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STIPULATION.

Monmouth County Circuit Court

HARRY V. OSBORNE, administrator *pendente lite* of the estate of James G. Barnett, deceased, *Plaintiff,* *vs.* PAUL C. TAYLOR, *Defendant.*	*At Law.* *Stipulation.*

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It is hereby stipulated by and between Osborne, Cornish & Scheck, attorneys for the plaintiff, and Harry R. Cooper, attorney for the defendant, that the following facts are agreed upon and are submitted to Honorable Frank B. Jess, Judge of the Monmouth County Circuit Court, to hear and determine the same:

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"In an action instituted in the New Jersey Supreme Court, Monmouth County, in which the First National Bank of Spring Lake was plaintiff and Harry V. Osborne, Admr., etc., and Paul C. Taylor were defendants, the said bank obtained a judgment against both of the defendants. The suit was based on a promissory note of five thousand dollars ($5,000.) dated November 23, 1922, made by James G. Barnett to the order of the First National Bank of Spring Lake and endorsed by Paul C. Taylor. The judgment was entered on May 15, 1925, and was for five thousand six hundred and sixty-one dollars and sixty-six cents ($5,661.66) and fifty-eight dollars and thirty-one cents ($58.31) costs. The defendant

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Harry V. Osborne requested in the answer filed by him in the said cause, that if judgment be entered against him it should be determined by the Court that his liability is secondary to the liability of Paul C. Taylor. No testimony was taken, however, to determine the relative liability of the defendant Harry V. Osborne as aforesaid and Paul C. Taylor; and no determination was made as to their relative liability.

On May 27, 1925, Harry V. Osborne, Administrator, etc., paid the amount of the judgment to the bank, had the judgment satisfied as to himself and took an assignment of the judgment from the bank. He subsequently applied to Justice Lloyd under Section 30 of the Judgments Act (3 c. s. 2962) for leave to levy execution against the defendant Taylor.

Testimony was taken by order of Justice Lloyd before Benjamin B. Smith; the witnesses examined being Paul C. Taylor and Frederick Shock.

After reading the testimony and the briefs filed by counsel for both defendants, Justice Lloyd suggested that the question of the liability of Taylor to Harry V. Osborne, administrator, be determined either by a jury or the Circuit Court Judge without a jury under stipulation.

Defendant, Harry V. Osborne, as administrator, contends that by reason of the circumstances incident to the creation of the obligation, the defendant Taylor is indebted to him under an implied agreement to refund to him the money he expended in the payment of the judgment. Taylor denies any such liability.

It is agreed that the matter be submitted for final determination to the Honorable Frank B. Jess, Circuit Court Judge, and that the testimony

taken before Benjamin B. Smith under the order of Justice Lloyd be submitted to Judge Jess and considered by him as if taken before him.

It is further stipulated and agreed that both sides reserve the right to appeal from the final determination of Judge Jess."

OSBORNE, CORNISH & SCHECK, 10
Attorneys for Plaintiff.

HARRY R. COOPER,
Attorney for Defendant.

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DEPOSITIONS.

New Jersey Supreme Court

MONMOUTH COUNTY.

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FIRST NATIONAL BANK OF SPRING LAKE, *Plaintiff,* *vs.* HARRY V. OSBORNE, Administrator, &c., *et als.*	*Order to Take Testimony.*

DEPOSITIONS

20 taken in the above-stated cause before the subscriber, Benjamin B. Smith, Supreme Court Commissioner, at his office in Asbury Park, N. J., on Friday, the twenty-fourth day of July, at ten o'clock in the forenoon, pursuant to order to take testimony, in the presence of Harry R. Cooper, Esq., of counsel for the defendant, Mr. Paul C. Taylor and Emanuel P. Scheck of Osborne, Cornish & Scheck appearing for the de-
30 fendant, Harry V. Osborne, Administrator, opposed; it being stipulated that the depositions be taken stenographically and the signatures of witnesses waived.

MR. PAUL C. TAYLOR, being duly sworn according to law, testified as follows:

Direct examination by Mr. Scheck.

Q Mr. Taylor, you are one of the defendants
40 in this case, are you not? A Yes, sir.

Q Where do you live, Mr. Taylor? A Belmar.

Q New Jersey? A New Jersey.

Q How long have you lived there? A Thirty-one years.

Q Did you know Mr. James G. Barnett, of whose estate Harry V. Osborne is administrator? A Yes, sir. 10

Q How long did you know Mr. Barnett? A I knew Mr. Barnett for a period of fifteen years.

Q Where did he live during that period? A Where did he live during that period?

Q Yes. A He lived in Belmar part of the time in the summer.

Q Every summer? A I believe he did, yes. 20

Q Was he in any business during the period that you knew him? A I cannot answer that, during that period. I really do not know of my own knowledge.

Q Most of the time he was in business, was he not? A I cannot answer that; I do not know.

Q About how old was he when he died? A I would say a man of at least sixty years, of my own judgment. 30

Q The judgment in this case, Mr. Taylor, is on a note that is dated November 23, 1922, payable in three months, and is signed by James G. Barnett and endorsed by him and by you. Was that note given in renewal of a previous note?

Mr. Cooper: I object to that as immaterial, incompetent and irrelevant, on the ground it is not the note sued on in this suit. 40

Q Now, will you answer that question, Mr. Taylor? A I do not think I can answer that question—I cannot answer that question.

Q Do not you know whether the note in suit was made by Mr. Barnett to take up another note? A You are referring to the note of what date?

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Q The note on which this suit is brought. A No, sir. No, you are wrong; besides, I was not on that note.

Q On what note? A The one you refer to.

Q You are the defendant in this case, are you not? A Presumably.

Q What do you mean by presumably? Are you a defendant in this case? A Yes, sir.

Q Then there is no presumption about it, Mr. Taylor. And this case is based on a promissory note, and in this case there is a judgment against you and the other defendant, is there not? A Yes, sir.

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Q How much is the judgment, do you know, on this note? A In this case?

Q On what note is this judgment against you and the other defendant? A On what note?

Q Yes. A On a note of $5,000.

Q Dated when? A Dated November 23, 1922.

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Q For how much? A $5,000.

Q Payable when? A In three months.

Q Made by whom? A Made by James G. Barnett.

Q To whose order? A The First National Bank of Spring Lake.

Q And you were an endorser on that note, were you not? A Yes, sir.

Q Now, I repeat the question that I asked you before. Was this note given to take up a previous note?

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Mr. Cooper: I object to that question on the ground that it is irrelevant, immaterial and incompetent, and does not affect the note sued on in this case.

A Yes, this note was given to take up a previous note.

Q Who was the maker of the previous note? 10
A James G. Barnett.

Q Are you sure of that? A Yes, sir.

Q What makes you so sure of that? Did you see that note? A Yes, sir.

Q Do you remember testifying at Freehold at the trial of this cause, Mr. Taylor? A Do I remember testifying? Yes.

Q And do you remember saying the previous note was a note of the Columbia Hotel Holding Company? Do you remember testifying to that? 20
A This note was not a renewal note of the Columbia Hotel Holding Company in November, 1922.

Q Do you remember that you testified at the trial of this cause that the note on which this suit was brought was given as a renewal of a previous note, of which the Columbia Hotel Holding Company was maker and on which you and Mr. Barnett were endorsers? A Of course, I cannot say whether I did or not. The 30
records will speak for themselves whether I was an endorser or not.

Q Mr. Taylor, you now say that the note on which this suit was based is not a renewal of the Columbia Hotel Holding Company? Is that right?

Mr. Cooper: I object to the answer of that question on the ground it is irrelevant, incompetent and has no bearing on this suit. 40

Q The question is whether this note on which suit is being brought is a note of the Columbia Hotel Holding Company? A Yes.

Q Was it given in renewal of any previous note? A I would not say it was.

Q Do you say it was an original note of James G. Barnett? A Yes, sir.

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Q To your knowledge, did Mr. Barnett borrow the $5,000 evidenced by the note from the Spring Lake National Bank? A He did.

Q And he got the money? A As far as I know he got the money. Do you mean money, cash, was it paid in cash?

Q I ask whether he got the money for this note. A He got the benefit of the money.

Q You are saying, Mr. Taylor, that this is an original obligation of Mr. Barnett's? A Yes, sir.

20

Q And that Mr. Barnett borrowed this $5,000 from the Spring Lake National Bank? A Yes, sir.

Q And he got the money for that note? A I would not say he got the money. He got the benefit.

