

# New Jersey Court of Errors and Appeals

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| ROSEVILLE TRUST COMPANY,<br>Plaintiff-Appellee,<br>vs.<br>A. W. BARNEY, JR.,<br>Defendant-Appellant. | } | On Appeal<br>from Judgment of<br>Affirmance. |
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## BRIEF FOR APPELLANT

### The Facts

The appeal in this case brings up a judgment of affirmance entered in the Supreme Court, sustaining a judgment in favor of Roseville Trust Company in the sum of \$438.00, entered in the First District Court of Newark, (p. 17, ll. 15-25).

The suit is founded upon an accommodation note made by the father of the appellant; copy of note appears at top of page 5; that he was a mere accommodation maker, see p. 6, ll. 11-15; this note (in the sum of \$400.00), was "discounted" by Roseville Trust Company on June 6th, 1913, after endorsement thereof by the appellant; the company was insolvent at that time, but this was unknown to appellant (p. 6, top); the trust company made an entry on its books (upon the "dis-

count" of said note), in favor of appellant in the sum of \$394.00 (p. 5, l. 29); appellant, who was a regular depositor with the trust company, drew against his account in the normal course of business, but his balance at no time fell below \$191.82 (pp. 35, 36, 37; especially p. 35, l. 37); on August 13th, 1913, the Commissioner of Banking & Insurance took charge of the Roseville Trust Company (p. 6, ll. 22 to 35).

The Court found that

“at the time which said commissioner took charge of said trust company, the books of said company showed a credit balance in favor of A. W. Barney, Jr.,”

and the Court also specifically found

“that the trust company was then indebted to defendant in the sum of \$476.99; said defendant has never received said sum or any part thereof from any one” (p. 7, ll. 1-11).

The appellant had filed a full and ample set off in the District Court (pp. 13 bottom to 15 top).

*Notwithstanding that the trust company was admittedly indebted to appellant in a sum in excess of the amount of appellant's note, the District Court refused to allow the set off.*

Hence this appeal. The details of fact are fully shown in the “Judge's findings” in the printed book (aided by the Exhibits), and reference will be made, as necessary, thereto in the course of development of the points herewith submitted.

## POINT I

**The defendants set off against plaintiff should have been allowed.**

## A

The Court found that defendant was indebted to plaintiff in the sum of \$400.00, on the note involved in this litigation; also that the plaintiff was indebted to the defendant in the sum of \$467.99, on the 13th day of August, 1913, prior to the commencement of this suit; that said \$467.99 represented the balance due from plaintiff to defendant as shown on the books of the Trust Company by reason of excess of moneys deposited, over drafts made against his bank account; that said \$467.99 remained unpaid.

Ordinarily and primarily, in a suit at law by A (*eo nomine*), against B, B may set off against the claim of A any demand which B may have against A, that is susceptible of being the subject-matter of a set off.

The District Court Practice Act in express terms authorized the set off in this suit; Section 60 of said act reads as follows (*Comp. Stat. p. 1970, Sec. 60*):

“The plaintiff in such suit shall, on or before the time specified for appearance in the process or summons, or on the return of the warrant, or at the time of appearance specified in the recognizance, file with the clerk a copy of his account or state of demand against the defendant, and in default thereof the said plaintiff shall be nonsuited, with costs; *and if the defendant have*

*any account or demand against the plaintiff, he shall be permitted to discount or set off the same against the account, debt or demand of such plaintiff."*

Section 85 of said District Court Practice Act relating to suits on bills and notes, provides:

"Any person sued shall be entitled to set off his demands against the plaintiff in the same manner as though such defendant had been sued in the form heretofore used" (Comp. Stat., p. 1982, Sec. 85).

Inasmuch as this is a suit by the Trust Company and in the name of the Trust Company, and the Commissioner of Banking & Insurance simply appears as the agent in charge for the purpose of liquidation, it follows that the set off should have been allowed under the District Court Practice Act, unless some positive rule of law or statute overrides the District Court Act in this respect.

The Commissioner of Banking & Insurance by virtue of the Trust Companies Act is not permitted to bring suits in his name, but is required to bring suits in the name of the insolvent or mis-managed trust company; the pertinent portion of the act referred to reads as follows:

"For the purpose of executing and performing any of the powers and duties hereby conferred upon him, the commissioner may *in the name of such trust company*, prosecute and defend any and all suits and other legal proceedings and may *in the name of such trust company*, execute acknowledge and deliver any and all deeds, etc" (P. L. 1913, last 4 lines of p. 283, first 3 lines of p. 284).

It is to be noted that the authority exercised by the Commissioner of Banking & Insurance may be exercised not only when a trust company becomes insolvent, but also whenever it shall appear

*“that any trust company has violated its charter or any law of this state, or is conducting its business in an unsafe or unauthorized manner, or if any trust company shall refuse to submit its books, papers and concerns to the inspection of said Commissioner or any examiner appointed by him.”*

etc. (P. L. 1913, Chap 171, p. 282, Sec. 1).

The ground of decision below that the damages of the defendant are unliquidated is untenable as will presently be shown (*Links vs. Mariowe*, 84 Atl., 1056, N. J. Sup. Ct.).

### B

Even without the aid of the statute, the defendant was entitled to his right of set off, for the following reasons:

The state of the case shows that the defendant discounted the note in question at the Trust Company and received a credit on its books for the proceeds; that he had been a customer of the Trust Company for a long time theretofore and continued to be such up to the time that the Trust Company went into the hands of the Commissioner of Banking & Insurance; that at the time of the discount of said note, defendant had a balance at the Trust Company; a copy of such account is shown in the printed state of the case (Exhibit P-6); thereafter the defendant made drafts on such account and also made deposits

and the net result of said discount, said drafts and said deposits are represented by the indebtedness of the Trust Company to defendant, which is the subject of defendants set off.

In other words the case is like that contemplated in *Receivers vs. Paterson Gas Light Co.*, 23 N. J. L., at 306 bottom to page 308, top, from which I quote as follows:

“The right of set off is founded on principles of natural justice and equity. In *Green vs. Farmer*, 4 Burr., 2220, Lord Mansfield, in delivering the opinion of the Court, remarked, ‘Natural equity says that cross-demands should compensate each other by deducting the less sum from the greater; and that the difference is the only sum which can be justly due.’

