant.

10

THE COURT: What is the point of it?

MR. DEMAREST: The number of people; whether he is not entirely mistaken in his testimony.

THE COURT: I will permit it.

A. No; that does not seem to be the paper.

Q. No, I do not ask you if that is the paper.

A. I mean that does not seem to me to be the list.

20

That looks to me to be more like the claims of the people whose claims we were trying to buy, who had claims against the Doyne Lumber and Milling Company.

Q. Was the paper you had made up in that form (handing witness a paper)? Look through it; don't take the first page only. A. No, sir.

RE-DIRECT EXAMINATION BY MR. HUDSPETH:

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Q. Mr. Goldenhorn, referring to these claims, and particularly that of Roberson & Demarest, do you remember that being discussed between yourself, Mr. Doyne and Mr. Hudspeth and Mr. Berghoff? A. Yes, sir, I do.

Q. Do you remember Mr. Doyne's explanation of that and his insistment? A. I do not remember what his explanation was. I know it was discussed, but what his explanation was I do not remember.

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Julius Berghoff—Direct-Cross.

JULIUS BERGHOFF, recalled, testified in rebuttal as follows:

DIRECT EXAMINATION BY MR. HUDSPETH:

Q. Do you remember at the conference with Mr. Doyne and Mr. Goldenhorn, amongst other claims a claim of Roberson and Demarest being discussed? A. I do.

10

Q. Was that a claim for against them, in their favor or against them? A. It was against Roberson & Demarest.

Q. Do you remember what Mr. Doyne said about the claim? A. Yes.

Q. What? A. It was for money collected by them and never turned over.

CROSS EXAMINATION BY MR. DEMAREST:

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Q. It was not for any goods bought from the Doyne Lumber and Milling Company then, was it? A. I am telling you only what he said. He said it was for money collected and not turned over.

Q. When did he tell you that? A. When we were negotiating for the purchase.

Q. Oh, for the purchase? A. Yes.

Q. And when did you get the knowledge that there was a claim of Roberson & Demarest for two thousand dollars? A. It was the largest claim we had over there.

30

Q. And where did you get the knowledge from? A. From the paper Mr. Goldenhorn had.

Q. Then you did, Mr. Berghoff, examine into the claims that were due to the Doyne Lumber and Milling Company, and ask Mr. Doyne about them, didn't you? A. I have examined the paper that Mr. Goldenhorn showed me, but I have never examined the books, never seen the books.

40

Julius Berghoff—Cross

Q. But you did talk to Mr. Doyne about the Roberson & Demarest claim, didn't you? A. I think Judge Hudspeth did; possibly I did too.

Q. Didn't you say a moment ago that you did? A. Yes, I know I did.

Q. Were you right or wrong when you said that? A. We have talked about it after, because
10 we used it—ordered Judge Hudspeth to bring suit.

Q. You talked about it as you said a few moments ago, at the time you were negotiating with Doyne? A. Yes.

Q. And you talked with him about other things at the same time, didn't you? A. Possibly. Now, I could not say, but I can tell you one—

Q. One moment. Well, go on; I do not want
20 to shut you off. A. The claim against Roberson & Demarest was particularly to be remembered, because there was also a claim of Roberson & Demarest against the Doyne Lumber and Milling Company, and Mr. Doyne said that our claim—that that will not be paid; we do not need to pay that—we were buying all the claims—he said this don't need to be purchased because our claim is much larger than theirs.

Q. Mr. Doyne at that time told you about the
30 Roberson & Demarest claim, that there were moneys collected by Roberson & Demarest for the Doyne Lumber and Milling Company, and that that amount of money had been paid out on notes that the Doyne Lumber and Milling Company were liable for, didn't he? A. No, sir; no, no. I do not know anything about that. I have heard you say that afterwards.

Q. Well, didn't Doyne tell you it at the time?
40 A. No, sir; no.

Q. How many claims besides the Roberson &

Robert S. Hudspeth—Direct.

Demarest claim, which you say you discussed with Doyne while the negotiations were going on, did you discuss with him? A. We did not discuss any particular claim, with the exception of the Roberson & Demarest.

Q. That is all. A. Because there was two claims one way, and the other the other.

10

ROBERT S. HUDSPETH, called and sworn on behalf of the plaintiff, in rebuttal, testified as follows:

THE WITNESS: I am a member of the Bar of this State—

MR. DEMAREST: Ask yourself the questions, Judge, please. That is what I was required to do yesterday.

20

BY MR. HUDSPETH:

Q. Were you present at any of the conferences or negotiations between Messrs. Doyne, Goldenhorn and Berghoff? A. Yes.

BY MR. GOLDENHORN:

Q. When was that, Judge Hudspeth? A. That was during these negotiations; I cannot say exactly when.

Q. Was anything said about the claim of Roberson and Demarest in your presence at that time? A. Yes; particularly so.

30

Q. What was said? A. Mr. Doyne insisted that there was a claim of some proportion—I have forgotten the amount—against Roberson & Demarest.

MR. DEMAREST: If it is the Roberson & Demarest claim he is going into I object to that as immaterial.

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Robert S. Hudspeth—Direct.

Q. Was there any other claim—

THE COURT: I think it is material, because it will tend to corroborate what was said by Mr. Goldenhorn in respect to the other claims. You have shown that he was hazy in his recollection. Now they have a right to show what the fact is.

10

Q. Just tell us what was said with respect to the claim of Roberson & Demarest at that time by Mr. Doyne. A. Doyne's insistent was that they had collected moneys which they had not turned over, and I did not pay much, or place much, confidence in the assertion, and I think at the time I did not take that account into consideration in the proposed turnover, and Doyne insisted that if there was a turnover that that account should be pressed.

20

Q. Do you recall, Judge Hudspeth, a list being presented by Mr. Goldenhorn of the claims that were owed to the Doyne Lumber and Milling Company from people? A. I recall that Mr. Doyne and yourself had several lists, several times, in regard to the assets, outstanding claims.

30

Q. Do you recall Mr. Goldenhorn or Mr. Doyne in your presence and in the presence of Mr. Berghoff at these conferences at your office, asking that Mr. Doyne be excused from the payment of some small claims that were due by him to the company? A. Some such dis—

MR. DEMAREST: I object as leading.

THE COURT: I sustain the objection. He may ask him what was said.

Q. Do you recall anything being said by Mr. Doyne about any personal claims of his? A.
40 Yes, sir.

Q. What was said by him or Mr. Goldenhorn

Robert S. Hudspeth—Direct.

in your presence? A. He said there were some personal claims against Mr. Doyne or Mrs. Doyne, I have forgotten which, that they did not propose paying, and that it would be wiped off the books. They discussed as to the extent of those claims, and the idea was that they were small.

Q. Was there ever any discussion in your presence, and in the presence of Mr. Doyne, about exempting from collection any claim as large as a seven hundred or a five hundred dollar claim? 10
A. Not at all.

Q. Of anybody? A. Not at all, for this reason; The question was how large the assets were, in order that a loan might be secured from the Union Trust Company, and to eliminate an asset of eight hundred dollars would not have been considered for a moment at that time. I want to say, in justice to Roberson & Demarest, the reason I take the stand is that it was to corroborate what Mr. Goldenhorn said in regard to the discussion of the claim. But I saw Judge Roberson regarding this claim—I first wrote him and then saw him—and I think I spoke to Mr. Demarest—but Judge Roberson said that the offsets against the claim were sufficient or more than sufficient to wipe it out, and I did not do anything further about it after the turnover was made. 20

Q. But, Judge Hudspeth, you are positive that the claim was a claim of about two thousand dollars due on a statement from Roberson & Demarest to the Doyne Lumber and Milling Company? 30

MR. DEMAREST: I object to that as leading.

A. Oh, yes, it was a large amount, I cannot say how much, that the Doyne Lumber and Milling Company claimed to be due by Roberson & Demarest to it, and it was put on this list as one of the legal assets. 40

Robert S. Hudspeth—Cross.

CROSS EXAMINATION BY MR. DEMAREST:

Q. Judge, you were acting at that time for whom? A. I was acting at that time for Mr. Berghoff and the Union Trust Company.

Q. And when was that in relation to the completion of the negotiations between Doyne and Berghoff, before or after? A. Oh, they had negotiations preceding the receivership, after Simon Doyne left, got out.

Q. Now after Simon Doyne got out of the concern, and before it went into the hands of the receiver, there were negotiations first carried on between Berghoff and Doyne, were there not? A. Between Mr. Hudspeth and Mr. Doyne, in order to try and find a purchaser or some one to take over the plant—

Q. Oh, were you representing— A. —and I got Berghoff into the matter finally.

Q. And then after the appointment of a receiver when were those negotiations resumed? A. Why, almost immediately. The idea was this, to try and take over the plant as a going concern, and in order to do that Berghoff had to arrange to buy up the claims.

Q. That is the debts of the company, you mean? A. Doyne had to assist him. The debts of the company, and they were trying to buy them up at fifty cents on the dollar, and I secured the money for them to enable them to carry that thing out.

Q. By a loan from the Union Trust Company to Berghoff? A. Yes.

Q. And you drew the contract of March 8, 1910, didn't you? A. Yes.

Q. And Mr. Weller was a clerk in your office? A. Simply a go-between, a medium.

Robert S. Hudspeth—Cross.

Q. And acted for Berghoff in the matter as agent? (No answer).

Q. Now there were conferences at which Mr. Berghoff and Doyne and yourself attended, weren't there? A. Oh, yes, a number of them.

Q. At one of which they discussed this Roberson and Demarest account, didn't they? A. Well, that was discussed several times.

10

Q. And they discussed the other accounts, too, didn't they? A. No; Mr. Berghoff relied entirely apparently, upon Mr. Hudspeth and Mr. Doyne and the statements presented by Mr. Goldenhorn. He did not see the books; I never saw the books.

Q. All the conferences between Berghoff and Doyne were not carried on in your presence, were they? A. I cannot say as to that.

Q. No; and you do not know what occurred except at the conferences where you were present?

20

A. I do not know, but I know the result of them.

Q. And can you—

THE COURT: Did you finish your answer?

A. Yes.

Q. Can you as a witness positively state that at these conferences where Doyne and Berghoff and yourself were present, where the taking over of the assets of the corporation and the purchase of its debts were discussed, that the only claim due to the company discussed was that of Roberson & Demarest? A. Yes; I will tell you why, Mr. Demarest. This matter was predicated entirely upon the lists and statements made by Doyne to Mr. Hudspeth. Mr. Berghoff was rather passive over the whole thing, and the Union Trust Company was a creditor to a large extent of Mr. Doyne, or the Doyne Lumber and Milling Company; and I wanted to save this plant as a grow-

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Robert S. Hudspeth—Cross.

ing concern, and to save the Union Trust Company, and I finally persuaded Berghoff to get in and take over this matter and make an arrangement with Doyne, who was a practical man, to carry on the business, and I raised the money, and he left everything to Mr. Hudspeth.

10 Q. Now, Judge, will you look at this paper that I show you and tell me whether that was not made up in your office? A. I do not recognize any such type as ~~that~~ or color of print that ever was made up in my office.

Q. Let me call your attention to the items—to Hudspeth and Lane—cash paid Hudspeth and Lane—on the third page—and cash paid Roberson and Demarest. A. Six hundred dollars.

20 Q. Paid Roberson and Demarest six hundred dollars. A. Three times as much as paid Hudspeth.

Q. Didn't you get yours? What did you get out of it.

MR. GOLDENHORN: I object.

Q. Didn't you, Judge, have a copy of that statement made up— A. No, I did not.

30 Q. —and use in your negotiations with the Union Trust Company? A. Why, I cannot say. I do not recognize this statement at all. I know we had quite a number of statements. We would discover some new claims and then we would discover some new debts. Doyne was not giving us too much, I will say that—and I had a sort of pumping process which I employed and tried to get at the facts, and every little while we would get a new statement.