Q What do you mean by that? A I mean that he had a note at the Spring Lake National Bank.

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Q For the same amount? Was it his note? A He was endorser of that note.

Q Who was the maker of that note? A The Columbia Hotel Holding Company.

Q He gave this note, then, to take up a note on which the Columbia Hotel Holding Company was maker? A You might construe it that way.

Q I understand you to say, Mr. Taylor, that there was a note in the Spring Lake National Bank of which the Columbia Hotel Holding Com-

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pany was maker, and that Mr. Barnett was endorser, and that when the note became due, the note on which this suit is based was given to take it up. That is right, is it not? A I would not so construe it myself.

Q I am not asking you for a construction. Is that a fact or is it not? A The facts of the case are this: that Mr. Barnett wanted to borrow the money from the bank. 10

Q For what purpose? A To pay off this Columbia Hotel Holding Company note.

Q And therefore he gave this note to the bank and the bank gave up the Columbia Hotel Holding Company note? A I cannot say. The bank may be holding it yet, for all I know.

Q You say, Mr. Taylor, that Mr. Barnett wanted to borrow $5,000 from the Spring Lake National Bank? A Yes. 20

Q And that he wanted the money to pay the note held by the bank on which the Columbia Hotel Holding Company was maker. Is that right or not? A I would say that is correct.

Q You further say that you do not know whether the bank released the note on which the Columbia Hotel Holding Company was maker when the bank received the new note? A I have no knowledge of that. 30

Q Did Mr. Barnett go to the bank himself and give them this note on which the suit is based? A Not to my knowledge.

Q Do you know who took Mr. Barnett's note to the bank in November, 1922? A In November, 1922?

Q Yes, that is the date of this new note. A I was in the habit of attending to that note for Mr. Barnett. I presume I took it there. 40

Q Is that only presumption on your part? A Yes.

Q You do not distinctly remember? A I do not distinctly remember on that date.

Q When this note of which Mr. Barnett was maker was given to the Spring Lake National Bank to take up the company's note, were you an endorser on the new note? A No, sir.

Q Were you an endorser? A What note are you referring to?

Q I am referring to this note. A In November? Yes.

Q Where? A I cannot say where I became an endorser.

Q Was it not at the bank? A I would not say it was at the bank.

Q Don't you remember testifying at Freehold at the trial of this cause that you took Mr. Barnett's note to the Spring Lake National Bank; that you were not then an endorser and that the bank, acting through Mr. Shock, would not accept Mr. Barnett's note in the place of the Columbia Hotel Holding Company's note unless you endorsed it? A I do not remember.

Q Is not that the truth? A Not entirely. I refreshed my memory from records and I was at sea.

Q You say that is not entirely the truth. What part is the truth and what part is not the truth? A I presume you mean the first time?

Q I am referring to November, 1922. A You are referring—

Q I am referring to November, 1922, when this present note was given to the Spring Lake National Bank in the place of the Columbia Hotel Holding Company's note. I am speaking of the note in suit. A You want to know if I endorsed

the note at the bank at that time, is that the question?

Q That is part of the question. A Well, it is true in so far as the date of November, 1922, is concerned, but is not true as to the time of the original note.

Q To what note do you refer? A I am referring to the note. 10

Q Was there more than one note on which Mr. Barnett was maker and you were endorser in which the Spring Lake National Bank was payee and in which the sum was $5,000? A I did not endorse the original Barnett note.

Q What do you mean by the original Barnett note? A I mean this note which was renewed in November, 1922.

Q My next question is this: Of what note was the note dated November, 1922, a renewal? 20 A A renewal of the Barnett note given when?

Q In February of that year. A 1922?

Q Yes, in February, 1922. Was that a loan given by the bank to Mr. Barnett? A Yes, sir.

Q For his personal use? A I would not say.

Q Don't you know, as a matter of fact, that note given by Barnett was a renewal of a previous note given by the Columbia Hotel Holding Company? A I do not know that, no.

Q Do you know whether or not a note was 30 given to the Spring Lake National Bank by the Columbia Hotel Holding Co. for $5,000 on which Mr. Barnett was endorser? A Yes, sir.

Q When was that note given to the bank? A The first time you mean?

Q Yes. A I do not know.

Q Haven't you anything to show it? A I have not with me.

Q In what year was it given? A I do not know that. 40

Q In what month was it given? A I do not know what month.

Q Do not you know it was given in August, 1921? A Not from memory.

Q Was the Columbia Hotel Holding Company a corporation of the State of New Jersey, organized under the laws of New Jersey? A I am not sure whether it was New Jersey or Delaware.

Q Were you an officer? A President.

Q During what period were you president? A I would really have to refer to records for that, I do not recall to mind.

Q Approximately about when did you become president? About when? A Well, if my memory serves me correctly I would say about 1915 or 1916. I do not know.

Q It was either 1915 or 1916? A I presume so.

Q How long did you remain president? A About four years.

Q And then what office did you hold? A The hotel was sold. I did not hold any office.

Q When was the hotel sold? A 1921.

Q What month? A December.

Q Was the corporation dissolved at the time of the sale? A To the best of my knowledge.

Q The company had given a note to the bank for $5,000 before the sale? A Do you speak of the sale in 1921? Yes, sir.

Q When I speak of the bank, I refer to the Spring Lake National Bank; am I right? A Yes, sir.

Q At the time the company borrowed this $5,000 of the bank you were the president of the company? A Yes.

Q How much stock was issued and outstanding at the time? A I could not answer that.

Q How many stockholders were there at that time? A I could not answer that.

Q Were there more than a dozen? A I do not know.

Q Were there a great many or were there only a few? A I do not know.

Q How much stock did you have in the company? A I do not know. I do not know how much stock I had at that time. 10

Q Can you tell us how many shares of stock you had at any time in that company? A About $4,000 at the sale.

Q You mean in 1921? A Yes.

Q Before that time had you more money than $4,000 invested in that company? A I never had more money in stock.

Q Did you have other moneys invested? A I sure did, about $30,000. 20

Q Were you the largest stockholder? A No, sir.

Q Did anyone have any greater investment in this company than you? A Not from any standpoint.

Q You had more money tied up in this company than anyone else? A Yes, sir.

Q How many directors were there in the company at the time you borrowed the $5,000? A I do not know. 30

Q Were there more than three directors? A I do not know.

Q Were there more directors at any time? A Yes, sir.

Q How many more? A Six at one time.

Q Was that the largest number? A Yes, I think so.

Q What was the smallest number at any time? A Three.

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Q Did the other three resign? A You mean at what time?

Q At any time. A It was brought about by the sale of the hotel.

Q So at the time of the sale there were six? A Three.

10 Q Prior to the sale there had been six? A Some time prior.

Q Then I ask you how was the reduction brought about? A One died; I presume the other two resigned. I do not know whether they resigned or not.

Q Was Mr. Barnett a director? A No.

Q Was he ever an officer? A No.

Q Was he ever a stockholder? A Yes.

Q How many shares did he have? A I cannot answer that.

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Mr. Cooper: I object on this line of questions on the ground that it is irrelevant, immaterial and incompetent.

Q Mr. Barnett's stock holdings were very small in this company? A I cannot answer that.

Q Have you no idea of how many shares he had? A No, sir.

Q Cannot you approximate? A No, sir.

30 Q Did he have as much stock as you? A No, sir.

Q Did he become a stockholder after or before you? A I do not know.

Q Who arranged the loan of $5,000 from the Spring Lake National Bank for the Columbia Hotel Holding Company? A I did.

Q With whom at the bank did you have that first transaction? A Mr. Shock.

Q At that time was the company a depositor

40 at that bank? A I do not think so.

Q Were you ever a depositor at that bank? A Yes, sir.

Q At that time did the company owe money to other banks on other notes?

Mr. Cooper: I object to that question as immaterial, irrelevant and incompetent.

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A I presume they did.

Q How much did they owe?

Mr. Cooper: I object.

A I do not know.

Q Don't you know as a matter of fact that they did? A I cannot say exactly. Sometimes they did and did not.

Q I refer to the time when you borrowed the money.

20

Mr. Cooper: I object to that question as immaterial, irrelevant and incompetent.

A I do not know.

Q You signed the checks for the company? A Yes, sir.

Q You should know on what banks you drew these checks? A I do not know.

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Q When was it the company borrowed this $5,000 from the Spring Lake National Bank? A I answered that before.

