

**INDEX.**

	Page
Notice of Appeal .....	1
Grounds of Appeal .....	2
Summons .....	6
Complaint .....	7
Exhibit "A"—Annexed to Complaint....	11
Exhibit "B"—Annexed to Complaint ....	12
Answer .....	14
Reply .....	18
Postea .....	19
Judgment .....	20
Supersedeas .....	21
Motion for Non-Suit .....	40
Motion for Direction of Verdict by Defendant	91
Motion for Direction of Verdict by Plaintiff..	95
Direction of Verdict .....	95

WITNESSES FOR PLAINTIFF.

Fred G. Schupp:	
Direct .....	25
Cross .....	26
Recalled—Direct .....	39
John T. Mascuch:	
Direct .....	27
Cross .....	30
Redirect .....	31
Recross .....	33
Recalled—Direct .....	67
Recalled—Cross .....	77

WITNESSES FOR DEFENDANT.

Ralph McLean (Deposition):	
Direct .....	41
Cross .....	48
Redirect .....	52
Charles F. Griemsmann:	
Direct .....	93

TESTIMONY IN REBUTTAL.

	Page
Joseph J. Mascuch:	
Direct .....	85
Cross .....	87

PLAINTIFF'S EXHIBITS.

	Adm'd	Ptd
	Page	Page
P-1—Check for \$407.03 .....	26	103
P-2—Check for \$5288.23 .....	26	104
P-3—Letter dated Aug. 6, 1926.....	70	106
P-4—Letter dated Aug. 10, 1926 ....	70	107

DEFENDANT'S EXHIBITS.

D-1—Letter dated April 17, 1926...	66	108
------------------------------------	----	-----

Notice of Appeal.

Filed December 23, 1927.

New Jersey Supreme Court.

ESSEX COUNTY.

ECONOMY AUTO SUPPLY Co., INC. Plaintiff-Respondent,	}	10
vs.		
FIDELITY UNION TRUST COMPANY, Defendant-Appellant.	}	Action at Law
		Notice of Appeal.

To: SAUL J. ZUCKER, 20  
Attorney of Plaintiff-Respondent:

Please Take Notice that the defendant in the above stated cause hereby appeals from the judgment heretofore entered on the Twenty-first day of December, Nineteen Hundred and Twenty-seven, and from every part thereof, to the New Jersey Court of Errors and Appeals in the last resort in all causes. 30

Dated, December 22, 1927.

Respectfully,

HOOD, LAFFERTY & CAMPBELL,  
Attorneys for Defendant-Appellant.

Service of the within Notice is hereby acknowledged this 22 day of December, 1927.

SAUL J. ZUCKER,  
Attorney for Plaintiff-Respondent. 40

**Grounds of Appeal.**

Filed February 1, 1928.

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

10	ECONOMY AUTO SUPPLY COMPANY, INC., Plaintiff-Respondent,	}	Action at Law Grounds of Appeal.
	v.		
	FIDELITY UNION TRUST COMPANY, Defendant-Appellant.		

To: SAUL J. ZUCKER,  
Attorney for Plaintiff-Respondent:

20 Please Take Notice that the following are the grounds upon which the defendant-appellant, Fidelity Union Trust Company, a corporation of New Jersey, appeals from the judgment heretofore entered on December 21, 1927, and from every part thereof:

1. Because said judgment is contrary to law.
2. Because the trial court, over the objection and exception of defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

30 "Q. Will you point out in the by-laws the section and read it to us? That applies to the duties of president?"

3. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

40

*Grounds of Appeal.*

"Q. Will you turn to the section referring to the duties of the president?"

4. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

"Q. Read the resolution respecting the funds of the company." 10

5. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

"Q. Were there any other funds drawn from this company or transferred in any other manner except provided for by this resolution of June 11th?" 20

6. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

"Q. Were there any funds of the Cox Corporation withdrawn or deposited except pursuant to this resolution?"

7. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

"Q. Did you make a demand on the Economy Auto Supply Company for the payment of these two bills?" 30

8. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

40

*Grounds of Appeal.*

ously permitted the witness, John T. Mascuch, to answer the question following:

“Q. Does your ledger account of the Economy Auto Supply Company show the obligation for these two checks?”

9. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

“Q. The amount due on these two checks?”

10. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

20 “Q. Is the account still open?”

11. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

“Q. Did the Cox Company credit the Economy Auto Supply Company with the amount involved in this suit?”

30 12. Because the trial court, over the objection and exception of the defendant-appellant, erroneously permitted the witness, John T. Mascuch, to answer the question following:

“Q. Are there any credits from the Economy Auto Supply Company not shown on these ledger sheets?”

40 13. Because the trial court, over the objection and exception of the defendant-appellant, errone-

*Grounds of Appeal.*

ously permitted the witness, John T. Mascuch, to answer the question following:

“Q. Referring to the ledger account, does that ledger account show credit for the two checks involved in this suit?”

14. Because the trial court erroneously and over the objection of the defendant-appellant, directed a verdict for the plaintiff-respondent for the sum of \$6,912.07, to which direction the defendant-appellant duly took exception. 10

15. Because the trial court erroneously refused the defendant-appellant's motion to direct a verdict in favor of the defendant-appellant, to which refusal the defendant-appellant duly took exception.

HOOD, LAFFERTY & CAMPBELL, 20  
Attorneys for Defendant-Appellant.

Due and legal service of a copy of the above grounds of appeal is hereby acknowledged.

SAUL J. ZUCKER,  
Attorney for Plaintiff-Respondent.

30

40

**Summons.**

STATE OF NEW JERSEY

to

FIDELITY UNION TRUST COMPANY,

You are Summoned to answer the annexed complaint of the Economy Auto Supply Co. Inc., in an action at law in the New Jersey Supreme Court, Essex County. And

(L.S.)

10 take notice that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Honorable WILLIAM S. GUMMERE, Chief Justice of our said New Jersey Supreme Court, at Trenton, this twenty-third day of September, Nineteen Hundred and Twenty-six.

EDWARD J. KELLEHER,  
Clerk.

SAUL J. ZUCKER,  
Attorney.

*Notice to the within named Defendant:*

In case the within writ of summons and complaint 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 thereof upon you, and must file your answer within twenty days from the date of such service, and in default thereof, judgment will be entered against you. (Lawful service upon a corporation is deemed personal service for the purpose of this notice).

Dated, September 23, 1926.

SAUL J. ZUCKER,  
Attorney of Plaintiff.

**Complaint.**

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ECONOMY AUTO SUPPLY Co., INC.  
Plaintiff,

vs.

FIDELITY UNION TRUST COMPANY,  
Defendant.

Action at Law  
Complaint. 10

The plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal place of business in the City of Newark and County of Essex, complaining of the defendant, says: 20

FIRST COUNT.

1. That the defendant is a trust company organized under and pursuant to the laws of the State of New Jersey and has its principal place of business in the City of Newark, where it does a general banking business.

2. That heretofore, on or about and between the first day of May, Nineteen Hundred and Twenty-six, and the twenty-fifth day of June, Nineteen Hundred and Twenty-six, and for sometime prior thereto, the plaintiff maintained a deposit at, and was a depositor in the bank or trust company owned and operated by the defendant, and the plaintiff from time to time did make deposits to its credit in said bank, which said deposits were made and to be maintained by the said trust company under 30 40

*Complaint.*

an agreement wherein and whereby the said trust company was to receive and accept the deposits made by the plaintiff in said bank and credit such deposits to the account of the plaintiff and did agree that it would, whenever required, pay such sum or sums of money to such person or persons as the plaintiff might designate by a check, note or other obligation of a like character, drawn on said bank and properly signed by the plaintiff and charge the same against the account so maintained as aforesaid by the plaintiff with the defendant.

3. Notwithstanding its agreement in that behalf the said defendant did on or about the seventeenth day of June, Nineteen Hundred and Twenty-six, honor and pay from the said deposit of the said plaintiff two checks aggregating the sum of Five Thousand Six Hundred Eighty-seven Dollars and Twenty-six Cents (\$5,687.26), drawn to the order of the Cox Corporation, to a person or persons not designated in said checks as the payee thereof, which said sum was charged against the said plaintiff's account, true copies of which checks are hereto annexed and made part hereof, one in the sum of Five Thousand Two Hundred Eighty Dollars and Twenty-three Cents (\$5,280.23) and the other in the sum of Four Hundred and Seven Dollars and Three Cents (\$407.03), and are hereby expressly referred to as if the same were herein set forth fully and at length; although said checks were properly signed by the said plaintiff, said checks were not paid to the persons designated therein as payees and were not endorsed by the payee or the person designated in said checks as payee nor by the authority of the person designated therein as payee, but the said defendant paid the same to some persons unknown to the

10

20

30

40

*Complaint.*

plaintiff and charged the said sums of money, represented by said checks, against the plaintiff's deposit contrary to the true intent and meaning, tenor and effect of the arrangement under which the said plaintiff became a depositor with the defendant trust company.

4. That the payee of said checks, the Cox Corporation, the person designated in said checks, did not endorse the said checks, but that what purports to be an endorsement of the said Cox Corporation is not the genuine signature, and was not made by the authority of, said corporation, and that the said defendant has charged against the plaintiff's account the sum total of the said two checks contrary to its agreement in that behalf, and the said Cox Corporation has not, in accordance with the order of the plaintiff, received the proceeds of said checks, and said checks were not paid to the person designated therein by the plaintiff as payee.

5. That the plaintiff has notified and advised the said defendant of the improper endorsements upon said checks or orders and has demanded that the defendant return to and credit the account of the plaintiff with the sum of Five Thousand Six Hundred and Eighty-seven Dollars and Twenty-six Cents (\$5,687.26), which the said defendant has wrongfully charged against said account and withdrawn therefrom, but the said defendant, although often requested, has failed and refused and still does refuse so to do.

Judgment will be claimed on this count in the sum of Five Thousand Six Hundred and Eighty-seven Dollars and Twenty-six Cents (\$5,687.26), together with interest and costs.

10

20

30

40

Complaint.

SECOND COUNT.

1. The plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, demands of the defendant the sum of Ten Thousand Dollars (\$10,000.00) due from the defendant to the plaintiff for cash money loaned and advanced by the plaintiff to the defendant at its special instance and request; and in the like sum for moneys paid out by the plaintiff for the use of the defendant at its special instance and request; and in the like sum for moneys had and received by the defendant for the use of the plaintiff; and in the like sum for interest for the forbearance by the plaintiff at the request of the defendant of moneys due and owing from the defendant to the plaintiff upon two certain checks, copies of which are hereto annexed and marked "Exhibit A" and "Exhibit B" and made part hereof as if herein set forth fully and at length, which said checks were drawn by the plaintiff on the defendant, in the bank of which defendant, the plaintiff had and maintained a deposit and which were improperly charged to said plaintiff's account.

Judgment will be claimed on this count in the sum of Five Thousand Six Hundred and Eighty-seven Dollars and Twenty-six Cents (\$5,687.26), together with interest and costs.

Dated, September 23, 1926.

SAUL J. ZUCKER,  
Attorney of Plaintiff.

Complaint.

Exhibit "A."

Number  
B 7280

ECONOMY AUTO SUPPLY CO., INC.  
268 Halsey Street

Newark, N. J. June 10, 1926 10

Pay to the Order of Cox Corp. \$5288.23/100  
Five Thousand Two Hundred Eighty-eight Dollars  
Twenty Three Cents Dollars

ECONOMY AUTO SUPPLY Co., INC.  
B. MILLER  
President.

To the  
FIDELITY UNION TRUST COMPANY  
55-9 Newark, N. J. 20

(Endorsed on back)

Pay to the Order of  
Sheldon Axle & Spring Co.  
Cox Corporation  
William M. Cox  
President

Pay Second National Bank  
of Wilkes-Barre, Pa., or order  
Sheldon Axle & Spring Co. 30

Pay to the Order of  
Any Bank, Banker,  
Bankers or Trust Co.  
Previous Endorsements Guaranteed  
June 16 1926

The Nat'l Park Bank of N. Y.  
154 154



Answer.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ECONOMY AUTO SUPPLY Co., INC.  
Plaintiff,

10

v.

FIDELITY UNION TRUST COMPANY,  
Defendant.

Action at Law  
Answer.

The defendant, a corporation of the State of New Jersey, with its principal office in the City of Newark:

20 ANSWERING FIRST COUNT, SAYS:

- 1. It admits paragraph 1 of the complaint.
- 2. It admits paragraph 2 of the complaint.
- 3. It denies that part of paragraph 3 of the complaint in which it is alleged that the checks therein mentioned and drawn to the order of "Cox Corporation" were paid "To a person or persons not designated in said checks as the payee thereof", and that "Said checks were not paid to the persons designated therein as the payees and were not endorsed by the payee or the person designated in said checks as payee nor by authority of the person designated therein as payee, but said defendant paid the same to some persons unknown to the plaintiff and charged said sums of money represented by said checks against the plaintiff's deposit contrary to the true intent and meaning, tenor and effect of the arrangement under which

40

Answer.

the said plaintiff became a depositor with the defendant trust company". And says that said checks were duly and legally endorsed by the payee therein named and that the payment of such checks was made to the legal holder thereof.

4. It denies "That the payee of said checks, the Cox Corporation, the person designated in said checks, did not endorse the said checks". It denies that the "Endorsement of said Cox Corporation is not the genuine signature and was not made by authority of said corporation". It admits that it "Has charged against the plaintiff's account the sum total of said two checks". It denies that such charge was made "Contrary to its agreement in that behalf, and that said Cox Corporation has not in accordance with the order of the plaintiff received the proceeds of said checks, and said checks were not paid to the person designated therein by the plaintiff as payee".

10

20

5. It admits that the plaintiff has notified and advised it of what the plaintiff claims to be an improper endorsement upon said checks, and has made the demand in paragraph 5 stated, but denies that the charges made against said account on account of said checks were improperly made.

30

ANSWERING SECOND COUNT, SAYS:

1. That to all of the said several promises in said second count mentioned, it did not promise in the manner and form as the plaintiff hath above thereof complained against it and of this it puts itself upon the country, etc.

DEFENSE TO FIRST COUNT.

- 1. The checks mentioned and described in plain-

40

*Answer.*

tiff's complaint were made payable to "Cox Corporation".

2. Cox Corporation was at that time indebted to the Sheldon Axle & Spring Co. in a large sum of money, approximately \$400,000.

3. In the month of February, 1926, the Cox Corporation was indebted to said Sheldon Axle & Spring Co. to the extent of more than \$350,000.

4. To induce said Sheldon Axle & Spring Co. to continue to manufacture goods for said Cox Corporation, the said Cox Corporation agreed to and with the Sheldon Axle & Spring Co. to assign to it, the Sheldon Axle & Spring Co., all future invoices of goods sold by the Cox Corporation until the full amount of indebtedness to the said Sheldon Axle & Spring Co. should be fully paid.

5. Said checks were issued for goods sold and delivered by the Cox Corporation to the plaintiff after the agreement mentioned in paragraph 4 hereof.

6. Pursuant to said agreement, Cox Corporation by its President, endorsed said checks to the order of "Sheldon Axle & Spring Co.", and delivered the same to the Sheldon Axle & Spring Co., and the amount for which said checks were given was credited by the Sheldon Axle & Spring Co. to the indebtedness of Cox Corporation.

7. After crediting said checks to the amount due the Sheldon Axle & Spring Co. from the Cox Corporation there was still due from said Cox Corporation to the Sheldon Axle & Spring Co. an amount in excess of \$350,000.

8. Said checks were then endorsed "Pay Second

*Answer.*

National Bank of Wilkes Barre, Pa., or Order, Sheldon Axle & Spring Co."

9. Said checks were then endorsed "Pay to any Bank, Banker or Trust Co., or Order, prior endorsements guaranteed, June 15, 1926, Second National Bank of Wilkes Barre, Pa., W. E. Lewis, Cashier."

10. Said checks were then endorsed "Pay to the order of any Bank, Banker, Bankers or Trust Co., previous endorsements guaranteed, June 16, 1926, The Nat'l Park Bank of N. Y."

11. Said checks were then endorsed "Pay any Bank, Banker or Trust Co., or Order, prior endorsements guaranteed, June 16, 1926, Federal Reserve Bank of N. Y."

12. Said checks were then presented to this defendant, and the amount thereof paid and charged against the account of the plaintiff.

## DEFENSE TO SECOND COUNT.

1. This defendant repeats as a defense to the second count its defense to the first count.

HOOD, LAFFERTY & CAMPBELL,  
Attorneys of Defendant.

10

20

30

40

Reply.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ECONOMY AUTO SUPPLY Co., INC.  
Plaintiff,

10

vs.

FIDELITY UNION TRUST COMPANY,  
Defendant.

Action at Law  
Reply.

The plaintiff, replying to the Answer filed by the defendant, says:

20

IN ANSWER TO THE DEFENSE TO THE  
FIRST COUNT.

- 1. It admits Paragraph 1.
- 2. It denies Paragraphs 2, 3, 4, 5, 6, 7.
- 3. As to Paragraphs 8, 9, 10, and 11, the plaintiff alleges that the checks speak for themselves.
- 4. It has no knowledge or information, sufficient to form a belief as to the allegations contained in Paragraph 12.

30

IN ANSWER TO THE DEFENSE TO THE  
SECOND COUNT.

- 1. It repeats all the allegations contained in the Reply to the Defense to the First Count.

Dated: October 22, 1927.

SAUL J. ZUCKER,  
Attorney of Plaintiff.

40

Postea.

NEW JERSEY SUPREME COURT.

ECONOMY AUTO SUPPLY Co., INC.  
Plaintiff,

vs.

FIDELITY UNION TRUST COMPANY,  
Defendant.

Action at Law  
Postea.

10

This case was tried before the Hon. NELSON Y. DUNGAN, Circuit Court Judge, to whom the above entitled cause was referred by the Hon. WILLIAM S. GUMMERE, Chief Justice, by an order made and entered on the opening day of the September term, 1927, with a jury at the Essex Circuit, on December 7th and 8th, 1927.

20

Upon the conclusion of the testimony both the defendant and the plaintiff moved the court for a direction of a verdict, and thereupon the Judge directed the jury to return a verdict against the defendant and in favor of the plaintiff for Six Thousand One Hundred Ninety-two Dollars and Seven Cents (\$6,192.07).

30

Dated, December 8, 1927.

NELSON Y. DUNGAN,  
Circuit Court Judge.

Entered Dec. 21/27.

40

**Judgment.**

NEW JERSEY SUPREME COURT.

10	ECONOMY AUTO SUPPLY Co., INC. Plaintiff,	}	Action at Law
vs.			On Postea.
FIDELITY UNION TRUST COMPANY, Defendant.			

It is Ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of Six Thousand, One Hundred and Ninety-two Dollars and Seven cents, besides costs to be taxed nisi.

Entered December 21, 1927.  
On motion of  
SAUL J. ZUCKER, Attorney.

\$6,192.07
57.56
\$6,249.63

Discharged by order of Court. See Min. Oct. Term. 1927, under date of Dec. 28, 1927.

A true copy.  
EDWARD J. KELLEHER,  
Clerk.

**Supersedeas.**

Filed December 28, 1927.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10	ECONOMY AUTO SUPPLY Co., INC. Plaintiff,	}	Action at Law
vs.			Supersedeas.
FIDELITY UNION TRUST COMPANY, Defendant.			

It appearing that upon the verdict of the jury and the return of the postea in the above cause, a judgment was on the twenty-first day of December, nineteen hundred and twenty-seven, entered in favor of Economy Auto Supply Co., Inc., plaintiff, vs. Fidelity Union Trust Company, defendant, in the sum of six thousand one hundred ninety-two dollars and seven cents, and the costs of this suit have been taxed at fifty-seven dollars and fifty-six cents; and it also appearing that said Fidelity Union Trust Company has appealed from the judgment of the Supreme Court to the Court of Errors and Appeals; and that said Fidelity Union Trust Company hereby tenders itself ready and willing to deposit with the clerk of this court such sufficient and satisfactory sum as this court may direct as security for the payment of such sum or sums of money as may finally be determined and ascertained to be due said plaintiff in this action, agreeable to the statute in such case made and provided:

IT IS, on this 24th day of December, nineteen hundred and twenty-seven, ORDERED, that the

*Supersedeas.*

real estate of the defendant, Fidelity Union Trust Company, be and the same is hereby discharged from the lien of the above mentioned judgment, upon the said defendant depositing with the clerk of this court lawful money of the United States of America in the sum of Seven thousand dollars as security for the payment of such sum or sums of money as may be determined and ascertained to be due in the above cause of action.

10

And it is further ORDERED, that said sum of money shall be retained by said clerk until the final determination of the above cause of action and be subject to the lien of the aforesaid judgment, or any judgment recovered therein.