40 Q. And in trying to get at the facts, Judge, didn't you inquire into the names of the debtors of the Doyne Lumber and Milling Company? A. Why, yes, but I cannot tell—

Robert S. Hudspeth—Cross.

Q. Do you mean to say you carried on all these negotiations, that you had so much difficulty in finding out what the condition of the business was, and still that you did not look over the books and find out what claims were good and what claims were bad, and ask whether they were paid or were not paid, with the exception of the claim of Roberson and Demarest? A. I mean to say most positively that there never was any arrangement or suggestion that a claim of seven hundred dollars should be eliminated and applied to Mr. Doyne's account. 10

Q. I did not ask you that. Will you please answer the question?

(Question repated).

A. I do. I mean to say that I had in view what the corporation owed more particularly than anything else—how much we would have to pay the creditors, and then I knew from what Mr. Berghoff knew, the value of the plant. As to what was due the concern, that was problematical. They might put down ten thousand dollars and we would only collect one thousand dollars; and I was negotiating upon the basis of what I could settle with the creditors for and what the value of the plant was. 20

Q. Wasn't it necessary if you were to carry out this scheme of purchase and paying off the claims of the creditors of the concern, that you had, in order to find out how much money had to be raised for that purpose, to find out what the assets of the corporation were worth in order that you knew how much money you could obtain from the assets and apply it to the payment of the debts? A. No, my dear fellow, that could not be so, because I had to raise enough money right then and there to pay the creditors, and we would 30 40

Robert S. Hudspeth—Cross.

10 have to take care of the concern afterwards. I was not paying any attention to what was due to the concern. In regard to what money I had to raise, I had to raise the money right down and hand it over to the receiver—which I did; and I want to say that I was not anxious about the claims due, because I did not press you, I did not bother you about your thousand dollars, or two thousand dollars; I did not bother you. When you said you did not owe it I did not pay any attention to it; yet we were two thousand dollars out.

Q. You stated a moment ago you knew Roberson and Demarest did not owe that claim? A. They said they did not; I did not press it. There was two thousand wiped out.

20 Q. But you would not press a claim that you thought was not due? A. But Mr. Doyne said it was due and that was a good asset, and we were dealing on that basis; but I found out it was not any good.

Q. You found out it was not any good? A. From what you said; from what you said.

TESTIMONY CLOSED.

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Colloquy.

MR. DEMAREST: If your Honor please, there is one matter I think before I go to the jury, that I would like to bring to the attention of the court. There was a little occurrence here yesterday morning, which to me at least would be rather regretful, and

I have asked the stenographer to turn to the minutes and find what occurred there, and I find that in objecting to the ques- 10
tion of Judge Hudspeth I used these words: "I think the whole examination so far—I have not objected to it—has been leading under the yes or no policy adopted by the court. This is your own witness,"—apparently addressed to Judge Hudspeth. I wish, so far as the court is concerned, and those who heard that occurrence and the result of it, to say that when the word 20
"policy" was used I did not intend that anybody in the room should infer that I intended to criticise any established custom of the court nor insinuate that any such custom existed. What I intended to say when I said what I did say—and I must admit that I do not see how any offense could be taken from it—but what I did intend to say at that time was what I 30
thought was the fact as regarded this case. I did not want to say that it was the court's policy; I did not want to insinuate that the court was unfair. Perhaps I did not state it exactly as I should have; and I want to say now, if the court had in mind that I intended to lambaste the court or I had anything in my mind that I wanted to deliver myself of by saying what I did, that I had no such intention whatever, and it was merely what I thought was—perhaps 40
not elegant nor entirely accurate—a statement of the situation as I then understood it; so that I do not want the court or any-

Colloquy.

10 body who was in the room at that time, to gain the impression that I was trying to lambaste the court, because I had not the slightest intention of doing so, nor the slightest provocation for it; and even if I had, I think that my deportment usually in a court room—at least I attempt to make it so much that of a gentleman that I would not attempt to use that sort of artillery on the court. So that I wish the court to thoroughly understand what I meant when I stated what I did, and I wish the court now to understand, whether it was beautifully or inelegantly stated, what I intended to state, and I would like to straighten that out before I go to the jury, to explain to the court what I meant.

20 THE COURT: Well, Mr. Demarest, the court of course only can gather what a man means from what he says. There is only one thing that I am actually proud of. I do not think that I possess any great mentality. I do not think that, and I do not care very much to have other people think that I do. Neither do I possess any great amount of vanity about my position as a judge here. I do not care anything about
30 that part, but there is one thing that I am absolutely proud of, and that is my desire here to invariably and on all occasions do the just thing and to give everybody the fairest and the fullest kind of a hearing that he is entitled to. Now that thing I am proud of; and when you said yesterday that I had indulged or adopted a policy—a yes or no policy—with the witnesses, it
40 conveyed to my mind the impression that you meant that I was shutting off witnesses by saying to them, "Now don't you tell us anything at all, you just say 'Yes' or 'No' "; and of course I resented that. Now,

Colloquy.

I think it was a very handsome thing in you this morning to publicly say what you have said, and if on the occasion when you made the remark about the policy of the court the court basted you rather vigorously I want you to distinctly understand, and I want to tell you as publicly as you have have made what reparation you think is necessary, that the court had no desire 10
in any way to reflect either upon your veracity or upon you ability. I feel that is only a proper thing, where men are performing functions as we are performing here, when one man goes as far as you have gone, that the other man should go as far as I have, and I want you to understand that the court has no notion that you are otherwise than a perfectly able, respectable, responsible, honest practitioner of 20
law.

MR. DEMAREST: I do take this occasion, while the matter is before the court, to say that the court can at all times understand so far as I am concerned in the conduct of any case, unless I serve your Honor notice to the contrary at any time—which is not likely to occur—that any expression that I may use, and that may not exactly 30
fit the situation, is not intended as any personal affront to the court, and the court can depend upon our friendship of twenty-four years last past to vouch for the statement I make. If you think I am after you, ask me whether I am, and I will tell you.

THE COURT: If I think anybody is after me, I will take care of myself. You can go ahead with the argument.

MR. DEMAREST: I am going to ask your 40
Honor not to think it but to find out the next time.

Charge.**GENTLEMEN OF THE JURY:**

This suit is brought by the Hudson Milling Company against William F. Higgins and is to recover a balance alleged to be due on a book account for materials furnished by the Doyne Lumber and Milling Company to William F. Higgins, the balance claimed being \$791.30.

10 First of all, you have heard the case so thoroughly argued by both counsel with respect to the facts of it that there is no need for me to reiterate those facts, but the case really is not at all a difficult case nor is it a case that is half as intricate as it might appear from the arguments that have been presented so satisfactorily to you by counsel on both sides.

20 There is only one question as I see it in this case, and that question is whether or not the claim for all of the lumber that was furnished by the Doyne Lumber and Milling Company to William F. Higgins was agreed to be paid for by Higgins, or was correctly and properly chargeable to Higgins, or whether a part of it was to be paid for by William F. Doyne by an agreement or arrangement entered into between William F. Doyne and the defendant Higgins, or by a ratification of a talk which took place between Hig-

30 gins and Doyne, if one did take place at the time the lumber was bought, or by the acquiescence of the Doyne Lumber and Milling Company in the claim made by Higgins that the lumber furnished was to be charged to Doyne and not to him; and when I say the lumber furnished I mean the lumber furnished to the house owned by Mrs. Doyne.

Now in this case, first of all, I charge you that

40 "The contracts of corporations stand on the
"same footing with contracts of natural persons

Charge.

"and depend upon the same circumstances for their validity and effect."

I charge you furthermore—and I am charging you now from the requests that have been made to me by the defendant for charges—that "Doyne's authority with the Doyne Lumber and Milling Company need not be shown by writing or resolution of the Board of Directors; it may be shown by parol" that is by oral testimony given from the stand. 10

I next charge you, as I am requested, "That if his authority were to give credits, he had the right to make himself the debtor of the corporation for goods delivered to Higgins."

I charge you also, as requested, "That if he did assume to pay Higgins' account to the corporation at the time and under the circumstances testified to by him, it was within the scope of his agency as testified to by him." 20

Next, I charge you, "That if the company received any benefit from Doyne's bargain (that is, the Doyne Lumber and Milling Company), it is estopped; consequently the plaintiff cannot now disavow the contract."

I charge you: "If the transactions were brought to the notice of the directors of the Doyne Lumber and Milling Company, silence on their part for any considerable time is an acquiescence." 30

By that I desire you to understand, however, that in order that silence shall act as an acquiescence a full knowledge of all the facts and circumstances attending the transaction is essential.

I am requested to charge, furthermore, "That a formal ratification by the directors of the Doyne Lumber and Milling Company was not necessary, if the transaction was within the express 40

Charge.

"or implied powers of Doyne, or was not, within
 "a reasonable time after knowledge by the direc-
 "tors, disapproved."

I charge you furthermore, as requested, that
 "If Doyne's authority was to manage the entire
 "business, except to sign checks, the contract
 "with Higgins would be within his authority."

- 10 I charge you furthermore, that "Doyne's au-
 "thority might be inferred from the custom of the
 "corporation in permitting him to exercise a
 "general management, extending credits and such
 "acts as he was accustomed to do."

I charge you that "If the account of Higgins
 "was closed before the transfer to Weller, the ac-
 "count did not pass to Weller or the plaintiff by
 "the bill of sale."

- 20 By "closed" I mean if the account, by the
 agreement of the Doyne Company, fully entered
 into by an agent duly authorized to enter into
 it, or entered into by the board of directors, either
 by resolution or by ratification or by acquiescence,
 was closed in any one of those legal ways, why
 then manifestly the account would not pass to
 the plaintiff corporation, the Hudson Milling
 Company; by a bill of sale.

- I charge you, as requested, "That any estoppel
 30 "laches, or ratification by the Doyne Lumber and
 "Milling Company before the sale to Weller would
 "bind the plaintiff in this suit."

The reason for that is that Mr. Weller could get
 no better title than the Doyne Lumber and Mill-
 ing Company had, and if he got no better title
 than the Doyne Lumber and Milling Company
 had he certainly could transmit no better title
 than he had himself to the Hudson Milling Com-
 pany.

- 40 I charge you that "Any agreement made by

Charge.

"Berghoff before the sale by Weller to the corporation respecting the defendant's account with "either Doyne or Higgins binds the plaintiff"—provided that agreement were to close this account, and that agreement were fully executed by Berghoff before the account was passed to the Hudson Milling Company, or was known to the Hudson Milling Company and was either acquiesced in or adopted by the Hudson Milling Company. 10

I am requested to charge you that "If the account is one within the terms of the contract "between Doyne and Higgins of March 8th (if "you believe that such a contract is established "to have been made), it was discharged by the "entry of the last credit."

I charge you furthermore, as requested, "That "any verbal agreement respecting the account 20 "between Doyne and Berghoff after the contract "of March 8th, and before the sale by Weller "to the Hudson Milling Company, was binding."

I charge you furthermore, that "Weller, as "Berghoff's trustee or intermediary—or medium, "as he has been called—received no better title "to the assets of the insolvent corporation than "the insolvent corporation had."

I charge you, as requested "That Weller's 30 "title was subject to any agreement made by his "principal, Berghoff."

I charge you furthermore, "That the Hudson "Milling Company received no better title to the "account than the Doyne Lumber and Milling "Company and Weller had, and took the account "subject to all prior defenses."

I charge you, "The discharge of this account "was properly a matter of contract between Doyne "and Berghoff." 40

Charge.