“ ‘Where there were mutual debts unconnected, the law said they should not be set off, but each must sue. The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 *Anne*, etc. (directing mutual demands to be balanced’; and he attributes the origin of the statute of *George 2* to the glaring injustice of not setting off mutual debts against each other.”

“And, for this reason, the statute has always not only been construed with great liberality, but Courts of law have been disposed to carry out its equitable principles even beyond the strictness of its letter. In the case of *The State v. Welsted*, 6 Halst., 398, Chief Justice Ewing said, that ‘besides the set off by statute, Courts of law have assumed and exercised a juris-

*diction over mutual demands deducting one from the other, or satisfying one by means of the other, in analogy to the wise and beneficial provisions of the statute; not however because supported by it, but because incidental to the due administration of the laws, and flowing from the right to control suitors to such a course as is demanded by equity and justice. But (he adds) this extraordinary power is only exercised where demands are fixed and ascertained by the admission of the parties.'*

"Now admitting that we could not allow this set off under the statute enabling mutual dealers to discount, and that these parties do not sustain to each other the relation of 'mutual dealers,' in the language of the statute in reference to frauds by incorporated companies, and that it cannot be allowed without invoking the extraordinary power of the Court to enlarge, for equitable ends, the scope of the first statute, or resorting to the general equity of the second, still, I have no doubt in a proper case we may do either. Is this such a case? Do the defendants, as between themselves, and the other creditors of the bank, represented by the receivers, stand in a situation to entitle them to the exercise, in their behalf, of this extraordinary or equitable power?"

*"If this claim on the part of the defendants had had any connection with that held by the receivers; if for instance, the draft had been discounted for the defendants, and the deposit and the notes had been the proceeds of it; or if in any way, it had appeared that the money had been deposited,*

and the notes taken with the mutual understanding that the amount should be applied to the payment of the draft when it became due; or the mutual indebtedness had been at all the result of direct mutual dealings between the parties, *or had grown even incidentally out of the course of mutual dealings, doubtless it would have been within the strict doctrine of legal set off.*"

"Here it is a case of mutual indebtedness, and a case where the demands are ascertained and unquestioned on both sides. The bank, at the time of its failure, held the accepted draft of the defendants; the defendants at the same time had a deposit in the bank, and held notes of the bank. The indebtedness on both sides was just, and but for the failure of the institution, would have been settled between them."

"And a case could hardly be presented where, upon principles of natural justice and strict right, parties would be more clearly entitled to have their mutual claims set off against each other. I think, therefore, that it comes within the fair construction of the words used in the statute itself."

## POINT II

### A

**The insolvency of the trust company and the fact that the Commissioner of Banking & Insurance took control thereof cannot affect the result.**

As the state of the case shows objection was made to the proof of the insolvency of the Trust

Company and the intervention of the Commissioner of Banking & Insurance.

Nevertheless the Court below in deciding the case founded its decision solely upon that fact (see printed state of case, p. 6, ll. 30 to 36).

The Trust Company is neither a savings bank nor a mutual insurance company or the like, which are in a class by themselves and which are expressly subject to a different rule (*Stone, Receiver vs. N. J. & H. R. R. & F, Co.*, 75 N. J. L., 173); savings banks and mutual insurance companies present cases where the defendant

*“is a member of the association and hence a quasi partner in the enterprise.”* *ib.*; see also *Hannon vs. Williams*, 34 N. J. Eq., 256.

That a Trust Company is to be differentiated from a savings bank is plain upon inspection of Section 25 of the Trust Companies Act (*Comp. Stat.*, p. 5664, Sec. 25), in which it is provided that

*“in case of mutual dealings between the corporation and any person to allow just set offs in favor of such persons in all cases in which the same ought to be allowed according to law and equity.”*

While no receiver was appointed in the case of *Roseville Trust Company*, the section just quoted

*“is not merely directory nor does it leave to the discretion of the receivers whether set offs shall be allowed or not. It was designed to prescribe a rule for their action and to define and settle the rights of parties as well as to confer powers. In its operation it entitles the party as a matter of legal right, to the benefit of every set off,*

*legal and equitable*" (23 N. J. L., at 296, about middle of page).

Besides said section illustrates the *policy of the state* with regard to Trust Companies and shows that the *Public Policy* in their case is to be differentiated from that in the case of savings bank; and shows that the state favors set offs in the case of insolvent trust companies.

We will therefore assume that this appeal must be decided as if the Trust Company were an ordinary corporation or individual.

Now in the case of ordinary corporations or individuals, questions have arisen as to the right of set off, *where a receiver was appointed*; these questions have arisen only because the defendant had no claim against the *receiver as such*, and hence because of legal technicalities might be considered as precluded from setting up his right against the insolvent in a suit to which the insolvent was not a party; in other words, in cases of insolvency where receivers are appointed there may occasionally be difficulty because of the fact that there arises a question of "Parties"; the situation may be symbolized thus:

"In a suit of A the receiver of X brought against B, can B set up a claim against X."

In this State the difficulty in allowing a set off where a receiver has been appointed is *stated* in the leading case of *Receivers vs. Paterson Gas Light Company*, (23 N. J. L., at p. 288, last half of page), and is *resolved* by the application of the old act to prevent frauds by incorporated companies (*ib.*, p. 291 bottom), leading to allowance of the set off (*ib.*, 296); (it may be remarked that the statute dealt with in that case is on all fours with Section 25 of the Trust Companies Act, (*supra*).

**But in the case in hand no receiver super-  
vened and the suit was brought in the name  
of the trust company itself, and not in the  
name of a receiver or other representative.**

Hence the difficulty which was resolved in favor of equity in *Receivers vs. Paterson Gas Light Company* does not even present itself here and therefore nothing stands in the way to decide this case precisely as if insolvency had not supervened.