And it is further ORDERED, that if said judgment be affirmed, that said clerk pay to the plaintiff, or to its attorney, from the moneys so deposited in this cause the amount determined and ascertained to be due the plaintiff, with interest and all costs, and that he return to the defendant the surplus of such deposit.

20

Let this rule be entered in the minutes.

WM. S. GUMMERE,  
*C. J.*

On motion of  
HOOD, LAFFERTY & CAMPBELL,  
Attorneys for Defendant.

30

We consent to the making of the above order of Supersedeas.

SAUL J. ZUCKER,  
Attorney of Plaintiff.

40

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Wednesday, December 7, 1927.

ECONOMY AUTO SUPPLY Co.

vs.

FIDELITY UNION TRUST Co.

Action at Law

10

Before—Hon. NELSON Y. DUNGAN, *J.*, and a jury.

For the Plaintiff appear SAUL J. ZUCKER and LIONEL P. KRISTELLER.

For the Defendant appear HOOD, LAFFERTY & CAMPBELL (by LOUIS HOOD and FRANCIS LAFFERTY.)

20

Mr. Kristeller: Before the jury is actually brought into the case, I have a motion to strike out the defenses to the first count and the defense to the second count, which is identically the same.

Perhaps I had better explain the pleadings first and inform your Honor what it is about.

This is a suit by the Economy Auto Supply Company against the Fidelity Union Trust Company. The Economy Auto Supply Company is a depositor in the Fidelity Union Trust Company, and in May and June of last year, 1926, drew two checks on that bank to the order of the Cox Corp. We have alleged that the bank had an agreement by which it was to receive and accept the deposits, as is usual with banks, and to pay it out or to the order of the plaintiff, as evidenced by those checks. We say those two checks—photostatic copies of

30

40

*Motions.*

which are annexed to the pleadings—were made out by the Economy Auto & Supply Company, and were thereafter endorsed “Pay to the order of Sheldon Axle & Spring Company, Cox Corporation, William M. Cox, president,” and then endorsed by the Sheldon Axle & Spring Company, “For deposit in above bank, the Second National  
10 Bank of Wilkes Barre, Pa.,” and to other banks came to the Fidelity Union Trust Company, and the Fidelity Union Trust Company accepted the checks and paid them and took the money out of the account of the plaintiff. The plaintiff then was informed that this endorsement was an improper endorsement, and called the attention of the bank to it, claiming that the president of the Cox Corporation had no authority to endorse the check, and that the bank was put upon its notice,  
20 that it was not paid directly to the Economy Auto & Supply Company, but to some other person.

The first part of the answer is a denial and alleges it was paid to the person authorized, but the other defenses—or, rather, the defenses to the count—are all in one, as follows: “The checks mentioned and described in the plaintiff’s complaint were made payable to Cox Corporation.” That the Cox Corporation was at that time indebted to the  
30 Sheldon Axle & Spring Company in a large sum of money, approximately. \$400,000. Third, that in the month of February, 1926, the Cox Corporation was indebted to the Sheldon Axle & Spring Company to the extent of more than \$350,000. Fourth, to induce the said Sheldon Axle & Spring Company to continue to manufacture goods for the said Cox Corporation, and the said Cox Corporation agreed to and with the Sheldon Axle & Spring Company to assign all invoices of the Cox Corporation  
40 until”—

*Fred G. Schupp—Direct—for Plaintiff.*

The Court: I am just wondering under what practice you are making this motion? Your complaint does not reserve that right nor in your reply to the answer.

Mr. Hood: Before they made a reply they made an application to the Chief Justice, which I did not argue, to strike out that defense, and he denied that motion, and how this can come before the trial court now I do not understand. 10

The Court: You are moving now to strike out the special defenses?

Mr. Kristeller: Yes.

Mr. Hood: We certainly object to it.

The Court: The motion will be denied.

Plaintiff’s counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal. 20

MR. KRISTELLER opens in behalf of the plaintiff.

MR. HOOD opens in behalf of defendant.

At one o’clock, P. M., the court took a recess for one hour.

After recess. 30

FRED G. SCHUPP, sworn in behalf of plaintiff.

*Direct-examination by Mr. Kristeller:*

Q. What is your occupation? A. I am office manager for the Economy Auto & Supply Company.

Q. Have you charge of their books? A. I have.

Q. Charge of their bank account? A. I have. 40

*Fred G. Schupp—Cross—for Plaintiff.*

Q. (Showing witness paper.) I show you two checks and ask you if those checks were drawn by your company? A. They were.

Q. Were they paid and taken out of your account at the Fidelity? A. They were.

Q. Were the amounts as set out in those checks deducted from that balance in the Fidelity? A. Yes, sir.

Q. Has that balance ever been returned? A. It has not.

(The checks referred to are offered in evidence and marked Ex. P1 and P2 respectively.)

Q. Have you figured the interest on these checks? A. Yes, sir.

Q. What is the total amount? A. The total amount of the two checks, with interest—

Q. No, the interest. A. The interest on the one check is \$38—that is, the check of \$407.03, dated May 10th. The interest on the June 10th check is \$472.

The Court: You were just asked the accrued amount of interest.

Witness: The accrued amount of interest is \$510.

Q. Making a total of \$6,210.22? A. That is right.

*Cross-examination by Mr. Hood:*

Q. For what period of time do you figure the interest? A. From the time the checks were given up until today.

Q. From the time the checks were given? A. Yes.

Q. Up until today? A. Yes, sir.

Q. Not from the time your account was charg-

*John T. Mascuch—Direct—for Plaintiff.*

ed? A. The account was charged shortly after the checks were given.

Q. You say they were paid some time in June, 6-17-26—that is the 17th of June and one of the checks dated May 10th. A. Yes.

*By the Court:*

Q. The one paid June 17th is dated when? A. June 10th.

Q. So that you figured your interest from the date of the checks and not from the date of the payment of the checks?

The Court: When was the \$407.03 check paid?

Mr. Hood: I think they were paid on the same day and I believe that are so marked. They seem to be dated the same day. One is dated May 10th and the other is dated June 10th.

Q. What rate of interest did you figure? A. Six per cent. per annum.

Q. Did you figure according to an interest table or just according to regular interest that we figure at school? A. I figured according at six per cent. a year.

Q. One per cent a month? A. Yes, sir.

Q. And a mill for every six days? A. Yes.

JOHN T. MASCUCH, sworn in behalf of plaintiff.

*Direct-examination by Mr. Kristeller:*

Q. What office do you hold in the Cox Corporation? A. Secretary-treasurer.

Q. (Showing witness book.) I show you a book

*John T. Mascuch—Direct—for Plaintiff.*

and ask you if this is the original minute book of your corporation? A. It is.

Q. Does that minute book contain the original by-laws of your corporation? A. Yes, sir.

Q. Will you point out in the by-laws the section and read it to us? That applies to the duties of the president.

10

Mr. Hood: I object. I have indicated, if your Honor please, in my opening to the jury, that, in my judgment, there is an implied duty recognized in the courts, and if the implied duty happens to be in conflict with an expressed duty, placed upon the officers, that the bank would not be chargeable with that knowledge, unless it is established that that knowledge was known to the bank. My position would be that those things are not competent or relevant until a preliminary proof is established, that these things were brought to the knowledge of the bank.

20

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the court.

30

Exception noted as ground of appeal.

A. (Reading:) "The president shall be the executive officer of the company and shall have general management of the business of the company. The president shall have custody of the seal of the company and shall affix the said seal to any instrument requiring the same."

Q. What is that section of the by-laws? A. Section 15.

40

Q. Will you turn to the section referring to the duties of the president?

*John T. Mascuch—Direct—for Plaintiff.*

Mr. Hood: I object. May my objection which I made before apply to all the by-laws?

The Court: It will be understood, and you may have an exception to this line of testimony.

Exception noted as ground of appeal.

10

A. (Reading) "The treasurer shall be the financial officer of the corporation and shall perform the duties usually performed by the treasurer of a corporation, and when requested he shall render a report to the directors."

Q. Is there contained in that book all of the minutes of the corporation and its organization?

A. Yes, sir.

Q. Is there any minutes of the board of directors authorizing or directing the disposition of funds coming to the corporation? A. Yes, sir.

20

Q. Will you tell us when and what you now refer to? A. (Reading) "Meeting of the Board of Directors of the Cox Corporation held June 11, 1924."

Q. Who was present at that meeting? A. William G. Cox, Joseph J. Mascuch, John T. Mascuch, Edgar Storms, Joseph Gallagher.

*By the Court:*

30

Q. How many directors were there? A. Enough.

Q. That is, all the directors? A. Yes, sir.

*By Mr. Kristeller:*

Q. Read the resolution respecting the funds of the company?

Mr. Hood: My objection goes to all this testimony, your Honor?

40

*John T. Mascuch—Cross—for Plaintiff.*

The Court: Yes. Your exception will be noted.

A. (Reading) "On motion, duly made and seconded and carried, it was resolved that the funds of the company deposited to the credit of the company in the Second National Bank of Wilkes Barre, Pennsylvania, and are authorized to be  
10 withdrawn therefrom only upon the signature of the secretary-treasurer, C. F. Griesman, and counter-signed by either the president, William G. Cox, or vice-president, Joseph T. Mascuch."

Q. Was that resolution, or any of the by-laws which you have read, rescinded or changed prior to the 17th day of June, 1926? A. No, sir.

*By the Court:*

Q. You are the secretary-treasurer? A. Yes,  
20 sir.

Q. Joseph Mascuch is the vice-president? A. Yes, sir.

*Cross-examination by Mr. Hood:*

Q. You read the name of William G. Cox. Is that your record? A. That is my error. William M.

Q. William M. was president at the time? A.  
30 Yes, sir.

Q. What did you say was the date of that resolution? A. June 11, 1924.

Q. How long before that was Mr. Cox the president of the organization? A. July 17, 1923.

Q. How long after that was he president? A. (Examines book.)

Q. How far have you traced him now? A. June  
40 16, 1926.

*John T. Mascuch—Redirect—for Plaintiff.*

Q. Any beyond that? A. No, that is when the new board was elected and new officers.

Q. When did the new officers go in? A. As of that date.

Q. Will you be good enough to read me that resolution? I didn't quite get that. A. Which one?

The Court: The one of June 11, 1924, to  
10 be deposited in the Second National Bank of Wilkes Barre.

Witness: (Reading) "On motion, duly made seconded and carried, it was resolved that the funds of the company be deposited to the credit of the company in the Second National Bank of Wilkes Barre, Pennsylvania, and are authorized to be withdrawn therefrom only upon the signature of the secretary and  
20 treasurer, C. F. Griesman, and the president, William G. Cox, or the vice president, Joseph G. Schupp."

Q. That is all there is to that? A. That is all.

*Redirect-examination by Mr. Kristeller:*

Q. Were there any other funds drawn from this company or transferred in any other manner except provided for by this resolution of June 11th?  
30

Mr. Hood: I object to that. I think you are rather anticipating the defense. That is rebuttal testimony.

Mr. Kristeller: There is evidence to show that wasn't necessary.

Mr. Hood: I don't quite understand that the practice of the company either for or against the by-laws or the resolution, can in any way affect the transaction between  
40

*John T. Mascuch—Redirect—for Plaintiff.*

the Economy Auto Supply Company and the bank, which, after all, is the issue in this case, and, therefore, I think that is incompetent.

The Court: The objection will be overruled.

10 Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. With the exception of the checks in suit and some other checks that were deposited all at the same time, in which we are not interested, were any funds of this company withdrawn or paid except in the manner provided for in this resolution? A. No, sir.

20 Mr. Hood: I object to that and I want to urge the same reasons that I urged before.

The Court: I think this question is objectionable in its present form.

Q. Were there any funds of the Cox Corporation withdrawn or deposited except pursuant to this resolution?

30 Mr. Hood: I object and I urge what I urged before, because the testimony is irrelevant and incompetent.

The Court: The objection will be overruled and an exception noted.

A. No, sir.

Q. Withdrawn or transferred? A. There were no funds transferred, only according to the resolution.

40

*John T. Mascuch—Recross—for Plaintiff.*

*Recross-examination by Mr. Hood:*

Q. Did you pay any bills at all in cash? A. Just what way do you mean?

Q. Did you pay anybody in cash? A. I wasn't treasurer at that time. I didn't pay the bill.

Q. You were secretary? A. No, Mr. Griesman was secretary-treasurer at that time. 10

Q. What is his full name? A. Charles F. Griesman.

Q. When did you get to be secretary-treasurer? Don't you recall without looking it up? A. No, I couldn't give the exact date.

Q. Can you give me approximately the date? A. Approximately, June, 1926.

*By the Court:*

Q. Is not your election shown by the minutes? A. Yes, sir. 20

*By Mr. Hood:*

Q. The same date as the other—that is, June 16th? A. On April 27, 1926, I was made assistant treasurer and assistant secretary.

Q. April 27th? A. Yes, sir.

The Court: That is not just the question that was asked you. 30

Witness: And on June 19, 1926, I was made secretary-treasurer.

Q. Then did you hold any office at all from the date of the resolution which, as I recall it, was 1924, until the time when you were made assistant secretary-treasurer? A. I was only a director.

Q. Then you didn't have anything to do with the disbursement of funds, did you? A. Only as a director. 40

*John T. Mascuch—Recross—for Plaintiff.*

Q. A director does not ordinarily trouble himself with individual payments that are made, does he? A. No, sir.

Q. He simply gets the report as to how much money was paid in and how much was paid out?

Mr. Kristeller: I object to what he usually does.

10 Q. Did you directors do anything else than that? A. No, sir.

Q. How can you say that no funds were distributed in pursuance of that resolution from 1924, the date of the resolution, until April, 1926, when you had no knowledge of the actual interest of the treasury department of your company? A. Since that time I have gone over the books.

20 Q. And your conclusion is only on the basis of the books? A. Yes, sir.

Q. You had paid cash, hadn't you? A. Paid cash was handled by the treasurer.

Q. The cash he paid out, didn't he? A. I presume so.

Q. There was a check drawn for that, for individual items paid out? A. If there was cash paid out, I presume that was the way it was paid out.

30 Q. The Cox people had been working for them, hadn't they? A. Yes, sir.

Q. Did they pay their workmen by check? A. Yes, sir; each Cox workman was paid by a check.

*By the Court:*

Q. In what state do you do business? A. We were in Pennsylvania at that time.

Q. Do you know whether the laws of Pennsylvania permit that? A. They do not.

*John T. Mascuch—Recross—for Plaintiff.*

*By Mr. Hood:*

Q. In all events, you had no personal knowledge of how things were administered in the treasury office while the administration was going on? A. Nothing more definite.

Q. And your conclusion is altogether based on your examination of the books of the company made subsequently to April, 1926? A. Yes, sir. 10

Q. It was subsequently to June 16, 1926? A. Yes, sir.

Q. When was your examination actually made? A. It was made approximately after April, 1927.

Q. So you didn't make that examination until a year after you became the treasurer? A. No, sir; in 1926, April, 1926.

Q. I thought you said you made the examination in April, 1927? A. I made an error if I so stated. It is '26. 20

Q. You want to correct that. You did that as soon as you came in an assistant treasurer, is that the way I understand it? A. Yes, sir.

*By the Court:*

Q. From what books of the company did you ascertain that, were they books under your control or how did you ascertain it? A. From the cancelled checks. 30

Q. That does not quite answer the question whether they were papers and books under your control as secretary-treasurer? A. Yes, sir.

*By Mr. Hood:*

Q. Is that all you did, examine the cancelled checks and check them up? A. And then I went over it with the auditor and checked it up with whatever books he has. 40

*John T. Mascuch—Recross—for Plaintiff.*

Q. Then your conclusion is from what the auditor told you? A. No, sir, I found out.

Q. What did you find out yourself? A. There was no evidence of cash being paid out of the company.

Q. Was there any other cash paid to the company? A. Some amount representing that.

10 Q. Was there any evidence of cash paid to the company? A. Yes, sir.

Q. Did you check those items? A. They were credited through the bank.

Q. They were deposited in the bank, every cash item that you received? A. The cash item was collected—

20 Q. Won't you please answer my question whether every cash item you received was deposited in the bank? A. To the best of my knowledge, yes.

Q. Why do you qualify by saying to the best of your knowledge? A. I may state that as to all my answers.

Q. Have you any doubt about it? A. The question seems a little confusing to me.

30 Q. I don't want to confuse you, but I want you to tell me, as a matter of fact, you credited every item of cash that was received by the company to see what came of it, and whether it went into the bank? A. I traced every transaction; we had had covering the sale of merchandise for which we received payment.

40 Q. But you are not answering my question. I am asking what you said? Some things were paid in cash, and by that, of course, you mean in money. I ask you if you traced each of these money items to see whether that money was deposited in the bank? A. Not each and every individual item.

*John T. Mascuch—Recross—for Plaintiff.*

Q. You didn't. Then how can you say, as you do say, that all payments were made out of the bank? A. Payments?

Q. Yes. A. I thought you asked the money coming into the company—not going out.

The Court: His answer to Mr. Kristeller's question was if funds were transferred or withdrawn, according to that resolution. He did not say that all funds were deposited. 10

Mr. Hood: "Transfer" must mean something, too.

20 Q. You would call it a transfer if money came into your company and you paid that money over, either in one sum or in a number of sums, to somebody—you would call that a transfer, wouldn't you? A. Yes, sir. 20

Q. I want you to tell me whether or not, as to the moneys that had been received, the cash moneys that came to the treasury of the company, were all transferred to the company's credit by depositing them in the bank? A. That I can't answer. Of course, the cash didn't all come into my hands nor did the checks.

30 Q. The checks did not come into your hands during the period we are talking about? A. No, sir. 30

Q. And you traced them, apparently, between the check books? A. Yes, sir.

Q. That same audit of the books that you say your auditor has? A. Yes, sir.

Q. You made no attempts to trace the cash money? A. I can't say that I did.

*By Mr. Kristeller:*

40 Q. What kind of business did the Cox Corporation do? A. Selling automobile bumpers. 40

*John T. Mascuch—Recross—for Plaintiff.*

Q. Did you do cash business for which you received cash payments? A. No, sir.

Q. Did you do any business of that kind? A. Probably a little.

Q. And practically all of the business was done on credit and payments made by mail and checks? A. Yes, sir.

10 *By Mr. Hood:*

Q. Tell me a little more about this Cox Company and the business you did with the Sheldon Company? A. In what respect?

Q. What time did you do business with them?

Mr. Kristeller: Objected to as not cross-examination.

The Court: Objection overruled.

20 Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

A. We started business on June 11, 1924. The board authorized William M. Cox and Joseph Mascuch—

Q. I do not care for the details of it; I just want to know when you started the business. Have you got any of the Cox Company books here? A. No, sir.

30 Q. Was there an account on your books of transactions with the Sheldon Company? A. Yes.

Q. Do you recall what period of time? A. They dated back, approximately, to December, 1924.

Q. And continued until what time? A. Until, approximately, June 19, 1926.

Q. How late in June, 1926? A. It may have run over a little into July, but it was approximately June and July.

40

*Fred G. Schupp—Recalled, Direct—for Plaintiff.*

Q. What year? A. 1926.

Q. Your transactions were frequent up to June and frequent about up until the time— A. Our office was in the main office of the Sheldon Spring & Axle Company, and our offices were together and naturally our transactions were very frequent.

Q. You bought a lot of things from them? A. Bumpers.

Q. You had almost daily transactions with them? A. Yes, sir.

Q. And this ran into a considerable sum of money? A. More or less.

Q. What do you mean by more or less?

Mr. Kristeller: I object to this line of questioning. It is not proper cross-examination.

The Court: I will sustain the objection.

20 Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

FRED G. SCHUPP, recalled in behalf of plaintiff.

*Direct-examination by Mr. Kristeller:*

Q. Have you refigured the interest? A. Yes, 30 sir. On the \$407.03 note the interest is \$36.12; on the check of \$5000 the interest is \$465.69.

Q. It makes a total of how much interest? A. The total interest is \$504.81.

*By the Court:*

Q. \$504.81? A. No. \$502.81.

Q. And \$36.12? A. \$465.69. That is right.

Q. That is \$501.81? A. Yes, sir.

40

*Motion for a Non-Suit.*

Q. That makes a grand total of \$6192.07? A.  
That makes a grand total of \$6192.07.

Cross-examination Waived.

Plaintiff Rests.

10 Mr. Hood: I move for a nonsuit. I move  
for it on the basis of what I have already  
indicated because I say, on the state of  
facts, that there has been no proof of knowl-  
edge brought home to the corporation with  
regard to the resolutions that appear upon  
the books or the by-laws that were read. I  
do not think that they were inconsistent  
with the duties of the president, but if there  
20 should be any inconsistency, I still say that  
the point I desire to make is that where the  
burden is thrown upon the bank in the pay-  
ment of checks because of irregularities,  
and then if there is any contradiction be-  
tween the regulation of the company and  
the implied powers that were shown by the  
ordinary duties assumed by the president,  
in order to hold the bank responsible, it is  
necessary to prove that there was brought  
home to the knowledge of the bank the ex-  
30 istence of those specific requirements which  
were in contradiction to the implied duties,  
and that, otherwise, the bank would regu-  
late itself by the ordinary implied duties  
and act accordingly.