Of course the burden would rest upon the defendant to show that there was such a contract and what the contract was.

I am requested to charge you, "That the burden "of proof to show the debt is upon the plaintiff."

That is true.

I charge you, "That while the books of account
 10 "may be prima facie evidence of the debt, the
 "circumstances testified to, or their condition,
 "may be considered to disprove them or their
 "value as evidence."

I am requested to charge that. With respect
 to that last matter I qualify what I am requested
 to charge, in this particular, that nobody in this
 case has disputed the items that go to make up
 this account. Mr. Higgins does not deny that be
 20 bought every stick that is alleged to have been
 sold. Mr. Higgins does not deny that every-
 thing that is alleged to have been sold was de-
 livered to him, nor does Mr. Higgins deny that
 every penny that is charged for the whole amount
 was a proper, a legal and a reasonable charge.
 There is no denial about that, so that consequent-
 ly on the face of the book, with respect either to
 the amount of goods sold or the value of the
 goods, there is no dispute whatever. If there
 30 is any evidence in the case that either counsel
 can call my attention to to indicate that there
 is anything wrong about the amount of goods or
 the price, I would like to hear it.

MR. DEMAREST: Only the credit, fifty-
 two dollars, that is all.

THE COURT: I am not speaking of
 credits; I am talking about the goods sold.
 There is no dispute then, I understand.

40

MR. DEMAREST: No.

Charge.

THE COURT: Now there is some evidence in the case from Mr. Higgins that he returned goods that had been delivered, amounting to fifty-two dollars. Of course you must take that into consideration in passing upon this account and give it such weight as it may be entitled to under the circumstances.

Now then, I say, there is no dispute about the amount furnished and the price of it, so that
10
that you can wipe entirely out.

Now there is some question raised about the books because there is a so-called mutilation of the books, in other words that a couple of pages have been taken out. Now you must consider that in passing upon the question that is before you with respect to whether or not this account was opened originally with Higgins, how the account stood and all about it, and you are to ask
20
yourselves in the light of the so-called mutilation who would most profit by cutting those pages out? To whose advantage was it to remove those pages? Why were they removed, if they were removed? and you are to apply all the evidence in the case to the solution of that question, if it can be solved; and whatever solution you arrive at of course will be considered by you in determining whether the plaintiff is entitled to a verdict
30
in this case or whether the defendant is.

Now then, with respect to the rules which shall govern you generally—all these things that I have charged you I charge you to be the law—but generally speaking with respect to the rules which shall guide you, first of all the plaintiff, the Hudson Milling Company, is obliged to make out its claim by the greater weight of the evidence. It is obliged to show that it did sell and deliver goods to Higgins for the amount indicated.
40

Charge.

Prima facie the books of account of a merchant are evidence of the sale and delivery of goods and their value. If there be any peculiarity about the book, if there be any mutilation of the book, that is to be considered by you in passing upon the question as to whether or not the account is vavdily and properly represented by the books as presented. That bears upon that question and must be considered by you.

Now then, if the plaintiff makes out his claim by the greater weight of the evidence and shows you that there is a balance of \$791.30 due to the plaintiff, then the defendant is obliged to show its defense, if it have any defense, of payment, if it claims payment, by the greater weight of the evidence. Now payment in this State is an affirmative defense, and the defendant is obliged to make out the fact of payment by the greater weight of the evidence before the defendant is entitled to prevail upon that defense. Now in this case the claim asserted by the defendant is that these goods were not in the first instance sold to Mr. Higgins with the intention that he should be responsible for them, but that a part of the debt was to be borne by Mr. William F. Doyne. Now whether or not they were sold to Higgins or whether they were sold with the credit to be advanced to Doyne is one of those items the burden of the establishment of which rests upon the plaintiff in the case, because the plaintiff must make out his claim by showing the sale and the delivery of the goods to the person who requested or ordered them. Now in this case there is a claim that William J. Doyne had authority to extend credit and that his authority was only limited with respect to the matter of drawing checks. That he claims he could not do. On the question of the authority of agents of a corporation I give you these rules: "The

Charge.

"powers of the officers of a corporation over its
 "business and property are strictly the powers
 "of agents, powers fully conferred by the charter
 "or delegated to them by the directors or man-
 "agers in whom, as the representatives of the
 "corporation, the control of its business and
 "property is vested. There are cases in which
 "the powers of an officer of a corporation and
 "his authority to act for the company are enlarged 10
 "beyond those powers which are inherent in his
 "office, but those are cases in which the agency
 "of the officer has arisen from the assent of the
 "directors, presumed from their consent and
 "acquiescence in permitting the officer to assume
 "the direction and control of the business of the
 "company. Thus when in the usual course of the
 "business of a corporation an officer has been
 "allowed to manage its affairs, his authority to 20
 "represent the corporation may be implied from
 "the manner in which he has been permitted by
 "the directors to transact its business. These
 "are simple instances of the application of the
 "principle that usual employment is evidence of
 "the powers of an agent, and a responsibility will
 "be laid upon the principal for the acts of his
 "agent within the apparent authority so conferred
 "upon the agent a doctrine which has come to be
 "applied to corporations in many respects as well 30
 "as to individuals, and with the same qualifica-
 "tions and limitations. In such cases the author-
 "ity of the officer does not depend so much on his
 "title and the theoretical nature of his duties
 "as on the duties he is in the habit of perform-
 "ing."

Now that bears upon the question as to whether
 or not Mr. William F. Doyne was authorized to
 extend the credits of the corporation and to act
 generally about the financial matters of the 40
 corporation, with the exception of drawing checks,

Charge.

as he has testified in this case he was authorized. Now if he had power to extend credit, as I have charged you heretofore, he might extend that credit to himself. He might agree with some person who was about to purchase, and if Mr. Doyne himself wanted to have some work done on his own property he might agree that this man
10 should offset the whole of his claim against the company against a part of the company's claim against him by whatever he had done either for the company or for the company and Mr. Doyne. In such a case there would be a case, as the counsel has very properly argued in summing the matter up to you, of Mr. Doyne becoming himself the debtor of the corporation; and it is just over that point in the case that the whole discussion in this case arises. The question is as to whether
20 or not that transaction ever took place. The argument of the plaintiff in the case is that such transaction never took place and that Mr. Doyne never became the substituted debtor or never became liable on the books of the company and that no such arrangement ever occurred. The claim of the defendant in the case is that such a transaction did take place; and that is the only vital and important question for you to settle in the case. Of course if no such transaction ever took
30 place between Mr. Doyne and Mr. Higgins as the defendant in the case claims and the board of directors did not ever accept any such transaction and acquiesce in it, why the defendant has no defense to this action. If such a transaction did take place, why the defendant is entitled to advantage himself of it and to have the full amount of his claim subtracted from the amount of the claim for the balance made by the Hudson
40 Milling Company, and the difference between those two sums amounts to eight dollars and seventy-eight cents

Charge.

Now, therefore, the proposition for you to settle is whether or not in this case the sum of \$791.30 is due to the plaintiff. Get these notions clearly in your minds. Is there \$791.30 due to the plaintiff? That is the plaintiff's full claim for the balance on the account. If you are satisfied that the plaintiff has made out that that balance is due, why then you must return a verdict for the plaintiff and assess the plaintiff's damages at \$791.30. If on the other hand you are satisfied that the plaintiff has made out that \$791.30 was the balance appearing on the books but that Mr. Higgins returned \$52.00 worth of goods and did not receive credit on that account for it, why then your verdict should be for the plaintiff and you would assess the plaintiff's damages at the sum of \$791.30 minus \$52.00. If in the third place you are satisfied that the transaction took place as is claimed by Mr. Doyne and Mr. Higgins in the case, why then your verdict would have to be for the plaintiff for the sum of \$791.30—and if you thought Mr. Higgins had made out the \$52.00 return of goods, minus \$52.00—and then minus \$730.52. leaving a balance of \$8.78 which you would find a verdict in favor of the plaintiff for.

Now those I think are the three phases of the case in which a verdict can be rendered either for \$791.30 or for \$791.30 minus \$52.00 or for \$8.78.

Now is there any other matter that you can suggest that I have covered?

MR. DEMAREST: You have covered everything, and you have covered it well.

THE COURT: All right, gentlemen, then you will take the case under these rules and decide it.

Memorandum of Agreement.

MEMORANDUM OF AGREEMENT, made this Eighth day of March, A. D. Nineteen hundred and ten, between WILLIAM DOYNE and RACHEL DOYNE, his wife, both of the City of Bayonne, County of Hudson and State of New Jersey, parties of the first part, and JULIUS BERGHOFF, of the City of Jersey City, in the said County and State, party of the
 10 second part, as follows:

WHEREAS, the Doyne Lumber & Milling Co., a New Jersey Corporation, is now in financial difficulties, and is in the hands of a Receiver, appointed by the Court of Chancery of New Jersey, in a suit brought by certain creditors of the said Doyne Lumber & Milling Co.; and

WHEREAS, the parties of the first part are the owners or control all of the stock of the said
 20 Company, issued and outstanding; and

WHEREAS, it is the desire of the parties of the first part to protect their said stock holdings and to save the said business from being sold and passing into the hands of strangers; and

WHEREAS, it is the desire of the said parties of the first part that the party of the second part should take steps to try and save the said property, and as far as possible, the stock interests of
 30 the parties of the first part, in the said Doyne Lumber & Milling Co.; and

WHEREAS, the said party of the second part has undertaken to raise moneys with which to buy up the claims and demands against the said Doyne Lumber & Milling Co., and to have the said Receiver discharged and the said creditors' suit discontinued, or the property of the said Doyne Lumber & Milling Co. sold by the said Receiver, and buy the same in, &c., &c.; and
 40

WHEREAS, the said party of the second part,

Memorandum of Agreement.

has suggested that a corporation be formed, through and by which he might have the said business of the said Doyne Lumber & Milling Co. taken over and continued as a going concern; and

WHEREAS, the said Richard Doyne is the owner of certain property in the City of Bayonne, upon which there are mortgages amounting in the aggregate to Fifty-five Hundred Dollars (\$5500), and is willing to place an additional mortgage on said property to the extent of Five Thousand Dollars (\$5000), to be used as collateral security, to enable the said party of the second part to raise moneys for the purposes aforesaid; 10

NOW THEREFORE, THIS AGREEMENT WITNESSETH: that the said parties hereto, for and in consideration of the sum of One Dollar (\$1.00) to each in hand paid by the other, the receipt whereof is hereby acknowledged, and of the services to be performed by the party of the second part hereunder agree with each other as follows: 20

The party of the second part will proceed at once to have formed a New Jersey corporation, with a capital of Thirty Thousand Dollars (\$30,000), to be known as the "HUDSON MILLING Co., or some similar title, for the purpose of acquiring the said business, property, &c., of the Doyne Lumber & Milling Co., as a going concern, and also so far as necessary, the stock of the Doyne Lumber & Milling Co., and to pay the creditors of the same, who have filed their claims with the Receiver, upon the basis of compromise already made with such creditors, as well as such other creditors who have failed to file their claim, provided a satisfactory compromise can be made with the same; also to settle with the Receiver of the said Company, and have the said creditors' cause in Chancery discon- 30 40

Memorandum of Agreement.

tinued, or to have a sale made by the Receiver of said property, &c., so as to acquire the title to the said Doyne Lumber & Milling Co.'s property and business as aforesaid; the claim of R. S. Hudspeth for services to date to be paid in full.

10 That the said party of the second part will proceed to finance and secure the necessary funds to enable him to carry out the undertakings aforesaid, to the best of his ability, to an amount not exceeding the sum of Eighteen Thousand Dollars (\$18,000), but upon the terms and conditions herein provided.