Q I show you, Mr. Taylor, a note dated February 23, 1921, for $5,000, payable in three months after date, to the order of James G. Barnett. It has the First National Bank of Belmar printed on it and the Spring Lake National Bank typed on it, made by the Columbia Hotel Holding Company, Paul C. Taylor, president,

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and E. F. Lyman, Jr., treasurer, endorsed by James G. Barnett, and ask you whether you ever saw that note before? A Yes, sir.

Q Is that your signature as president? A Yes, sir.

Q Is that evidence of the loan made by the
10 company from the Spring Lake National Bank? A Yes, sir.

Q And is this date, February 23, 1921, the first time that the company borrowed the $5,000 from the Spring Lake National Bank? A I do not know.

Q If this does not represent the first loan would you say that this is the renewal of the same kind of note? A I would not say at all.

Q Why? A Because I do not know.

20 Q I offer this note in evidence—

Mr. Cooper: I object on the same grounds that it is immaterial, irrelevant and incompetent.

Q When the company borrowed this $5,000 from the Spring Lake National Bank the company gave a note to the bank for that amount and that note was endorsed by Mr. Barnett.
30 How did Mr. Barnett get to become an endorser of that note? A He was asked.

Q By whom? A By myself.

Q Where did you ask him? A What is the date on that note?

Q February twenty-third. A I could not say.

Q Why did you refer to the note? A I wanted to see whether it was winter or summer. In the summer Mr. Barnett came to Belmar. I
40 don't know whether I took that up with him

when he was in Belmar or Newark. I do not know.

Q When you took it up with him in Belmar or Newark what did you say to him? A I do not know.

Q Had he ever endorsed a note for this company before? A I do not know.

Q Had he ever endorsed a note for you? A I do not know. 10

Q Did he get anything for endorsing it? A Not from me.

Q Did he get anything from anybody else? A Not to my knowledge.

Q Did anyone else in your company have anything to say in regard to endorsing this note? A I do not know.

Q But it was you who asked him? A Yes, sir. 20

Q Did you go alone? A I presume I did.

Q And you told him the company was in financial difficulties?

Mr. Cooper: I object.

A I do not know.

Q But that happens to be a fact? A I do not know.

Q Was not the company in financial difficulties? 30

Mr. Cooper: I object.

A That depends on what you mean. The company might borrow money anticipating a or they may be in need of money for immediate use.

Q In which of these two conditions did the company find itself? 40

Mr. Cooper: Also objected to.

A I do not know.

Q It had issued a considerable number of bonds at that time?

Mr. Cooper: Also objected to.

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A I could not state.

Q I ask you how many? A I do not know at this date whether they did or did not.

Q This was in the same year in which the hotel was sold, December, 1921. You had been its president some five or six years prior to 1921? A Sometime prior.

Q During all that time you were president? A No, not all the time.

20 Q Did they pay any dividend?

Mr. Cooper: I object.

A No, sir.

Q You had sold this company over $20,000 worth of material which had not been paid for? A Over $30,000.

Q When the company borrowed this money from the Spring Lake National Bank they were

30 indebted to you for over $30,000?

Mr. Cooper: I object.

A I cannot answer. At this time the company owed me over $30,000.

Q When you say the company owed you more than $30,000 at this time you mean how much? A I do not know just how much.

Q Approximately? A I presume about $40,000.

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Q That was for merchandise and equipment? A Not so much that but either for monies which I had advanced or for materials.

Q When was the first operations to which you refer? A I cannot give you the year. When the corporation called the Columbia Hotel Company was formed I was a member but not president. That was the time they purchased of me $32,000 worth of material. 10

Q There was a first corporation then? It was called The Columbia Hotel Company and that company sold out to the Columbia Hotel Holding Company and it was the first company known as the Columbia Hotel Company which owed you $32,000 for merchandise? A Yes, sir.

Q In either 1915 or 1916 that company sold out to the Columbia Hotel Holding Company and you became president of the latter company? A Yes, sir. 20

Q Then between the time you became president in 1916 or 1915 and the time of the giving of the note of February, 1921, you put in the second corporation an additional $10,000?

Mr. Cooper: I object.

A At least $10,000 I should say. 30

Q Did you actually and actively run the hotel? A No, sir.

Q Who ran the hotel after the second corporation was formed? A We had hotel managers, different ones.

Q How many? A I think three different managers in that time.

Q And each one was a failure? A Yes, sir.

Q Did you, at any time, manage it yourself? A No, sir.

40

Q Did the company operate the hotel during the summer of 1921? A Yes, sir.

Q That is the year in which the hotel was sold? A Yes, sir.

Q Did the company have any successful year? I refer to the first corporation. A No, sir.

10 Q Lost money every year? A Yes, sir.

Q Did any other stockholder or officer of the company put in any more money besides you?

Mr. Cooper: I object.

A No, sir.

Q In other words you carried the whole burden?

Mr. Cooper: I object.

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A Yes, sir.

Q Referring again to your conversation with Mr. Barnett in which you asked him to endorse the note. Did you tell him the condition of the company? Financially?

Mr. Cooper: I object.

A I cannot recall what I told him. I naturally

30 told him of the condition of the company.

Q You told him it had been losing money? A I cannot say.

Q You told him that approximately? A I believe I did.

Q Did you ever tell him you were in for $40,000?

Mr. Cooper: I object.

A I do not know.

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Q Can you tell us now why Mr. Barnett endorsed this note for the company at your request?

Mr. Cooper: I object.

A Personally I think it was because of his interest in the hotel property, it being in close proximity to his own property and he having known the hotel for a number of years and seeing that it was kept up and not put in hands to the detriment of the surrounding property. 10

Q And as a favor to you he endorsed this note?

Mr. Cooper: I object.

A As a favor to me personally? 20

Q Yes. A I would not say so personally.

Q He got nothing for his having endorsed this? A Not to my knowledge.

Q You say not to your knowledge? A I do not know. How do I know what someone else may do?

Q But as far as you know you were the only one who spoke to him about endorsing this paper? When I say paper I mean the note given to the Spring Lake National Bank. A Yes, sir. 30

Q Did you go to Mr. Barnett pursuant to any discussion to the Spring Lake National Bank directors?

Mr. Cooper: I object.

A Yes, sir.

Q There had been a directors' meeting? A Yes, sir.

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Q Were minutes kept of that meeting? A I cannot state.

Q To the best of your recollection a resolution was passed?

Mr. Cooper: I object to that question for the reason that the books of the company are the best answer.

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Q I understand you to say that the directors discussed the possibility of borrowing money from the Spring Lake National Bank? A No. The question you asked me was had the directors any meeting in regard to this loan. I do not know about this loan.

Q Do you remember if Mr. Barnett's name was discussed? A Yes, sir.

Q What was the discussion regarding Mr. Barnett?

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Mr. Cooper: I object on the grounds that it is immaterial.

A At one of the meetings, I cannot give the date, Mr. Barnett's name was brought up, the directors wondering if he, being a large property owner there, would be willing to endorse paper for the company for moneys they wished to borrow.

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Q What did you say at the meeting? A I cannot say.

Q Did you tell them you knew Mr. Barnett for a long time? A I cannot say.

Q It was a fact that you knew him? A Yes, but some of the others knew him as long as I did.

Q You say he was a large property owner. He owned the property next door and one other? A I think he had two.

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Q Don't you know as a matter of fact the other property he owned was about five blocks inland? A I cannot say.

Q What did he own? A He had river property.

Q What do you mean? That is about several miles away. A No, about one. 10

Q But it is a fact that that was only a boat-house? A No.

Q What else did he have on the lake front? A I think he owned the lot due east of the river front.

Q Then he had only a boat-house and possibly a lot about a mile from this property? A Yes, sir.

Q That is all the property he had in Belmar? A Yes, sir. 20

Q Just prior to the sale of the hotel the company gave Mr. Barnett a mortgage to secure his money?

Mr. Cooper: I object to that on the ground that the records are the best evidence.

A They did not give Mr. Barnett a mortgage.

Q What did they give? A A joint mortgage to Barnett and Taylor. 30

Q That was you? A Yes, sir.

Q And that was to secure the various endorsements made by you and Mr. Barnett for the company? A No, sir.

Q What was the mortgage given to secure? A It was given to Mr. Barnett to secure his endorsement.

Q And you were the joint mortgagee? A Yes, sir.

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Q It was given to secure what the company owed you? A Partially.