The Court: The motion will be denied.

Defendant's counsel prays an exception  
to this ruling of the court.

Exception noted as ground of appeal.

40 Mr. Hood: I would like to read the depo-

*Ralph McLean—Deposition-Direct—for Defendant*

sitions taken in this matter and which I  
would like to offer.

Mr. Kristeller: The depositions were  
taken in this matter, by consent, with the  
stipulation that no objections need be taken  
as the questions are propounded, and ob-  
jections and rulings thereon may be made  
when the depositions are read in open court. 10

The Court: So if the question is asked,  
you may make objection.

Mr. Hood: (Reading): "By Mr. Kristel-  
ler: It is stipulated by counsel that no ob-  
jections need be taken as the questions are  
propounded, and objections and rulings  
thereon may be made when the depositions  
are read in open court."

"Counsel stipulate that the signatures of 20  
the witnesses are waived."

"MR. RALPH McLEAN called on behalf of the  
defendant, and sworn. Direct-examination by Mr.  
O'Neill.

"Q. Where do you live, Mr. McLean? A.  
Wilkes-Barre, Pa., 78 West South Street.

"Q. What if any official position do you fill with 30  
the Sheldon Axle & Spring Company? A. I was  
made treasurer of the Sheldon Company on the  
15th of September, 1926.

"Q. And the Sheldon Axle & Spring Company  
is now in bankruptcy? A. It is."

Mr. Kristeller: That is objected to on the  
ground it is incompetent, irrelevant, and  
immaterial.

The Court: It may remain. 40

*Ralph McLean—Deposition-Direct—for Defendant*

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: The answer to that is: "It is."

10 "Q. Were you continuously treasurer from the date when you were appointed down to the time of the bankruptcy? A. Yes, sir. Q. And since the bankruptcy petition was filed have you continued in the employ of the receiver in bankruptcy? A. Yes, sir. Q. Down to date? A. Yes, sir. Q. As such treasurer, whether or not you were the official custodian of the books and records of the Sheldon Axle & Spring Company, showing its financial transactions with others, including the Cox Corporation? A. Yes, sir. Q. Have you the records of the Sheldon Axle & Spring Company with you showing the business relations and the standing of the accounts between the Cox Corporation and the Sheldon Axle & Spring Company down to and including the 10th day of June, 1926? A. Yes, sir. Q. Will you produce them please? (Witness produces accounts.)

20 Mr. O'Neill: Witness produces a number of loose sheets, fourteen in number, both sides, excepting two sheets. Q. Now just describe your system of bookkeeping at the Sheldon? A. In regard to this particular account? Q. Sure."

30 Mr. Kristeller: I object to that as immaterial.

(After argument, objection withdrawn.)

"A. The account with the Cox Corporation was opened back in August, 1924; the first entry is. Q. And when was the last entry? A. The last entry was made on this account December 31, 1926. The account was charged with various items of cash, as

40

*Ralph McLean—Deposition-Direct—for Defendant*

the Sheldon Company spent money for the Cox Corporation, and also various adjustments and other entries which went through on what we call a journal voucher."

Mr. Kristeller: I object to the last of his answer and ask that it be stricken out as not responsive.

The Court: As I understand the rule, 10 only the attorney asking the question can move to strike out the answer as not responsive.

Mr. Kristeller: That is correct, but this is a deposition. I think it is immaterial from 1926 on. He asks: "And when was the last entry?" He answers and then details some figures.

The Court: The motion will be denied. 20

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: (Continuing): "Q. Now just explain what a journal voucher means in this system? "A. The account as shown on our ledger does not give any specific details of those entries, simply reference numbers, so that unless the account—or unless the entry, rather, was a straight cash transaction it became necessary to make a journal voucher, which would give the details. Now in regard to the credits to the account, consisting of cash received from the Cox Corporation, either directly or indirectly, and any other entries, that had to be put through as a journal voucher, or on a journal voucher. Q. These sheets produced by you are your ledger sheets? A. Yes, sir. Q. Now referring to your records, what was the balance due from the Cox Corporation to the Sheldon 30 40

*Ralph McLean—Deposition-Direct—for Defendant*  
Axle & Spring Company on September 1st, or August 31st, 1925?"

Mr. Kristeller: I object to that as immaterial to this issue.

The Court: I am just wondering as to what the relevancy of that is.

10 Mr. Hood: I think it will appear when we go a little further in the testimony. We are coming to the resolution of the Cox Company that refers to the account.

The Court: I will receive it subject to motion to strike out if it appears later on to have no relevancy. That does not appear now.

20 Mr. Hood: (Reading): "A. August 31st, 1925? You want it just as the account shows, don't you? A. Yes, sir."

Mr. Kristeller: I make the same objection to that question.

The Court: It will be overruled, subject to a motion to strike out.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

30 Mr. Hood: (Reading): "Q. Yes. A. On August 31st, 1925, the account showed a debit balance of \$206,727.57. Q. Now, Mr. McLean, what was the debit balance, if any, from the Cox Corporation to the Sheldon Axle & Spring Company, on June 10, 1926?"

Mr. Kristeller: I make the same objection.

The Court: The same ruling.

40 Plaintiff's counsel prays an exception to

*Ralph McLean—Deposition-Direct—for Defendant*  
this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: "A. On June 10, 1926, the balance was \$382,213.14. Q. Now from June 10, 1926, down to December, 1926, the date of the last entry in your books, how much additional was charged, if any, against the Cox Corporation? In other words, what was the balance on December 31, 1926?" 10

Mr. Kristeller: I make the same objection.

The Court: The same ruling.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: (Reading): "On June 10, 1926, the balance was \$382,213.14. Q. Now, from June 10, 1926, down to December, 1926, the date of the last entry in your books, how much additional was charged, if any, against the Cox Corporation? In other words, what was the balance on December 31, 1926?" 20

Mr. Kristeller: Same objection.

The Court: Again I do not see the relevancy of that. It may be received subject to a motion to strike out. 30

Mr. Hood: (Reading): "A. \$358,403.84. Q. In other words, the balance had been reduced from three hundred and eighty-two thousand plus to three hundred and fifty-eight thousand plus, that right? A. Yes, sir."

Mr. Kristeller: I make the same objection.

The Court: The same ruling. 40

*Ralph McLean—Deposition-Direct—for Defendant*

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: (Reading): "Now assuming on the 31st day of August, 1925, all of the existing indebtedness due from the Cox Corporation to the Sheldon Axle & Spring Company was \$55,000.00, with that assumption, how much would the debit balance of Cox to the Sheldon be on June 10, 1925?"

Mr. Kristeller: I make the same objection.

The Court: That assumption, of course, is based on something that has not appeared as yet. It may appear later on.

Mr. Hood: If you will read the answer to that they are apparently talking about '26 and not 1925.

Mr. Kristeller: 1926 is right.

The Court: It will be received subject to a motion to strike out.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: (Reading) "Q. Now assuming that on the 31st day of August, 1925, all of the existing indebtedness due from the Cox Corporation to the Sheldon Axle & Spring Company was \$55,000, with that assumption, how much would the debit balance of Cox to the Sheldon be on June 10, 1925? A. Assuming the balance was \$55,000.00 on that date, the balance on June 10, 1926 would be \$224,581.19. Q. Now by reference to your records tell me when was the first credit following June 10th in favor of the Cox Corporation?"

40

*Ralph McLean—Deposition-Direct—for Defendant*

Mr. Kristeller: The same objection.

The Court: It will be received subject to a motion to strike out.

Mr. Hood: (Reading): "A. First credit after June 10th is a small entry on July 31st, for \$140.74; probably an adjustment of some sort. Q. From and after June 10th, 1926, down to the end of the account in December, 1926, state whether or not the debit balance due the Sheldon Axle & Spring Company from the Cox Corporation, as shown by your books, was ever less than \$200,000.00?"

Mr. Kristeller: Same objection.

The Court: Same ruling.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: (Reading): "A. Never."

Mr. Hood: (Reading): "Now I direct your attention to your records for May and June, 1926, and call your attention particularly to a check of the Economy Auto Supply Company, dated May 10, 1926, number B 6817, amount \$407.03, and ask you what was done with the proceeds of that check? A. Credited to the account of the Cox Corporation on the Sheldon's books. Q. Now I direct your attention to another check of the same party, maker, No. B. 7280, amount \$5,288.23, and ask you what was done with the proceeds of that check?"

Mr. Kristeller: I make the same objection.

The Court: The objection will be overruled as to that.

Defendant's counsel prays an exception

40

*Ralph McLean—Deposition-Direct—for Defendant*

to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: (Reading): "A. Same procedure; it was credited to the Cox Corporation on the Sheldon's books."

10 Mr. Kristeller: I make the same objection, that that is immaterial and that at this time it ought not to be admitted until your Honor has decided whether that endorsement is a proper endorsement.

The Court: I doubt very much whether that is a legal question as the case now appears to me. The objection will be overruled.

Plaintiff's counsel prays an exception to this ruling of the court.

20 Exception noted as ground of appeal.

Mr. Hood: (Reading): "A. Same procedure; it was credited to the Cox Corporation on the Sheldon's books."

30 Mr. Kristeller: I will read my cross examination. (Reading): "Cross-examination by Mr. Kristeller: Q. These papers that you are reading from are just simply records with figures, without any details, aren't they? A. Yes, sir. Q. How do you know what items Mr. O'Neill just referred to? A. Because they show—one of them shows specifically for that amount, and the account, the cards, have reference numbers which we can readily refer to the checks, cash book and journal entry, and so forth. Q. But you can't tell from looking at this paper, can you? A. In one instance, yes. Q. In which instance? A. The second; that is, I can find the specific amount. Q. In addition  
40 to the two checks mentioned by Mr. O'Neill, you

*Ralph McLean—Deposition-Cross—for Defendant.*

received other checks of the Economy Auto Supply directly to your order, didn't you? A. I can't answer that; I don't know. Q. Can't you answer that by looking at the papers? A. We received two other checks that I know of, which show in the details of this account, but whether they were made payable to the—whether they were paid direct to the Sheldon or to the Cox I don't know. They were credited over to the Cox Corporation.

10 Q. You said in answer to Mr. O'Neill's question, if I remember correctly, that you had no credit entries on that account from June 10, 1926, to December, 1926, is that right? A. There is the one journal entry and—no, that is not correct, if I said that.

Q. When was the first large credit entry after June 10, 1926? A. Well, now, what do you mean by large? The first entry after June 10th  
20 is a \$9.00 item; we have one \$40.00, \$43.00, \$1200.00.

Q. When was the \$1200.00 item? A. On June 15th, which contains—in which amount is included the first check that Mr. O'Neill spoke of. Q. When is the next item credited? A. On the same date. Q. How much is that? A. \$370.07.

Q. Do you know what that is? A. That is a cash item. I can give you the details. Q. From these pages? A. From these papers, which show the name of the payee, and so forth. Q. When did  
30 you deposit the check of the National Auto Supply Company of Reading, or when did you credit it, rather? A. The credit was made on June 15th in both instances.

Q. No, I am talking now of another account, the National Auto Supply of Reading? A. Oh, this is the Economy, isn't it? The National Auto Supply? I will have to look through these papers to answer that question. Q. But you know that such a check was received by  
40

*Ralph McLean—Deposition-Cross—for Defendant.*

the Sheldon? A. From the Reading Company?  
 Q. Yes? A. No, sir. Q. Do you know whether  
 during this time, between June—between May 1st  
 and June 17th you received a check from Burn-  
 10 ford & Begley, Kingston, Pa.? A. Between May  
 1st and June 17th? Yes, on May 11th. Q. On  
 May 11th? How much? A. \$149.04, from Burn-  
 aford-Begley Co. Q. And when was that credited  
 on the Cox account? A. On May 11th. Q. Did  
 you receive during that time checks from the Dun-  
 can & Goodell Company, Worcester, Mass.? A.  
 Yes, sir, same date, May 11th, two checks, \$499.94  
 and \$1,668.77. Q. Did you also during that time  
 receive checks from Forer & Forer, Springfield,  
 Mass? A. Yes, sir. Q. How much? A. \$128.80.  
 Q. Any others? A. That is the only one I see  
 just going through the first time. Q. Did you re-  
 20 ceive one from H. A. Gable? A. Yes, sir, two on  
 May 11th, \$27.76— Q. When was that credited?  
 A. May 11th. Q. They were deposited by you  
 May 11th? A. That is the date of the credit in  
 the account. Q. When did you deposit them? A.  
 May 11th I would say, deposit made the day of the  
 credit, usually. Q. Now just look at those credits  
 and tell me what the amounts of the checks are  
 that you got? A. \$27.76 and \$192.12. Q. And  
 30 on the 27th, did you get one for \$77.40 from the  
 same people? A. Credited to the account on May  
 —on June 4th, \$77.40. Q. You were Treasurer of  
 this company at that time? A. No, sir. Q. So  
 you don't know, then, from looking at your rec-  
 ords, when these checks were deposited do you?  
 A. Assume that they were deposited the day of the  
 credit. Q. Never mind, I don't care about assum-  
 ing. I say you don't know? A. No, sir. Q.  
 Weren't there a number of checks credited on June

40

*Ralph McLean—Deposition-Cross—for Defendant.*

16th, or 15th, of that year? A. Yes, sir. Q. Do  
 you know what date those checks bore, any of  
 them? A. On June 15th we made a deposit of  
 \$837.12. Q. On June 6th? A. On June 15th.  
 It consisted of four checks, and they were dated all  
 June 14th. Q. Did you make a deposit on June  
 16th? A. There is a credit of \$11.10 on the 16th,  
 cash, from James Tucker. Q. No credit on June 10  
 16th for these Economy Auto Supply checks? A.  
 We showed a credit on the 15th for both of them.  
 Q. On the 15th? A. Yes, sir. Q. Did you just  
 tell me you had a small item on the 15th? A. No.  
 Q. What is your deposit on the 15th? A. The  
 15th? The 15th shows a credit of—we show a  
 cash credit to the account on June 15th of  
 \$11,039.56. Q. And can you tell me what checks,  
 and what date the checks are? A. I can tell you  
 what they are. I don't know whether I can tell 20  
 the dates or not. Here is the list of one of the de-  
 posits, Economy Auto. We have two detail state-  
 ments showing deposit on June 15th, giving full  
 names and amounts of the individual checks. Q.  
 You assume from the records that these credits are  
 checks that were to the order of the Cox Corpora-  
 tion for goods sold to them, deposited by the Shel-  
 don, although you don't know of your own knowl-  
 edge?

Mr. O'Neill: Wait a moment. I think that 30  
 would be unfair to put the question that way. He  
 doesn't assume directly that. Q. You only can  
 assume from the records that these are credits to  
 the Cox Corporation? A. I know from the records  
 that they are credited to the Cox Corporation. Q.  
 You don't know how they came do you? A. No.  
 Q. And the papers that you are reading from are  
 the original entries made by the bookkeeper, or

40

*Ralph McLean—Deposition-Cross—for Defendant.*

prior treasurer, and all terminate in these ledger sheets? A. Yes, sir. Q. These are the journal entries and the credit memoranda? A. Yes, sir. Q. And it is from these pages that the ledger entries are made? A. Yes, credit memoranda. Q. In the deposit of June 15th, 1926, to which you have referred, do you find included therein a credit in favor of the Cox Corporation of \$407.03? A. Yes, sir. Q. And also one for \$5,288.23? A. Yes, sir.

Redirect-examination by Mr. O'Neill: Q. Mr. McLean, you have produced, have you not, an exact transcript from the books of the Sheldon Axle & Spring Company, showing the status of the account between the Sheldon Axle & Spring Company and the Cox Corporation as of August 31, 1926, and up to date? A. Yes, sir. Q. On loose sheets? A. Yes, sir.

Mr. O'Neill: Defendant offers these sheets in evidence, and counsel for plaintiff stipulates that no objection will be made to the formality of proof, but no stipulation is made as to the probative effect of the items therein shown. (Marked for identification defendant's Exhibit A, and copy thereof attached hereto.)

Mr. Kristeller: I object to the offer at this time on the ground that the account between the Sheldon Company and the Cox Company is not material to this issue.

The Court: The objection will be overruled.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: I will now read the deposition of George M. Wall, as follows:

*Ralph McLean—Deposition-Redirect—for Def't.*

"Q. Mr. Wall, where do you reside? A. Kingston, Pennsylvania. Q. Street address? A. 467 Wyoming Avenue. Q. For many years you were the general manager of the Sheldon Axle Works? A. Yes, sir. Q. Sheldon Axle & Spring Company? A. Yes, sir. Q. What official position did you hold in that company in 1924, when the account with the Cox Corporation commenced? A. I was vice president and general manager. Q. And you have continued to hold that position in the Sheldon Axle & Spring Company down to the present date? A. I gave up the management, or general managership to the Sheldon Axle & Spring Company, in April, 1925, and was thereupon elected vice president. Q. Were you familiar with the accounts of the Sheldon Axle & Spring Company with the Cox Corporation? A. In a general way. Q. Are you familiar with the transactions involved in this suit, involving these two checks of the Auto Economy Supply Company of Newark, N. J.? A. I would have to qualify that in a general way. Q. Well were you at one time specifically familiar with them? A. Not as to the amounts, I don't think, Mr. O'Neill, but as to the transactions, yes. Q. Do you know what was done with the proceeds of those two checks? A. They were given to our cashier for deposit. Q. Were they deposited? A. I would have to depend on the record for that. Q. Well, have you consulted your records to determine what was done with them? Do you know or do you not know whether the proceeds were credited to the account of the Cox Corporation? A. The records would have to speak for themselves on that. Q. At the time that these checks were endorsed to the order of the Sheldon Axle & Spring Company, what position, if any, did you hold in

*Ralph McLean—Deposition-Redirect—for Def't.*

the Cox Corporation? A. Director. Q. Who was the President of that Corporation? A. William M. Cox. Q. Who was the treasurer of that corporation? A. Charles F. Griemsman. Q. As a vice president of the Sheldon Axle & Spring Company, whether or not you know that on June 10, 1926, there was any indebtedness due from Cox Corporation to the Sheldon? A. Yes. Q. Large or small? A. Large. Q. And do you know as such vice president whether or not there was any balance due the Sheldon from the Cox Corporation at the end of December, 1926? A. Yes. Q. Large balance or small balance? A. Large. Q. You don't know the exact amount? A. No. Q. For the amount you would have to look to the books, and depend upon the books? A. Yes, sir. Q. That is true also of June 10th? A. Yes, sir. Q. Mr. Wall, I show you paper marked for identification Defendant's Exhibit B, being a memorandum of agreement, executed under date of December 24, 1925, between the Sheldon Axle and Spring Company and the Cox Corporation, and ask you if that is the contract under which the Sheldon Axle & Spring Company was doing business with the Cox Corporation from and after that date and down to April 17, 1926?"

30 Mr. Kristeller: I object to that. That doesn't come within the pleadings, the arrangement by which two other companies were doing business.

Mr. Hood: Does that relate to the account?

The Court: It will be received subject to a motion to strike out.

40 Plaintiff's counsel prays an exception to this ruling of the court.

*Ralph McLean—Deposition-Redirect—for Def't.*

Exception noted as ground of appeal.

Mr. Hood: (Reading): "That is right. "Q. Now on April, 1926, a somewhat different arrangement was entered into between the Cox Corporation and the Sheldon, was there not? A. Yes, sir."

Mr. Kristeller: I object to that. I make the same objection. 10

The Court: The same ruling.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Hood: (Reading): "A. Yes, sir. Q. Under which they continued to do business thereafter until they severed relations? A. Right.

"Mr. O'Neill: I offer this exhibit in evidence, counsel for plaintiff stipulating that no objection is made to the formality of the proof, but reserving the right to object to its materiality and probative effect; and counsel for the plaintiff further stipulating that this agreement may be copied by the stenographer in the depositions with the same force and effect as if the original had been attached thereto. (For copy of Exhibit see pages 19 to 24 inc.) Q. Mr. Wall, I now show you two sheets marked for identification as defendant's Exhibit C, and will first ask you who was the secretary of the Cox Corporation on April 20 and 21, 1926, and for a long time prior thereto? A. C. F. Griemsman. Q. Are you familiar with Mr. Griemsman's signature? A. Yes, sir. Q. I show you the signature attached to these sheets, and ask you if you can identify that signature, that handwriting? A. Yes, sir, that is Mr. Griemsman's signature. Q. Now were you present as a Director at two meetings of the Cox Corporation held April 20th and 40

*Ralph McLean—Deposition-Redirect—for Def't.*

April 21st, 1926? A. Yes. Do you know who were present of the Directors of the Cox Corporation at these meetings? A. Mr. Cox, Joseph J. Mascuch, and John T. Mascuch, Mr. Griemsman and myself. Q. This exhibit purports to contain or show the proceedings of the meetings of the Board of Directors of the Cox Corporation, held  
10 April 20th and 21st, 1926. I ask you to look at this exhibit and state whether or not it truly represents what transpired at these two meetings? A. I think that is right.