### B

**If the Commissioner of Banking & Insurance is to be regarded as a receiver, then Section 25 of the Trust Company Act applies; if he is not to be regarded as a receiver then the suit is by the bank eo nomine and no obstacle prevents the full operation of the statute of set offs.**

### POINT III

**The insolvency of Roseville Trust Company strengthens our right to set off.**

In the case of *Receivers vs. Paterson Gas Light Company (supra)* at page 285, it was contended:

“If the set off be allowed, the defendants will receive the full amount of their claim against the bank, while the dividend of other creditors will be proportionately diminished.”

nevertheless the Court in that case (p. 291), stated as follows:

“The rule prevades both bankrupt and insolvent laws founded on general principles of equity, that all cross-demands, whether connected or independent, provided they be mutual as between the bankrupt, or the insolvent, and the creditor, shall be set-off, and the balance only shall be deemed the indebtedness upon the one side or the other. The assignees take a bankrupt’s property in the same condition, and subject to the same burthens, as the bankrupt himself held it. And the rule rests on the principle, that the assignees are considered not as purchasers for a valuable consideration, but as voluntary assignees and personal representatives, and are therefore distinguished from particular assignees. 2 Vern., 428, *notel.*”

That case involved facts almost on all fours with this: there the defendant was liable on an accepted bill of exchange (for \$500.00), payable to the order of X and endorsed to the bank which subsequently passed into the hands of the receivers; the bill of exchange matured on October 3, 1851, and the bank went into the hands of the receiver *nine days before that date* (*ib.*, p. 284 top). At the time the bank stopped payment the defendant had on deposit \$455.00, and \$287.00 in bills of the bank and continued to hold the same until suit was brought and thereafter (*ib.*, 284).

The case of *Crisp vs. Dunn*, 56 N. J. L., page 355, may also be of aid at this time; Magie, J., there said (p. 358), as follows:

“That one who is indebted to an insolvent estate may set off his own debt against claims of such an estate upon him, but can-

not purchase or acquire the debts of others to the estate to set off against such claims, was conceded in the argument to be the law, and the doctrine accords with reason and the deliverances of our Courts." *Bateman vs. Connor*, 1 Halst., 104; *Receivers vs. Paterson Gas Light Co.*, 3 Zab., 283; *Hannon vs. Williams*, 7 Stew. Eq., 255.

#### POINT IV

**The fact that the Mutual Bank of Roseville purchased practically all assets of Roseville Trust Company, after this suit was commenced, cannot affect the situation.**

The order of the Chancellor providing for such sale (Exhibit P-4), specifically sets forth that all assets shall be taken by the new bank "subject to off sets, counter claims and defenses if any."

Besides the assignment to the new bank made after this suit was commenced cannot affect the status of the same; see *Elsberg vs. Honeck*, 76 N. J. L., 181.

After judgment obtained by either party the Court can protect the equities arising by virtue of the assignment which was made subsequent to suit; see *Sloan vs. Sommers*, 14 N. J. L., 509, especially at top of page 512, where the Court said:

"If a third person has a bona fide right or interest in the suit which the Court can protect it will do so";

also page 514; the case just cited involved an assignment after suit was brought.

**POINT V**

**The set off of Barney involves liquidated damages.**

It would hardly appear necessary to cite a case to the effect that a claim for a balance due from a bank to a depositor involves liquidated damages.

The case of *Receiver vs. Paterson Gas Light Co.*, (*supra*) and *Links vs. Mariowe*, (*supra*), both dispose of this point.

**POINT VI**

**The "assignment" from Barney to Mutual Bank of Roseville never became effective.**

**A**

We discuss this question though we contend here as we did below that any question relating to said assignment can be of no moment in determining what judgment should be given in this cause, because by its very terms the "assignment" could not become effective until after the suit was commenced.

The assignment (Exhibit P-3), reads in part:

"Provided, however, that this assignment shall not be or become effective until such time as the Commissioner of Banking & Insurance of the State of New Jersey shall authorize the said Mutual Bank to commence business upon or after the acquisition by the said Mutual Bank of Roseville of the assets and property of the said Roseville Trust Co."

Now this suit was commenced January 7th, 1914; and the Mutual Bank, as the District Court Judges "*Case on Appeal*" shows, did not acquire any assets of the insolvent Trust Company until some time thereafter.

Of course the suit must be decided upon the issues raised by the pleadings, and, if any rights by assignment have supervened, they can be protected under the principles of *Sloan vs. Sommers* (*supra*), after judgment.

There is no practice in the District Court by which the parties to the suit can be changed; especially after a verified "set off" has been filed, which under the express statutory provisions of the District Court Practice Act, prevents the plaintiff submitting to a nonsuit. (*Comp. Stat.* p. 2000, Sec. 150.)

## B

But of greater importance is the following:

Exhibit P-2 and Exhibit P-3, the proposal to the defendant by the Mutual Bank and the "assignment" to the Bank, *must be read together*.

The proposal contemplates that "all the assets of the Roseville Trust Company" shall be "turned over to the Depositors, including all claims *against directors or any person or persons whatsoever.*"

This quotation is from the third paragraph of Exhibit P-2: the proposal is reiterated in the fourth paragraph.

In a succeeding paragraph it is set forth:

"The new Bank expects to receive, from certain of the directors of the Roseville Trust Company, cash payments to be added to the assets of the new Bank. Directors,

making payments accepted as satisfactory will be released from liability on account of any claim against them for negligence”;

immediately preceding it sets forth:

“It is expected that collections may be made on account of items which the Department of Banking & Insurance has not allowed as good, from suits against Directors and from action on the former treasurers bond, which will in time substantially increase the value of said stock. \* \* \*”

The penultimate paragraph of Exhibit P-2 reads:

“The form of assignment to be executed by each depositor provides that said assignment shall not become effective until the Commissioner of Banking & Insurance has authorized the new Bank to commence business. *Unless therefore the entire plan becomes effective and operative, the assignment will not take effect.*”

There is also a provision by which the Bank “reserves the right to withdraw this offer, if less than all the depositors” should join.

Now the Mutual Bank ~~has~~, because of the limitations of Exhibit P-4, *viz*: the order of the Chancellor confirming the sale to such Bank, has not acquired all claims against all the directors, nor the claim founded on the treasurer’s bond nor various other assets; Exhibit P-4 orders a sale of all assets

“except, however, any right of action upon surety bonds of former officers or employees of said Roseville Trust Company on ac-

count of the negligence or improper conduct of said officers and directors (exclusive of officers and directors with whom settlements may be made pursuant to compromises hereinafter referred to), and excepting also any concealed or undiscovered assets belonging to the Roseville Trust Company hereafter discovered.”