Q What do you mean by partially? A It was only for $50,000. They owed me $52,000.

Q And that was the third mortgage. What was the amount of the prior mortgages?

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Mr. Cooper: I object.

A $40,000, if I am correct was the first mortgage and $50,000 was the second mortgage, given to secure bonds.

Q And the first mortgage was foreclosed and wiped out the third mortgage?

Mr. Cooper: I object.

20 A No, I do not think it was foreclosed.

Q How was it wiped out? A I will have to refer you to court records.

Q But the result of the fact is that that third mortgage never materialized any benefit either to you or to Mr. Barnett? A As far as myself, no.

Q You were joint mortgagee in that document? A Yes, sir.

30 Q Did the stockholders get anything for their stock when the hotel was sold?

Mr. Cooper: I object.

A Not to my knowledge.

Q Did the corporation's creditors?

Mr. Cooper: I object.

A Not to my knowledge.

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Q So that to your knowledge the stockholders and the creditors lost everything they put in this company? A To my knowledge. You speak of the last sale in 1921? They did get some, the stockholders, they got three per cent. I do not know as far as I am personally concerned.

Q You got something for your stock? A Some odd thirty per cent. of the stock. 10

Q Of your common stock? A There was only one stock issued. The stockholders got nothing.

Q You mean that the holders of stocks issued by the Columbia Hotel Holding Company got a dividend of thirty per cent.? A When the hotel was sold this was unbeknown to me. There was a deal made by some of the bondholders that they were to receive one hundred cents on a dollar. I say I never saw this transaction but that 20 was upset in the court so that what they got I don't know.

Q How many bonds did you have?

Mr. Cooper: I object.

A $46,000 at that time.

Q What did you get? A Thirty odd per cent.

Q Do you know whether any other bondholders got the same dividend of 30 per cent.? 30

Mr. Cooper: I object.

A I do not know.

Q How many bonds were issued and outstanding at the time of the sale which was in December, 1921? A I do not know.

Q At the time of the sale of the hotel you were president of the company? A Yes, sir. 40

Paul C. Taylor, cross.

Q Did you conduct negotiations for a sheriff's sale? A Foreclosure proceedings had been started by the first mortgagee.

Q And it was in that proceeding that the third mortgage was wiped off?

10 Mr. Cooper: I object.

A I am not a legal man, I cannot answer that.

Q You were made a defendant in that suit as a mortgagee of the third mortgage? A I presume I was.

Cross examination by Mr. Cooper.

Q Mr. Taylor, in your direct examination you stated that Mr. Barnett owned property near
20 the Columbia Hotel; as a matter of fact, that property is on Ocean avenue? A Partially.

Q How much of it was on Ocean avenue? A The house in which Mr. Barnett resided is on Ocean avenue.

Q Did he have other property in that neighborhood? A Just in the rear he owned a house.

Q How near was the property to the hotel? A The ocean front property was within fifty-
30 one feet and the Third avenue property I think butts up on the hotel property on the side.

Q And did Mr. Barnett keep these properties in first-class condition? A Yes, he did.

Q Were they valuable?

Mr. Scheck: I object to that question on the ground that Mr. Taylor is not familiar with real estate values.

Mr. Cooper: I withdraw that question for
40 the time being.

Q Mr. Taylor, have you had occasion to buy real estate in Belmar? A I have.

Q Are you familiar with values in Belmar? A I am.

Q How much would you say this entire property owned by Mr. Barnett was worth at the time this note was given? 10

Mr. Scheck: I object to that on the ground the witness is not qualified to testify, and further, that question is immaterial, irrelevant and incompetent.

Q At the time the note was given. I am speaking now of the note on which this suit was brought, and also of the time the original note was given. A I think a fair valuation I testified on was $50,000. 20

Q The value of these two properties depended somewhat, did it not, on how the hotel was conducted and run?

Mr. Scheck: I object to that question.

A I would say it depended very much on the hotel property.

Q About how many people did the hotel accommodate? A About 250. 30

Q And what class of people in 1921 and up to 1923, up to January 1, 1923, patronized the hotel?

Mr. Scheck: I object to that as immaterial, irrelevant and incompetent.

A The hotel has always had in it a very good class of people.

40

Q Speaking of very good class, as a matter of fact the hotel has been patronized by the wealthy class? A Yes, sir.

Q And was so patronized by such a class of people at the time the notes testified to this morning was given? A Yes, sir.

10 Q Referring now to the note on which this suit is brought, at the time you took this note to the bank do you recall what conversation you had with Mr. Shock in regard to it? A I do.

Q Will you state that conversation?

Mr. Scheck: I object to that on the ground that it is hearsay, and also it is immaterial, incompetent and irrelevant.

A I told Mr. Shock that Mr. Barnett wished
20 to borrow $5,000 from the bank, as he had been given a mortgage on the Columbia Hotel as security for a note then in the Spring Lake Bank, and he wished to borrow this money to pay off the note then in the bank.

Q Now, did that note have your endorsement on it, the one which he wanted to pay off? A No, sir.

Q Did that note have your signature on it
30 anywhere except as an officer of the hotel company? A No, sir.

Q The note which you refer to is this note marked "O. 1" in evidence, that is the note on which Mr. Barnett wished to borrow money to pay off? A It is.

Q At that time was your name on this note on which the suit was brought, the time you took it down to Mr. Shock? A No, sir.

Q What did Mr. Shock say to you?

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Mr. Scheck: I object for the same reasons as stated above.

A I am not clear in my mind as to whether at this time Mr. Shock had any conversation with me as regards to my endorsement.

Q Prior to the time you endorsed the note on which suit was brought you did have a conversation with Mr. Shock? A Yes, sir. 10

Q What did Mr. Shock say to you?

Mr. Scheck: I repeat my objection to the conversation between Mr. Taylor and Mr. Shock, and it is agreed by the counsel that this objection goes to all the conversation without further making it.

A Mr. Shock in this conversation said to me that the note had come up before his board of directors and that some of them thought there should be another endorsement on the note, as they were not very well acquainted with Mr. Barnett or his affairs. He then said to me, "Why not put your name on the note?" And I said to him, "I do not care to do this." After further conversation on the same line I told him I would put my name on the note providing the bank did not look to me for payment of the same. But that I would, however, in case Barnett failed to pay the note, see that the bank was made good for the same. 20 30

Q And did Mr. Shock agree to that? A He did.

Q And it was under that condition you endorsed the note? A Yes.

Q I am speaking now of the note upon which suit was brought. A Yes. 40

Paul C. Taylor, re-direct.

Q I show you Exhibit T. 1, which is a note dated May 23, 1922, for $5,000, due August 23, 1922. Was it the renewal of that note for which the note in suit was given as a renewal? A It is.

Q The note just shown you is Barnett's original note and is not endorsed by you? A It is not.

Q And was a renewal note of this note endorsed by you? A Not to the best of my knowledge.

Q Did that note contain your signature as maker or in any other capacity, the note which was a renewal of T. 1? A Not to my knowledge.

Re-direct examination by Mr. Scheck.

Q Mr. Taylor, you say you went to the Spring Lake Bank with a note made by Mr. Barnett and said to the bank that Mr. Barnett wants to borrow $5,000 on this note? Why didn't Mr. Barnett go himself? A I couldn't answer that.

Q Why did you go for him? A Because he asked me to.

Q Where? A Where?

Q Where did he ask you? A I do not know.

Q Were you employed by him at that time? A No.

Q How did he happen to ask you? A He wanted to borrow that money, and wanted me to ask.

Q Did he borrow it for himself or to take up the note previously given by the Columbia Hotel Holding Company? A As far as I know, he wanted to borrow it to pay off the Columbia Hotel Holding Company note.

Q So when you went to the bank for Mr. Barnett you knew then and you mean now that it was to take up the Columbia Hotel Holding note. Is not that so? A As far as I know.

Q Mr. Barnett was a very wealthy man? A I am not familiar with his wealth.

Q You knew he was a wealthy man? A I do not know. 10

Q Mr. Barnett did not ask you to go to the Spring Lake Bank and borrow money for him? A He asked me for this.

Q For his personal use? A I do not know.

Q He had the note there? A Yes.

Q Did he have a note in the bank? A He had a note in the bank.

Q But it was the company's note in the bank when you went there with Mr. Barnett's individual note? A No, it was not the company's note in the bank at that time. It was his. 20

Q Between the hotel and Mr. Barnett's property there was one property at the time Mr. Barnett first endorsed the note for the company? A Yes.