“Mr. O’Neill: I offer this Exhibit in evidence, (Exhibit C), counsel for plaintiff stipulating that he makes no objection to the formality of proof, but reserves the right to object to its materiality and probative effect. Counsel for plaintiff further stipulates that this Exhibit may be copied into the record by the stenographer with the same force and effect as if the original thereof were attached thereto.”  
20

Mr. Hood: There is a memorandum agreement, marked Defendant’s Exhibit B dated December 24, 1925, which I think should be read at this time unless Mr. Kristeller objects.

Mr. Kristeller: It is immaterial to this issue.  
30

The Court: Is there anything in that agreement with reference to the payment?

Mr. Hood: No, that relates to the reduction.

The Court: It will be admitted.

Plaintiff’s counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

40 Mr. Hood: (Reading): “This exhibit, Mr. Wall,

*Ralph McLean—Deposition-Redirect—for Def't.*

purports, does it not, to be a copy of the record over the signature of the secretary? A. Right.”

Mr. Hood: This is the agreement to which reference has been made. (Reading):

“Memorandum of Agreement, made and executed in duplicate under date of December 24, 1925, between the Sheldon Axle & Spring Company, a corporation of the State of Pennsylvania, having its principal office in the City of Wilkes-Barre, party of the first part, hereinafter called “Sheldon”, and the Cox Corporation, a corporation of the State of New Jersey, having its principal office in the City of Wilkes-Barre, party of the second part, hereinafter called “Cox”:  
10

Whereas, Sheldon is engaged in the manufacture, among other things, of Cox automobile bumpers and fenderettes with all necessary brackets and equipment therefor, and Cox is engaged in the buying, selling and engineering of automobile bumpers, brackets and fenderettes with all necessary equipment therefor; and  
20

Whereas, Cox is desirous of purchasing said articles from Sheldon in large quantities according to certain specifications and under certain conditions;

Now, Therefore, This Agreement Witnesseth, That for and in consideration of the sum of One (\$1.00) Dollar by each to the other in hand paid at and before the execution of this agreement, receipt whereof by each is hereby acknowledged, and for other valuable considerations, the parties hereto have mutually agreed and by these presents do mutually covenant and agree as follows:  
30

1. Cox agrees to purchase from Sheldon, front and rear bumpers with brackets and fenderettes,  
40

*Ralph McLean—Deposition-Redirect—for Def't.*

to the amount of at least six thousand (6,000) in all, each month during the life of this agreement, at the prices designated immediately hereinafter, to wit:

Model						
	501	Nickel plated	Front Bumper & bracket complete	\$7.50	ea	
	503	" "	Rear " " " "	7.50	"	
	001	" "	Front " " " "	6.33	"	
	003	" "	Rear " " " "	6.33	"	
10	005	" "	Front " " " "	5.46	"	
	007	" "	Rear " " " "	5.46	"	
	320	" "	Front & Rear Bumper Bracket Complete,	5.33	"	
	631	" "	Fenderettes complete	7.50	"	
	633	" "	Fenderettes " "	6.94	"	
	206	" "	Front Bracket,	1.55	"	
	212	" "	" "	1.55	"	
	218	" "	" "	1.55	"	
	220	" "	" "	1.55	"	
	222	" "	" "	1.55	"	
	236	" "	" "	1.55	"	
	806	" "	" "	1.55	"	
	808	" "	" "	1.55	"	
	810	" "	" "	1.55	"	
20	226		Rear " "	1.55	"	
	228		" "	1.55	"	
	234		" "	1.55	"	
	248		" "	1.55	"	

and other models not listed.

2. It is agreed that Cox will furnish to Sheldon a schedule setting forth the quantities of the various model numbers which it will require each month, this schedule to be furnished at least thirty days in advance, unless Sheldon in any particular month agrees to accept shorter notice; and an acceptance by Sheldon of less than thirty days' notice in any particular month is not to be construed as releasing Cox from giving the full thirty days' notice in advance for all other months.

3. It is further agreed that in case Cox does not furnish Sheldon with shipping orders in any month, sufficient to cover the quantities set forth in the schedule already furnished by Cox for that month, as required in the foregoing paragraph, then the excess quantity of manufactured product

40

*Ralph McLean—Deposition-Redirect—for Def't.*

shall be place by Sheldon in a suitable store-room for finished product.

4. It is understood and agreed that when finished bumpers and brackets are delivered to the finished store-room, aggregating Fifty Thousand (\$50,000) dollars in value, based on the prices agreed upon between the two companies in this contract, that Cox will endeavor to borrow, on warehouse receipt, using its selling price as a basis to make such a loan, enough money to reimburse Sheldon to the extent of Fifty Thousand (\$50,000) Dollars. Sheldon, however, agrees that if Cox is unable to borrow more than fifty (50%) per cent. of the value of these bumpers, based on prices as agreed upon in this contract between Cox and Sheldon, Sheldon is willing to accept such payment of fifty (50%) per cent. on account. If Cox is unable to secure a loan over or above fifty (50%) per cent. mentioned, within a period of sixty (60) days after the stock has reached a valuation of Fifty Thousand (\$50,000) Dollars, Sheldon reserves the right, and Cox agrees that Sheldon may and can dispose of these bumpers at market price.

It is further understood and agreed by Sheldon that any and all merchandise returned by Cox or Cox customers as defective will be replaced by Sheldon free of charge.

5. Cox further agrees that it will furnish, in duplicate, and at least four weeks before the date of shipment, a complete set of blue prints and specifications of work required, acceptable to Sheldon. All blue prints are to be prepared and maintained by Cox, who shall furnish copies of same to Sheldon as and when requested. Both parties hereto are to sign each blue print and no changes

40

*Ralph McLean—Deposition-Redirect—for Def't.*

16. Cox agrees that there will be on its part no interference in the manufacture of the aforesaid products and that it will and must accept all products in accordance with the specifications determined on at the time of signing this agreement.

17. This agreement is to be and remain in force until cancelled by mutual agreement of the parties hereto; provided, however, that either party may  
10 cancel upon thirty days' written notice to the other, after which a period of an additional eleven months will be allowed in which to end the business; that is to say, the business between the parties is to be ended one year from the date upon which the said thirty days' written notice is given by either party. All brackets and fenderettes are to continue to the end of the year succeeding the  
20 service of the thirty days' notice herein set forth.

In the event of termination of this contract Sheldon, its successors or assigns, agrees that will not use any of the designs, processes, features or methods developed by Cox.

This contract is to be binding on the parties hereto, their successors or assigns, during its term.

In Witness Whereof, said Sheldon and Cox caused their respective corporate seals to be hereto affixed and duly attested by their proper corporate  
30 officers.

SHELDON AXLE & SPRING COMPANY,

Attest: By H. R. Schooley,  
J. F. Armstrong, Secretary, President.

(Seal of the Sheldon Axle  
& Spring Company)

THE COX CORPORATION,

By Joseph J. Mascuch,  
Vice President & General Manager.

40

*Ralph McLean—Deposition-Redirect—for Def't.*

Attest:

C. F. Griemsman,  
Secretary.

(Seal of Cox Corporation)

Mr. Hood: I would like to read into the evidence Exhibit C.

Mr. Kristeller: I have no objection to its  
10 going in.

Mr. Hood: (Reading).

“Meeting of the Board of Directors  
of  
Cox Corporation

Held April 20th, and 21st, 1926.

A special meeting of the Board of Directors of the Cox Corporation which was called in accordance with paragraphs 9 and 10 of the by-laws of the corporation was held at the office of Sheldon  
20 Axle and Spring Company, Wilkes-Barre, Pa., on the above dates with the following Directors present:

Wm. M. Cox	George M. Wall
Joseph J. Mascuch	John T. Mascuch
C. F. Griemsman	

The meeting was called to order by the Chairman, Joseph J. Mascuch.

The Chairman called for the reading of the minutes of the previous meeting and on motion duly made, seconded and carried, the minutes of the previous meeting were adopted as read.  
30

The secretary reported the issue of 20 shares of common stock to William M. Cox he having advised the corporation that he wished to take up the 20 shares of common stock subscribed for by him. The secretary advised that Mr. Cox's check for \$200.00 in payment of this stock would be deposit-  
40

*Ralph McLean—Deposition-Redirect—for Def't.*

ed in the Corporation's depository, the Second National Bank of Wilkes-Barre.

After considerable discussion of various topics a motion was duly made, seconded and carried that the meeting adjourn temporarily at approximately 5:30 P. M. April 20th to be resumed at approximately 10:30 A. M. April 21st.

10 At 11:15 A. M. April 21st in accordance with the motion to adjourn, passed on April 20th the Chairman called the meeting to order to resume left-over business and the meeting was declared open for further discussion and business.

The Chairman called a recess at 1 P. M. for luncheon and again called the meeting to order at 2:45 P. M.

20 On motion duly made, seconded and carried, the action of Joseph J. Mascuch acting as General Manager in assigning net accounts receiveable for shipments made on and after April 17th 1926, be and is hereby ratified and confirmed; allowances being made for selling expenses of the corporation as per contract with Sheldon Axle and Spring Company.

(Signed) C. F. GRIEMSMAN.

(Page 2.)

30 On motion duly made and seconded it was resolved that all outstanding customers' notes and net accounts receiveable be and are hereby assigned to the Sheldon Axle and Spring Company to be applied to the reduction of the indebtedness of this Corporation to said Sheldon Axle and Spring Company and the Treasurer is hereby authorized to execute such assignment.

40 Motion carried with three affirmative votes and two negative votes.

*Ralph McLean—Deposition-Redirect—for Def't.*

On motion duly made and seconded it was resolved that the President and Vice-President be and they are hereby authorized and empowered to enter negotiations with the Sheldon Axle & Spring Company upon a basis for cancelling and terminating the present written contract executed by it and our corporation under date of December 24, 1925 and to negotiate with said Sheldon Axle and Spring Company upon the best terms and conditions which to them seem proper and advantageous for the execution of a new contract provided and it is hereby understood that the new prices contained in memorandum signed April 17, 1926 be made retroactive to January 1st, 1926.

Motion carried with four affirmative votes and one negative vote.

No further business coming before the meeting, motion was duly made, seconded and carried that the meeting adjourn.

Same was so declared by the Chairman.  
April 21, 1926.

(Signed) C. F. Griemsmann,  
Secretary."

Adjourned until Thursday, December 8, 1927, at ten o'clock, A. M.

---

SECOND DAY.

Thursday, December 8, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

Mr. Hood: In order to save the time of the court, counsel have agreed upon some things. One is that the deposit slip of this check—it is a little hard to make out both

*Colloquy.*

of these checks—the first is dated June 15, 1926, when the check went out on the bank of original deposit.

The Court: You mean when it was charged to the account?

10 Mr. Hood: When the Sheldon Company deposited it in its bank for collection in Wilkes-Barre. That was June 15th, in regard to both checks, and it was paid at our bank in Newark on the 17th. I want to offer a paper bearing date April 17th, executed by A. Wyland and Mr. Mascuch, and so far as the signatures are concerned, the genuineness of them are admitted. This contract of April 17, 1926, refers to the matter of the minutes that we have read under a later date, I think either the 20th or 21st.

20 Mr. Kristeller: I object to it. I admit the genuineness of the signatures, but I object to it on the ground that it is irrelevant.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Kristeller: Is that admitted subject to a motion to strike out?

30 The Court: No.

(The paper referred to is marked Ex. C1.)

Mr. Hood: I suppose it is also admitted that the checks were for the payment of bills for merchandise which had been sold prior to the date on which the checks were given?

Mr. Kristeller: Yes.

Mr. Hood: By the Cox Company to the plaintiff?

40 Mr. Kristeller: Yes.

*Colloquy.*

The Court: I do not know whether you think it is relevant or not, but I notice that in either the pleadings or the proofs—I have forgotten which—the plaintiff insists that he never received credit from the Cox Company for these checks. I recall no proof of that. Is that an important matter in the case or is it not? 10

Mr. Hood: That would not be my side of the case.

The Court: This account would be between the Cox Company and the Sheldon Company. My suggestion is that there is no proof in this case whether the Cox Company gave credit to the Economy Auto Supply Company for the amount of those checks.

20 Mr. Hood: I think, as I recall it, the only thing suggested was in the opening of the case to the jury.

The Court: Of course, if the Cox Company received credit from this plaintiff for those checks, then I cannot see that no harm has come to this plaintiff by the payment of the checks by the bank. In any event, whatever may be the situation, it was the lack of authority of Mr. Cox. 30

JOHN T. MASCUCH, recalled in behalf of plaintiff.

*Direct-examination by Mr. Kristeller:*

Q. You are treasurer of the Cox Company? A. Yes, sir.

Q. Does there appear on the books of the Cox

40

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

Company a credit for those two checks? A. No, sir.

Objected to.

Objection sustained.

Q. Did the Cox Company receive the proceeds of those two checks?

10      Objected to.

The Court: If he knows of his own knowledge or was it from his examination of the books, too? I understood him yesterday to say that his knowledge of this transaction resulted from the examination of the books.

Mr. Kristeller: If the Economy Auto Supply Company's books do not show a credit, he knows that.

20      The Court: Unless it is a relevant and material matter in the case I must sustain the objection to the manner of proof. The manner of proof is improper, as well as the matter itself.

The Court: Perhaps I have raised a matter here which you do not think important.

Mr. Kristeller: I can show a demand made by the Economy Auto Supply Company for this money by the petitioners and by myself as solicitor.

30      Q. Did you make a demand on the Economy Auto & Supply Company for the payment of these two bills? A. Yes, sir.

Mr. Hood: I object to that.

The Court: That may remain.

Defendant's counsel prays an exception to this ruling of the court.

40      Exception noted as ground of appeal.

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

Mr. Hood: My objection is not only as to the manner of the proof, but also on the ground that it is irrelevant.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal. 10

Mr. Hood: I object to the whole line of testimony on this point.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. Did you tell the Economy Auto & Supply Company that these checks had not been received by your company? 20

Mr. Hood: I object for the same reason.

The Court: I will sustain that objection. I do not think it makes any difference what demand was made on the Economy Auto & Supply Company. I have a suspicion this is a dispute between the Sheldon and Cox Company.

Mr. Kristeller: I do not think so. I think this is a question between the bank and the depositor, after being notified that the checks were not paid to them. 30

I desire to offer letter of the Economy Auto & Supply Company to the Fidelity Union Trust Company dated August 22, 1926.

Mr. Hood: I object. I do not think it is 40

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

competent and I think it is irrelevant to the issue.

The Court: It will be admitted.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

10 The Court: There is some writing on the back.

(Two papers are offered in evidence and marked Exhibits P3 and P4 respectively).

Q. You are the treasurer of the Cox Company?

A. Yes, sir.

Q. Is the Economy Auto & Supply account open on your books today?

20 Mr. Hood: I object on the ground that the best proofs are the records of the company, and that for that reason I do think that the testimony is not in proper form, but my objection is also that the entire proof is incompetent and irrelevant because I do not think that is an issue to be tried in this case, an issue between the Fox and Sheldon people. That changes the issue, because this is an issue between the bank and the Economy Auto Supply Company. The question is whether the bank performed its duty to the Economy Auto & Supply Company.

30 The Court: I feel obliged to sustain the objection upon the first ground.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. Is the account open on your books at the present time for the amount of these checks?

40

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

Mr. Hood: I object.

The Court: The books are not produced, and he says that his information came from the examination of the books. It is true that in his former testimony no objection was made to that testimony, but when objection is made then I am obliged to rule in accordance with that view. I will sustain the objection.

10

Mr. Kristeller: We are not trying to prove these books. This is a collateral matter. It is a matter upon which proof must be based.

The Court: My thought is that if you actually received credit on the books from the Cox Company for these amounts, of course, you cannot now recover against the bank because your check was paid and credited on the account that you owed to the Cox Company, and, if I am right about that, that is a very relevant matter, and it is not a collateral matter, and if I am not right about it does not make any difference at all.

20

Mr. Kristeller: Apparently the court is taking the side of the case that counsel has taken, because I do not think it is part of the proof.

The Court: It may be that your statement in the pleadings that the checks were not paid to the persons designated therein—

30

Mr. Kristeller: My contention is that it is a question of law. I can get the books in a very few minutes. However, I can get the books here in a very few minutes.

The Court: We will suspend this case for the time being until the books are produced.

40

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

(At this point a recess was taken for two hours).

Mr. Kristeller: Producing this testimony, I would like to move to strike out the testimony in the deposition on the ground that it appears now that it is irrelevant, the question and answers referring to the alleged fund due from the Cox Corporation to the Sheldon Spring & Axle Company.

The Court: The motion will be denied.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

JOHN T. MASCUCH resumes the stand.

*Direct-examination (continued) by Mr. Kristeller:*

Q. You are the treasurer of this company? A. Yes, sir.

Q. You have produced the pages of the ledger showing the Economy Auto & Supply Company account? A. Yes, sir.

Q. From the beginning of the account up to the present time? A. Yes, sir.

Mr. Hood: I would like to ask this witness a question.

*By Mr. Hood:*

Q. Of course, being treasurer, you are familiar with the books of the company? A. Yes, sir.

Q. Do you keep a journal? A. A journal is kept.

Q. What do you enter in the journal? A. Checks received.

40

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

Q. (Showing witness book). Is this the journal? A. No, sir.

Q. Is that the first entry you make of them? A. On the journal, the checks received. First of all, they are entered on the customers' account.

Q. And before they are entered in your journal?

A. They are usually entered first in the customers' account. If any orders come in, and should a customer owe us money, and a check had come in, it is better to have that check entered first so the customer can have an open account. If we delayed entering it on the ledger there the customer's account would show that there would be an overdue and the goods might be sent C. O. D.

*By the Court:*

Q. Is this all you produced? A. I didn't understand you wanted all the books.

Mr. Hood: I object to this.

Mr. Kristeller: I am not suing on a book account. Your Honor has taken the view that we ought to show that this account was opened.

The Court: Do not misunderstand me. I expressed the view. You may adopt that view or not, as you think desirable in this case. If you think that I have expressed a view which is immaterial to your case, you are not obliged to adopt that view at all, nor will you be prejudiced in my mind for failure to adopt that view.

Mr. Kristeller: Your Honor refused to strike out the testimony and I have to take this course.

40

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

*By Mr. Kristeller:*

Q. Can you tell from your ledger whether or not this account against the Economy Auto Supply Company is still open?

Objected to.

The Court: The question may be answered.

10 Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

A. I can.

Q. Does your ledger account of the Economy Auto Supply Company show the obligation for these two checks? A. Yes, sir.

Q. The amount due on these two checks?

20 The Court: I do not know what you mean by that.

Q. Is the account still open? A. Yes, sir.

Mr. Hood: May I have the benefit of an exception to all this line of testimony as being irrelevant and immaterial?

30 The Court: I do not see the importance of the testimony, what is due on the account. The important thing, it seems to me, when I said what I did originally, was whether the Cox Company had credited the plaintiff in this case with the amount of those checks.

Q. Did the Cox Company credit the Economy Auto Supply Company with the amount involved in this suit?

40 Mr. Hood: I object. It is not the best proof. It ought to be established by the books.

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

*By the Court:*

Q. Is the entire account between the Cox Company and the Economy Auto Supply Company reflected in these ledger sheets that you have here?

A. Yes, sir.

Q. Are there any charges against the Economy Auto Supply Company which are not reflected upon the ledger sheets? A. No. 10

Q. Are there any credits from the Economy Auto Supply Company not shown on these ledger sheets?

A. No.

Mr. Hood: I would like to have something on the record that I do not consent to that part of the testimony, even if it be asked by the court.

The Court: It will be assumed that you object to every question by the court. 20

Mr. Hood: I object to it as irrelevant and incompetent, and as not being the best proof.

The Court: You may have an exception.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. Were you a director of the Cox Company on or about April 1, 1926? A. Yes, sir.

30 Q. Was there any disputed claim by the Cox Company against the Sheldon Company at or about that time, between those two companies, arising out of the contract dated December 24, 1925, which was offered in evidence by the defendant?

Mr. Hood: I object.

The Court: The question may be answered yes or no.

A. Yes, sir. 40

*John T. Mascuch—Recalled, Direct—for Plaintiff.*

Mr. Kristeller: Under our rebuttal, we should be allowed to show that there was a claim the other way.

The Court: You mean there was not an indebtedness between Cox and Sheldon?