20 Rachel Doyne, one of the parties of the first part hereto, will make, execute and acknowledge a bond and mortgage upon her property in the City of Bayonne, where she resides, for the sum of Five Thousand Dollars (\$5000) to the said party of the second part, to be employed by him as and for collateral security in the securing of the moneys aforesaid.

30 The said party of the second part undertakes that the cost for financing the said matter, as aforesaid, shall not cost, by way of commissions, more than Fifteen Hundred Dollars, in cash, which is to be taken out of such moneys secured by him, and the necessary costs and expenses for Counsel fees and disbursements, which shall not exceed the sum of Fifteen Hundred Dollars (\$1500), including the formation of such corporation, also to be taken out of said moneys.

40 All the claims and demands against the said Doyne Lumber & Milling Co. taken up and secured by the said party of the second part, may be used by him, and he is empowered to turn the same over as additional collateral security, unto the party or parties advancing the moneys aforesaid; all stock of the said Doyne Lumber & Milling Co.

Memorandum of Agreement.

held or under the control of the parties of the first part, or secured by the party of the second part, shall also be employed by him, as and for collateral security for the purposes aforesaid.

It being expressly understood, that the said corporation so to be formed, and the said party of the second part, or either, may make and deliver to the party or parties making such loans and advances, such security by way of collateral, in addition to the above provided, as may be required by the loaner. 10

When the said "Hudson Milling Co." is formed and organized, and has secured the business, assets, &c., of the Doyne Lumber & Milling Co., as herein provided, it shall then proceed to carry on the said business, and the said Thirty Thousand Dollars (\$30,000) of stock of the said new Company shall be issued and distributed as follows: 20

The full amount thereof in payment for the business, goodwill, stock, material and all property, real and personal, of whatsoever nature and kind, including bills and accounts receivable.

All the stock of the said Doyne Lumber & Milling Co. is to be surrendered and turned over by the parties of the first part to the party of the second part, and by him deposited, if necessary, as additional collateral for the loans aforesaid, and to become the property of the new Company, and held by it for such purposes it may see fit. 30

Upon the issuance of the said capital stock of the new Company, one-third thereof shall be distributed unto the parties of the first part in equal portions; two-thirds of the balance of the capital stock amounting to Twenty Thousand Dollars (\$20,000) shall be distributed to the party of the second part. 40

Memorandum of Agreement.

The said Hudson Milling Co. shall thereupon, and during each and every three months after it undertakes the conduct of the said business, proceed to pay off the debt incurred by reason of the loans and advances aforesaid, in an amount not less than Two Thousand Dollars every three months after the commencement of said business
10 by said new company, and every six months there shall be had a statement of account, and a dividend then declared amongst the stockholders, after reserving from the profits such amount as shall be required to properly carry on the said business.

The dividends may be in the shape of cash, or script or note dividends, as the judgment of the Directors may deem most expedient at the time.

20 The said William Doyne, one of the parties of the first part hereto, shall be employed by the said new corporation, at a salary not exceeding Thirty-five (\$35.00) Dollars per week, such employment to continue so long as he shall devote his entire time and attention to the said business, and use his best efforts, to the satisfaction of the Board of Directors of the said new Company. Said party of the second part will use his best endeavors to secure a three-year contract of employment between the said Corporation, so to be
30 formed, and the said William Doyne.

As soon as the new company shall have satisfied and discharged its indebtedness incurred by reason of the loan secured by the said party of the second part, down to the sum of not more than Nine Thousand Dollars, then and in such event, the said bond and mortgage for Five Thousand Dollars (\$5000) given by the said Rachel Doyne
40 shall be satisfied and cancelled, and delivered up to her, otherwise to stand as such collateral security until such amount is fully paid with interest.

Memorandum of Agreement.

The said party of the second part will sell to the said parties of the first part in equal shares, all of the remaining stock held by him, being the balance of the stock over and above Ten Thousand Dollars (\$10,000) (which is to be originally issued to the said party of the second part, as aforesaid) of the said new company, issued and outstanding, at any time within the period of three years from the date hereof, at and for the price of Five Thousand Dollars (\$5000) in cash. Provided, however, that before this option becomes operative and of any force, the said new Company shall have fully paid and discharged any and all script dividends or note dividends, issued by the said new company, and not fully paid and discharged at the time the said parties of the first part would otherwise be entitled to exercise their option, as well as the full amount of the company's indebtedness, for any and all of the loans and advances secured by the said party of the second part, with interest, as aforesaid, and provided further, all of said quarterly installments are paid on account of said loans, as herein provided, and as the same become payable hereunder, otherwise such option to be of no force or effect.

Upon the said parties of the first part exercising such option and purchasing such stock, upon the terms and conditions above provided, and all loans and advances having been fully paid with interest, then the Ten Thousand Dollars (\$10,000) of stock of the new corporation so deposited by the parties of the first part as additional collateral security hereunder, shall also be delivered back to them free and clear of any claim or demand whatsoever.

The said party of the second part expressly agrees that he will hold intact for the period of

Memorandum of Agreement.

three years from the date hereof, the said stock that the said parties of the first part have the option to purchase, as herein provided. Provided, however, all the terms and conditions of this agreement are fully performed and carried out on the part of the parties of the first part, and as herein provided.

- 10 It is further understood between the parties hereto, that the said parties of the first part shall turn over to the said new corporation, and if necessary, so to do, shall make, any deeds or paper writings required, of any property or other assets of the Doyne Lumber & Milling Company, which they, or either of them, may have in their possession, or under their control, the purpose being that the said new company, shall have and possess either through the efforts of the party of the second part or by the acts of the said parties of the first part, any and all of the property, both real and personal, as well as all goods, chattels and effects of the Doyne Lumber & Milling Co.

- 20 It is further understood and agreed, between the parties, that any and all claims and demands found upon the books of the Doyne Lumber & Milling Co. against the said William Doyne, one of the parties of the first part hereto shall as soon as the new corporation secures control of the new company, be cancelled and discharged so far as the new company may be enabled to cancel and discharge the same.

- 30 It is further provided, that after the payment of all costs and expenses, as well as the Receiver's fees and those of his counsel, that all moneys in the said Receiver's hands, or to be accounted for and distributed by him, are to be paid to the said party of the second part, and applied by him
- 40 at once towards the payment of said loans and advance.

Memorandum of Agreement.

It is further agreed, that the dividend on Twenty Thousand Dollars (\$20,000) of stock, or any part thereof, belongs to the holders of that stock, and are not subject to any accounting for hereunder.

This agreement shall be binding and apply to the heirs, executors, administrators and assigns of the respective parties hereto.

10

In witness whereof, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

WM. DOYNE, (Seal),

R. DOYNE, (Seal),

JULIUS BERGHOFF, (Seal).

Signed, sealed and delivered in the presence of {

20

R. S. HUDSPETH,

I. F. GOLDENHORN.

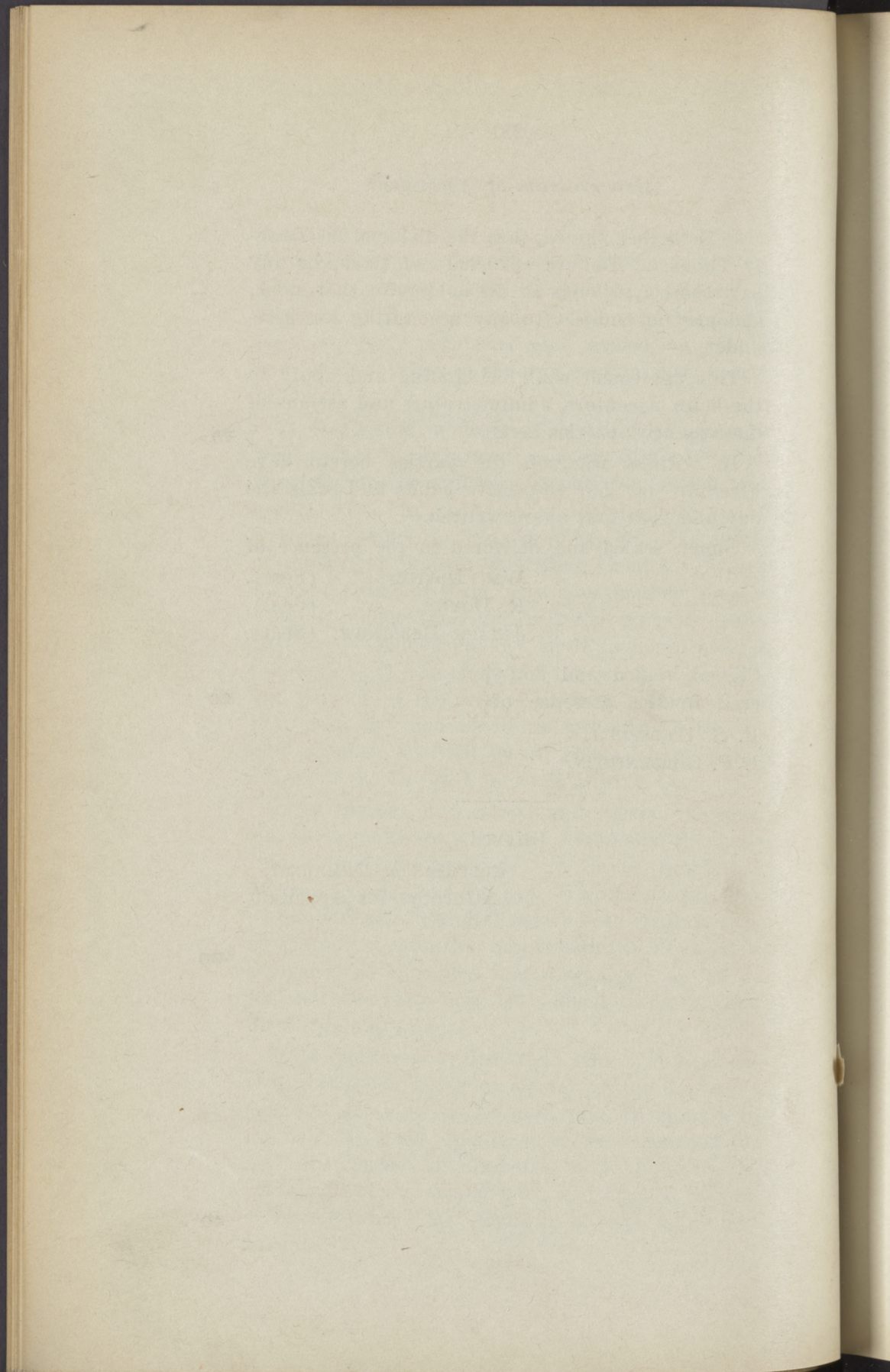
Signed,

ROBERSON & DEMAREST,

Attorneys for Appellant.

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New Jersey Court of Errors and Appeals

HUDSON MILLING COMPANY,

Plaintiff-Respondent,

vs.

WILLIAM F. HIGGINS,

Defendant-Appellant.

10

STATEMENT OF FACTS.

This is an action for goods sold and delivered by the Doyne Lumber & Milling Company to the defendant upon a book account which the plaintiff holds by assignment.

Between November 16, 1908 and August 10th, 1909, the Doyne Lumber & Milling Company sold lumber to the defendant amounting to \$1248.31 on account of which total credits of \$493.01 were given, leaving a balance of \$791.30 for which this action was brought (Case p. 22). The jury after deducting \$52.00 for goods returned (Case p. 170), by the defendant returned a verdict for the balance of the account amounting to \$739.30 (p. 20).

Prior to 1908 William Doyne individually conducted a lumber and milling business in the City of Bayonne. In the latter part of 1908 the concern was incorporated and all the stock issued to William Doyne, his cousin Simon Doyne and their respective wives (p. 169). Simon Doyne was the President, William Doyne, Vice-President and general manager and they and their wives constituted the board of directors. William Doyne had the general management and direction of the business, superintending the mill,

directing to whom credit should be given and financing the concern (pp. 32, 33, 89, 90).