Q What kind of property was the intervening property? A Residential.

Q Who owned it? A I think at that time it was owned by the Johnson Estate. 30

Q Who were the executors of the Johnson Estate? A I cannot tell you.

Q Who was in charge of that estate? A I do not know.

Q Was it a one-family house? A Yes.

Q Nicely kept? A Yes.

Q Did you make any effort to get the owners of that property to endorse for the company? 40

Mr. Cooper: I object to that on the grounds that it is immaterial, irrelevant and incompetent.

A No.

Q Who in February, 1921, owned the property south of the hotel?

10

Mr. Cooper: I object.

A I do not know.

Q In the same block? A There is nothing there.

Q Who owned property across the street from the hotel in 1921? A I do not know.

Q Did you make an effort to find out? A No.

Q Did you make any effort to get the owner of that property to endorse this note or any other note for the company? A Not to my knowledge.

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Q Did you make any effort to get any other property owner in Belmar to endorse this note to the Spring Lake Bank or any other note for the company?

Mr. Cooper: Objected to as immaterial.

30

A I did not personally.

Q You say you did not personally. Did anyone? A Not to my knowledge.

Q As a matter of fact, Mr. Taylor, because of certain business reasons between the hotel and Barnett, and because of the further fact that Barnett had these properties to which you have testified, is it not a fact that he assumed this old note and gave his individual note for that paper?

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Mr. Scheck: I object to that question on the ground that it assumes facts which have not been shown to exist; namely, that there were business transactions between Barnett and the company.

A Mr. Barnett was very much interested in the hotel, as I had had several conversations with him, and he thought the property was very valuable and said it should not bring less than $175,000. 10

Q Is it not a fact that because of certain business relations between the hotel and Barnett that Barnett individually assumed this company's note by his individual renewal? A He did.

Q What business relations were there? A At the time he assumed this note he had a mortgage on the hotel. 20

Mr. Scheck: Are you referring to the same mortgage to which you testified before and in which you were a mortgagee?

The Witness: Yes.

Mr. Scheck: By agreement of counsel the attorney for defendant Osborne is permitted to enter a general objection to all of the testimony of conversation between Mr. Taylor and Mr. Shock as if each question had been specifically objected to, on the grounds that such conversations are hearsay and are therefore immaterial, incompetent and irrelevant. 30

Mr. Cooper: I desire, by consent of counsel, to enter a general objection to the whole line of testimony involving other transactions than that involving the making 40

of the note on which suit was brought, and the grounds for this objection are that such testimony is incompetent, irrelevant and immaterial, and an attempt to vary by parol testimony the contents of a written instrument and the respective liabilities of the parties as shown by the said instrument.

10

MR. FREDERICK F. SHOCK, a witness produced on the part of the defendant Taylor, being duly sworn according to law, testified as follows:

Direct examination by Mr. Cooper.

20 Q Mr. Shock, you are the president of the First National Bank of Spring Lake? A Yes, sir.

Q What were you in 1922? A Vice-president.

Q On or about November 23, 1922, do you recall a conversation with Mr. Taylor in reference to the note involved in this suit? A I had a great many. I had several. I do not know whether it was this particular note or not.

30

Q Do you recall Mr. Taylor coming down to the bank and this note was made for $5,000? A Yes, sir.

Q Was Mr. Taylor's name on the note at this time? A I have no records here. I do not think his name was.

Q Referring to the copy of this note of which we had the original in Freehold, and using that copy as though it were the original. I show you a note made in 1922 and ask you if the

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signature on that note was the signature of Mr. Barnett? A Yes, sir.

Q You were familiar with his signature and knew it was his? A Yes, sir.

Q Who presented the note to you? A Mr. Taylor.

Q At the time that note was presented to you by Mr. Taylor was his signature on the note? A I cannot answer that definitely. I do not know if it was on this or a previous one. 10

Q I am referring only to this note. Mr. Shock, you say you cannot answer that? A No, sir.

Q You recall the conversation with Mr. Taylor at the time that note in question was presented as to his, Taylor's, liability on the note? A I asked Mr. Taylor to endorse the note. I told him we were carrying a note of Mr. Barnett's and that only one of our directors knew Mr. Barnett and I thought Mr. Taylor should endorse it. 20

Mr. Scheck: I object to all the conversation between Mr. Shock and Mr. Taylor as being hearsay and not binding.

Q What did you say to Mr. Taylor and what did Mr. Taylor say to you in regard to this note? 30

Mr. Scheck: It is agreed between us that I am objecting to all of the testimony of this conversation.

Mr. Cooper: Now, do you recall what Mr. Taylor said to you and what you said to him about his, Taylor's, signature on this note?

A When I asked him to endorse he said this was Barnett's paper and did not see why he should endorse.

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Q What did you say about his liability on the note? A I did not say anything.

Q Are you sure? A I could not ask Mr. Taylor to put his name on the note and then not hold him liable in case he did not pay the note.

Q This note that Mr. Taylor brought to you
10 at this time, was it a renewal of Barnett's individual note? A Not to my knowledge.

Q I show you a note dated May 23, 1922, in the amount of $5,000 payable in three months after date to the First National Bank of Spring Lake, signed by James G. Barnett, and I ask you if that is not a note of which this note is a renewal? A I think there was a note in between.

Q But was there a note which was given in
20 between which was of the same character and made by James G. Barnett? A I could not say. I do not know whether the note in between had Mr. Barnett's endorsement or not.

Q Have you records in your bank which would show that? A I think our discount book would show that.

Q Will you present that? A I will have to present it.

Q This note is dated May twenty-third and
30 was due on August twenty-third. There was a renewal of this note which was to be given in November 23; you do not know where that note is? A No, sir.

Q This note was given as a renewal of this note in question? A Yes, sir.

Q Did Mr. Taylor get any money from your bank on the note on which this suit was brought? A No, sir.

Q The proceeds of the note on which the suit
40 was brought were placed to the credit of a re-

newal note which has been offered in evidence; is that so? A Yes, sir.

Q And Mr. Taylor was not a party to that note? A No, sir.

Cross examination by Mr. Scheck.

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Q Mr. Shock, the note dated May 23, 1922, which is marked "T. 1" is one of a series of renewal notes, is it not? A Yes, sir.

Q And in the same line of series is a note on which this suit is based? A Yes, sir.

Q I show you the note dated February 23, 1921, which has been marked in evidence as "O. 1" and ask you if this is in that line of series or renewals? A Yes, sir.

Q Will you give us the history of that series of notes, tell us who the first maker of the note was and to whom the proceeds of the note went? A Originally we discounted a note for the Columbia Hotel Holding Company and my recollection is that we drew a check for the proceeds to the order of the Columbia Hotel Holding Company. Later Mr. Taylor presented the note to me of James G. Barnett, and with the proceeds of that note the note of the Columbia Hotel Holding Company was cleaned up.

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Q And then that note of Mr. Barnett's was renewed from time to time until the note was given on which this suit is based? A Yes, sir.

Q And the last note in that series was made by Mr. Barnett and endorsed by Mr. Taylor? A Yes, sir.

Q And to the best of your recollection some of the other notes in that same series may have been endorsed by Mr. Taylor?

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Mr. Cooper: I object to that question.

Mr. Scheck: I withdraw that question.

Q Mr. Shock, who brought the first note to the bank? A Mr. Taylor.

Q Did the Columbia Hotel Holding Company have an account with your bank? A No, sir.

Q Did Mr. Taylor have an account? A He has now. I cannot say at that particular time.

Q Has he been a depositor for some time? A Yes, no.

Q Was Mr. Barnett at any time a depositor at your bank? A No, sir.

Q And Mr. Barnett did not get the proceeds of the first note to the best of your knowledge? A I cannot say. I think the Columbia Hotel Holding Company got the proceeds.

Q Was an account opened in your bank at the time the first note was given by the Columbia Hotel Holding Company? A No, sir.

Q You loaned that company $5,000 without requiring it to open an account in your bank? A Yes, sir.

Q And you say you drew a bank check to the company for the proceeds of that first note? A Yes, sir, that is my recollection.

Q Have you seen that check recently? A No, sir.

Q Did Mr. Barnett ever come to your bank with regard to the first note or any renewal of it? A No, sir.

Q Did you ever have any dealings in regard to this note with anyone except Mr. Taylor? A No, I do not think so.

Q Mr. Shock, you testified at the prior trial of this case in Freehold in May, 1925, did you not? A Yes, sir.