Mr. Kristeller: Yes, or if there was an indebtedness, there was a claim against them in excess of the amount due. 10

Mr. Hood: That means in the controversy between the Economy and the Fidelity Union Trust Company we have got to try out an issue between the Cox Company and the Sheldon Company.

The Court: I will sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal. 20

*By the Court:*

Q. Referring to the ledger account, does that ledger account show credit for the two checks involved in this suit?

The Court: It will be assumed that you object to that and that the objection will be overruled and an exception may be noted.

Defendant's counsel prays an exception to this ruling of the court. 30

Exception noted as ground of appeal.

A. No; the Economy has no credit for those two checks.

Q. In your books? A. No, sir.

Mr. Kristeller: It is stipulated between counsel that there is a suit pending in the Federal District Court for the middle district of Pennsylvania for unliquidated dam- 40

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

ages for the breach of the contract.

Mr. Hood: I object to it because I do not think that has anything to do with this, particularly as counsel has not told us when that suit was begun.

The Court: I will sustain the objection.

*Cross-examination by Mr. Hood:*

10

Q. The home office of the Cox Company is in Newark? A. Yes, sir.

Q. And it has an office in Pennsylvania somewhere, has it not? A. Not now.

Q. Did it ever have any? A. Yes, sir.

Q. Did it have one in 1926? A. Yes, sir.

Q. Where was its office? A. At one time in the Sheldon Building and then we moved down to the city. 20

Q. Where was that? A. Wilkes-Barre, Pennsylvania.

Q. Its business office was there? A. Yes, sir.

Q. All you had in Newark was its registered office? A. Yes, sir.

Q. That is, you carried on all the office business of the company, you carried it on in Wilkes-Barre? A. Yes, sir.

Q. All your correspondence was at Wilkes-Barre, is that right? A. Yes, sir. 30

Q. And these checks that we are talking about came through the regular mail to Wilkes-Barre; that is true? A. Yes, sir.

Q. And they came to the office of the Cox Company, did they not? A. No, sir.

Q. Where did they come to? A. They came to the post office. The Sheldon Company brought our mail and they had instructions to deliver— 40

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

Q. Don't tell us what the instructions were unless they were formal instructions from one company to the other. You had your mail brought up by the Sheldon people, didn't you? A. Yes, sir.

Q. In those days there was great friendship and intimacy between the companies and the Sheldon Company? A. There was, up until these checks.

10 Q. It was just later? A. No, I think it was a trifle before.

Q. You have the files of letters? A. Yes, sir.

Q. You were at that time treasurer, were you? A. No, sir.

Q. Just a director at that time? A. Yes, sir.

Q. And therefore, the only knowledge that you had with regard to any of these things is occasioned by your inspection of the books and vouchers of the company? A. Well, I was continually at the  
20 Cox Corporation, in their office.

Q. That is not an answer to my question. I want to know if the only knowledge you had about this thing—I mean the transactions connected with the sending of these two checks by the Economy Auto & Supply Company to Wilkes-Barre, and the transfer of the funds by the president of the corporation, Mr. Cox, or the endorsement that appears on them, that is what I mean by the thing. The only knowl-  
30 edge that you have with regard to that is what you had subsequently acquired through an examination of the books and papers of the Cox Company? A. That, together with conversations I had with other members of the firm.

Q. Conversations you had with whom? A. Joseph Hughes, the auditor, Mr. Healey, and I also had a conversation with the Economy Auto & Supply Company.

40 Q. Then, as a matter of fact, when you talk about

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

the things that you speak of, you don't speak surely from what you have discovered from the examination of the books and papers, but you also talk from matters told to you by other people in the employ of the company? A. Not on the questions that were asked direct. Those I have actually looked in the book. I have answered so and so, some of the other knowledge, some of which I was asked, I got through conversations with the other  
10 members of the firm.

Q. Did you have any knowledge as to what transpired with regard to those checks at the time—I mean, about the middle of June, 1926? A. No, sir.

Q. So that all the knowledge that you have about the thing, you made a subsequent investigation? A. Yes.

Q. When did you make that investigation? A. When we tried to get money from the Economy  
20 Auto Supply Company, from their old account—

Q. Won't you answer my question, as to the time? I am asking you to give me the time. You gave me the incident, but you don't give me the time. A. It was approximately from the 15th to the 20th of June.

Q. Approximately the 15th to the 20th of June,—what year? A. 1926.

Q. And what did you do—not what did somebody else do—but what did you do? A. I communicat-  
30 ed with the general manager and asked him—

Q. Which general manager? A. The Cox Corporation.

Q. You communicated with the general manager of the Cox Corporation. You were then located at Wilkes-Barre? A. Yes.

Q. You had nothing to do with the affairs of the company except that you were then a director? A.  
40

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

No; I was employed continuously there in the office of the corporation.

Q. In 1926? A. Yes, sir.

Q. When did you say that you were a director purely? A. I was a director, but not an officer.

Q. You were not an officer in 1926, then? A. In the latter part of 1926 I was made assistant treasurer. 10

*By the Court:*

Q. April, 1927? A. I don't remember the exact date. If I had these books I could tell you.

*By Mr. Hood:*

Q. I understood you to say that you did not have anything to do with the affairs of the Cox Company except that you were a director in it. Am I right about that? A. No, sir; you are not right. 20

Q. What else did you have to do with it? A. I was in the office, and when the general manager was away I took care of his position at that time, whenever he was away.

Q. This was out in Wilkes-Barre? A. Yes, sir.

Q. What did you do when he was not away? A. I did some of the work, carried on some of the changes, and also some engineering.

Q. What kind of work and what kind of detail did you carry on? A. Answering customers' correspondence, taking their request for material, taking care of any of their complaints, taking care of any of the salesmen's complaints, and general office work. 30

Q. You didn't receive the checks? A. No, sir.

Q. You didn't enter the checks? A. No, sir.

Q. You didn't make deposits? A. No, sir.

Q. Can you tell us whether, in the middle of 40

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

June, 1926, the general manager was away or wasn't away? A. When he went away he might be away for five days and be in a day.

Q. I want to know whether at this time—you tell us you took his place when he was away, you tell us you did general office work, and that didn't have anything to do with the money or the entry of the money upon the books, and I ask you whether at this time you were discharging the functions that you were discharging when the general manager was present, or whether you were discharging the general manager's functions? A. When he was present or away? 10

Q. You have told us that when he was present he did that part of the job himself, but when he was away you did that for him, so I do not think we can have any question about that. You get my question? A. I am rather confused. 20

Q. Let us see if we can straighten it out. In June, 1926, you were a director of the Cox Company and were also an office employee? A. Yes, sir.

Q. Your duties as office employee were varied? A. Yes, sir.

Q. It didn't include the matter of handling checks, receiving money, or making entries for them? A. No, sir. 30

Q. They were all of a different company—they were, generally speaking, clerical? A. Yes. The auditors took care of the checks.

Q. You didn't? A. No, sir.

Q. The general manager didn't take care of the checks? A. He didn't enter them in the books.

Q. Did he have anything to do with them? A. He would ask the auditor how the account stood.

Q. That is all he would have to do about that—is 40

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

that right? A. The auditor was then to give any account which was lax, he would inform him.

Q. He would report it? A. Yes, sir.

Q. But otherwise he wouldn't have anything to do with it? A. No, sir.

Q. When you were discharging the functions of the general manager, did you make inquiries as to the account? A. Yes, sir.

10 Q. And were you informed by the auditor as to what their status was? A. No.

Q. Do you recall whether in June, 1926, about the time now in controversy, you made any inquiries as substitute general manager of the auditor with regard to any account? A. The auditor came up after about the 11th and 12th and usually went and told of the lax accounts, the accounts that were back pay, and he would stress on the accounts that had been prompt heretofore, and among those he mentioned was the Economy.

20 The Court: Do you recall that until April, 1927, when he was elected treasurer, he was the assistant secretary and treasurer?

*By Mr. Hood:*

Q. Do you recall saying so, that you were elected as secretary and treasurer? A. Yes, sir.

30 Q. Were you discharging any duties as secretary and treasurer during that period? A. Yes, sir.

Q. Then in addition to being assistant secretary and treasurer, you were performing those duties, you were also performing clerical services and you were doing the engineering work? A. Yes, sir.

Q. And you were substituting for the general manager when he was away? A. Yes, sir.

40 Q. I ask you whether anything about that time that we are talking of, when you were supposed to

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

be, I think, general manager, while he was away? A. Yes, sir.

Q. You remember that you were substituting for the general manager while he was away and that you heard from the auditor that some accounts were behind, overdue, according to the books at that time? A. That was somewhere between June 15th and the 20th.

10 Q. That was somewhere between June 15th and 20th? A. Yes, sir.

Q. It wasn't earlier than the 15th? A. I don't recall the exact date.

Q. What is your impression about it? A. You see, in the auto game, they usually pay their bills by the 10th, and there was four or five days, the auditor checks up, he has in his hand some accounts.

20 Q. And after the seven days the Economy Auto & Supply Company was taking advantage of its own discounts? A. Yes, sir.

Q. It was very good pay? A. Yes, sir.

Q. It got special datings, didn't it? A. I don't recall offhand.

Q. Don't you know from a familiarity with the business that they got a dating of three or four months ahead? A. Yes, they had.

30 Q. Paid at the expiration of the three or four months that they were entitled to a discount of ten per cent? A. I don't recall that.

Q. You had to do with the books of the Cox Corporation? A. If I had my books, I could.

Q. Having to do, as assistant secretary in the various capacities that you speak of, you say now that you haven't any knowledge of that at all? A. I don't recall whether the Economy is one of them.

40 Q. Do you recall with your present information,

*John T. Mascuch—Recalled, Cross—for Plaintiff.*

anything about that situation between the Economy and the Cox? A. The Economy, like any other shipping, was because sometimes a longer dating in the winter months, and to carry them through, so they would take some stock.

Q. I ask you do you recollect? A. I recall something.

10 Q. What do you recall? A. I know of one shipment, one of the first ones, we allowed them a longer time than the usual thirty days for payment.

Q. What do you mean, one of the first shipments, what year? A. It was in 1925.

Q. Do you recall anything else? A. Not at the present time.

Q. The Cox people no longer carry on their office in Wilkes-Barre? A. No, sir.

20 Q. And they have removed all their office equipment, books, papers, everything that they had there, to Newark? A. Yes, sir.

Q. And they are now in Newark? A. Yes, sir.

Q. Their incorporation and books consisted only of the ledger? A. No, sir.

30 Q. What else did it consist of? A. We have a cash book, sales record, material book, accounts payable, accounts receivable, and any such books that any ordinary corporation would need to carry on their business.

Q. And those books were at your place of business in Newark to which you went when we took the adjournment? A. Yes, sir.

Q. And they were within your reach and obtainable? A. Yes, sir.

Q. And the only thing you brought was these few sheets that you have presented here? A. Yes, sir.

40 Q. And you didn't bring the books that contained this? A. No, sir.

*Jos. J. Mascuch—Rebuttal, Direct—for Plaintiff.*

Q. But you opened the books and you took those sheets out and left everything else behind? A. Yes, sir.

JOSEPH J. MASCUCH, sworn in behalf of plaintiffs in rebuttal.

*Direct-examination by Mr. Kristeller:* 10

Q. At the time that we are talking about, April, 1926, and thereabouts, what was your connection with the Cox Corporation? A. Chairman of the Board, vice president and general manager.

Q. And who was the treasurer of the Cox Corporation? A. What date?

Q. April, 1926. A. C. F. Griemsman.

Q. And who was the president of the Sheldon Company? A. C. F. Griemsman. 20

Q. That is the same person? A. Yes, sir.

Q. Who was the bookkeeper, the actual keeping of the books of the Cox Corporation at or about that time? A. John Charles.

Q. And who was the bookkeeper who had charge of the Sheldon Company? A. John Charles.

Q. The same person? A. Yes, sir.

Q. Who handled the mail of the Cox Corporation at that time? A. J. J. Mascuch—I did. 30

Q. How did you get your mail? A. It came up in the mail car and was delivered to my desk by John Childs, unopened.

Q. About April, May and June was there any change in the method by which the mail was delivered to you? A. No, the mail came to my desk unopened.

Q. Did you get the checks of the Economy Auto & Supply Company which are in evidence as Exhibits here P1 and P2? 40

*Jos. J. Mascuch—Rebuttal, Direct—for Plaintiff.*

Objected to.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. Where did those checks go, if you know? A. In the office of the Sheldon Company.

10 Q. Who told you that?

Objected to.

(Question withdrawn).

Q. Did you ever see those checks until you saw them here? A. Yes, sir.

Q. Where? A. In the Economy Auto & Supply, the first time I saw them.

*By the Court:*

20 Q. When? A. About the 25th day of June, 1926.

Q. So all you know about where those checks were received is what somebody told you? A. No, sir, what I personally handled, the money and the checks.

Q. Then you did see them there? A. No, sir, they never came to my desk. I opened the mail and delivered the checks personally all the ways to the auditor. The checks never came to my desk.

30 Q. What was the regular course in your company of handling checks? A. The mail came to my desk. I opened it, distributed the mail to the sales department and assigned the agents and turned the checks over to the auditor.

Q. So your treasurer didn't get them? A. The treasurer and the auditor were in the same office.

Q. And at that time was Mr. Griemsman? A. Yes, sir.

40 Q. He was treasurer and auditor, then, of both

*Jos. J. Mascuch—Rebuttal, Direct—for Plaintiff.*

companies? A. No, he was just treasurer of Cox and treasurer of Sheldon. He was not an auditor in either these two companies.

Q. You said it was the same person? A. I meant the same office.

Q. Who was the auditor? A. John Childs.

Q. Then I will go back to my former question. Then the treasurer did not receive the check due— you delivered them to the auditor? A. They were delivered to both persons. Sometimes they were delivered to the auditor and sometimes they were delivered to the treasurer. They both performed the same duties, because the treasurer was not there all the time.

10

The Court: The testimony will be stricken out, that these checks came to the office of the Sheldon Company. The testimony was that these checks came to the office of the Sheldon Company. It does not appear that he knows that of his own knowledge, and the testimony is stricken out.

20

*Cross-examination by Mr. Hood:*

Q. In those days did the Cox Company have a president? A. Yes, sir.

Q. And was his name William M. Cox? A. Yes, sir.

30

Q. Do you know his writing? A. Yes, sir.

Q. (Showing witness papers.) Is that his writing on the back of these checks? A. Yes, sir.

Q. I am interested in something that you said about using the same office. Do you mean that the Cox people and the Sheldon people were all located in the same office? A. On the same premises, on the same floor, but by separate compartments.

40

*Jos. J. Mascuch—Rebuttal, Cross—for Plaintiff.*

Q. Do you mean the different officers had separate places partitioned off on the same floor? A. Yes, sir.

Q. And in close proximity to each other? A. Yes, sir.

Q. Was the whole thing so indiscriminately so to speak, one? A. No, sir.

10 Q. What I mean is this: Did you have a division anywhere where you said, "This side is Cox and this side is Sheldon"? A. Yes, sir.

Q. But you were all on the same floor? A. Yes, sir.

Q. When you had a common officer for both, as you seem to have had in some of your offices, did you have a separate office when each sat as officer of Sheldon and then an office where he sat as officer of the Cox, or did he sit in the same office all the time and discharge his functions from that as officer of the two companies? A. It worked both ways.

Q. At the time, for instance, was he the treasurer of both the companies? A. Yes, sir.

Q. Did he have one office or did he have two? A. He had one corporation office.

Q. What do you mean by that? A. He came over in the Cox office and he worked and he went over in the Sheldon office and he worked there.

30 Q. That is what I am trying to find out, whether he had an office where he filled the functions of the Cox and Sheldon people, or whether there were two officers, one the treasury department of the Cox, and the treasury department of the Sheldon, and that he visited there, one to the other, as occasion required? A. He had one specific office. While he worked in two, one specific desk.

40 Q. Will you tell me whether or not the Cox Company had a treasurer's office separate and apart from the office of the Sheldon? A. No, sir.

*Jos. J. Mascuch—Rebuttal, Cross—for Plaintiff.*

Q. It was all one room? A. It was one room, one partition and desk.

Q. You did go away at times, didn't you? A. Yes, sir.

Q. How often did that occur? A. Sometimes I was away a week and sometimes a day and then I was gone for a month.

Q. How often were you absent? A. I was at the plant a majority of that time. 10

Q. You mean by a majority of the time, fifty per cent of your time? A. Eighty-five per cent. of the time.

Q. Of course, you locate just exactly when you were there and when you were away? A. I can state pretty close when I was there and when I was away.

Q. Do you remember whether you were away during the month of June, 1926? A. No, sir. 20

Q. You don't remember? A. I do remember.

Q. Were you away? A. Just for a week.

Q. The week involved office time or no? A. We worked Saturdays and Sundays.

Q. When you say a week now, you mean what? A. Saturday afternoons and Sundays and back on the job on Mondays.

Q. Then you were pretty busy there? A. Yes, sir. 30

Q. In both companies? A. In one company.

Q. Which company was that? A. The Cox Corporation.

Q. You were very busy during June, 1926? A. Yes, sir.

Q. And you are sure that during all that time the work was carried on on Sundays in the Cox Corporation? A. Yes, sir—not all of the day—part of the time. 40

*Jos. J. Mascuch—Rebuttal, Cross—for Plaintiff.*

Q. I want to know whether about this time, in June, when you were away, your brother substituted, the gentleman who was on the stand is your brother? A. Yes, sir.

Q. Whether he substituted for you as general manager? A. He was appointed and acted as general manager when I wasn't there.

10 Q. And during the month of June you say that that would happen no oftener than once during the month? A. Specifically in June I was there all the time, to the best of my knowledge.

Q. So there wasn't any substitution during the month of June at all? A. There was.

Q. I thought you said you would be there all the time? A. I was, but there was substitution, when I wasn't in the office. I went away probably in the morning and came back at night, up to Scranton to  
20 see some of the jobbers.

Q. Then you were more than general manager—you were also salesman? A. No, sir, I was general manager of the company.

Q. What did you go to Scranton for? A. To straighten out some of the mess that the salesman couldn't straighten out.

Q. If you went away in the morning you came back in the afternoon, and you think that while you were away he might have done some of your work?  
30 A. Yes, sir.

Q. Do you remember going to Scranton very much in June, 1926? A. Yes, sir.

Q. What do you recollect about it? A. Preparing the case, how much to sue Sheldon, with the attorney.

Q. That wasn't going to see one of your customers? A. The customer was in the same town.

40 Q. So you did both? A. Yes, sir.

*Jos. J. Mascuch—Rebuttal, Cross—for Plaintiff.*

Q. The Sheldon people had an office for the president? A. Yes, they did.

Q. Who was it? A. Mr. Schooley.

Q. In June, 1926? A. Yes, sir. He was at the bank, but not at the Sheldon offices.

*By the Court:*

Q. Was Mr. Cox in any way connected with the Sheldon Company as an officer? A. I can't answer that—at that time he was not, to my knowledge. 10

*By Mr. Hood:*

Q. Was he at any time? A. No, not to my knowledge.

Q. He was president of the Cox Company? A. Yes, sir.

Q. And he had an office as president? A. He didn't. 20

Q. Didn't he have an office there? A. He was a salesman.

Q. Salesman and president? A. Yes, sir.

Q. And he had no place to sit? A. No, sir.

Q. Did you have any letterheads? A. Yes, sir.

Q. Did his name appear on them? A. No, sir.

Plaintiff Rests.

Defendant Rests. 30

Mr. Hood: I desire to make a motion for the direction of a verdict in favor of the defendant. The foundation of that motion is the application of the same principle as I talked about yesterday as to the implied authority of the president of an ordinary corporation, and that under the general rule that implication carries unless the authority of the pres- 40

*Motion for Direction of Verdict.*

ent president is abrogated and that the person who deals with him has knowledge of that fact, and in this application on this motion I rely upon the proposition that in a transaction involving the implied authority of the president of the bank, that puts the burden upon him who is served with the power of abrogation to prove it, and that in this case proof that the person with whom he dealt had knowledge of the fact had notice from which knowledge is imputed, that that power had been abrogated, and that in this case the burden is upon the plaintiff in that respect to show that the Fidelity Union, which dealt with this check, had no knowledge of the fact that the president's power to sign had waived endorsement of the check, because the implied power had become abrogated by competent and lawful action on the part of the corporation, and that in the absence of that proof, there being none in this case, as far as I know, that it must be assumed that the implied power, if it ever existed, still existed. We have some little dispute of the facts, but I don't know that we have any dispute about the pertinent facts.

The Court: I think there are none.

Mr. Hood: Not about which there can be any argument, and if your Honor says that that is so, I need not waste any further time talking about that one fact. I get down to the proposition that this Court had to take the responsibility for the decision of this issue, because if the facts are not in dispute, then there is not anything for the jury to decide, because, given the facts, you have got to apply the law to the facts, and if there is not any dispute about the fact, it is quite apparent that what you have to apply the law to is a series of undisputed facts. So if I am right, about this there are not

*Charles F. Griemsmann—Direct—for Defendant.*

in this case facts from which different minds would draw different conclusions. I want to call your Honor's attention to that paper that was introduced today. Your Honor permitted me to introduce a copy of it.