In the spring of 1908 the defendant was importuned by William Doyne to purchase from the Company the lumber for ten houses which the defendant was about to erect, which resulted in an agreement that if the defendant, who was a plumber, should purchase the lumber from the company, the company would have certain plumbing work done at its mill and Doyne would have plumbing work done upon his wife's private property and that the amount due the defendant for both the plumbing work to be done on the mill and upon Doyne's house should be offset against the account for lumber purchased and Doyne was to be substituted for the defendant as the Company's debtor. This is testified to by the defendant (p. 166), the plaintiff's bookkeeper Rose Reilly (p. 186), by William Doyne (p. 111 *et seq.*), and his son, Martin Doyne (p. 209). It is uncontradicted by any other testimony. Higgins thereupon did plumbing work at the mill amounting to \$427.26 for which credit was given (p. 173), and at Doyne's house to the extent of \$730.52 (p. 178). These amounts are also admitted by William Doyne. Later when the Company had difficulty of a financial nature, a public accountant named Duryee was employed to make up a financial statement from the company's books. This statement, he testifies, was gone over by the directors at a meeting, of which the accountant made minutes, (which are not produced by the defendant after demand for their production); that the Higgins account was discussed, the situation explained, and that it was agreed that the account was properly chargeable to William Doyne (pp. 234, 235). This is also testified to by William Doyne (p. 123), and Martin Doyne (p. 210). The plaintiff's ledger as produced shows that the page with the Hig-

gins account cut out and repasted in the book (p. 23), with a credit as follows: "June 14, William Doyne, J 85 \$708.91". At page 85 of the Journal, which is William Doyne's account, the same amount is charged to profit and loss. This date was after the plaintiff had by purchase acquired the account. This amount of \$708.91 appears to have been understood at that time by the corporation to be the amount due Higgins for plumbing work on Mrs. Doyne's house. Therefore, after allowing the \$52.00 for goods returned, the plaintiff would be entitled to a verdict for \$8.78 if Higgins' bill of \$730.52, which he testifies was due him, were allowed, or \$30.39 if he were credited with the amount credited to him on the books of the plaintiff and the Doyne Lumber & Milling Company. 10

This testimony and the entries are entirely uncontradicted by the plaintiff. 20

Simon Doyne and his wife, after the meeting above referred to, assigned all their stock to William Doyne and wife and their son.

In November, 1909, the Doyne Lumber & Milling Company became insolvent and Charles E. Annett was appointed its Receiver by our Court of Chancery. On March 8th, 1910, Julius Berghoff, now President of the plaintiff, entered into an agreement with William Doyne and wife (see agreement p. 284), whereby Berghoff agreed to furnish the money and to purchase the debts against the insolvent company, to purchase the assets of the company from the Receiver and to finance and form a corporation for that purpose. To secure Berghoff, Doyne's wife agreed to give him a \$5000. mortgage, upon her real estate, and Doyne and wife were to deliver up their stock in the insolvent company. When the new company was organized Doyne and wife were to receive one-third and Berghoff two-thirds of its 30 40

stock. The contract between them further provides that

"any and all claims and demands found up-
 "on the books of the Doyne Lumber & Mill-
 "ing Company against William Doyne, one
 "of the parties of the first part hereto shall
 "as soon as the new corporation secures
 "control of the company, be cancelled and
 "discharged as far as the new company
 "may be enabled to cancel and discharge
 "the same" (p. 290).

10

The contract provides that its provisions shall bind the assigns of either party thereto.

20

Berghoff thereupon, being by assignment the principal creditor of the company, petitioned the Court of Chancery for a sale to him of the Company's assets by the Receiver, he agreeing to assume its indebtedness and an order to that effect was made March 31, 1910 (p. 45). A bill of sale for the assets was made April 23, 1910 by the Receiver of Charles H. Weller, who was a clerk in the office of Berghoff's attorney, and acted as agent for Berghoff (pp. 45 & 55). The Hudson Milling Company, the plaintiff in this action, in the meantime, was incorporated and, the same day he received title, Weller executed a bill of sale of the assets which he had purchased from the Receiver to the new corporation (p. 13). Berghoff and Doyne became direc-
 30 tors of the new corporation. Berghoff was also its President and Doyne, general manager (p. 58).

30

40

William Doyne testifies that before making the contract of March 8th, 1910, he and Berghoff discussed the accounts receivable of the corporation, including the Higgins account, and he explained that the account was chargeable to himself (p. 132). Martin Doyne testifies to the same effect (p. 211). This is disputed by Berghoff. After the incorporation of the plaintiff Higgins

purchased from it various bills of lumber which were charged to and paid by him. No bill for the account sued upon was ever rendered to him until shortly before the institution of this suit in March, 1912. Higgins also did plumbing work for the new corporation for which he was paid. The account until this suit was brought was treated by both parties as paid (p. 167).

The Hudson Milling Company, the plaintiff, now brings this suit claiming ownership of the 10 account by virtue of the assignment of it by Annett, the Receiver, to Weller and from the latter to the plaintiff.

The defendant claims that by virtue of his agreement with Doyne, at the time the bargain was made, he is not indebted to the plaintiff beyond \$8.78 the difference between the accounts.

I.

The terms of the contract between Doyne and Berghoff respecting Doyne's account were binding upon the plaintiff corporation. 20

This covers the first two grounds of appeal (p. 2).

It is testified by four witnesses (pp. 166, 186, 111, 209), that credit was to be given to the defendant for the plumbing work he was to do 30 for the Company at the mill and for Doyne at his wife's house, upon his indebtedness for lumber furnished. This is not denied by the plaintiff and stands uncontradicted. William Doyne, as general manager, not only had authority to make this contract, but that the scheme was known and assented to by the directors at a regular meeting is also shown (pp. 123, 210, 234), and uncontradicted. The contract was therefore executed long before the appointment of a receiver 40 and the account, so far as the defendant was con-

cerned, paid. The corporation might have held the amount of the plumbing bill on Mrs. Doyne's house due to it from William Doyne but not from the defendant. This situation amounted to payment by the defendant.

It was Julius Berghoff who entered into a contract with Doyne after he had purchased most of the corporation's debts and had agreed to pay the remainder, whereby he was to form, finance
 10 and turn over to a corporation, when in being, all that he should acquire from the Receiver and the benefits obtained in purchasing the debts against the old corporation at less than par. The contracts of the old corporation and its good will as a going concern were to be, and subsequently were turned over to the new company. "Any and all claims and demands * * *
 20 against William Doyne" (p. 290), were a part of the consideration of the agreement for Doyne was turning over all the stock he had or controlled in the old company, idemnifying Berghoff with a mortgage and in return was to receive one-third of the stock of the new company. The fact that the contract between Berghoff and Doyne was performed through the medium of Berghoff's agent Weller, makes not the slightest difference for the contract was fully performed except as to the cancellation of this debt.

30 The question here raised appears at pages 62-71 and is lucidly laid down by the trial judge for the benefit of this court.

There is no doubt that where a corporation has been formed, an agent acting in its behalf must either be clothed with the authority to act or his acts must be ratified, actively or passively, by the proper corporation authorities. This principle has evidently misled the trial judge. The
 40 facts already admitted at the stage where this question arose show an entirely different proposition.

At the time the contract was made Berghoff was capable of making it; the corporation was not, for it was not in being, but when formed it lawfully became the agent of Berghoff in the performance of his contract. Both he and Doyne, the parties to the contract were incorporators, directors and officers. They possessed full knowledge of the terms of the agreement and *acted* upon it in every essential particular even to enter the settlement of the account in the books. The plaintiff asserts this entry was unauthorized. Doyne denies it. But the defendant here insists that when the corporation was formed and acted upon the contract which had been made by Berghoff and Doyne, it cannot take advantage of what was beneficial to it and repudiate what it considered disadvantageous but that it, and its officers, without formal ratification became bound by its terms and each became the implied agent of the other. The debt being extinguished as an asset of the new corporation and not due to it from Doyne, could not be due from the defendant in this suit.

The facts in this case take it out of the principle laid down in *See v. Heppenheimer*, 3 Rob. 36 because there (a) an independent company was formed with an independent board of directors to whom the terms of the contract should have been made known, (b) here the agreement between Doyne and Berghoff was not the creation of a liability of the new company nor of a fraudulent character (c) the new company was formed to carry on the business of the insolvent corporation in accordance with the contract between these two men and (d) it acted upon and adopted that contract by accepting the benefits of the contract. In this case the new corporation was expressly by its charter formed to take over the business of the old company. No new capital was invited from the public. Its entire

stock was taken by the parties to the contract either individually or as the representatives of others, both men became its officers and Doyne had given value for the provision respecting the Higgins account. The corporation therefore in its formation had no other function than to carry out this contract of Doyne and Higgins.

Clement v. Young, 3 Rob., 347 cited by the court has not the slightest bearing upon the facts
 10 here presented. The ruling of the court was most important to the defendant's case. It deprived him of a principal defense and the vigorous attitude of the court in the presence of the jury is equal or paramount to a direct instruction to them upon the subject.

The principle here contended for is not a novel one. *See v. Heppenheimer* (supra) is clearly distinguishable and not opposed. *Woodbury Heights Land Co. v. Landenschlager*, 10 Dick. 91 and
 20 *Sea Coast R. R. v. Wood*, 20 Dick. 530, proceed upon the same theory that the plan, fraudulent in character, designedly was not disclosed to the directors representing the innocent stockholders who had subscribed. In this case the same parties who made the contract were to be and became the new company. This fact distinguishes the case from those last cited.

Burden v. Burden, 40 N. Y. Supp., 499.
 30 *Hall v. Huter Bros.*, 157 N. Y., 694.

While the minutes of the new corporation show no adoption of it by solemn action of its board of directors, the company's business was confined to what it purchased from Berghoff's agent Weller exactly as set out in the Doyne-Berghoff contract, which contained the provision regarding Doyne's indebtedness. No new obligation was created thereby but the value of the
 40 assets purchased was slightly lessened by an entirely legal agreement untainted by fraud, de-

ception or concealment. The new corporation could not separate the parts of the contract.

Pitts v. D. M. Steel Co., 75 Mo. Ap., 221;

Pitman v. Chicago Zinc Co., 113 Mo.

App., 513;

Esper v. Miller, 131 Mich., 334.

Thistle v. Jones, 91 N. Y. Supp., 113.

The leading case cited in all the authorities is *Weatherford etc. R. R. v. Granger*, 86 Tex., 351 which holds: 10

"If a contract be made on behalf of a corporation by its promoters, and the corporation after its organization, with a full knowledge of the facts accepts its benefits it must take it with its burdens and, if the other party has performed the stipulation binding upon him, it may be enforced against it"

and again:

"the exercise of any right inconsistent with the non-existence of such contract may be deemed conclusive evidence of such adoption." 20

The like rule is adopted in:

Moore etc. Hardware Co. v. Travers Hardware Co., 87 Ala., 206.

The rule is adopted as a governing principle in *Thompson on Corp.*, Vol. I, p. 101, where a number of other cases are cited. 30

Bell's Gap R. R. v. Christy, 79 Pa. St., 54;

Smith v. Parker, 148 Ind., 127.

The principle in this case should, we contend, go further than in the cases above cited. No express ratification of the agreement was necessary. The object of the formation of it was to carry out Berghoff's promises. These were plainly and honestly mentioned in the contract and worked 40

no fraud upon innocent parties. Both parties to the contract were to be the new corporation. The corporation when formed was to be Berghoff's *agent* to perform his promises. When it became incorporated it became his agent and immediately by taking the benefits of the bargain, ratified his acts as its agent and became bound by its contract.