Frederick F. Shock, re-direct.

Q And just prior to your testifying did you not examine the records in your bank relating to this transaction? A Yes, sir.

Q Your recollections at that time were fresh from the records? A Yes, sir.

Q Do you remember testifying at that trial as follows: Q And the note which you accepted in the place of the first one you said was James G. Barnett's note, is that right?" A "Yes." Q "It was endorsed by Mr. Taylor, wasn't it?" A "Yes." Do you remember so testifying, Mr. Shock? A Yes, sir. It must be correct if it is there.

Re-direct examination by Mr. Cooper.

Q Mr. Shock, you say this must be correct. You are assuming because you made that statement at the trial, is that your basis for saying that? A Yes, sir.

Q Have you that note in your possession at the present time? A No.

Q Would your records show that note was endorsed by Mr. Taylor? What book would show that? A Our discount and offer book.

Q If you produced it at a continuation would the discount and offer book show that situation? A Yes, sir.

I hereby certify that the foregoing is a true and correct transcript of the depositions of the several witnesses therein named, taken before me, a Supreme Court Commissioner, pursuant to notice, by Edna M. Herbert, stenographer, at my office in the Professional Building, Asbury Park, N. J., at ten o'clock in the forenoon, in the presence of Harry R. Cooper, Esq., of counsel

for the defendant, Paul C. Taylor, and Emanuel P. Scheck of Osborne, Cornish and Scheck, appearing for the defendant, Harry V. Osborne, Administrator, it being stipulated that said depositions be taken stenographically and the signatures of witnesses waived.

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BENJ. B. SMITH,
Supreme Court Commissioner.

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MEMORANDUM BY THE COURT.

MONMOUTH COUNTY CIRCUIT COURT.

HARRY V. OSBORNE, administrator *pendente lite* of the estate of James G. Barnett, deceased, *Plaintiff*, *vs.* PAUL C. TAYLOR, *Defendant*.	*Action at Law.* *Memorandum by the Court.*

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Osborne, Cornish & Scheck for the plaintiff.

Harry R. Cooper for the defendant.

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JESS, *J*. The controversy between the parties in this suit results from an action in the Supreme Court, tried at the Monmouth Circuit. The plaintiff in that action, the First National Bank of Spring Lake, N. J., recovered a judgment against the defendants, Harry V. Osborne, administrator *pendente lite* of James G. Barnett, deceased, and Paul C. Taylor. The judgment was founded upon a note on which Barnett appeared as maker and Taylor as endorser. Osborne paid the judgment and now seeks reimbursement from Taylor.

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Pursuant to stipulation the question of Taylor's liability was submitted to me on an agreed state of facts, the evidence taken before a commissioner and briefs of counsel.

After I had filed my conclusions in the office of the clerk of the Supreme Court, in the cause as originally entitled, counsel for the present plaintiff submitted to me certain requests for

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formal findings. I then suggested that the issues between the parties be joined in the Monmouth County Circuit Court, with Osborne as plaintiff and Taylor as defendant. This suggestion was adopted by counsel for the respective parties and the matter now is before me for decision on a stipulation of the same import as that which was filed in the Supreme Court proceedings. Since the conclusions heretofore referred to contain that stipulation and state the basis of my present findings, I deem it advisable to annex a copy of those conclusions hereto.

Subsequent to the filing of the stipulation in this court I heard argument of counsel relative to the question whether I had, in my conclusions, given consideration to the contention of the plaintiff that it was the circumstances incident to the creation of Barnett's original liability which raised an implied obligation upon the part of Taylor to indemnify Barnett or his estate. If I did not in my memorandum make the fact sufficiently clear I will now add to what was there written the specific statement that the controlling reason for my conclusion was that I did not find from the evidence any implied obligation on the part of Taylor to indemnify Barnett against the liability he assumed in making the original note in the series which finally resulted in a judgment against the estate of Barnett.

FRANK B. JESS,
Judge.

FINDINGS.

MONMOUTH COUNTY CIRCUIT COURT.

HARRY V. OSBORNE, administrator *pendente lite* of the estate of James G Barnett, deceased, *Plaintiff*, *vs.* PAUL C. TAYLOR, *Defendant*.	*Action at Law.* *Findings.*

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This case was tried before Judge Frank B. Jess, without a jury and without process or pleadings, upon a stipulation and evidence taken before a commissioner.

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After consideration of the stipulation and evidence, and after hearing counsel for plaintiff and defendant, the Court finds:

1. That the contention of the plaintiff that the defendant is indebted to him as administrator *pendente lite* of the estate of James G. Barnett, deceased, under an implied agreement to refund to him the amount of money he expended in the payment of a judgment upon a note of which Barnett was the maker and Taylor the endorser, is not supported by the evidence.

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2. That the note on which judgment was recovered against Osborne, as administrator, and Taylor, was the last of a series of notes which were, in effect, renewals of an original note endorsed by Barnett, but that the circumstances under which Barnett became the endorser of this

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original note were not such as to raise an implied obligation upon the part of the defendant to indemnify Barnett or his estate against ultimate liability on such note.

3. The Court finds that the plaintiff has no cause of action against the defendant.

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FRANK B. JESS,
Judge.

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JUDGMENT.

MONMOUTH CIRCUIT COURT.

December Term, 1925.

HARRY V. OSBORNE, admr. *pendente lite* of the estate of James G. Barnett, deceased, *Plaintiff,* *vs.* PAUL C. TAYLOR, *Defendant.*	*Action at Law.* *Judgment by Court.* *Judgment Entered March 25, 1926. 4 P. M. Costs $49.00.*

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Harry R. Cooper, Attorney.

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Judgment in the above-entitled action was entered on this twenty-fifth day of March, A. D. One thousand nine hundred and twenty-six, in favor of the defendant Paul C. Taylor and against the plaintiff Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, deceased; action at law; judgment by the Court of no cause of action and the sum of forty-nine dollars costs of suit. Judgment entered and signed March 25, 1926, 4 P. M.

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NOTICE AND GROUNDS OF APPEAL.

Filed March 29, 1926.

MONMOUTH COUNTY CIRCUIT COURT.

HARRY V. OSBORNE, administrator *pendente lite* of the estate of James G. Barnett, deceased, *Plaintiff*, *vs.* PAUL C. TAYLOR, *Defendant*.	*Action at Law.* *Notice of Appeal.*

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To Harry R. Cooper, attorney of the defendant.

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TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause on the following grounds:

The Court found and decided:

1. That the contention of the plaintiff that the defendant is indebted to him as administrator *pendente lite* of the estate of James G. Barnett, deceased, under an implied agreement to refund to him the amount of money he expended in the payment of a judgment upon a note of which the said Barnett was maker and the defendant endorser, is not supported by the evidence.

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2. That the note on which judgment was recovered against plaintiff as administrator *pendente lite* of the estate of James G. Barnett, deceased, and against the said Paul C. Taylor was

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the last of a series of notes which were, in effect, renewals of an original note made by said James G. Barnett, deceased; but that the circumstances under which the said James G. Barnett, deceased, became the maker of the said original note were not such as to raise an implied obligation upon the part of the defendant to indemnify the said James G. Barnett, deceased, or his estate against liability on the said note. 10

3. That the plaintiff has no cause of action against the defendant.

OSBORNE, CORNISH & SCHECK,
Attorneys of the Appellant.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HARRY V. OSBORNE, administrator *pendente lite* of the estate of James G. Barnett, deceased, *Plaintiff-Appellant,* *vs.* PAUL C. TAYLOR, *Defendant-Respondent.*	*Action at Law.*

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

In an action in the New Jersey Supreme Court on a promissory note of $5,000 dated November 23, 1922, made by James G. Barnett to the order of the First National Bank of Spring Lake, N. J., and endorsed by Paul C. Taylor judgment was obtained by the bank against both defendants, viz: Harry V. Osborne, as administrator *pendente lite* of the estate of James G. Barnett and Paul C. Taylor.

The administrator has paid the judgment; which with interest and costs, amounted to $5,661.58, and taken an assignment from the bank.

His contention is that the circumstances surrounding Barnett's signing of the note are such as to raise an implied promise on the part of Taylor to repay Barnett for the loss incurred.