The Court: Is it admitted as to the company it is from and the company it is to?

Mr. Kristeller: You admitted it over my objection. I only admitted that the signatures were genuine.

Mr. Hood: Will you admit that it related to a transaction between the Cox Company and the Sheldon Company?

Mr. Kristeller: No.

Mr. Hood: Will your Honor permit me to introduce the evidence on that point?

The Court: Unless Mr. Kristeller will agree to what it is.

Mr. Kristeller: I am told that Wyland was employed by the Sheldon Company and so was Floyd. It has our O. K. on it.

Mr. Hood: I want to know whether or not this did not relate to the transaction between the Sheldon Company and the Cox Company.

The Court: You may reopen the case and put in the proof.

CHARLES F. GRIEMSMAN, sworn in behalf of the defendant.

*Direct-examination by Mr. Hood:*

Q. On April 27, 1926, were you connected with either the Cox Company or the Sheldon Company?

A. I was treasurer of the Sheldon Company and I was treasurer and secretary of the Cox Corporation.

*Motion for Direction of Verdict.*

Q. On that day did you have a Mr. John Floyd?  
A. Yes, sir.

Q. Was he connected with either of those companies? A. He was the works manager and the assistant secretary.

Q. On that day did you have a Mr. Wall? A. Yes, sir.

10 Q. Was he connected with either of those companies? A. He was connected with the Sheldon Company.

Q. And there were at that time the Messrs. Masuch connected with either of those companies? A. Yes, sir.

Q. One was the general manager of the Cox Company? A. He was vice president and general manager.

20 Q. Of the Cox Company? A. Yes, sir.

Q. And Mr. J. J. Masuch, which one was that?  
A. He was the vice president and general manager.

Q. On that day was there anybody by the name of A. Wylan? A. Yes, sir.

Q. Did you know him? A. Yes, sir.

Q. What did he have to do with either of these companies? A. He was general manager of the Sheldon Company.

30 Q. On that day did you receive a copy of this communication that I am presenting to you? Had you ever seen it before? A. I may have seen it. I can't recall it.

Q. You can't testify about it? A. I can't recall that I received a copy of this on April 17.

Q. Did you have any knowledge about it at that time? Did you see it? A. I had knowledge of it. I may have seen it later than that day.

40 Q. Did you have any knowledge of the transaction to which this relates? A. Yes.

*Charles F. Griemsman—Direct—for Defendant.*

Q. And between what companies was the transaction to which it relates? A. Between the Sheldon and the Cox Corporation.

Q. Did it relate to any other corporation at all?  
A. Not to my knowledge it didn't, no.

Not cross-examined.

10

Mr. Hood: So I say that this litigation is within the time and within the matter dealt with by this first resolution.

Mr. Kristeller: I move for the direction of a verdict in favor of the plaintiff and against the defendant.

The Court: Do you then agree with Mr. Hood that there is no dispute in this case 20 on any material facts which would take it to the jury, or that there are any facts from which different conclusions can be drawn from the testimony?

Mr. Kristeller: Yes; I do agree with Mr. Hood.

(Counsel argue.)

30

DIRECTION OF VERDICT.

The Court: There has never been an adopted doctrine in this state, the rule followed in some of the states, that, where a motion for a direction has been made by attorneys on both sides, the questions involved become matters of law for the court and not for the jury; but where both sides admit and insist, as they do in this case, that there is no dispute of any material facts, and that there are 40

*Direction of Verdict.*

no proven facts from which different conclusions or inferences can be drawn, then it is a question for the court and not for the jury. So the fact that motions have been made for the direction of a verdict under those circumstances, makes it the duty of the court to direct the jury to render a verdict either for or against the plaintiff, as stated by  
10 Mr. Hood in his argument.

I have examined, with a great deal of interest, the cases cited in both briefs. I have examined most of the cases cited upon the plaintiff's brief because they are New Jersey cases as I have had no difficulty in gaining access to them. I have not had the same opportunity to examine the cases cited in the defendant's brief, as most of them are cases in the Western States but I am so well acquainted with the care exercised by Mr. Hood and  
20 Mr. Lafferty in the preparation of their cases and their briefs, that I am willing to accept their brief as an accurate statement of the law quoted therein, and will assume that the cases hold precisely what the brief sets forth, and, from a careful reading of the brief, that the holding of the courts of the states where those cases were decided, is to the effect that the general powers of the president include the signing and endorsements of checks; but  
30 the question which presents itself to this court at this time is whether or not the same rule has been adopted by the courts of this state, which must control the action of the trial courts of this state, and it is not a question of whether or not the rule laid down in those cases cited in defendant's brief ought to be adopted in this state. That is of no moment. The question is whether or not our courts have adopted a similar or a different rule. A careful examination of the cases in this state  
40

*Direction of Verdict.*

leads to the conclusion that there is no implied power or general authority of a president to receive and disburse moneys of the corporation. It therefore becomes important in the consideration of this case to ascertain just what the powers of the president are.

Mr. Justice Katzenbach, in the case of *Aerial League of America vs. Aircraft Fireproofing Corporation*, found in 117 *Atlantic Reporter*, p. 705, has stated the situation so comprehensively in a brief paragraph that I shall read it. He says: "A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws or corporate action of its stockholders or board of directors, or can be implied from the powers expressly inferred,  
20 or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them." I think that is complete. I doubt if there can be any decisions in this state which enlarges the power of a corporate officer beyond these definitions. Therefore, I think we should consider just what the conferred powers were in the Cox Corporation. Section 15 of the by-laws provide:  
30 "The president shall be the chief executive officer of the company and shall have general management of the business of this company. The president shall have custody of the seal of the company and shall affix the said seal to any instrument requiring the same." The duties of treasurer are as defined in the by-laws: "The treasurer shall be the financial officer of the corporation and shall perform the duties usually performed by the  
40

*Direction of Verdict.*

treasurer of the corporation when requested, and who shall render a report to the directors." By resolution of the board of directors adopted on the 11th day of June, 1924, it is provided that the funds be deposited to the credit of the company in the Second National Bank of Wilkes-Barre, Pennsylvania, and are authorized to be withdrawn  
 10 therefrom only upon the signature of the secretary and treasurer, Mr. Griesman, and counter-signed by either the president, William M. Cox, or the vice-president, Joseph J. Mascuth.

There has been introduced in evidence an agreement between the Cox Corporation and the Sheldon Company, to which latter corporation this check was transferred by the president of the Cox Corporation, which was dated December 24, 1925.  
 20 It must be assumed that this agreement was executed by the respective corporations after proper corporate action, as it apparently provided for the handling of the entire transaction between these two companies, and I am quoting from section 10, the last part of it: "All bank checks for money out of its treasury must bear the signature of its treasurer." By resolution of the Cox Company on April 21, 1926, it is provided: "That the action of Joseph J. Mascuth, acting as general manager,  
 30 in assigning net accounts for shipments made on or after April 17, 1926, be and is hereby ratified and confirmed, allowance being made for selling expenses of the corporation as per contract with the Sheldon Company." It appears that prior to this meeting, by letter of April 17, 1926, Mr. Weiland, general manager of the Sheldon Company, wrote to Mr. Flood, who was connected with the Sheldon Company, copies of which were sent to Mr. Wall, also connected with the Sheldon  
 40 Company, which is as follows: "This is your

*Direction of Verdict.*

authority to start shipping Cox bumpers immediately, with a distinct understanding that all invoices for bumpers from this date are to be assigned to the Sheldon Company." And this is O. K'd by Joseph J. Mascuth, who was at that time chairman of the board, vice president and general manager of the Cox Company. Subsequent to that resolution last quoted, a resolution was adopted that "All outstanding customers' notes and net  
 10 accounts receivable be and are hereby assigned to the Sheldon Company, to be applied to the reduction of its indebtedness to this corporation, the Sheldon Axle & Spring Company, and the treasurer is hereby authorized to execute such assignment." As I understand it, there is no other by-law, resolution, agreement or letter which would in any way reflect upon the power of the  
 20 president to endorse these checks. The checks were made by the Economy Auto Supply Company, the plaintiff in this suit. They were sent to the Cox Company. According to the testimony of Mr. Joseph J. Mascuth they were not handled in the usual way or, at least, he says, he never received them, although all mail in the usual course of business came to his desk unopened; that he opened the mail, turned the orders over to the proper  
 30 factory people, and the checks were sent to the auditor and treasurer. He says these checks were not received by him. The checks were endorsed "Cox Corporation, by William M. Cox, president." There is no question in the case but that William Cox was the president or that the signature upon the check is the proper and true signature of William M. Cox. They were made payable, as indicated by the endorsement, to the Sheldon Company and deposited by the Sheldon Company; they came  
 40

*Direction of Verdict.*

to the defendant company, were charged against the account of the plaintiff in the Fidelity Union Trust Company, which reduced the balance there by the amount of these checks, and the plaintiff company did not receive credit for them from the Cox Company.

10 The only importance of inquiry whether credit was given by the Cox Corporation to the plaintiff being, of course, that if the plaintiff had received credit from the Cox Corporation it was not damaged by the action of the defendant, and hence, could not recover in this case.

It is insisted on behalf of the defendant, and there is no dispute about that, that they had no knowledge of the provisions of the by-laws, resolutions, contents of letter and agreement of the Cox Company, and that, consequently, because of the  
20 general authority and implied powers of the president to transact the business of the corporation they were not put upon inquiry to ascertain whether or not the president of the Cox Company, William M. Cox, had authority to endorse these checks and hand them over to the Sheldon Company, and whether or not he did have that authority; and, having turned these checks over in pursuance of the resolution of April 21st, he was acting under an implied power given to him by that  
30 resolution; or, in other words, to quote from Mr. Hood's argument, that because of this resolution these checks in any event belonged to the Sheldon Company and it was a mere matter of detail,—the endorsement of them and the passing of them over to the Sheldon Company, because of the resolution which provided that "all outstanding customers' notes and net accounts receivable be and hereby are assigned to the Sheldon Company." I  
40

*Direction of Verdict.*

doubt very much whether that can be so because, notwithstanding this letter of April 17th, which is offered in evidence, this resolution of the Cox Company appears to relate to transactions which had taken place up to that time, and does not seem to comprehend in specific terms customers' notes which might thereafter be given and accounts which thereafter might become accounts receivable, nor am I inclined to think that the endorsement of these checks and the turning of these checks over to the Sheldon Company was a compliance either with the resolution or the agreement or the power conferred upon the president, but that these checks should have been handled by the treasurer. The effect of what the president did was to take the money out of the treasury of the company, where it lawfully belonged and pay it to the Sheldon Company. As I say, I have examined the cases to which reference has been made on behalf of the plaintiff and I have examined particularly the case of *Dennis Metal Manufacturing Company vs. Fidelity Trust Company*, 123 *Atlantic*, p. 614, and while the facts in that case are quite different from the facts in this case, because in that case, as suggested by Mr. Hood in his argument, the knowledge of the defendant of the misappropriation of the funds of the corporation, of which Mr. Dennis was president, could hardly be questioned, because the money was deposited by him in his own individual account in the defendant's bank; but I am impressed with what Mr. Justice Katzenbach, who also delivered the opinion in that case, has to say about it. He says: "A president of a corporation does not have, by virtue of holding the office of president, any power to endorse checks, drafts, notes, and other  
10  
20  
30  
40

*Direction of Verdict.*

obligations payable to the corporation. There are many matters in which one holding the high office of president cannot bind the corporation. The New Jersey cases in this point are collected in the case of *Aerial League of America vs. Aircraft Fire-proofing Corporation*," which cites and quotes from a number of New Jersey cases and one New York case, I think, which is to the same effect.

Therefore, I find myself unable to agree with the view that the power to endorse checks is within the implied power or general authority of a president of a corporation, nor that, by virtue of the resolution, the agreement between the Cox and Sheldon Companies or the letter of April 17th, that power was conferred upon the president so that in endorsing these checks and passing them over to the Sheldon Company, he was performing purely a ministerial act in doing for the Cox Company what is should have done and what the Cox Company was obliged to do in the discharge of its obligation to the Sheldon Company.

These views necessarily result in the direction of a verdict in favor of the plaintiff and against the defendant, and Mr. Shuppe has figured the interest from the date when these checks were charged to the account of the plaintiff, Fidelity Union Trust Company, at \$36.12 upon the check of \$407.03 and \$465.69 upon the check of \$5283.03, making the interest altogether \$5081.81, the total of the two checks being \$5,690.26. The total of the face of the checks, together with the interest, is \$6,192.07, for which amount I direct you to find a verdict in favor of the plaintiff and against the defendant.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

**Exhibit P-1.**

Number  
B 6817

ECONOMY AUTO SUPPLY CO., INC.  
268 Halsey Street

Newark, N. J. May 10, 1926.

Pay to the Order of Cox Corp. \$407.03/100  
Four Hundred Seven Dollars Three Cents--Insured 10  
Dollars

ECONOMY AUTO SUPPLY Co., INC.  
LEON MILLER,  
President.

To the  
FIDELITY UNION TRUST COMPANY  
55-9 Newark, N. J.

(Endorsed on back) 20

Pay Second National Bank  
of Wilkes-Barre, Pa., or order  
Cox Corporation  
Pay to the Order of  
Sheldon Axle & Spring Co.  
Cox Corporation  
William M. Cox  
President

Pay Second National Bank 30  
of Wilkes-Barre, Pa., or order  
Sheldon Axle & Spring Co.  
Pay to the Order of  
Any Bank, Banker,  
Bankers or Trust Co.  
Previous Endorsements Guaranteed  
June 16 1926  
The Nat'l Park Bank of N. Y.

40

*Exhibit P-2.*

Pay any Bank  
Banker or Trust Co.  
or Order  
Prior Endorsements  
Guaranteed  
Jun 16 1926  
Federal Reserve Bank  
of New York

10

**Exhibit P-2.**

Number  
B 7280

ECONOMY AUTO SUPPLY CO., INC.  
268 Halsey Street

Newark, N. J. June 10, 1926

20

Pay to the Order of Cox Corp. \$5288.23/100  
Five Thousand Two Hundred Eighty-eight Dollars  
Twenty Three Cents Dollars

ECONOMY AUTO SUPPLY Co., INC.  
B. MILLER  
President.

To the  
FIDELITY UNION TRUST COMPANY  
55-9 Newark, N. J.

30

(Endorsed on back)

Pay to the Order of  
Sheldon Axle & Spring Co.  
Cox Corporation  
William M. Cox  
President

40

Pay Second National Bank  
of Wilkes-Barre, Pa., or order  
Sheldon Axle & Spring Co.

*Exhibit P-2.*

Pay to the Order of  
Any Bank, Banker,  
Bankers or Trust Co.  
Previous Endorsements Guaranteed  
June 16 1926  
The Nat'l Park Bank of N. Y.  
154 154

10

Pay any Bank  
Banker or Trust Co.  
or Order  
Prior Endorsements  
Guaranteed  
Jun 16 1926  
Federal Reserve Bank  
of New York

20

30

40

**Exhibit P-3.**

ECONOMY AUTO SUPPLY CO.

Incorporated

268 Halsey St. Newark, N. J.

Phones 4410-1-2-3-4-5 Mulberry

Shop Equipment      Replacement Parts  
Car Accessories

10

Aug. 6, 1926.

Fidelity Union Trust Co.,  
Broad Street,  
Newark, N. J.

"Att'n Mr. Merz"

Gentlemen:

On June 10th, 1926 we, The Economy Auto Supply Co. Inc., drew our check payable to the order of the Cox Corporation in the amount of \$5,288.23. We have been informed by the Cox Corporation that this check was improperly negotiated and in spite of the improper endorsement of the Cox Corporation (Pay to the order of Sheldon Axle & Spring Co., Cox Corporation, William M. Cox, President) ; your bank paid this check.

The Cox Corporation are holding us liable for the account for which the said check was to have been payment. Will you kindly credit our account with the sum of \$5,288.23 and advise us as soon as you have done this so that we can properly pay the Cox Corporation and be relieved of any liability to them.

Very truly yours,

ECONOMY AUTO SUPPLY CO. INC.

B. MILLER

President.

BM-LGL

40

**Exhibit P-4.**

August 10, 1926.

Economy Auto Supply Co.,  
268 Halsey St.,  
Newark, N. J.

Attention—Mr. B. Miller, President.

Gentlemen:

In reference to your letter of August 6th, we have received a letter today from the office of Jacob L. Newman enclosing your paid and canceled check No. B6817, dated May 10th, and drawn on this bank to the order of Cox Corporation, for \$407.03, and check No. B7280, dated June 10th, and drawn on this bank to the order of Cox Corporation, for \$5,288.23.

We have also received an affidavit signed by John T. Mascuch, Secretary of the Cox Corporation, with reference to the endorsements of these checks.

We will endeavor to secure a refund for you in the above amounts, but would request that you await our advice before drawing any check in refund to the Cox Corporation as we do not believe that the affidavit at hand will be sufficient.

Very truly yours,

O. H. MERZ,  
Vice President

CLW:SM

10

20

30

40

**Exhibit D-1 (Referred to as Exhibit C-1).**

April 17, 1926.

Mr. John Floyd.

Copy to Messrs. Wall,  
Griemsman,  
Mascuch.

This is your authority to start shipping Bilcox  
10 Bumpers immediately, with the distinct under-  
standing that all invoices for bumpers, from this  
date, are to be assigned to the Sheldon Axle &  
Spring Company.

A. WEILAND  
General Manager.

O. K.  
J. J. MASCUCH.

AW/MW

20

30

40

27 MAY.

Arthur W.

**New Jo**

ECONOMY  
INC.,

FIDELITY  
PANY,

**BRIE**

This is  
damages  
the New  
tried bef  
Circuit  
Court, b  
tion of a  
any mat  
plaintiff,

The re  
appellant  
dated re  
1926, in  
Dollars  
Thousand  
and Twe  
able to th

The ch  
"I  
Spri  
Cox,

and tion  
SPRDANY  
WILL to  
ous  
sequition  
bank in  
ent'd to  
10,  
Th  
the f its  
that its  
not  
with Cor-  
the fol-  
that,  
the of-  
of er orm  
of thirer  
thori he  
the r  
Cox re-  
(S. Ces-  
Th C.,  
the c  
p. 28 and  
of  
the  
of  
hor-  
pon  
G. F.  
t the  
Thent,  
the C  
soug any  
lows olu-  
d it  
Vom-  
r paid  
S

**Exhibit D-1 (Referred to as Exhibit C-1).**

April 17, 1926.

Mr. John Floyd.

Copy to Messrs. Wall,  
Griemsman,  
Mascuch.

This is your authority to start shipping Bilcox  
10 Bumpers immediately, with the distinct under-  
standing that all invoices for bumpers, from this  
date, are to be assigned to the Sheldon Axle &  
Spring Company.

A. WEILAND  
General Manager.

O. K.  
J. J. MASCUCH.

AW/MW

20

30

40

27 MAY.T.1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

**New Jersey Court of Errors and Appeals**

ECONOMY AUTO SUPPLY Co.,  
INC.,

*Plaintiff-Respondent,*

*vs.*

FIDELITY UNION TRUST COM-  
PANY,

*Defendant-Appellant.*

*On Appeal  
from  
Supreme  
Court.*

**BRIEF ON BEHALF OF RESPONDENT.**

**Statement.**

This is an appeal from a judgment of \$6,249.63 damages and costs entered December 21, 1927, in the New Jersey Supreme Court. The case was tried before Dungan, J., and a jury, at the Essex Circuit and at the conclusion of the case the Court, being moved by both parties for a direction of a verdict, and there being no dispute on any material facts, directed a verdict for the plaintiff, and against the defendant for \$6,192.07.

**Facts.**

The respondent, which is a depositor in the appellant bank, was the maker of two checks dated respectively May 10, 1926, and June 10, 1926, in the amounts of Four Hundred Seven Dollars and Three Cents (\$407.03) and Five Thousand Two Hundred Eighty-eight Dollars and Twenty-three Cents (\$5,288.23), each payable to the order of COX CORPORATION, payee.

The checks were endorsed as follows:

*"Pay to the order of Sheldon Axle &  
Spring Co., Cox Corporation, William M.  
Cox, President,"*

AND LEGAL SERVICE  
OF 3 COPIES OF THE WITHIN

*Brief*

IS ACKNOWLEDGED THIS 14<sup>th</sup>

DAY OF May 1928

*Wood Luffly & Campbell*

ATTORNEY OF Appellant

and were deposited by the SHELDON AXLE & SPRING Co., in the SECOND NATIONAL BANK OF WILKES BARRE, and after passing through various banks in the course of collection, were subsequently returned to the maker after the drawee bank, the appellant, had charged the respondent's account with the said amounts.