It therefore follows that the assignment (Exhibit P-3), has never become effective under the very terms of the writings relied on by the plaintiff.

The State of the Case shows that Barney never received anything upon the “assignment” and there is an absolute and complete failure of consideration.

### C

The assignment does not presently assign anything; its operation is *in futuro*; it leaves the thing assigned in the control of the assignor, who in fact, after executing Exhibit P-3, namely in October, 1913, filed his proof of claim, making the very claim to a right of off set, which is now disputed here by the Roseville Trust Company, by the Mutual Bank its successor and (after suit brought) by the Commissioner of Banking (Exhibit P-5).

Under these circumstances the “assignment” must be regarded *at law* as an agreement to assign and not as an assignment, by which the assignee presently divested himself of all title to the chose in action.

**POINT VII**

**The "assignment" can only relate to the surplus of \$67.99 (plus interest), claimed by the defendant, after deduction of the amount of the note (\$400.00) from the amount of the deposit (\$467.99).**

On September 8th, 1913, as the settled state of the case shows, the appellant tried to pay the note by his check to the order of the Commissioner of Banking & Insurance, drawn on the Roseville Trust Company against his deposit balance of \$467.99.

Thereafter he filed Exhibit D-2 in which he specifically claimed the right of off set, which exhibit concludes as follows:

"That after deduction of the face of the note there will remain due to deponent's said son on account of the premised matters, from said Company, the sum of \$67.99, together with lawful interest thereon from the 14th day of August, 1913."

After suit was commenced, and not until after suit was commenced, was this claim disputed (Exhibit P-5).

So that even if the assignment should be considered as an effective legal assignment, it can only relate to the \$67.99.

"A man will be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim; for '*Qui sentit commodum sentire debet et onus*' the grantee shall not be in

a better condition than he who made the grant'' *Broom's Legal Maxims*, star page 710;

the Mutual Bank, as assignee cannot be heard to repudiate the proof of claim made by Barney which was necessary to establish and which proves the claim to which the Bank asserts title as assignee.

*Sloan vs. Sommers (supra)*, will protect the Mutual Bank in the event of judgment for defendant, if the assignment be considered effective.

### POINT VIII

**The defendant received nothing, except a credit on the books of the Trust Company upon discount of the note (p. 5, ll. 25-30; p. 6. ll. 10-20).**

The Trust Company was *insolvent* at the time the note was discounted, though this was unknown to Barney (p. 6, top).

From the day the note was discounted, June 6, 1913, (p. 5, ll. 20-30), till the bank closed its doors, Barney's balance never fell below \$191.82 (pp. 34, 35, 36 and 37).

In short he never availed himself of the credit on the books of the bank to amount greater than \$208.18—that is, the difference between \$400.00 and \$191.82.

His average balance was largely in excess of \$191.82 (pp. 34-37).

To the extent to which he never availed himself of the fictitious credit on the books of the Trust Company—fictitious because the bank was insolvent and continued so to be (p. 6 top)—Bar-

ney never received the consideration upon the sale of the note.

So in no event should judgment go against him in excess of \$208.18, plus interest—even if the set off be not allowed.

In view of the fact that his average balance was so large as is shown by the account (pp. 34-37), and at the time of the Trust Company's "failure" was in excess of the amount of the note—Barney, we respectfully submit, is not liable at all on the note—there having been a complete failure of consideration.

#### POINT IX

**We demand judgment in this Court in the sum of \$67.99, plus interest from August 13th, 1913, plus all costs.**

Respectfully submitted,

OTTO A. STIEFEL,  
Of Counsel with Defendant-Appellant.

## New Jersey Court of Errors and Appeals

ROSEVILLE TRUST COMPANY, a corporation,

*Plaintiff-Appellee,*

*vs.*

A. W. BARNEY, JR.,

*Defendant-Appellant.*

*On Appeal  
from  
Judgment of  
Affirmance.*

*Brief of  
Plaintiff-  
Appellee.*

### FACTS.

On the sixth day of June, nineteen hundred and thirteen, A. W. Barney, Sr., the father of defendant-appellant, A. W. Barney, Jr., made a promissory note of which the following is a true copy (page 5, State of Case) :

“\$400.00. Newark, N. J., June 6, 1913.

Three months after date I promise to pay to the order of myself, Four hundred dollars 00/100 at the Roseville Trust Company.

Value received. A. W. Barney.”

On the same day, said A. W. Barney endorsed his name in blank on the back of said note, and A. W. Barney, Jr., the defendant-appellant endorsed said note in blank and in addition as follows:

“For value received presentation, demand, protest and notice of dishonor is hereby waived.

A. W. Barney, Jr.”

On the same day, defendant-appellant, A. W. Barney, Jr. acting by and through his father, delivered the note in question to the Roseville Trust Company, and in consideration therefor received a credit on the books of the company in the sum of three hundred and ninety-four dollars (\$394.00).

*Facts.*

At that time and for a long time theretofore, said defendant-appellant, A. W. Barney, Jr., had been a customer of the Roseville Trust Company and had deposited checks and money in the regular course of business with said company and had drawn checks against his account; that said company in this connection had furnished the defendant-appellant with a pass-book. On the said sixth day of June, nineteen hundred and thirteen, an entry was made by a duly authorized agent of the Trust Company in the pass-book showing a credit in favor of the defendant-appellant in the sum of three hundred and ninety-four dollars (\$394.00); that the Trust Company was insolvent at the time it took the note and credited the defendant-appellant's account with the proceeds thereof, but this fact was unknown to the defendant-appellant; the defendant-appellant continued to make deposits and draw checks against his account which were paid, between June 6, 1913, and August 13, 1913 (pages 35-36-37, State of Case).

On August 13th or 14th, 1913, the Commissioner of Banking and Insurance took charge of the Roseville Trust Company under the provisions of the Act concerning Trust Companies, Compiled Statutes, Vol. 4, page 5654, as amended by Chapter 171 of the Laws of 1913 (P. L., 1913, page 282). On that day the Roseville Trust Company was insolvent.