The note on which the suit was based was the last of a series of renewals. The first note of the series was dated February 23, 1921, was made by the Columbia Hotel Holding Co. (Paul C. Tay-

lor, President and E. F. Lyman, Jr., Treasurer) to the order of James G. Barnett, and endorsed by Barnett. It was $5,000, payable in three months. In the course of successive renewals Barnett's name appears sometimes as endorser and sometimes as maker; the last two notes of the series were signed by Barnett as maker and by Taylor as endorser. These notes were dated August 23, 1922, and November 27, 1922, respectively.

The testimony shows that the money was originally borrowed from the bank for the said Columbia Hotel Holding Company of which Taylor was president, and in which he was heavily interested as a creditor. The proceeds of the original note went to the corporation. At that time the corporation was insolvent. It had been a losing venture from the beginning, and had never paid a dividend.

Taylor had been president for five or six years; was the largest stockholder and a creditor for about $40,000. His investment in the corporation was over $50,000.

Barnett was not an officer nor director; he was a small stockholder.

Taylor went to Barnett and asked him to endorse the note for the corporation. He says he told him about the financial straits of the company. At Taylor's request Barnett lent his name to the note. Taylor took the note to the bank, had it discounted and got a check to the order of the corporation.

There were seven renewals of the note, and each time Taylor made the arrangements. He went to Barnett's house, got him to sign his name on the front or back, as he (Taylor) desired, and took the renewal notes to the bank.

We charge that by Taylor's conduct, and the benefit he received through Barnett's lending of his name to the corporation, he, Taylor, impliedly agreed to reimburse Barnett for any loss he might sustain.

We charge also that Barnett endorsed the original note not only for the accommodation of the corporation, but also for the accommodation of Taylor.

PRINCIPLES OF LAW APPLICABLE.

I. Where one of several defendants pays the amount of a judgment, and takes an assignment, the payment does not operate as a satisfaction as to any of the defendants except the one paying the money and he may seek reimbursement from the others:

White v. *Brown,* 29 N. J. L. 514;
Paulin v. *Kaighn,* 27 N. J. L. 503;
Durand v. *Trusdell,* 44 N. J. L. 597;
McKennan v. *Corcoran,* 70 N. J. Eq. 627.
National Newark Banking Co. v. *Sweeney,* 88 N. J. L. 140;
37 Cyc. 396.

II. When one pays money under a legal obligation assumed by him at the request of another, and for his benefit, the *law implies a promise* to repay on the part of the person at whose request and for whose benefit the obligation is assumed.

Wheeler v. *Young,* 143 Mass. 143, 9 N. E. 531.

III. In an action brought by the surety against the principal for indemnity, or by one surety against another for contribution, *the real situation and responsibility of the parties may be shown by parol evidence in an action at law.*

Paulin v. *Kaighn,* 27 N. J. L. 503.

IV. *As between the accommodating party and the one accommodated there is an implied promise* on the part of the latter to reimburse the former for all losses resulting from his undertaking.

Morgan v. *Thompson,* 72 N. J. L. 244;
Laubach v. *Pursell,* 35 N. J. L. 434.

V. Where one is compelled to pay money which in justice another ought to pay, the former may recover from the latter the sum so paid.

31 C. J. 446;
Vogemann v. *American Dock Co.,* 198 N. Y. 586 (92 N. E. 1105).

ARGUMENT.

Taylor's testimony is to the following effect:

The corporation owed him $52,000; he was more heavily interested than anyone else; he carried the whole burden; the company never paid a dividend; it had three different managers, and they were all failures; the company never had a successful year; it lost money every year; he told Barnett of the condition of the company when he went to him to ask him to sign the note; that he was the only one who spoke to Barnett about endorsing the note.

As to the consideration that passed to Barnett, Taylor testified:

> "Q He got nothing for his having endorsed this? A Not to my knowledge.
>
> Q You say not to your knowledge? A I do not know. How do I know what someone else may do?
>
> Q But as far as you know you were the only one who spoke to him about endorsing this paper? When I say paper I mean the note given to the Spring Lake National Bank. A Yes, sir."

Later in his testimony Taylor's explanation of the consideration moving to Barnett for his endorsement was that he owned property near the hotel operated by the company, and wanted to see the hotel property kept up. His further testimony on that point, however, disclosed that Barnett's property consisted of some lots on the Shark River, about a mile from the hotel, and that between his residence on Ocean Avenue, Belmar, N. J., and the hotel property on the same street was the residence of Johnson; and that neither Johnson or any other neighbor of the hotel property was requested to endorse paper for the hotel corporation.

Taylor says also that just prior to the sale of the hotel, which was in December, 1921, the company gave a mortgage to Barnett and Taylor to secure Barnett's endorsement, and the indebtedness of the company to Taylor. It was a joint mortgage; and was wiped out by a foreclosure of the first mortgage. *It should be borne in mind that this mortgage was given nine or ten months after Barnett incurred the obligation on which he was subsequently sued. It cannot spell consideration for the original undertaking; neither can it relieve Taylor of his liability to Barnett, for Taylor shared in the mortgage and was to be benefited by its security to the extent of his claim against the company.*

There is no doubt that Barnett endorsed the note at the request of Taylor.

Neither is there any doubt that it was for the benefit of Taylor.

It is unthinkable that Barnett endorsed for the corporation knowing that it was in so hopeless a financial mess. Taylor says he "naturally told him of the condition of the company." What

else Taylor told him, what promise he made, and what understandings they had must be gathered from the surrounding circumstances because Taylor does not disclose, and Barnett's lips are closed by death.

But we do know from the president of the bank that all the proceeds of the note went to the corporation. We know also, from Taylor's own testimony, that the corporation carried on after obtaining this money in February, 1921, until December, 1921, when it dissolved and until, in dissolution, Taylor received 30 per cent. of his $46,000 of indebtedness. He got $13,800 out of the corporation. There is no testimony that Barnett received anything. *That is potent evidence of the benefit received by Taylor out of the assumption by Barnett of a legal obligation which he subsequently had to pay.*

In *Morgan* v. *Thompson, supra.,* the Court of Errors and Appeals says: "This note was not enforceable against the maker in the hands of either Mick or Thompson. If either of them had sued the maker upon it the real transaction could have been shown."

That is a good test to apply here. If Taylor had paid the note, could he have maintained an action against Barnett?

"The real transaction could have been shown." The real transaction: The Columbia Hotel Holding Company hopelessly in debt; Taylor, its president, largest stockholder, largest creditor, going to Barnett, an old man whom he had known for fifteen years and getting him to endorse a note of $5,000; Taylor taking the note to his (Taylor's) bank; discounting it; Taylor arranging seven renewals, each time making out the renewal note, taking it to Barnett's home and

getting him to sign it, sometimes as endorser and sometimes as maker; the corporation losing its property through foreclosure, the corporation dissolved, and Taylor in some manner that he does not explain, obtaining $13,800 in settlement of his claim; Barnett compelled to pay the $5,000 and getting nothing.

We charge most forcibly that this is a case where the law of implied contract should be enforced. The principles above stated must govern this situation; and judgment should be awarded to the plaintiff for the full amount he was compelled to pay to satisfy the judgment against him.

Respectfully submitted,

OSBORNE, CORNISH & SCHECK,
Attorney for Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, deceased.

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New Jersey Court of Errors and Appeals

HARRY V. OSBORNE, administrator *pendente lite* of the estate of JAMES G. BARNETT, deceased,
Plaintiff-Appellant,

v.

PAUL C. TAYLOR,
Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT.

Statement of Facts.

The note upon which this suit was brought was a note for $5,000.00 dated November 23, 1922, made by James G. Barnett to the First National Bank of Spring Lake and endorsed by James G. Barnett and Paul C. Taylor. This is an application on behalf of the representative of the estate of James G. Barnett, deceased, to enforce contribution against Taylor the last endorser on the note in question.

Argument.

The Negotiable Instruments Act of 1902 provides under Section 68 thereof "As respects one another, endorsers are liable *prima facie* in the order in which they endorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."

The attorneys for the defendant Osborne, in order to enforce contribution as against Taylor in the ingenious brief which they have submitted have attempted to show that Barnett endorsed the note for the accommodation of the defendant Paul

C. Taylor, and that therefore he, Taylor, should reimburse the estate of James G. Barnett.

There is no doubt but that under the law as it now exists parol evidence is admissible to show the real relationship between the parties who have endorsed a negotiable note, and if the defendant Osborne could show that the fact was that Barnett endorsed the note for the accommodation of Taylor, and that he Barnett obtained no consideration and that Taylor did, he would undoubtedly be entitled to the relief which he seeks.