The court's ruling is a broad one holding that
 10 this contract could not operate to the benefit of Higgins by wiping out the account. If shut out effectually the defendant's right to show, for the benefit of Higgins, what was done by the new corporation and drives the parties to a multiplicity of suits (p. 70). The verdict should be set aside for these reasons.

II.

20 **It was proper cross examination to inquire of the plaintiff's witness what instructions were given her when she made the charges.**

The witness was that of the plaintiff, the book-keeper present at the conversation between Doyne and the defendant respecting the sale of the goods, and who made the entry of the sale at the direction of Doyne, the manager of the corporation.
 30

The court overruled on cross examination the question—"Did Mr. Doyne at that time, at the "time the account began tell you to charge to his, "Doyne's account and credit on the Higgins account the amount that Doyne would be indebted to Mr. Higgins for certain work that Mr. Higgins "was to do for him?"

The witness had testified the entries in this account were in her handwriting. (pp. 21, 22).
 40

The witness had testified on cross examination that she could not say whether there was anything due from the defendant (p. 24).

The cross examination of the witness on (p. 24) was reserved and her cross examination continued at (p. 85) while she was still the plaintiff's witness.

The witness testifies that she was present at the conversation between Doyne and Higgins and that Doyne instructed her respecting the entry of the account (pp. 91, 92).

The books of account while presumptive are not conclusive evidence of indebtedness. They may be questioned of their value entirely destroyed by cross examination. 10

Bayonne v. Standard Oil Co., 52 Vr., 717.

If the defendant, by cross examination of the witness who made the entry of the sale in the books were able to show that her instructions were not carried out by her, he was entitled to do so. The question excluded is obviously asked for this purpose. The cross examination had not been long and tedious to the point where its continuance was discretionary with the trial Judge. The question was direct to the *res gestae* of the entire liability. The books of account were not the contract between the parties, but evidence only. The whole contract so far as the witnesses have knowledge of it, might be inquired into. 20

Park v. Miller, 3 Dutch, 28.

Levitt v. Moreland, 40 Vr., 216. 30

The defendant submits that the right to cross examine the witness regarding her instructions as to the manner of making the memorandum were unreasonably denied by the court.

III.

The remarks and conduct of the court in respect to the defendant's counsel were improper and prejudicial to the defendant's case.

10 The remarks referred to under this objection are found at pages 96 and 97 of the printed case. Counsel does not wish to comment upon them further than to note that while they were perhaps vigorous and forceful, they lack the dignity which our bar should like to afford any court, and are not in keeping with the respect that the bench and the robe should command. The law is well settled, however, that:

20 "An attorney at law, as an officer of the court, is entitled to such treatment from the trial judge that the interests of his client will not be prejudiced; and where such treatment is not accorded him, as where the court makes remarks well calculated to disparage the attorney in the eyes of the jury, a judgment against the client will be reversed."

Williams v. City of West Bay City, 119 Mich., 395;

Cronkhite v. Dickerson, 51 Mich., 157.

30 "It is improper for the court before the jury to reflect upon the capacity and memory of counsel to whom clients have intrusted their interests; and it is positive error for him to state as a fact, when there is any question about it, that a witness has sworn to a particular statement."

Wheeler v. Wallace, 19 N. W., 33.

IV.

The court should have non-suited the plaintiff at the conclusion of the plaintiff's case.

This motion was directed to the condition of the books of account. The books, as produced by the plaintiff, showed the account discharged. The plaintiff's bookkeeper testified (p. 24), "There is not anything due from Mr. Higgins." The page where the account was entered had been cut out and repasted in the book (p. 25). The Higgins account had been transferred to profit and loss. The court had overruled the cross-examination of the defendant respecting the conversation with the bookkeeper at the time the sale of the lumber to the defendant was made as argued under Point II. The books of account were, therefore, discredited. The ledger had been admitted with consent of the defendant but this was not the evidence of the transaction. The condition of the books and the testimony, therefore, destroyed their value as a prima facie case and the case did not come within the rule in *Oberg v. Breen*, 27 Vr., page 1. The fact that they had been admitted by the defendant did not make them a prima facie case.

Bayonne v. Standard Oil Co. (supra).

The defendant contends that a prima facie case had not, at the time the case rested, been made out.

V.

The court should have not excluded conversations between the receiver of the insolvent corporation and its president regarding the account in question.

10 The testimony is that of Charles E. Annett, the receiver of the insolvent corporation, who is asked what conversation he had with William Doyne, president and manager of the insolvent company, respecting the account sued upon (p. 182). William Doyne's relations with the company have been explained. The object of the question was to show an admission by the authorized officials of the insolvent corporation that the account, as it appeared upon the books, was not due and that such statement was a declaration
20 against the interest by which the insolvent corporation and its subsequent assignees were bound. Under the same head comes the question to William Doyne, "Did you have any talks with Mr. Annett while he was the receiver of the company?"

The Receiver could gain no better title to the account than the insolvent corporation had nor could he sell any better than he possessed.

VI.

30 **The testimony of the witness Goldenhorn was a privileged communication and should have not been admitted.**

This witness is an attorney. He was first called by the plaintiff and excused because he had represented the defendant in the transaction as his attorney (p. 100). In rebuttal he was again
40 called and admitted (p. 253) that he acted for the defendant. The court permitted him to testify, against the defendant's objection.

The settled rule in respect to evidence by an attorney without the waiver of a principal is well settled.

Vought v. Vought, 5 Dick., 177;

Mathews v. Hoglan, 3 Dick., 455.

We submit that the evidence is sufficiently plain to excuse the necessity of further authorities.

VII.

10

Questions in cross-examination to the President of the plaintiff respecting the condition of the books are competent.

At page 82 the President of the plaintiff is asked whether the Higgins account and his (the witness' account) on the books of the plaintiff *do not appear by the books* to be cancelled the same day.

20

It appears from the examination that both accounts had been cut from the ledger and that both had an entry on the credit side showing they were satisfied. The question refers to the appearance of the books not to the knowledge of the witness as to the date of the transaction. It therefore is not a conclusion.

The question is relevant as an inquiry into the condition of both accounts to show what interest the witness had, if any, in the transaction.

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Such inquiry in cross-examination is proper.

Haver v. Central R. R. Co., 35 Vr., 312.

40

VIII.

A witness having knowledge of the subject, may, by cross-examination state the position held by her superior and what was done by him.

An error of the printer shows the questions overruled to have been asked in direct examination. This is an error. *It is a continuation of the cross-examination reserved to the defendant at page 34.*

The inquiries overruled (p. 89) are three in number and were asked of the plaintiff's witness, the bookkeeper, they are as follows:

- (a) "What position did Mr. Doyne occupy in the Doyne Lumber and Milling Company?"
- (b) "Do you know what his office was?"
- 20 (c) "Who sold the goods?"

Under this head also comes the propriety of the question put by the defendant to his witness Duryee, the accountant who attended and kept the minutes of the meeting at which the account in question was discussed:

- (d) "Do you remember whether Simon Doyne at that time was still an officer of the company?"

All these questions were proper. The first two and the last questions depended upon the knowl-
30 edge of the witness. The third referred to an act, the answer of which required no technical knowledge, and might have been answered by anyone.

The proposition is one of common sense requiring the citation of no authorities. The office of Doyne and the fact that he conducted the very transaction under consideration made it entirely proper to inquire into all the facts connected
40 therewith.

IX.

The verdict is opposed to the instructions of the Court and uncontradicted evidence on the part of the defendant which precluded a recovery.

This point possibly involves a construction of the new Practice Act. The testimony of the defendant and his witnesses showed conclusively, and is in no wise contradicted by the plaintiff. 10

(a) *That Doyne had the authority to make the contract with the defendant.*

(See testimony of Rose Reilly pages 32, 90, Doyne pp. 106, 110). There is no testimony to deny it. The defense is a proper one and was recognized by the court in his charge (pp. 274, 275).

(b) *That the value of the work done by the defendant at the Doyne Lumber and Milling Company's mill and at Doyne's wife's house was to be offset against the account for lumber sold to the defendant.* 20

(See testimony of Doyne pp. 111, 112). Reilly (pp. 91, 186). Martin Doyne (p. 209) and Higgins (p. 166). It is in no wise contradicted. The court charged this to be a good defense (p. 275).

(c) *The directors were aware of the transaction and both acquiesced in and approved it.* 30

(See testimony of Doyne p. 123). Martin Doyne (p. 210) and Duryee (pp. 234 and 235). The other principal director, Simon Doyne, is shown by the plaintiff (p. 144) to be a fugitive from this state. Therefore all possible evidence of the meeting is produced. It is testified to by Duryee, the accountant who kept the minutes of the meeting and is a disinterested party. It is nowhere contradicted. The minutes which were in the possession of the plaintiff were called for and not produced. 40

The trial judge recognized the defense (pp. 275, 276).

(d) *The last three matters having been completed before the sale by the Receiver to Weller, there could be no recovery by the plaintiff.*

(See same references to testimony).

The law sustaining the validity of these four defenses is too well settled to require citations.

10 While the court charged the jury, as requested by the defendant, respecting these matters the compliance came too late. The harm had already been done. A marked change in the attitude of the court during the trial is to be noted between the vigorous examination of the defendant's witnesses by the court (pp. 150-156, 222, 225-229), and the mildness of the charge (p. 274, et seq.). A principal defense had been excluded (Point I) in the presence of the jury in a manner more forceful than the instructions at the close of the case. The evidence had been largely excluded.

20 An apparent change of position on the part of the court at the close of the case, after the exclusion of evidence and a statement of the court's ruling to counsel, without a correction of impressions already made, came too late to benefit the defendant.

Application was made to the trial court for a rule to show cause why a new trial should not be ordered on these grounds, with a reservation of the objections raised upon this appeal and denied.

30 Section 25 of the new "Practice Act" provides that

"such appeal shall be in the nature of a rehearing upon any question of law involved
"in any ruling, order or judgment below."

The effect of this provision is, we contend, to invest the appellate court with such jurisdiction as it previously had under the old form of a writ of error and the trial court had under an order to
40 show cause.

The Supreme Court has heretofore upon an

order to show cause passed upon the exceptions taken at the trial below and not before it on error.

Byron v. Bayonne (not reported, decided May 5, 1911).

Section 214 of the Practice Act of 1903 (now repealed) was an apparent attempt to abridge this right as is Rule 83 recently promulgated for the application of the new Practice Act.