Among the assets of the bank which came to the hands of the Commissioner of Banking and Insurance was found the note in controversy. By the books of the bank it appeared that the defendant-appellant had a balance of four hundred sixty-seven dollars and ninety-nine cents (\$467.99) to his credit on the fourteenth day of August, 1913.

On November 28, 1913, the defendant-appellant filed his proof of claim with the Commissioner of Banking and Insurance (Exhibit D. 2, pages 37, 38, 39-40, State

*Facts.*

of Case), claiming credit for the four hundred sixty-seven dollars and ninety-nine cents (\$467.99).

On February 10, 1914, the Commissioner of Banking and Insurance notified defendant-appellant, in writing, as follows:

“You filed claim against Roseville Trust Company for surrender of note or for right of set-off. I wish to notify you under the provisions of Chapter 171 Laws of 1913 that said claim is rejected (page 33, State of Case).

Plaintiff brought this suit in the First District Court of the City of Newark on the note in question, in January, 1914. The defendant-appellant filed a set-off in the sum of four hundred and sixty-seven dollars and ninety-nine cents (\$467.99), the amount credited to the defendant-appellant on the books of the Roseville Trust Company.

On December 30, 1913, the Chancellor of the State of New Jersey made an order “Confirming Sale and Approving certain Compromises” (pages 26, 27, 28, 29, 30, 31, 32, State of Case).

Under the sanction of this order, the Commissioner of Banking and Insurance sold the note in question to the Mutual Bank of Roseville who continued to prosecute this action in the District Court in the name of the original plaintiff.

On January 7, 1914, suit was started on the note in question against both A. W. Barney, Sr. as maker, and A. W. Barney, Jr., as endorser on behalf of the Commissioner of Banking and Insurance in the name of the Roseville Trust Company as provided for in said Act (P. L., 1913, bottom of page 283). Since starting the said suit A. W. Barney, Sr. has died, and the suit has been continued against A. W. Barney, Jr.

*Law.*

**LAW.**  
**POINT I.**

The defendant does not deny his liability on the note but contends that he should be entitled to set-off as against said note the balance which he claims to have had in the Roseville Trust Company at the time of its failure, of four hundred and sixty-seven dollars and ninety-nine cents (\$467.99). The District Court refused to allow this set-off and gave the plaintiff judgment for the full amount of the note with interest, to wit, four hundred and eight dollars (\$408.00) together with costs of suit (page 13, State of Case). The defendant-appellant appealed from the judgment of the District Court to the New Jersey Supreme Court, which latter Court affirmed the judgment of the District Court with costs. (See opinion of Supreme Court, pages 42, 43, 44, 45, 46, State of Case.)

It is respectfully submitted that both the District Court and the New Jersey Supreme Court are correct in their findings, and that the defendant-appellant should not be permitted to set-off his alleged claim in this action.

There is one very important fact found in this case which the defendant-appellant seems to lose sight of in his entire argument, and which, in itself, is dispositive of this appeal; and that fact is that the affairs of the Roseville Trust Company were administered by the Commissioner of Banking and Insurance under Chapter 171 of the Laws of 1913, page 282, and that this Act makes no provision for a set-off by depositors or creditors as against the Commissioner of Banking and Insurance. The affairs of the Roseville Trust Company were not administered under the "Insolvent Corporation Act of New Jersey," or under Section 25 of the Trust Company Act as seems to be intimated in Point 2 of the defendant-appellant's brief.

*Law.*

Under the Act of 1913, *supra*, it is specifically provided that:

“All persons who may have claims against such Trust Company to present the same to the Commissioner and make legal proof thereof at a place and within a time not earlier than the last day of publication to be therein specified \* \* \* if the Commissioner doubts the justice and validity of any claim he may reject the same and serve notice of such rejection upon the claimant either by mailing or personally \* \* \*. An action upon a claim so rejected must be brought within six months after such service.” (P. L., 13, bottom page 284, top page 285.)

The manner of bringing such suit is to sue the Commissioner of Banking and Insurance in the name of such trust company (see bottom page 283 of Act). The moneys collected by the Commissioner of Banking and Insurance shall be deposited by him \* \* \* and “at any time after the expiration of the day fixed for the presentation of claims, the Court of Chancery may, by order, authorize the Commissioner to declare out of the fund remaining in his hands, after the payment of expenses, one or more dividends &c.” (Bottom page 285 of Act, 1913.)

It will be observed from the Act of 1913, from which the above quotations are extracted, that the method provided in this Act for creditors of the Roseville Trust Company was for them to present their claims, under oath, to the Commissioner of Banking and Insurance so that he might pass upon the same, and if any claim was rejected by him, the said claimant must bring his suit as provided by said Act within the time therein limited. There is no provision whatever in the Act authorizing the Commissioner of Banking and Insurance to “settle debts due the company upon such terms as he shall deem just and beneficial to the corporation, and in case of mutual deal-

*Law.*

ings to allow just set-off," as is provided in the Insolvent Corporation Act from which the foregoing quotation is taken.

There can be no question that the defendant-appellant in this case recognized this mode of procedure provided by the Act of 1913 under which the affairs of the Roseville Trust Company were administered, because he did present his duly verified claim to the Commissioner of Banking and Insurance as will appear by Exhibit D. 2 (pages 37, 38, 39, 40, State of Case). This claim was presented and filed with the Commissioner of Banking and Insurance in accordance with the provisions of said Act. On February 10, 1914, the Commissioner of Banking and Insurance, through his deputy, notified the defendant-appellant as follows:

"You filed claim against Roseville Trust for surrender of note or for right of set-off. I wish to notify you under the provision of Chapter 171 of Laws, 1913, that said claim is rejected" (pages 33, 34, State of Case).

It is respectfully submitted that under the law as laid down in the decisions, the claim which the defendant-appellant now endeavors to plead and prove as a set-off is not a legal set-off and therefore cannot be allowed in this suit.

In the case of *Receivers vs. Paterson Gas Light Company*, 23 N. J. L., at page 283 (and cited by the defendant-appellant in his brief as his authority for the allowance of this set-off), it will be observed that that was a suit brought by a receiver appointed by the Court of Chancery under the Insolvent Corporation Act, and is an entirely different statute from the one involved in this suit. The Chief Justice in his opinion in that case says on page 288:

"It is clear that the case is not within the provision of the statute authorizing a set-off at law. As between the plaintiffs and the defend-

*Law.*

ants the claims are not mutual debts. Where there are mutual debts, there must be mutual remedies. But the defendants have no claim against the receivers. They could maintain no action against them. Nor could the defendants have judgment against the receivers in this action in case the set-off should exceed the plaintiff's demand."