The respondent subsequently ascertained that the payee had never received said checks and that the amounts for which they were drawn had not been credited to the respondent's account with the payee, and that the COX CORPORATION, the payee, had never endorsed the checks, and that, what was apparently an endorsement of the payee was in fact a forgery, as such power of endorsement was not included in the by-laws of the payee which definitely set forth the authority of the president (S. C., p. 28) or in the resolution of the Board of Directors of the Cox Corporation, relied upon by the appellant (S. C., p. 64).

The By-laws of the Cox Corporation defines the duties of the President as follows (S. C., p. 28):

"The president shall be the executive officer of the company and shall have general management of the business of the company. The president shall have custody of the seal of the company and shall affix the said seal to any instrument requiring the same."

The resolution of the Board of Directors of the Cox Corporation, upon which the appellant sought to sustain its defense, reads as follows (S. C., p. 64):

"On motion duly made and seconded it was resolved that all outstanding customers' notes and net accounts receivable be and are hereby assigned to the Sheldon Axle and Spring Company to be applied to the reduc-

tion of the indebtedness of this Corporation to said Sheldon Axle and Spring Company and the Treasurer is hereby authorized to execute such assignment."

The agreement between the Cox Corporation and the Sheldon Axle and Spring Company in evidence (S. C., p. 57, at p. 60) and referred to by the court below (S. C., p. 98) by Section 10, provides:

"All Cox bank checks for money out of its treasury must bear the signature of its treasurer."

The duties of the Treasurer of the Cox Corporation as defined by the By-laws are as follows (S. C., p. 29):

"The treasurer shall be the financial officer of the corporation and shall perform the duties usually performed by the treasurer of a corporation, and when requested he shall render a report to the directors."

Funds of the Cox Corporation were to be received and disbursed in accordance with a resolution of its Board of Directors as follows (S. C., p. 30):

"On motion, duly made and seconded and carried, it was resolved that the funds of the company deposited to the credit of the company in the Second National Bank of Wilkes Barre, Pennsylvania, and are authorized to be withdrawn therefrom only upon the signature of the secretary-treasurer, C. F. Griesman, and counter-signed by either the president, William G. Cox, or vice-president, Joseph T. Mascuch."

There is no evidence in this case of any amendments or changes in the by-laws, resolutions or charter of the Cox Corporation and it is uncontradicted that the above excerpts completely state the powers and duties of the said officers of the Cox Corporation.

Inasmuch as the president of the payee never had authority to endorse checks coming into the treasury of the payee, any purported endorsement of the payee signed by the president was absolutely *void*, and the appellant, therefore, wrongfully charged the respondent's account with the amount of said checks, and inasmuch as the said checks were never *paid to the order of Cox Corporation*, the respondent is entitled to have the amounts of said checks paid to it by the appellant.

The answer of the appellant sets up an alleged agreement between Cox Corporation and the Sheldon Company whereby Cox Corporation agreed to assign to the Sheldon Company its *future invoices of goods sold*; that the checks in suit had been issued to the Cox Corporation for goods sold, and that William M. Cox, president of Cox Corporation, endorsed those checks to the Sheldon Company pursuant to the agreement.

The law applicable to the instant case is to the effect that the appellant should not have recognized the purported endorsement of the COX CORPORATION as a valid one, and that, therefore, it was responsible to the respondent for the amount of said checks. The court below adopted this view and directed the verdict accordingly (S. C., p. 95).

## LAW.

## POINT I.

**The appellant having agreed with the respondent to disburse the money standing to its credit only on the respondent's order, is responsible to it for the payment of a check to which the name of a necessary endorser has been forged.**

The relationship between a bank and its depositor, and the relative obligations incidental thereto, were clearly set forth in *Harter v. Mechanics National Bank*, 63 N. J. L. 578. The decision delivered by Justice Dixon, reads as follows, at page 580:

"The relation between a bank and its depositor is that of debtor and creditor, and the implied contract on the part of the bank is that it will disburse the money standing to the credit of the depositor only on his order and in conformity with his directions. *When, therefore, it makes a payment upon a check to which the depositor's name has been forged, or upon his genuine check to which the name of a necessary endorser has been forged, it must be held to have paid out of its own funds, and cannot charge the amount against the depositor unless it shows a right to do so on the doctrine of estoppel or because of some negligence chargeable to the depositor.*" (Italics ours.)

This case has been cited with approval in *Pratt v. Union National Bank*, 79 N. J. L. 117, a Supreme Court decision by Justice Trenchard (1907), and in *Pannonia Building & Loan Association v. West Side Trust Co.*, 93 N. J. L. 377, a Court of Errors and Appeals decision delivered by Chancellor Walker (1919). These decisions are all to the effect, as clearly set forth in the *Harter* case, *supra*, that when a bank has paid a check drawn upon it by its depositor, which con-

tains an improper or forged endorsement of the payee, it is responsible to the depositor for the amount of the check.

In the instant case when the checks in question were presented to the appellant for payment, it was immediately put upon notice that the endorsement of the COX CORPORATION was improper, and it was under an immediate duty to ascertain whether the purported endorsement of the payee was authorized. The appellant failed to do this, and saw fit to pay the checks upon presentment. The respondent, therefore, contends that for the appellant's negligence and breach of its contractual duty to the respondent, it is responsible to the respondent for the amount of said checks.

#### POINT II.

The purported endorsement of the Cox Corporation ("pay to the order of Sheldon Axle & Spring Co., Cox Corp., William M. Cox, President") was not a proper endorsement of the payee on said checks, as neither the charter, by-laws or corporate resolution authorized such endorsement.

*Stokes v. N. J. Pottery Co.*, 46 N. J. L. 237, at page 240, briefly stated the ordinary powers of the president of a corporation by virtue of his office:

"The powers of the president of a corporation, *virtute officii*, over its business and property are strictly the powers of an agent—powers delegated to him by the directors, who are the managers of the corporation, and the persons in whom, as its representatives, the control of its business and property is vested. If the corporation be organized for business purposes, the president is its chief executive officer. He may, without any special authority from the board

of directors, perform all acts of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of its business. *Boone on Corp.*, Par. 144. To this extent, the president, in virtue of his election as such, becomes the agent of the corporation. Beyond the powers which usage and custom and the necessities and convenience of business require in the executive officer of a corporation, he has no more control over the corporate property and funds than any other director."

The decision in this case was delivered by Justice Depue, and quoting from an earlier case, *Titus v. Cairo, Etc., Railroad*, 37 N. J. L. 98, it continued:

"In the absence of anything in the act of incorporation bestowing especial power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of a president or other officer, unless it is shown to pertain to his official duty or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. The authority requisite to charge the company must therefore be derived from the board of directors."

In the *Titus* case Justice Van Syckel said:

"If any authority is necessary upon a rule of law so well settled, it may be found by reference to *Angell & Ames on Corporations*, Sections 297, 298, 299."

The above case was approved in *Aerial League, Etc. v. Aircraft Corporation*, 97 N. J. L. 530. This case is a Court of Errors and Appeals decision, and in stating to what extent an officer or

agent can bind the corporation for which he acts, holds:

“A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws, or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them. It often results that one occupying a high official position in a corporation is without power to bind the corporation by contract.”

A still later decision, and one almost directly in point, is *Dennis Metal Manufacturing Co. v. Fidelity Union Trust Co.*, 99 N. J. L. 365. The question to be determined in that case, was whether the bank was responsible to its depositor for paying a check drawn to the order of *Dennis Metal Manufacturing Co.* and endorsed:

“Pay to R. W. Dennis, Dennis Metal Manufacturing Co., R. W. Dennis, president.”

The Court held that inasmuch as the power to endorse checks was not delegated to the president by the charter, by-laws or resolution such endorsement by the president was absolutely void, and

“A president of a corporation does not have, by virtue of holding the office of president, any power to endorse checks, drafts, notes, and other obligations payable to the corporation. There are many matters in which one holding the high office of president cannot bind the corporation. The New Jersey cases in this point are collected in the case of *Aerial League of America v. Aircraft Fireproofing Corporation*, 97 N. J. L. 530,

117 Atl. 704. Where a bank receives a check payable to a corporation and indorsed by the president so as to make it payable to himself, and the president deposits it in his personal account with the bank, the bank is chargeable with notice so as to put it on inquiry to determine whether the president of the corporation was authorized so to use its funds as against the corporation” (italics ours).

The opinion is a complete one and refers to cases in States other than New Jersey, and all are to the effect that the endorsement of checks coming into the corporation are not among the powers of the president incidental to his office.

The latest re-statement of the law in this respect is contained in the very recent case of *Savoy Silk Manufacturing Co. v. Royal Piece Die Works*, 4 N. J. Adv. Rep. 1638 (Court of Errors and Appeals). This decision holds that the authority of an agent of a corporation is distinctly circumscribed by express authority granted to him by the charter, by-laws or resolution. The case expressly approved *Aerial League v. Aircraft*, *supra*, and decided on the facts in that case, that the signature of the general manager of a corporation consenting to a composition agreement did not bind the corporation, no previous express authority having been granted to him to enter into such agreement.

It is apparent from an examination of the cases referred to *supra*, that the law in New Jersey is settled and clear that the powers of a president of a corporation are circumscribed by the authority delegated to him by the charter, by-laws and resolutions of the corporation, and in the absence of the president receiving express power to endorse checks, he is without such authority.

In the case at bar the president of the Cox Corporation by endorsing the checks in question to the Sheldon Company attempted to do exactly what is condemned in the above cases. Without any authority, express or implied by charter, by-laws or resolutions, he endeavored to deprive the Cox Corporation of funds which rightfully should have been deposited in its corporate bank account.

The appellant in its brief has cited a number of cases arising without the borders of our State, most of them being in the Far West, and has aimed to distinguish between an endorsement in which a corporate liability of guarantee is involved, and an endorsement for a convenient transmission of funds, arguing that the latter endorsement is proper as within the implied powers of the executive officer. It is submitted that this argument is illogical because it is based upon the effects of the endorsement rather than upon the right in the first instance of the president to endorse a check for a corporation.

To adopt the reasoning of the appellant would place in the hands of a president of the ordinary business corporation a most dangerous weapon. It would open wide the door to the fraudulent practice of an executive officer mulcting a corporation at the expense of its stockholders. Without adequate redress, a president could endorse checks and thus deprive the corporation of its entire income of checks and by collusion preclude a corporation from a valid defense it might have against improper charges by its creditors.

The appellant also makes the point that assuming that the president had no authority to endorse the checks in question, he had *implied* authority to assign its accounts receivable. This

is vigorously contested by the respondent because there is an actual authority to assign the accounts given not to the president, but to the treasurer (S. C. 64).

Under Point I, subdivision B, the appellant makes the point that Mr. Cox as general manager had implied and apparent authority to endorse these checks for transfer. It is sufficient answer to this argument that a definite resolution, as set forth above, stipulated the authority of the president and the restrictions within which he was bound.

Under Point II in the appellant's brief it assumes that the Cox Corporation was indebted to the Sheldon Company, that it had no defense to any claim Sheldon might make, that it had no counter-claim, which in fact it did have, and that because the Sheldon Company pocketed the money giving Cox Corporation credit therefor, that the Cox Corporation authorized such payment. Cox Corporation never made record of this payment on its books, and did not intend to in view of the large claim that it had against the Sheldon Company and which claim was actually in dispute (S. C. 75).

The appellant, under Point IV, makes the point that no injury resulted to the Cox Corporation because it has received the full benefits of the check (S. C. 75).

Besides the fact that it does not lie within the mouth of the appellant to say whether Cox Corporation received the benefits, it does not appear that this was the fact. On the contrary, the evidence does disclose that there was an actual dispute between the Cox Corporation and Sheldon Company, and obviously the payment of moneys by the medium of the president's endorsement

of checks which never reached the Cox Corporation's bank account deprived the Cox Corporation of its most powerful weapon of redress of holding up payment of improper charges. What action more *detrimental* in effect could the president have taken!

It is further insisted by the respondent that the cases of sister states should have no weight in the decision of the case at bar because the highest court of this State has in no uncertain language spoken on the proposition in question, and has definitely said that action such as taken by the president of the Cox Corporation in endorsing the two checks is not to be approved.

The endorsements of the Cox Corporation by the president were void and the appellant is bound to make good to the respondent its improper payments.

### CONCLUSION.

It appearing from the evidence in the case that the appellant agreed to disburse the money of the respondent on deposit with it only on respondent's order, and that the appellant made payment out of the respondent's funds on deposit with it, of a check to which the name of a necessary endorser had been forged, and that the court below upon all the evidence, none of which disputed a material fact, found that the President of the Cox Corporation was authorized neither by the charter, by-laws or proper corporate resolution to endorse the checks, and the court below having directed a verdict in favor of the plaintiff and against the defendants because of such improper endorsement and improper payment, the judgment below should be affirmed.

Respectfully submitted,

SAUL J. ZUCKER,  
Attorney of Plaintiff-Respondent.

May, 1928, Term.

LIONEL P. KRISTELLER,  
On the Brief.

27 MAY.T.1928

## New Jersey Court of Errors and Appeals

ECONOMY AUTO SUPPLY Co., INC., Plaintiff-Respondent,	} Action at Law On Appeal from Supreme Court.
v.	
FIDELITY UNION TRUST COM- PANY, Defendant-Appellant.	

### BRIEF OF DEFENDANT-APPELLANT, FI- DELITY UNION TRUST COMPANY.

#### Facts.

1. From August, 1924, to July, 1926, the Cox Corporation and the Sheldon Axle & Spring Company were engaged in business with each other upon a very friendly and intimate basis, and occupied offices together.

2. During the course of their business dealings, the Cox Corporation became indebted to the Sheldon Axle & Spring Company in a very large sum of money, which at no time after August, 1925, was less than \$200,000. and which, on June 10, 1926, amounted to \$382,213.45. (Case pp. 44 to 47)

3. An agreement, dated December 24, 1925, (case p. 57) shows in Section 8 that the Cox Corporation was to pay the Sheldon Axle & Spring Company \$55,000. as its portion of the losses on the business up to August 31, 1925, and the action of the Board of Directors of the Cox Corporation

of April 21, 1926, ratifying the action of its acting general manager in assigning accounts receivable to the Sheldon Axle & Spring Company and in assigning to the Sheldon Axle & Spring Company outstanding customers' notes and net accounts receivable to be applied to the reduction of the indebtedness of the Cox Corporation to Sheldon Axle & Spring Company (case p. 64) indicates an outstanding indebtedness from the Cox Corporation to the Sheldon Axle & Spring Company as of April 21, 1926. From the books of the Sheldon Axle & Spring Company, it appears that this indebtedness on June 10th, 1926, was in excess of \$382,000. and, on December 31st, 1926, was in excess of \$358,000. and the record contains no proof to the contrary.

4. The ratification above referred to appears in the following resolution (case p. 64):

"On motion duly made, seconded and carried, the action of Joseph J. Mascuch acting as General Manager in assigning net accounts receivable for shipments made on and after April 17th, 1926, be and is hereby ratified and confirmed; allowances being made for selling expenses of the corporation as per contract with Sheldon Axle and Spring Company."

and the assignment in the following resolution (case p. 64):

"On motion duly made and seconded it was resolved that all outstanding customers' notes and net accounts receivable be and are hereby assigned to the Sheldon Axle and Spring Company to be applied to the reduction of the indebtedness of this Corporation to said Sheldon Axle and

Spring Company and the Treasurer is hereby authorized to execute such assignment."

5. On May 10th and June 10th, 1926, the plaintiff, Economy Auto Supply Company, drew two checks upon the defendant, Fidelity Union Trust Company, in which it was a depositor, to the order of the Cox Corporation in the sums of \$407.03 and \$5,288.33 respectively, (Exhibits P-1 and P-2, Case pp. 103 and 104) in payment of bills for merchandise which had been sold to the plaintiff by the Cox Corporation prior to the dates on which the checks were drawn.

6. These checks were thereafter indorsed "Pay to the order of the Sheldon Axle & Spring Company, William M. Cox, president" and transferred to that Company. It is admitted that William M. Cox was president of the Cox Corporation at the time and that the signatures upon the two checks are the true and proper signatures of William M. Cox.

7. These checks were then, on June 15, 1926, deposited by the Sheldon Company and came to the Defendant, Fidelity Union Trust Company which, on June 17, 1926, paid them and charged them against plaintiff's account. It is admitted that the defendant had no knowledge of any limitations of the powers of William M. Cox as president, if any there were, or of any restrictions thereon.

8. On June 15, 1926, the Cox Corporation was given credit on the books of the Sheldon Axle & Spring Company for the proceeds of the above checks. (Case pp. 47, 48 and 52).

9. Under the by-laws of the Cox Corporation, its president was made the executive officer of the

company and given general management of the business of the company. (Case p. 28)

10. This is an action brought by the plaintiff, Economy Auto Supply Co., Inc., against the defendant, Fidelity Union Trust Company, to recover the proceeds of the above two checks on the ground that they were not paid to its order.

11. John T. Mascuch, a witness produced on the part of the plaintiff, over the objection and exception of the defendant, was permitted to answer the following questions:

A. Q. Read the resolution respecting the funds of the company?

A. (Reading) "On motion, duly made and seconded and carried, it was resolved that the funds of the company deposited to the credit of the company in the Second National Bank of Wilkes Barre, Pennsylvania, and are authorized to be withdrawn therefrom only upon the signature of the secretary-treasurer, C. F. Griesman, and countersigned by either the president, William G. Cox, or vice-president, Joseph T. Mascuch." (Case p. 30)

B. Q. Were there any other funds drawn from this company or transferred in any other manner except provided for by this resolution of June 11th?

A. No, sir; (Case 31, 32)

C. Q. Were there any funds of the Cox Corporation withdrawn or deposited except pursuant to this resolution?

A. No, sir; (Case 32)

12. At the close of all the evidence, both plaintiff and defendant moved for the direction of a verdict. The trial court refused to direct a ver-

dict for the defendant and directed a verdict in favor of the plaintiff for the sum of \$6,912.07, to both of which rulings of the trial court defendant duly excepted.

### POINTS.

1. The trial court erred in refusing the defendant's motion to direct a verdict in its favor.

2. The trial court erred in directing a verdict in favor of the plaintiff against the defendant.

3. The trial court erred in permitting the witness John T. Mascuch, over the objection and exception of the defendant, to answer questions 11 A to C inclusive (p. 4, ante).

## POINTS I AND II.

These points will be considered together.

The issue in this case is whether title to the checks in question passed by the endorsement of William M. Cox, the president of the Cox Corporation. That the endorsement is genuine is not questioned. It is not necessary for a decision in this case to consider the evidence in any other light than as an assignment. The proof shows it to have been such as distinguished from the ordinary contract of endorsement. The question is not whether the Cox Corporation is to be charged with the liabilities arising out of a contract of endorsement, but whether the title to the Economy Auto Supply checks passed to the Sheldon Company. If Mr. Cox, the president of the Cox Corporation, had either express or implied authority to make the transfer, the title to the checks passed, and the Economy Auto Supply Company cannot complain because it suffers no injury.

A. Mr. Cox had express authority to transfer these checks in payment of the debt due from the Cox Corporation to the Sheldon Axle & Spring Company, and the Cox Corporation was, therefore, bound by his act in doing so.

Under the by-laws of the Cox Corporation its president was made the executive officer of the company and given general management of the business of the company (Case p. 28). Mr. Cox, its president, by virtue of this by-law was given an authority similar to that possessed by the general manager of a business or manufacturing corporation. A general manager of such a corporation may do any act necessary to carry on the corporate business, for the powers of a general man-

ager are co-extensive with the general scope of the business of the corporation.

14 A. Corpus Juris, 94.

*Pickens Company v. Thomas*, 152 Ga. 648, 111 S. E. 27; 21 A. L. R. 1438.

*Thomas & Moran v. Kanawka Valley Traction Co.*, 73 W. Va. 374, 80 S. E. 476.

*Ceeder v. H. M. Loud & Sons Lumber Co.*, 86 Mich. 541; 49 N. W. 575.

And inasmuch as they include the power to dispose of corporate property in the ordinary course of its business (*14A Corpus Juris, 417*) See *Singer Construction Company v. Goldsborough*, 128 Atl. 754, Md.), it is generally held that the general manager has power to endorse commercial paper for transfer in furtherance of the corporate business.

3 Fletcher Corporations, Sec. 2113.

10 Fletcher Corporations, Sec. 2113.

*Ramboz v. Stansbury*, 13 Calif. App. 649, 110 Pac. 472.

and power to assign a chose in action belonging to the corporation.

14 A. Corpus Juris, 418.

3 Fletcher Corp. section 2119.

*Kentucky Consumers Oil Co. v. Continental Fuel Co.*, 171 Ky. 748, 188 S. W. 855.