Their difficulty is, however, that the facts in the case not only fail to show that Taylor received any benefit from this note, but show positively that he did not receive any benefit therefrom.

Assuming however, for the sake of argument, that the endorsement of Barnett was made at Taylor's request for the benefit of the Hotel Columbia Holding Company, and that the Holding Company received a benefit from his endorsement, the fact still remains that Taylor was not the Hotel Columbia Holding Company, although he may have been an officer of the same. Barnett was also a stockholder of this company, and the fact that Taylor may have had more money in the concern than Barnett is certainly not sufficient to saddle upon Taylor a debt which he neither expressly or impliedly contracted.

It will be noted that on the first note made in 1921 the Columbia Hotel Holding Company was the maker and James G. Barnett the endorser. Taylor's name did not appear on this note (S. C., 8, 11, 15).

That note was taken up by a note dated February 23, 1922, on which James G. Barnett was the maker and there was no endorser (S. C., 9, 11, 28).

This note was renewed on May 23, 1922, by a note of which James G. Barnett was maker and on which there was no endorser (S. C., 30).

This note was renewed on August 23, 1922, by a note of which James G. Barnett was the maker and upon which Taylor was not an endorser (S. C., 36).

The last note in the series was the note dated November 23, 1922, which note was a renewal note made for the purpose of liquidating Barnett's original obligation, and the note on which the suit was brought (S. C., 36).

This note was made by James G. Barnett and endorsed by him, and at the time it was presented at the bank, Taylor's endorsement did not appear thereon. (See pages 6, 7, 9 of Testimony.) (S. C., 28.)

It therefore appears that the first note as between Barnett and Taylor was an original obligation of Barnett's, on which Taylor was in no way liable, and it further appears that on the note on which the suit was brought Taylor was secondarily liable.

Section 30 of the Judgment Act applies only where a party is liable primarily to, or equally with a party seeking to enforce contribution and has no application to a party secondarily liable.

Whatever motives may have influenced Barnett to endorse the note in the first instance, or what considerations may have moved him to take care of the original indebtedness by a renewal or renewals, of course we do not know. The testimony shows, however, that Barnett had a valuable piece of property adjoining the hotel property (S. C., 22, 26, 50); was one of the oldest residents of Belmar, and interested in seeing the town, and particularly that part of it in which his property was located, kept up to the highest class of residential neighborhood, which distinction it had enjoyed for a number of years prior thereto, and was at that time a select residential district (S. C., 27, 28).

Barnett was also interested in the hotel as a stockholder (S. C., 14).

The testimony is uncontradicted that Barnett did not endorse the note as a favor to Taylor (S. C., 21, 22, 26, 27). The fact that Taylor endorsed the note for the accommodation of Barnett and that Barnett did not endorse the note for the accommodation of Taylor as claimed in Osborne's brief, is shown by the testimony of both Taylor and Shock (S. C., 8, 9, 28, 29, 30, 31, 33, 35, 36).

Mr. Shock the president of the bank (who in this controversy between Taylor and Barnett was a disinterested party) says on page 34 that Taylor's name was not on the paper when it was brought to the bank, and at page 35 says, "I asked Mr. Taylor to endorse the note. I told him we were carrying a *note of Mr. Barnett's* and that only one of our directors knew Mr. Barnett and I thought Mr. Taylor should endorse it" (italics ours), and further testified on this page, "When I asked him to endorse he said this was Barnett's paper and did not see why he should endorse."

Mr. Shock further testified on page 36 that Mr. Taylor did not get any money from the bank on the note on which this suit was brought, but that the money was placed to the credit of a renewal note given in renewal of an obligation of Barnett's, to which Taylor was not a party. The relation between Taylor and Barnett on the note in question is further shown by Taylor's statement on page 29, that Mr. Shock said to him that they were not very well acquainted with Mr. Barnett, and he, Shock, requested Taylor to put his name on the note for that reason, and that Taylor said to him that he did not care to do this, but that after further conversation on the same line he told Shock that he would put his name on the note providing the bank did not look to him for the pay-

ment of the same, but that he would, however, in case Barnett failed to pay the note see that the bank was made good for the same.

This very clearly shows the relation of the parties at the time the note was made. That it was a primary obligation of Barnett's and that Taylor intended to become liable to the bank only in case Barnett failed to pay the note. Indeed the testimony throughout shows this to be the case, and it is submitted that the evidence produced by the defendant Osborne in an attempt to vary the liability of the respective parties, as shown by the position of their endorsements on the note has fallen far short of that requirement, but that on the contrary the direct and positive evidence of the witnesses sustains Taylor's position, that the note is what it purports on its face to be, a note on which Barnett was primarily liable as maker and endorser, and on which Taylor was only secondarily liable as second endorser. In this situation the usual rule applies.

LAW.

I.

Payment by the party accommodated, since he is in fact primarily liable, operates as a discharge of the instrument (Norton On Bills and Notes, p. 183, Negotiable Instruments Act, Sec. 202).

> "The accommodated party can in no case look to the accommodation party, for the reason that the obligation as between them, is without consideration and a *nudum pactum;* and also that the purpose of the instrument was that the accommodation party should give it 'The Security' of his name. This being the intention of the obligation, no action will lie in behalf of the party to whom accommo-

dation is given" (Norton On Bills and Notes, p. 178; *Lancey* v. *Clark*, 64 N. Y., 209).

The party for whose benefit accommodation paper has been made acquires no rights against the accommodation party who may set up the want of consideration as a defense to an action by the accommodated party, since as between them there is no consideration, a fact which is always a defense to a suit on negotiable paper between the immediate parties. *Messmore* v. *Meyer*, 56 N. J. L., 31; 27 Atl., 938; 8 C. J., 259, 260.

II.

The decision of the Trial Court on questions of fact will not be disturbed on appeal.

This matter came twice before Judge Jess for his consideration, and after careful deliberation on the matter he wrote an opinion in which he went into the matter exhaustively and found from the evidence that the note in question while endorsed by the defendant Taylor was not in fact for his accommodation, and that the circumstances under which he became an endorser were not such as to raise an implied obligation on his part to reimburse the Barnett estate for the amount paid by the administrator to satisfy the judgment obtained in the suit to enforce payment of the note.

That opinion is not printed in the state of the case but is referred to in the memorandum printed on page 41. This memorandum was filed on reargument of the entire matter, in which the Trial Judge went again exhaustively into the facts at the request of counsel for the plaintiff, and the Trial Judge states specifically in such memorandum at page 42:

> "If I did not in my memorandum make the fact sufficiently clear I will now add to what

> was there written the specific statement that the controlling reason for my conclusion was that I did not find from the evidence any implied obligation on the part of Taylor to indemnify Barnett against the liability he assumed in making the original note in the series which finally resulted in a judgment against the estate of Barnett."

The circumstances under which the notes in question were issued were clearly matters of fact to be decided by the Trial Court, and the findings of the Trial Court being supported by the evidence, its judgment is not reviewable on appeal.

> "It is the accepted law that the findings of the Judge without a jury settles the facts. *Kalbfleisch* v. *Standard Oil Co.*, 43 N. J. Law, 260. It is his province to settle the facts according to his views of the evidence. *Mayor, etc., Jersey City* v. *Tallman*, 60 N. J. Law, 239; 37 Atl., 1026. Such findings of fact are not reviewable on error. It is only where the facts found do not support the conclusion, that the judgment can be disturbed on error" (*Bound Brook Stove Works* v. *Ellis, et al.*, 98 N. J. L., 523; 122 Atl., 690).

In *Lapayowker* v. *Levitsky*, 130 Atl., 627, at page 628, the Court of Errors and Appeals said:

> "On this testimony, the Trial Judge gave judgment for the plaintiff, which was in accordance with the reliable evidence before the Court. It is settled in this Court, the findings of fact by a Trial Judge sitting without a jury settles the facts. When such findings of fact are supported by evidence, they are not reviewable on appeal."

The Trial Court, after a careful examination of the evidence, both on the original hearing and on the motion for a reargument, having found that there was no implied obligation, under the facts and circumstances resting upon Taylor to reim-

burse the Barnett estate, its judgment should not be disturbed by this Court, where there was plenary evidence as appears in the printed case to sustain the judgment.

It is therefore respectfully submitted that the judgment of the Circuit Court be affirmed, with costs.

Respectfully submitted,

HARRY R. COOPER,
Attorney for Defendant-Respondent.

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