This is exactly the situation in the case at bar. The claim which the defendant-appellant sets up is not within the provision of our statute allowing set-offs.

Further, at page 292, the Chief Justice in the case above quoted, says:

"The claim of the defendants in this case does not, as has been seen from technical considerations, constitute a set-off at law, but that it is an equitable set-off against the demand of the receivers."

Again, in the opinion of Justice Elmer, page 297:

"Had this action been brought in the name of the bank itself before the appointment of a receiver, it is undeniable that the defendants would be entitled to their set-offs. But it is insisted that as there was no mutual dealing between the present plaintiffs and the defendants, the case does not come within the statute of set-offs. I think this position is correct. That statute is confined in its terms to parties having mutual dealings and their executors or administrators, and cannot be extended to parties suing as these plaintiffs do in their own name upon a right of action derived from another."

It will be observed from the opinions rendered in the case of *Receivers vs. Paterson Gas Light Company, supra*, that a claim such as the one now sought to be off-set in the suit at bar is not a legal set-off. While the claim set up in the case of *Receivers vs. Paterson Gas Light Company, supra*, was allowed by the Court,

*Law.*

it was allowed only upon the ground that the Insolvent Corporation Act under which that case was proceeding, authorized the allowance of the set-off, as will be observed from the latter part of the opinion of the Chief Justice on page 296, and of the opinion of Justice Elmer on page 297, wherein he says:

“But the right to make the set-offs claimed on the part of the defendants does not rest upon the statute above referred to (the Set-off Act). It arises out of the provisions of the Act under which the plaintiffs derived their power to sue (the Insolvent Corporation Act).”

Also the opinion of Justice Potts, pages 302, 303. So that the case of *Receivers vs. Paterson Gas Light Company* is only applicable to the suit brought by the receivers under the Insolvent Corporation Act and the set-off in that case was only allowed because of the peculiar language and power given to receivers under that Act. This language is not used and these powers are not given in the Act under which the Roseville Trust Company was liquidated.

The above case of *Receivers vs. Paterson Gas Light Company* was construed by Justice Swayze in the case of *Stone, Receiver vs. New Jersey & Hudson R. R. & Railroad Company*, 75 N. J. L., 172, where Justice Swayze at page 173, says:

“The right of set-off as against the receiver of an insolvent corporation does not rest upon statute of set-offs, but upon the provision of the corporation Act authorizing the receiver to settle debts due the company upon such terms as he shall deem just and beneficial to the corporation, and in case of mutual dealings to allow just set-offs.”

As was said by the Supreme Court in this suit (bottom of page 45, top of page 46, State of Case):

“The argument of the defendant-appellant for the allowance of the set-off rests upon the false

*Law.*

assumption that the Commissioner of Banking and Insurance is a receiver within the contemplation and control of the Act relating to Trust Companies (4 C. S., 5664) and that section 25 which defines the powers and duties of receivers appointed under the Act, among other things provides 'that in case of mutual dealings between the corporations and any person to allow a just set-off in favor of such persons in all cases in which the same ought to be allowed according to law and equity' was applicable to the case at bar. But this is clearly not so."

"The Commissioner of Banking and Insurance in the proceeding instituted by him against the Trust Company derived his power and authority from the Act of 1913, Chapter 171, page 282. *This Act created an entirely independent method of procedure against insolvent trust companies and points out in express terms what the duties and powers of the Commissioner of Banking and Insurance are in such cases.*"

*"There is no provision of the Act under this procedure regarding set-offs as contained in the original Act relating to Trust Companies in cases where receivers are appointed. The provision in the Trust Act relating to set-offs is not applicable where the procedure is such as was instituted in the present case."*

We respectfully direct the Court's attention to the fact that the Commissioner of Banking and Insurance of New Jersey took charge of the Roseville Trust Company on August 13th or 14th, 1913, which is found as a fact by the trial judge. (See middle of page 6, state of Case.)

The suit on this note was not started until January 7, 1914. (See page 16, State of Case.) The suit was therefore necessarily started by the Commissioner of Banking and Insurance in the name of the Rose-

*Law.*

ville Trust Company as is provided for in the Act of 1913, page 283, wherein it is provided:

“For the purpose of executing and performing any of the powers and duties herein conferred upon him, the commissioner may in the name of such trust company prosecute and defend any and all suits and other legal proceedings and may in the name of such trust company execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale of real or personal property, or sale, or compromise, or compound, authorized by the Court of Chancery as herein provided.”

So that it is manifestly a suit by the Commissioner of Banking and Insurance, for certainly, after August 13th or 14th, the date the commissioner took charge of the affairs of the Roseville Trust Company, the Roseville Trust Company itself could not bring suit upon this note, so that as between the plaintiff and defendant to the suit below, the claims were not mutual debts, and as stated by the Chief Justice in the case of *Receivers vs. Paterson Gas Light Company, supra*, the defendant in this suit had no claim against the Commissioner of Banking and Insurance. He could have maintained no action against the Commissioner of Banking and Insurance.

As was said by the Supreme Court in its opinion in this suit (bottom of page 44), “the right of set-off rests upon statute. The statute authorizing a set-off in law relates solely to where there are mutual debts extending, however, the right of set-off to the executors or administrators of said debtors (4 C. S., page 436):

“In construing this statute in *Receivers vs. Paterson Gas Light Company*, 23 N. J. L., 283, a case growing out of insolvency proceedings under the Corporation Act, Green, *C. J.*, on page 288,

*Law.*

says: 'It is clear that the case is not within the provisions of the statute authorizing a set-off by law as between the plaintiffs and the defendants. The claims are not mutual debts. Where there are mutual debts there must be mutual remedies, but the defendants have no claim against the receivers. They could maintain no action against them. Nor could the defendants have judgment against the receivers in this action in case the set-off should exceed the plaintiff's demand.' "

It will be observed that Chapter 171 of the Laws of 1913, page 282, is amendatory of Section 22 of the Act concerning Trust Companies (4 C. S., 4836) so that the affairs of the Roseville Trust Company were administered under Section 22 of the Trust Company Act as amended by Chapter 171 of the Laws of 1913, and were not administered under Section 24 or Section 25 as the defendant-appellant would like to make it appear. The debts were not mutual, and as the Trial Court found as a fact (page 11, State of Case, bottom of page), that the alleged set-off which the defendant attempted to prove in this case was not a liquidated amount, the Trial Court properly decided that the set-off should not be allowed. And this raises the second point on which the plaintiff-appellee relies, namely that the alleged set-off was not liquidated.