No constitutional right is abridged by the new statute but the power of the appellate court is intended to be extended. This, we understand, is in accord with the present English practice, which is attempted to be followed by the new act. 10

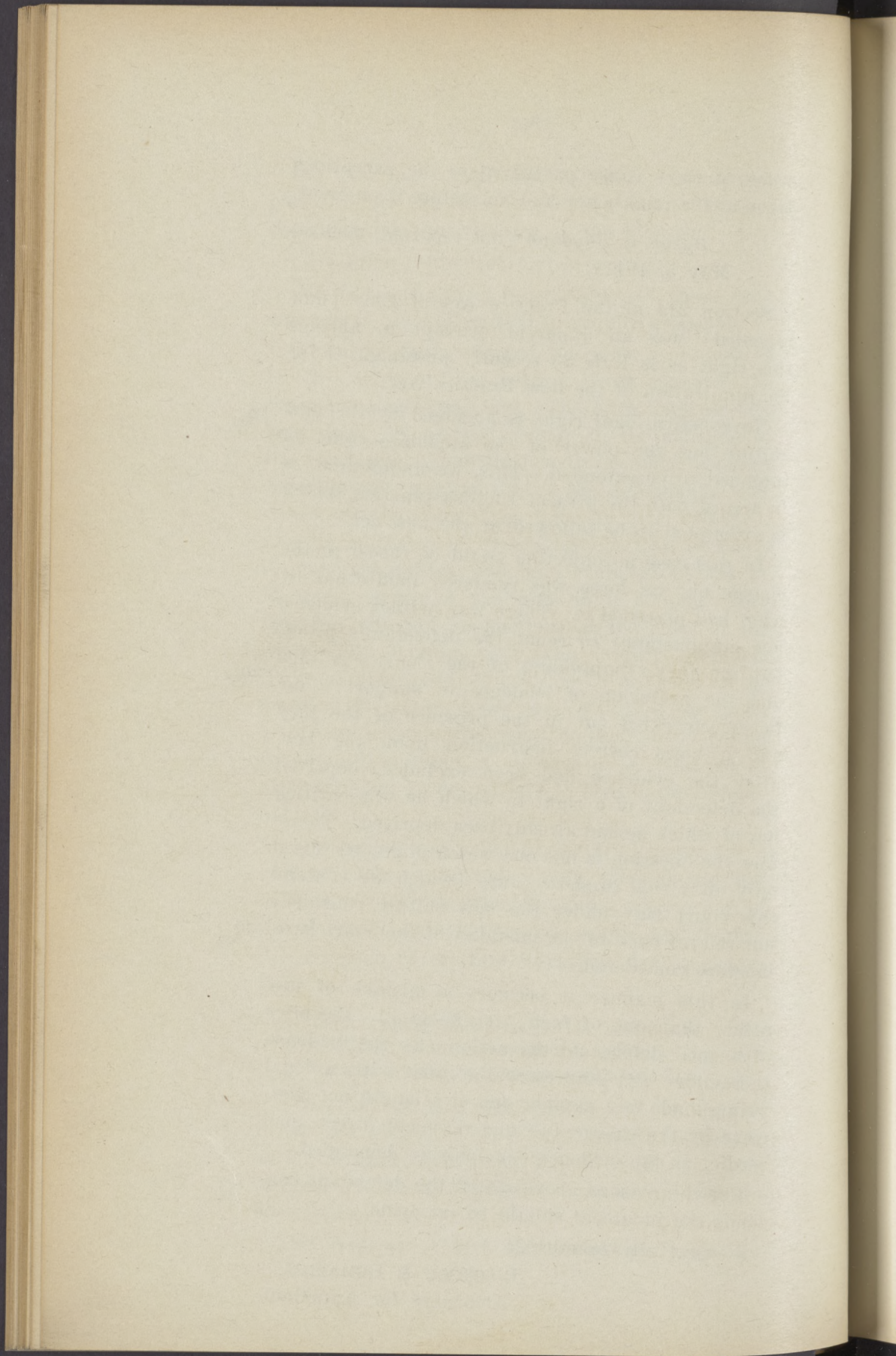
In this case no objection could be raised to the charge but its force was rendered ineffectual by what had preceded it. There was neither evidence nor circumstance to rebut the defendant's proof, but the jury's impression of the Court's rulings and the exclusion of evidence to support a defense was ruled out in the presence of the jury and a mere correct instruction upon the law, after the evidence had been excluded, deprived the defendant of a right to which he was entitled but of which he had already been deprived. Therefore the question is not one which might be raised only on a rule to show cause (which we contend this court may under the new statute consider) but relates back to the mistakes of the court here- 20 30 inbefore considered.

In this manner it becomes a mistake of law rather than one of fact. It affects (1) the offer of a good defense to the action (2) the evidence thereunder (3) impresses the jury with a legal ruling made in a manner and at a length not overcome by the charge (4) and does not direct such verdict as the evidence conclusively demanded.

For the reasons above stated the defendant contends the judgment should be set aside. 40

Respectfully submitted,

ROBERSON & DEMAREST,
Attorneys for Appellant.



New Jersey Court of Errors and Appeals.

HUDSON MILLING Co.,	}	Action at	
<i>Plaintiff-Respondent,</i>		Law.	
<i>vs.</i>		On Appeal	
WILLIAM F. HIGGINS,		from Judgment; in the	
<i>Defendant-Appellant.</i>		Hudson	
		County Circuit Court.	10

Brief of Hudspeth, Rysdyk & Garrison, in favor of Plaintiff-Respondent.

Statement of Facts.

This is an appeal from a judgment entered in the Hudson County Circuit Court on February 20th, 1913, for \$739.30 and costs (p. 20). The summons was tested and returnable before July 1st, 1912, and the pleadings were not moulded under the New Practice Act (p. 6).

The action was brought by the plaintiff, a corporation, against the defendant to recover a balance due from the defendant of \$791.30 with interest from January 1st, 1909, and costs for building materials furnished by the Doyne Lumber & Milling Co., the latter company having been decreed insolvent in the Court of Chancery of this State and the Receiver having, pursuant to an order made therein, sold and conveyed by a bill of sale dated March 31st, 1910, all of the assets of the Company (including the account of the defendant) to Charles H. Weller who in turn likewise sold and conveyed them on April 23, 1910, to the plaintiff (pp. 6 to 15).

Rose Reilly, a witness for the plaintiff, testified, among other things, that she was the book-

keeper of the Doyne Lumber & Milling Company (p. 21); that the first entry in the ledger was November 16th, 1908, and the last entry August 10th, 1909, during which period the total charges against defendant were \$1,284.31 and credits during that period of \$493.01 leaving a balance due from defendant to Doyne Lumber & Milling Co. of \$791.30 (p. 22); the ledger was admitted in evidence (p. 24); a balance of \$708.91 was charged off to profit and loss (p. 25); this is shown in the Journal (pp. 26 and 30) and the account likewise appears in the sales book of the company (p. 27) all of which books were admitted in evidence (pp. 21 to 28); that defendant wanted to buy material and that Doyne, the president and manager of the company, told him that he could pay for it by doing work around the place (factory) (p. 97); that she could not find any such account in the books (p. 98); that the entry in the books under date of August 21st for \$427.26 is a credit to Wm. Higgins for putting in sewer and improvements at the mill of the company (p. 99); that this is part of a running account; that the profit and loss entry in the Journal of the balance due from defendant is under date of June 14th, 1910, and does not come in the regular course of entries in the ledger (p. 99).

John Workmeister, a witness for plaintiff, testified (p. 35), that the entry in the ledger of June 14th, William Doyne, \$708.91 was not his handwriting; that one evening after everyone had gone home Mr. Doyne asked him to take it off and he charged it up to Mr. Doyne; that Doyne objected to having it charged to him and said that it should be charged off as a loss that was uncollectible and that he then made an entry profit and loss and did not post it further (p. 35); that one evening after all had left Doyne asked him to wipe off that entry; that Doyne said,

"No, don't charge it up to me, charge it up to profit and loss" (pp. 37-38-39-40).

Julius Berghoff, President of the Plaintiff testified in part as follows:

That among the bills payable to the Doyne Lumber & Milling Co. at the time the Hudson Milling Co. received a bill of sale from Charles H. Weller was included the Higgins account (p. 47); that he never gave any direction to charge the item of \$708.91 of June 14th, 1910, to a profit and loss (p. 47); that Doyne's job was purely mechanical; that he did not have anything to do with the finances of the Doyne Company (p. 48); that he did not at the time the assets of the Doyne Lumber and Milling Co. were transferred by the Receiver of that company to Weller by bill of sale have any conversation with Mr. Doyne regarding the Higgins account (p. 56); that the only list of the accounts appearing upon the books of the Doyne Company he ever saw was the one Mr. Goldenhorn gave him of the Union Trust Company (Goldenhorn testified at p. 254 that this statement regarding bills payable to the Doyne Lumber & Milling Co. contained a claim against Higgins) that he did not charge the Higgins account to profit and loss (p. 60); that he did not know Higgins until shortly before the suit was commenced (p. 61); that he did not cross off the Higgin account (p. 75); that he did not tell Doyne that the Higgins account should be crossed off the books of the Doyne Lumber & Milling Co. after the Hudson Milling Co. had been formed (p. 76); that he first learned thaat the Higgins account had been crossed off the books after the expert had gone over the books (p. 79); that he went over the claims with Goldenhorn and Doyne (p. 82); *that he never agreed with Higgins or Doyne that the account should be cancelled (p. 240).*

I. F. Goldenhorn, a member of the Bar of this State, witness for plaintiff, testified in part as follows:

That he had a list of the debtors of the Doyne Lumber & Milling Co. during the negotiations for turning that company over to Berghoff (p. 100); that he was retained by Mr. La Maire, a credit man, to find out about the situation (p. 251); that he was not retained by Doyne nor did he
 10 do any work for him (p. 252); that on numerous times he had conferences with Mr. Doyne, Mrs. Doyne, Mr. Hudspeth and the President of the Union Trust Company. That he had a statement of the assets of the Doyne Lumber & Milling Co. which included the claim of Higgins (p. 254); *that there was no suggestion that the claim of Higgins be eliminated or charged off the books* (p. 255).

William F. Doyne on behalf of the defendant,
 20 testified, that he was General Manager of the Doyne Lumber & Milling Co. (p. 110); that in November, 1908, he heard Higgins was to put up eleven or twelve houses on West Eleventh Street and told Higgins that if he would give him the business he would have certain work for him to do on the building and certain work at his house and he would give Higgins certain materials for the work and if one account won't
 30 balance the other they would pay each other the difference (p. 111-112-113); that he could not tell by looking at the books of the Doyne Company what amount of work Higgins had done for the Company; that the amount of Higgins' bill for work on his (Doyne's) house was \$732.62 (p. 114); *that the Directors of the Doyne Company were, himself, his wife, Simon Doyne and his wife; that the work was to be done on his wife's house, Rachel Doyne* (p. 123); that at
 40 an informal meeting of the Directors it was agreed that credit should be given to Higgins for all the goods he got (p. 122); that no min-

utes were kept of this meeting (p. 140); that the only meetings of the Directors of which he has a distinct recollection are the first three (p. 143); that when he entered into the agreement with Berghoff part of the consideration was the cancellation of any indebtedness on the books against him (p. 146); that no limit was put on the amount of credit to be given Higgins at the informal meeting of Directors (p. 149); *that the Higgins account was to be charged against him (Doyne) although the work was to be done for Doyne Company* (pp. 150-151); *that while the Doyne Company was in need of money, the Board of Directors authorized him to set off a claim of his personally against Higgins* (p. 154) *although the company did not owe him a cent* (pp. 155-156); *that he cannot remember any other claim that was cancelled* (pp. 156-157).

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William F. Higgins, defendant, testified in part, that Doyne came to him and said he would like some work done on his house and some at the mill; that he purchased goods from the Doyne Lumber & Milling Company and did work for the mill and that he was credited with the work on the books of the company; that he did work on Doyne's house (p. 166); that he returned goods to the Doyne Company amounting to \$52.00; that he did not give any figure on the factory work; that he never knew the account had been settled (p. 179).

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Martin H. Doyne, a witness for defendant testified that the Doyne Company was short of money (p. 223).

Julian L. Duryea, a witness for defendant testified in part (p. 236) that he was present at the meeting of Directors at which the account of Higgins was considered but that he did not know what became of the minutes.

Robert S. Hudspeth, a Member of the Bar of this State, witness on behalf of plaintiff testi-

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fied, that at a conference during the negotiations to turn over the property from the Doyne Company to Berghoff, Doyne said that there were some personal claims against him and Mrs. Doyne that should be wiped off the book (pp. 264-265). That they were small claims not amounting to as much as \$500 or \$700. That there was also a claim against Roberson & Demarest for moneys which Doyne insisted they had collected and not paid over.

10

I.

Defendant admits that the building material was sold and delivered to him and does not deny that the amount charged is a proper and legal charge.