*Howland Bros. & Cave v. Barre Savings Etc. Co.*, 89 Vt. 290, 95 A. 679.

In 3 *Fletcher Corp. section 2119*, it is said:

“The general manager may assign accounts due the corporation, and may assign

claims, especially where it has been the custom for him to do so. He may transfer the interest of the company in an executory contract which the company was unable to carry out. And it is within the apparent scope of the manager of an electric company to assign a part of the sum due the corporation on a contract to one to whom the corporation is indebted. The right to transfer commercial paper by indorsing it has already been noticed."

And in *Kentucky Consumers Oil Co. v. Continental Fuel Co.* supra, the Continental Fuel Co. was a corporation engaged in the business of mining and selling coal. It owed Sallie Thompson \$7000. for accumulated interest upon its bonds held by her. The general manager at the direction of the president assigned a claim held by the Continental Fuel Co. against the Louisville & N. R. Co. to her in payment of this debt. *Held* the assignment was valid. The Court said: (188 S. W. 857):

"In our opinion the president and general manager of an ordinary trading corporation engaged in the business of mining and selling coal, have in the absence of any limitation on their authority, full power and authority to assign an ordinary open account to a creditor of a corporation. It therefore follows that \* \* \* \* the assignment was valid."

In addition to these powers, a general manager also has authority to pay its debts.

14 A Corpus Juris 448.

3 Fletcher Corp. section 2130.

*Mann v. W. A. Gordon Co.*, 77 Ore. 457.

151 Pac. 704.

*Quee Drug Co. v. Plant*, 55 N. Y. App.

Div. 87, 67 N. Y. S. 10.

*McKiernan v. Lenzen*, 56 Cal. 61.

In *McKiernan v. Lenzen*, supra, the general manager of a corporation assigned a book account against the defendant to certain assignors of plaintiff in payment of a debt due them. *Held*: the general manager could assign an account to a creditor of a corporation. The court said:

"The result of the cases seems to be, that where the management of the affairs of a corporation is intrusted to a general managing agent, he has power to assign the choses in action of the corporation to its creditors, either in payment of, or as security for the payment of, a precedent debt of the corporation, without express authority from the board of directors. The presumption is, that the assignment was made by one having competent authority. It is not necessary to show that he was appointed for the purpose by written or sealed commission."

The record shows that the checks in question were transferred through endorsement in payment of a debt due from the Cox Corporation to the Sheldon Axle & Spring Company, and this payment duly credited to the Cox Corporation on the books of the Sheldon Company.

In *Blake v. Domestic Sewing Machine Company*, 64 N. J. E. 480, 38 A. 241, Vice Chancellor Emery points out that in this State the president of a corporation has no authority to endorse checks because the general management of the corporation is placed by statute with the Board of Directors. The language which vests the general management of the corporation in the Board of Directors does not vary essentially from the by-laws of the Cox Corporation which places such management in the hands of the President of the Company. On an application of the Vice Chancel-

lor's reasoning, the president's power to endorse checks would seem to be definitely established by the by-laws.

In addition to this by-law, the evidence shows that on April 21, 1926, the Cox Corporation approved the action of Joseph T. Mascuch in assigning net accounts receivable for shipments made on and after April 17, 1926, and then passed a resolution that "all outstanding customers' notes and net accounts receivable be and are hereby assigned to the Sheldon Axle and Spring Company to be applied to the reduction of the indebtedness of this corporation to said Sheldon Axle and Spring Company and the Treasurer is hereby authorized to execute such assignment." (Case p. 64.)

In view of the fact that these resolutions were passed on the same day and that the action of Mr. Mascuch refers to past accounts, the other resolution above referred to must be considered as referring to all other accounts receivable whether or not they were then due and payable. It follows, therefore, in the absence of proof to the contrary, that these assignments include the accounts for which plaintiff gave the checks in question. This assignment, therefore, passed the property in all the Cox Corporation accounts, including plaintiff's account, to the Sheldon Company. When Mr. Cox transferred these checks to the Sheldon Company he was merely turning its property over to it, and the fact that the resolution authorized the treasurer of the corporation to execute the assignment does not affect this assignment because Mr. Cox, as already shown, had express authority to assign its accounts, and the resolution imposed no limitation thereon.

We submit that the endorsements of these checks by Mr. Cox bound the Cox Corporation because under the express authority conferred upon

Mr. Cox as president, he had authority to dispose of or assign its property in the payment of its debts, and the payment made by transfer through such endorsements was regular and proper.

*B.* Assuming for the sake of argument that Mr. Cox had no express authority to transfer the checks in question in part payment of the Cox Corporation's indebtedness to the Sheldon Company, the transfer was nevertheless valid because he had implied authority as president of the Cox Corporation to transfer these checks in payment of its debts.

It is well to distinguish the power of a corporate officer to endorse commercial paper for the purpose of transferring the property thereunder from power to endorse for the purpose of imposing a liability upon the corporation. Where a corporate officer endorses paper for the purpose of imposing a liability on the corporation, he is making a contract of guaranty which is ultra vires the corporation, and consequently, obviously outside the scope of his authority. But where the endorsement is made merely for transfer, the agent is disposing of corporate property which is an intra vires act and falls within the scope of his authority.

The court in *Brown v. Donnell*, 49 Me. 421, 77 Am. Dec. 266 and *Lloyd & Co. v. Matthews*, 223 Ill. 477, 79 N. E. 172, 76 L. R. A. (n. s.) 376, distinguishes these two powers.

In *Brown v. Donnell*, *supra*, the court says:

"It is a point that has often been overlooked in cases like this, that the authority to be proved is not one to bind the corporation by a contract of *indorsement*—but simply an authority to transfer the property of

the company. Though generally, they are not always the same. The payee of a note may be estopped by his conduct from claiming property in a note, when he would by no means be held liable as an endorser. This more frequently happens when notes are transferred by agents of corporations, with the knowledge and implied assent of the officers and members thereof \* \* \*

"If the indorsement is sufficient to pass the property, so as to protect the maker in paying the note, that is all that is necessary to render him liable."

A president of a manufacturing or trading corporation has the implied or ex officio power to indorse its negotiable paper for the purpose of transferring title thereto in the ordinary course of its business.

- 3 Fletcher Corp. Section 2040;
- 4 Thompson Corp. Sections 4638, 4639;
- Jones v. Stoddart*, 8 Idaho 210, 67 Pac. 650;
- Iowa Nat. Bank v. Sherman*, 17 S. D. 396, 97 N. 12 (Modified 19 S. D. 238, 103 N. W. 19);
- Lloyd & Co. v. Matthews*, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N.S.) 376;
- Citizens State Bank v. Skiffington*, 196 N. W. 953 (N. D.);
- Weaver v. Henderson*, 206 Ala. 529, 91 S. 313.

In *Jones v. Stoddart*, *supra*, the court said

"The first contention urged by counsel for appellant is that while the note bears upon the back the following indorsement 'Boise City and Nampa Irrigation, Land, and Lumber Company, by H. B. Simmons, President,

no authority is shown which would enable the president of an irrigation company to indorse its negotiable paper

\* \* \* \* \* Mr. Thompson in his work upon Corporations, says: 'Although it is not without the implied power of the president of a corporation to alien its property, except in the ordinary course of business, and as the president is the usual officer to execute formal written contracts of the corporation, there is no difficulty, on principle, in concluding that he has the implied or ex officio power to indorse negotiable paper, for the purpose of transferring title to it, in the ordinary course of its business, except in cases where it is in express terms or by reasonable implication withheld in some governing instrument, to the knowledge of the person dealing with the corporation. The authorities are to the general effect that such a power is implied in law, and consequently need not be proved by an innocent person claiming under its exercise.' 4 Thompson, Corp. sections 4638, 4639. In *Mann v. Bank*, (Kan.) 10 Pac. 150, the note bore the following indorsement: 'The Champion Machine Company, by A. W. Pres.', and it was held that such indorsement would transfer the note, freed from all equities or infirmities of which the purchaser had no notice. We think the following authorities sustain the proposition that the president of an ordinary corporation has the implied power to transfer its negotiable instruments, so as to enable a purchaser for value to take the same freed from all equities or infirmities of which he had no notice: *Bank v. Wintler*, 45 Pac. 38, 53 Am. St. Rep. 890; *Thomas v. Bank*, (Neb.) 58 N. W. 943, 24 L. R. A. 263; *Saunders v. Bates* (Neb.) 74 N. W. 578; *Aiken v. Bank*, 16 Wis. 679; 1 Rand, Com. Paper, section 135."

So, also, in *Citizens State Bank v. Skiffington*, *supra*, the Court said:

"The president of a business corporation has the implied ex officio power, in the ordinary course of business, to indorse its negotiable bills receivable, for the purpose of transferring title thereto, unless such power be withheld, expressly or by reasonable implication, to the knowledge of the person dealing with the corporation. Such power is presumed and need not be proved in the first instance, by an innocent person, claiming under its exercise, and he takes the negotiable instrument, free from infirmities of which he has no knowledge, (citing cases). In *Citizens Bank v. Wintler*, 14 Wash. 558, 45 Pac. 38, 53 Am. St. Rep. 890, the Court there states the rule:

'The possession by a third person of a negotiable promissory note payable to the corporation, bearing the indorsement of such corporation, regular in form and signed by its general manager, is sufficient to raise the presumption that the officer so indorsing it had authority to make the indorsement, and that the person having the possession thereof is the owner of the note.'

"This is especially so when, as in the case at bar, the benefits of the transfer of the note have been received and retained by the corporation, payee therein".

In *Lloyd & Co. v. Matthews*, *supra*, where the president of a corporation had indorsed its note and guaranteed payment thereof, the court held that the indorsement was binding upon the corporation. The Court said:

"It is contended that, even though it be conceded that George E. Lloyd & Company, by E. C. Williams, its president, signed the guaranty, still, as a matter of law, the cor-

poration cannot be held liable without proof of special authority from the corporation to its president to execute the contract of guaranty. A corporation can act only through its agents, and the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation. *Atwater v. American Exch. Nat. Bank*, 152, Ill. 605, 38 N. E. 1017; *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48, N. E. 154; *Anderson v. South Chicago Brewing Co.* 173 Ill. 213, 50 N. E. 655; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 231; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988. If the contract in question had been executed by some agent who ordinarily does not have the power to sign such instruments, and the execution had been put in issue by properly verified plea, as is the case here, then it would be necessary to go beyond the mere fact of the execution of the instrument and prove the authority of the agent to execute the same; but when the contract is properly executed for the corporation by its president, and it is such a contract as the corporation might lawfully make, the proof of the execution by the president is all that is required, in the absence of any evidence to the contrary showing that the contract was not made by the authority of the corporation."

\* \* \* \* \*

"Upon a careful examination of these cases, it will be found that they are clearly distinguishable from the case at bar, in that the president, in the execution of the contracts, was using the credit of the corporation to serve his own private interests or that of some third party. Thus, in *Dobson v. More*, supra, where the president and general manager has express authority 'to sign notes, drafts, and acceptances in the name of the company, and to make checks upon the company funds in the bank for the payment of any proper indebtedness of the company,' and the president, merely to aid another company to raise money, executed in behalf of his company a written guaranty on the note of another corporation, it was held, as against the holder of such note with notice of the facts, that the company could not be held liable on such guaranty; there being no authority whatever shown for the president to bind the company, as guarantor, for the indebtedness of another. The powers of a president to bind a corporation by contracts are limited to those matters concerning which the charters and by-laws and the statutes of the state authorize it to make contracts. In *Park Hotel Co. v. Fourth Nat. Bank*, supra, where the president discounted a note for his own private benefit and indorsed by him in the name of the Park Hotel Company, of which he was president, and payable to himself, it was held that the corporation was not liable, and that the bank had notice, by the face of the note, that the president was exceeding his usual and ordinary powers in making a note to himself, and that in the absence of special authority from the corporation no recovery could be had. *National Park Bank v. German-American Mut. W. & Secur. Co.* supra, is a case in all essential features like *Dobson v. More*, supra, and the same rule is applied. Many other cases are to be found illustrating the

doctrine announced in the decisions above referred to, but, since this court in *Dobson v. More*, supra, has reviewed many of these cases and approved them, no necessity exists to discuss them further. The case at bar does not fall within the exception to the general rule recognized in these cases; but, since the guaranty sued on was placed on the note of appellant, and the note was discounted for its benefit, and the proceeds thereof were remitted to appellant, the plainest principles of justice require that the company should be held bound by the act of its president without any proof of authority beyond that which must be presumed from the fact that the president in good faith, and in the regular course of corporate business, and for the benefit of the corporation, executed the instrument sued on."

The New Jersey cases of *Aerial League of America v. Air Craft Fireproofing Corporation*, 97 N. J. L. 530, 117 Atl. 704, and *Dennis Metal Mfg. Co. v. Fidelity Union Trust Company*, 99 N. J. L. 365, 123 Atl. 614, have no application to the case at bar.

In *Aerial League of America v. Air Craft Fireproofing Corporation*, the question at issue was whether the president of a corporation had implied authority to impose a duty or liability upon the corporation. No attempt is made to do so here.

It is true that in *Dennis Metal Mfg. Co. v. Fidelity Union Trust Company*, supra, Mr. Justice Katzenbach, who wrote the opinion for the Supreme Court, says that the president of a corporation is merely its agent, and that, generally speaking, his agency does not carry with it the power to indorse checks. Probably this is dicta and not essential to his decision, as the crux of the case

there at issue was the conversion by the president of a corporation of corporate property through his indorsement, of which the bank had notice.

The same Justice, speaking for the Court of Errors and Appeals in *Aerial League of America v. Air Craft Fireproofing Corporation*, *supra*, states the rule as follows:

“A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them.”

That this statement of the rule does not exclude all indorsements is demonstrated by the cases of *Cogan v. Conover Mfg. Co.*, 69 N. J. E. 816, and *Budke v. Schalkenback & Budke*, 84 N. J. E. 467, in which assignments of claims to creditors in payment of debts were held to be within the implied powers of the president of a corporation. These cases were both decided by the Court of Errors and Appeals and substantially control the case *sub judice* if the contention that the indorsement was in fact an assignment is well founded.

In *Cogan v. Conover Mfg. Co.*, Swayze, J. speaking for the Court of Errors and Appeals said:

“The appellant claims a preference upon the funds in the hands of the receiver by reason of five assignments of accounts due the

insolvent corporation and collected by the receiver. Four of these accounts were due at the time of the assignments; one was of money not yet earned. The resolution of the board of directors, which is relied on as authorizing the assignments, empowers the president and treasurer to borrow money of the Coal and Ice Company, ‘the same to be returned to them out of the first collections following such loan.’ This did not authorize absolute assignments and the right of the appellant must depend upon the general authority of the president. We think this was sufficient to warrant him in collecting money due the company on outstanding accounts, and we see no valid distinction in this respect between collecting the money of the debtor and selling the account for its face value. The result in both cases is the same—book accounts are converted into cash. The first four assignments are valid and the amount thereby assigned belongs to the appellant. The fifth assignment is of money not yet earned. We find no authority in the president to make that assignment, and the claim of the appellant thereunder is not valid.”

In *Budke v. Schalkenback & Budke* the Court of Errors and Appeals followed *Cogan v. Conover Mfg. Co.*, *supra* and said:

“The general authority of the president of a business corporation being sufficient to warrant him in collecting outstanding accounts and in selling such accounts at their face value is sufficient to warrant him in assigning such accounts in discharge of the obligations of the corporation. This was held by this court in the case of *Cogan v. Conover Manufacturing Co.*, 69 N. J. Eq. 816.”

The evidence shows that the checks in question were given for bills for merchandise which were

then due. When Mr. Cox endorsed these checks for transfer, he was, therefore, actually assigning these accounts to the Cox Corporation's creditor, the Sheldon Axle & Spring Company, and in the absence of any proof to the contrary, he must be presumed to have acted within his authority.

The Cox Corporation was bound by the transfer of these checks in payment of its debt, although it may have placed limitations upon the authority of its president, for where an agent has apparent authority to do an act, an innocent third party is not bound by any secret restrictions thereon.

*Jones v. Stoddart, supra;*  
*Citizens State Bank v. Skiffington, supra;*  
*4 Thompson Corporations, Sec. 4638;*  
*National Furniture Co. v. Spiegelman &*  
*Co., 189 N. Y. Sup. 449, Affd. 190 N.*  
*Y. Sup. 831;*  
*Schorr v. Shayne & Co., 208 Ill. App. 328.*

It is not denied that the defendant had no knowledge of any restriction imposed upon the power of Mr. Cox to endorse or assign its choses in action. The Cox Corporation was, therefore, bound by Mr. Cox's apparent authority.

C. Even if the action of Mr. Cox in transferring these checks were unauthorized, the Cox Corporation was bound thereby because it received the full benefit thereof.

The record shows that the Cox Corporation was given credit on the books of the Sheldon Axle & Spring Company for the full amount of the two checks in question. It is generally held that when a corporation received the benefits of an unauthorized act of its agent, it cannot repudiate his authority to do the act.

*Cardwell v. Garrison, 193 S. E. 3 (N. C.)*  
*Phillips v. Interstate Land Co., 97 S. E.*  
*417 (N. C.)*  
*Bullen v. Milwaukee Trading Co., 109*  
*Wis. 41., 85 N. W. 749.*  
*Clement v. Bane Co. v. Michigan Cloth-*  
*ing Co., 110 Mich. 458, 68 N. W. 224.*  
*Hunt v. Northwestern Mortgage Trust*  
*Co., 16 S. D. 241, 92 N. W. 23.*  
*Wayne Title & Trust Co. v. Schuylkill*  
*Electric Ry. Co., 43 Atl. 135, 191 Pa.*  
*90.*  
*Penn. Natural Gas Co. v. Cook, 123 Pa.*  
*170, 16 A. 762.*

In *Cardwell v. Garrison, supra*, the court said:

"On the facts presented, not only is the president shown to be in charge of the company's transactions of this character, giving him the *prima facie* right to make the indorsement, but it appears also that the money procured by reason of this indorsement, or the great bulk of it has been turned over and is now held by the company, and in every aspect of the matter, therefore, the indorsement should be upheld as effective to pass the legal title to the purchaser."

In *Bullen v. Milwaukee Trading Co., supra*, the court said:

"There is a further conclusive answer to the complaint that the court failed to submit the question of the authority of the officers of the corporation to make the note. The request made to the court to submit the single issue as regards whether the corporation received consideration for the note waived the submission of any other question of fact.

"But is said the note was issued without

consideration and came to the possession of plaintiff affected with that infirmity. On this branch of the case it seems to be considered that if the finding of the jury is right, the judgment must stand, because if the corporation received the consideration for the paper it cannot be heard to deny liability thereon even though its officers had no authority to make it and the corporation no legal authority to empower them to do it."

In *Wayne Title & Trust Co. v. Schuylkill Electric Ry. Co.*, *supra*, a check of a corporation was signed by its treasurer and indorsed by its president to Goodwin, who had no knowledge of the treasurer's lack of authority to draw checks. The corporation received the full amount of the check from Goodwin and used it. HELD: The corporation was bound by its treasurer's unauthorized act because it had received the benefits thereof.

In view of the fact that the Cox Corporation received the benefits of these checks, it is bound by Mr. Cox's alleged unauthorized act.

Where the corporation itself cannot deny the authority of its agent to do a particular act, a third person cannot raise any question as to his authority.

*Shawmut Commercial Paper Co. v. Auerbach*, 214 Mass. 363, 101 N. E. 1000.

It is therefore, submitted that the court erred in refusing to direct a verdict for the defendant and in directing a verdict in favor of the plaintiff.

### POINT III.

**The trial court erred in permitting the witness John T. Mascuch, over the objection and exception of the defendant, to answer questions 11 A to C inclusive (p. 4, ante).**

As already shown Mr. Cox had implied authority to transfer or assign these checks in payment of his corporation's debts (Points I & II., B. *supra*) and inasmuch as it is not denied that the defendant had no knowledge of any restriction imposed upon Mr. Cox's power to indorse or assign its choses of action, the defendant was not bound by any secret restrictions thereon. (Points I & II B.) It was therefore error to permit the witness to answer questions concerning Mr. Cox's powers relating to his authority or lack of authority over the corporate funds, for the Cox Corporation was bound by his apparent authority.

**Conclusion.**

We, therefore, submit, that inasmuch as the court erred

1. In refusing the defendant's motion to direct a verdict in its favor

2. In directing a verdict in favor of the plaintiff against the defendant, and

3. In permitting the witness John T. Mascuch, over the objection and exception of the defendant, to answer questions 11 A to C (p. 4 ante)

**The judgment was contrary to law and should be reversed.**

Respectfully submitted,

HOOD, LAFFERTY & CAMPBELL,  
Of Counsel with Defendant-Appellant,  
Fidelity Union Trust Company.