#### POINT II.

That a claim to be the proper subject of a set-off must be for a liquidated amount has been decided by the courts of this state so frequently that it scarcely needs a citation of authority. However, we refer to the very interesting opinion of Justice Swayze on this subject in the case of *Godkin vs. Bailey*, 74 N. J. L., 655.

That the said alleged claim is not liquidated is found as a fact by the District Court (page 11, State of Case) wherein the Trial Court says:

*Law.*

“It is in evidence that depositors will not get the full amount of their balance at the time of the failure, but will receive a dividend not yet determined. The set-off for \$467.99 not being liquidated damages cannot be allowed.”

So that the defendant-appellant in this case is in no better position than was the defendant in the case of *Godkin vs. Bailey, supra*. No one knows, as yet, what dividend will be paid. As a matter of fact, the defendant-appellant knew the account to be in dispute, having had his claim for off-set refused by the Commissioner of Banking and Insurance. This refusal having taken place on September 8, 1913, when he took to the bank his check to the order of the Commissioner of Banking and Insurance. The defendant-appellant knew at that time that his account was disputed and that he would not be allowed to off-set the same.

For a full history of the Act of Set-Offs and as a striking example of unliquidated damages as applied to the subject of set-offs, we respectfully refer the Court to the case of *Godkin vs. Bailey*, decided by this Court, and reported in 74 N. J. L., page 655.

### POINT III.

As to the claim made by the defendant-appellant that there was a failure of consideration for the note, we respectfully submit that there is nothing in this contention for the reason that in addition to the consideration purported by the note itself, the defendant did obtain from the bank actual consideration for the note as shown in the opinion of the Trial Court (page 11, State of Case) wherein he says:

“In my opinion the defense of failure of consideration falls to the ground. The defendant did discount or sell the note to the bank and he did get credit for its value of which he did avail himself from time to time between June 6th and August 14th. It seems to me that he is in the

*Law.*

position of any other depositor as far as his balance is concerned and that he will be entitled to receive the same dividend as any other depositor upon his balance of \$467.99."

That the defendant-appellant did actually receive consideration for the note is clearly shown by Exhibit P. 6 (pages 34, 35, 36, 37, State of Case) which is a copy of the defendant's account with the Roseville Trust Company. It will be observed from this account that after the date of June 6, 1913, when the proceeds of the note were credited to the account of the defendant-appellant that he drew against said account reducing his balance at one time as low as one hundred ninety-one dollars and eighty-two cents (\$191.82), so that he actually received from the bank a good portion of the proceeds of the note in suit.

#### POINT IV.

To the foregoing must be added the further consideration touched upon in Point 6 of the defendant's brief, to wit: that Mr. Barney, this defendant-appellant voluntarily and of his own free will on October 27, 1913, sold, assigned, transferred and set over to the Mutual Bank of Roseville, the vendee of the Commissioner of Banking and Insurance any and all claims of whatever nature that he might have had either against the Roseville Trust Company, or the Commissioner of Banking and Insurance (pages 24, 25, State of Case) and therefore he did not have any claim either against the Roseville Trust Company, the Commissioner of Banking and Insurance, or the Mutual Bank of Roseville, on January 14, 1914, almost three months after the assignment when he filed his alleged set-off in this suit. And that said assignment became effective on the thirtieth day of December, 1913, the day of the signing of the decree by the Chancellor entitled: "Order Confirming Sale

*Law.*

and Approving certain Compromises" (pages 26, 27, 28, 29, 30, 31, 32, State of Case), so that on January 7, 1914, the date of instituting suit A. W. Barney, Jr. had absolutely lost all claim to the said fund, and did not have any claim either against the Roseville Trust Company, the Commissioner of Banking and Insurance or the Mutual Bank of Roseville.

It is respectfully submitted that for the above reasons this appeal should be dismissed and the judgment of the lower court affirmed.

PEIRCE & HOOVER,  
*Of Counsel with Plaintiff-Appellee.*

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State of New Jersey

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**Notice of Appeal from First District  
Court of the City of Newark to  
New Jersey Supreme Court**

*(Filed April 16, 1915)*

20

NEW JERSEY SUPREME COURT

ROSEVILLE TRUST COMPANY,  
Plaintiff-Appellee,  
vs.  
A. W. BARNEY, JR.,  
Defendant-Appellant.

On Contract.

30

TAKE NOTICE, that the defendant A. W. Barney, Jr., appeals from the judgment and determination of the First District Court of the City of Newark in an action brought by Roseville Trust Company against the said defendant and A. W. Barney in said Court, the said defendant A. W. Barney, Jr., being dissatisfied with the determina- 40

Specification Under Rule 145 of the Supreme  
Court

tion of the said District Court in point of law and  
with the direction of said District Court upon the  
admission and upon the rejection of evidence.

Dated, Newark, N. J., April 13th, 1915.

10

OTTO A. STIEFEL,  
Attorney for Defendant-Appellant,  
A. W. Barney, Jr.

To:

Messrs. Peirce & Hoover,  
Attorneys of Plaintiff  
and whom it may concern.

20

**Specification Under Rule 145 of the  
Supreme Court**

*(Filed April 27, 1915)*

NEW JERSEY SUPREME COURT

30 ROSEVILLE TRUST COMPANY,  
Plaintiff-Appellee,  
vs.  
A. W. BARNEY, JR.,  
Defendant-Appellant.

On Contract.