Judge Speer in his charge on page 278 says:

20

"Mr. Higgins does not deny that he bought every stick that is alleged to have been sold. Mr. Higgins does not deny that everything that is alleged to have been sold was delivered to him, nor does Mr. Higgins deny that every penny that is charged for the whole amount is a proper and legal and a reasonable charge. There is no denial about that so that consequently on the face of the book with respect either to the amount of goods sold or the value of the goods there is no dispute whatever. If there is any evidence in the case that either counsel can call my attention to to indicate that there is anything wrong about the amount of goods or the price, I would like to hear it.

30

"MR. DEMAREST: Only the credit \$52.—that is all.

"THE COURT: I am not speaking of the credits,—I am speaking about the goods sold: There is no dispute then I understand.

40

"MR. DEMAREST: No."

The defendant in his brief (p. 5), says:

"The defendant claims that by virtue of his agreement with Doyne at the time the bargain was made he is not indebted to the plaintiff beyond \$8.78, the difference between the two accounts."

Defendant Higgins in his testimony does not deny that the building material was sold and delivered to him as alleged but claims a credit of \$52 (pp. 165-170).

10

The books of account show a balance due of \$791.30 (p. 22).

Books of Account are legitimate prima facie evidence to show the sale and delivery in the usual course of business of personal property.

Oberg v. Breen, 21 Vr., 146.

Cited with approval in *Bayonne v. Standard Oil Company* 81 N. J. L., 717, at page 720.

20

II.

The defense of payment is the only defense made by the defendant and is an affirmative defense and shifted the burden of proof to the defendant and he failed to make out this defense by the greater weight of evidence.

In the defendant's brief at page 5, he states that his claim is that by virtue of his agreement with Doyne he is not indebted to the plaintiff beyond Eight Dollars and seventy-eight cents (\$8.78), the difference between the accounts.

30

The circumstances under which this agreement was made between Doyne and the defendant are all testified to by interested witnesses,—by the defendant, by Doyne, by his son.

This testimony is denied by Berghoff and by

40

the witness, John Workmeister, who is disinterested.

This raises the question which was properly left by the Court to the Jury as to the weight of evidence.

III.

The agreement between Doyne and Berghoff respecting the cancellation of claims against Doyne, was not adopted by the plaintiff, Hudson Milling Co. and not binding upon it.

A corporation to be formed is not bound by the terms of a contract made prior to its organization unless the new company adopts the contract. This is not ratification because ratification can only occur when the principle is in existence at the time the contract is made.

There is no evidence that the plaintiff corporation ever adopted the contract made between Doyne and Berghoff.

Clement v. Young-McShea Amusement Co., 70 N. J. E., 677;

Reed v. Inhabitants of City of Trenton, 85 Atl., 270, page 272.

IV.

The Higgins account was among the outstanding accounts of the Doyne Lumber Co. exhibited by Doyne to Berghoff during negotiations for purchase of assets of Doyne Co.

This statement is supported by the testimony of Robert S. Hudspeth and by the testimony of I. Faerber Goldenhorn, who is entirely disinterested.

V.

No legal error was committed in the trial of the case and the judgment should be affirmed.

The books of account was presumptive evidence of indebtedness.

The rule of law laid down in *Oberg v. Breen*, *supra*, is not overruled by *Bayonne against Standard Oil*, 52 Vr., 717. 10

In the Bayonne case the books offered in evidence showed only a record of conclusions drawn from readings of various readings. Upon their face they were not accurate.

No contention is made that the books of account in the case at bar are not accurate but suspicion is thrown upon them by the fact that a page was cut out.

This is a question for the jury to consider in weighing the evidence. 20

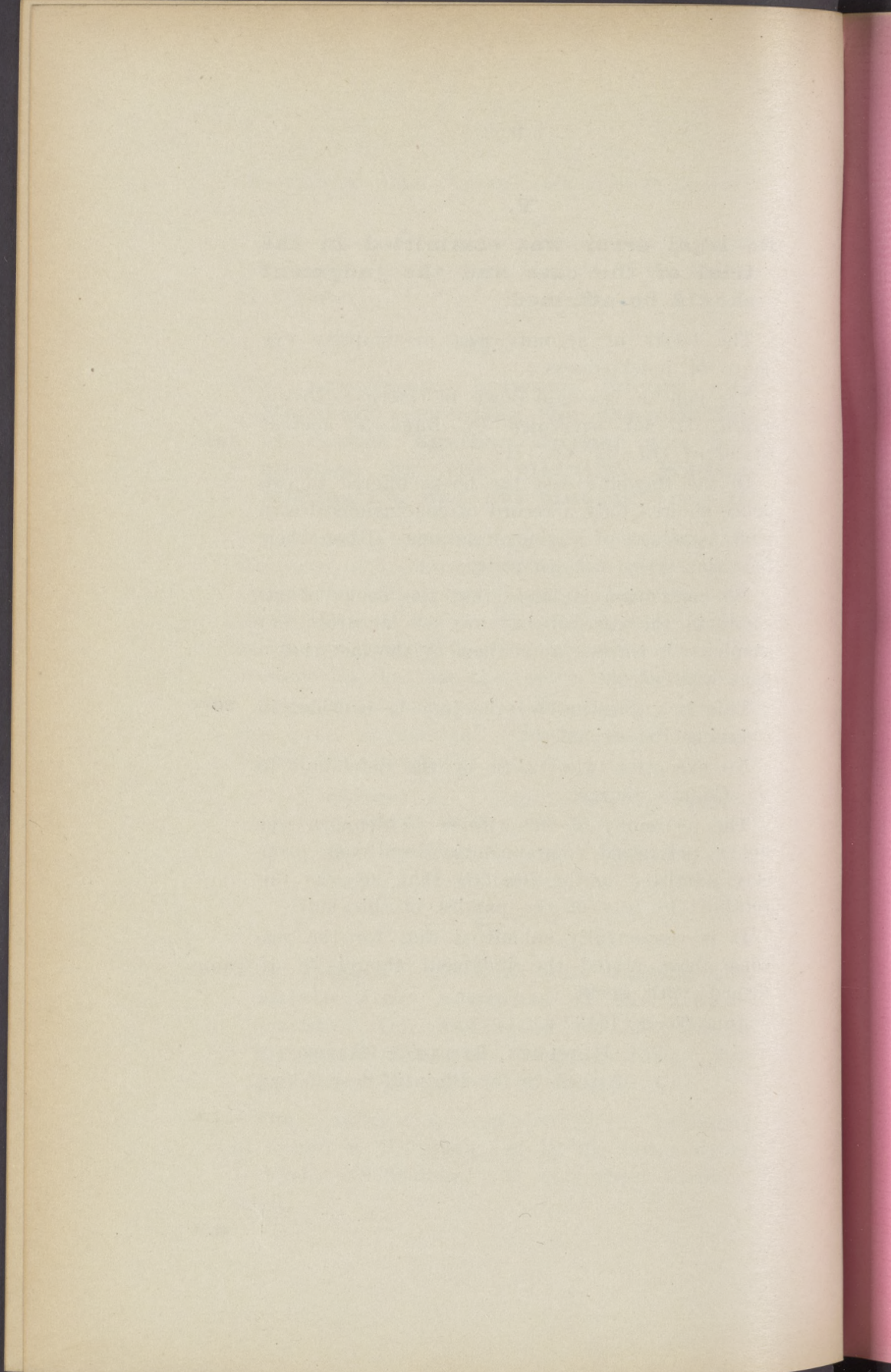
No exception was taken by the defendant to the Court's charge.

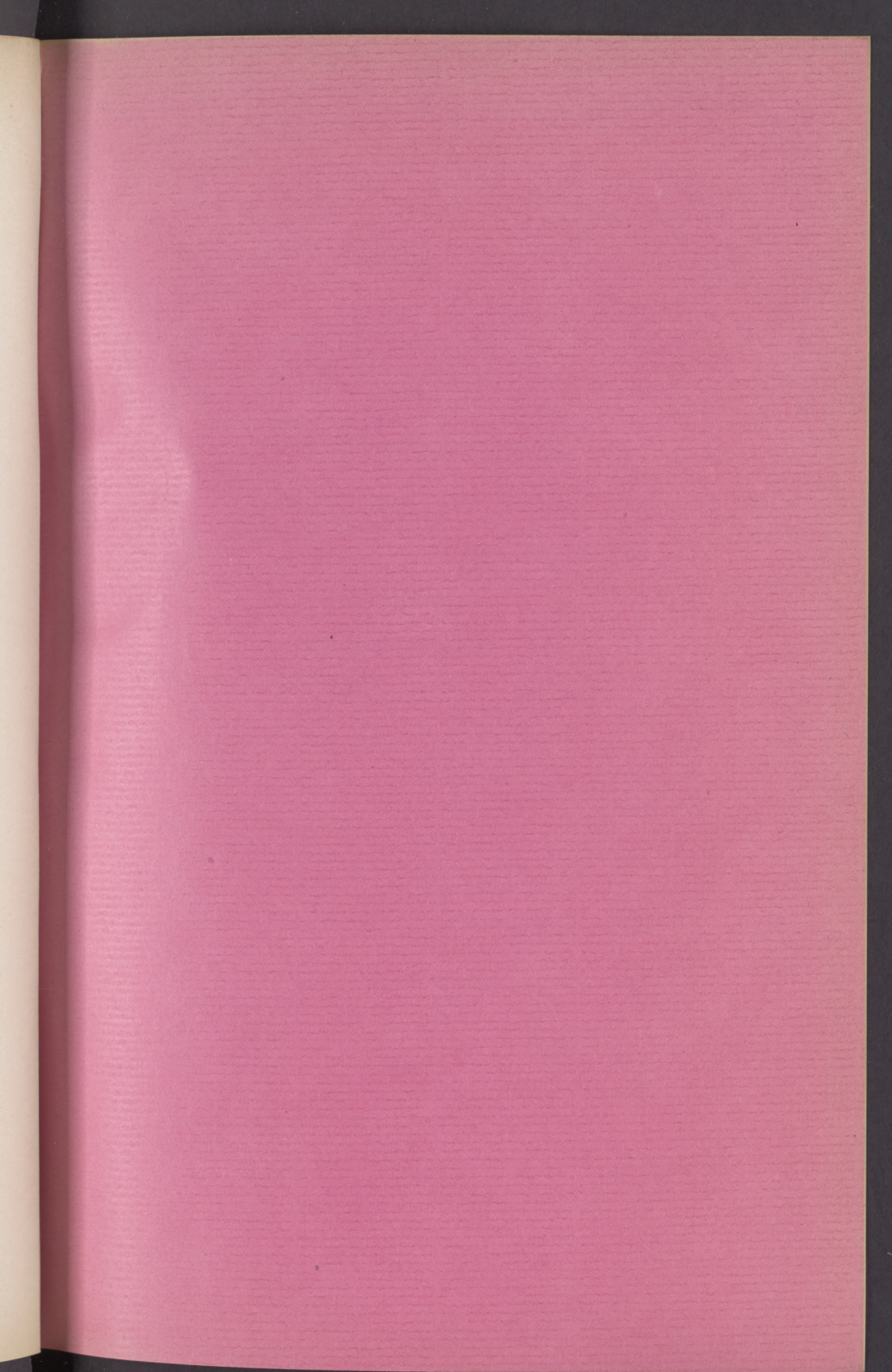
The testimony of the witness Goldenhorn was not a privileged communication and was properly admitted as he testified that he was not retained by any of the parties in this suit.

It is respectfully submitted that for the reasons above stated the judgment should be affirmed with costs. 30

June Term, 1913.

HUDSPETH, RYSDYK & GARRISON,
Attorneys for Plaintiff-Respondent.





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