In pursuance of Rule 145 of the Supreme Court  
of the State of New Jersey, the appellant hereby  
40 sets forth a brief specification of the determina-

Specification Under Rule 145 of the Supreme  
Court

tion and direction of the First District Court of the City of Newark, in the action in which the above entitled appeal has been taken, with respect to which determination and directions the appellant is dissatisfied in point of law, namely, as follows: 10

1. The Court refused to allow the defendant's set off.

2. The Court held that the claim set out in the defendant's notice of set off could not be the subject of a set off.

3. The Court gave judgment for the plaintiff without any regard to the defendant's set off.

4. The Court gave judgment for the plaintiff 20  
for the full amount of plaintiff's demand despite the fact that there was a failure of consideration upon the sale of the promissory note which is the subject of plaintiff's action by the above named defendant to the plaintiff.

5. The Court failed to give judgment in favor of the defendant, as demanded and claimed in defendant's notice of set off.

6. The Court admitted evidence with respect 30  
to the insolvency of plaintiff, upon plaintiff's endeavor to thereby defeat defendant's claim of set off.

7. The Court failed to determine properly that the suit below involved an action by plaintiff in the name of the plaintiff against defendant and (substantially) a cross action by defendant against plaintiff, which cross action was founded 40

## State of Case of Appeal

upon a demand which could with propriety be the subject matter of the "common counts"; and it being an admitted fact in the case that at the time Roseville Trust Company ceased doing business such Trust Company was indebted to the defendant in the amount alleged in the notice of set off, and the said indebtedness not having been paid, liquidated or discharged at the time of the commencement of the suit below, the claim of set off should have been allowed in full to extinguish plaintiff's demand and to become the basis of a judgment in favor of defendant for the excess of defendant's demand over plaintiff's demand.

OTTO A. STIEFEL,  
Attorney of Defendant-Appellant,  
A. W. Barney, Jr.

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**State of Case on Appeal**

*(Filed May 14, 1915)*

FIRST DISTRICT COURT OF THE CITY  
OF NEWARK

ROSEVILLE TRUST Co.,  
vs.  
A. W. BARNEY, JR. } On Contract.

This case was tried before me without a jury, and the parties having been unable to agree upon a state of the case to be used on appeal, have requested me to prepare such state of the case.

## State of Case of Appeal

I find the facts to be as follows:

On June 6th, 1913, A. W. Barney, the father of the defendant A. W. Barney, Jr., made a promissory note of which the following is a copy:

\$400 Newark, N. J., June 6, 1913. 10

Three months after date I promise to pay to the order of myself Four Hundred Dollars at the Roseville Trust Company.

Value Received A. W. BARNEY.

On the same day said A. W. Barney endorsed his name in blank on the back of said note and A. W. Barney, Jr., endorsed said note in blank and in addition as follows:

20  
"For value rec'd presentation demand protest and notice of dishonor is hereby waived.

"A. W. BARNEY, JR."

On the same day defendant A. W. Barney, Jr., acting by and through his said father delivered said note to Roseville Trust Company and in consideration therefor received a credit on the books of said company in the sum of \$394.00.

At that time and for a long time theretofore 30  
said A. W. Barney, Jr., had been a customer of said Roseville Trust Company and has deposited checks and money in the regular course of business with said company and had drawn checks against his account with said company; said company in this connection had furnished him with a "pass book" and on said 6th day of June, 1913, an entry was made by a duly authorized agent of said Trust Company in the "pass book" showing 40

## State of Case of Appeal

a credit in favor of said A. W. Barney, Jr., in the sum of \$394.00.

On June 6th, 1913, said Roseville Trust Company was insolvent, but this was unknown to said A. W. Barney, Jr.; the Roseville Trust Company continued to be insolvent thereafter.

10 A. W. Barney, the father of defendant A. W. Barney, Jr., was a mere accommodation maker of the note and made the same without consideration whatsoever.

A. W. Barney, Jr., was called as a witness in his own behalf and testified amongst other things that aside from the credit entries aforesaid, he received nothing from the Trust Company or any one at the time of the delivery of said note to said bank. The "pass book" was offered and received in evidence and was marked Exhibit D-1 on behalf of the defendant.

20 On August 13th or 14th, 1913, the Commissioner of Banking & Insurance took charge of said Roseville Trust Company under the provisions of the act concerning trust companies (Compiled Stat. Vol. IV. page 5654) as amended by Chapter 171 of the Laws of 1913 (P. L. 1913, page 282). On said day Roseville Trust Company was insolvent. The testimony by which the facts set forth in this paragraph were proved, and every part of it was objected to by the defendant (such testimony being offered on behalf of plaintiff), on the ground that the same was irrelevant and immaterial. The objection was overruled.

30 Between June 6th, 1914, and August 13th, 1914, the defendant made further deposits and issued checks drawn against his account with said Trust Company which were honored on presentation to  
40 said Trust Company.

## State of Case of Appeal

At the time at which said Commissioner of Banking & Insurance took charge of said Trust Company, books of said Trust Company showed a credit balance in favor of said A. W. Barney, Jr., and I find that the Trust Company was then indebted to defendant in said amount, in the sum of \$476.99; said defendant has never received said sum or any part thereof from any one. 10

On December 30th, 1913, the Chancellor of the State of New Jersey made an order "confirming sale and approving certain compromises," a copy of which was offered and received in evidence. The defendant's attorney objected to the offer of the order on the ground that it was immaterial and was in no way relevant to the issues in the action. 20

Under the sanction of the order, said Commissioner of Banking & Insurance sold said note to Mutual Bank of Roseville; said sale was made after the commencement of this action in the District Court and the action was prosecuted after the sale by said bank in the name of the original plaintiff.

On November 28, 1913, the defendant A. W. Barney, Jr., through the agency of an affidavit verified by his father, who has since died, filed his proof of claim with respect to the debt of the Trust Company owing to A. W. Barney, Jr., with the Commissioner of Banking & Insurance; the affidavit was received in evidence. 30

On September 8, 1913, A. W. Barney, Jr., took to Roseville Trust Company his check to the order of "George M. La Monte, Commissioner of Banking & Insurance State of New Jersey" drawn on Roseville Trust Company, in the sum of 40

## State of Case of Appeal

\$400.00 and attempted to pay the note aforesaid which fell due on that day; the Commissioner refused to receive such check in payment of the note.

On February 10, 1914, the Commissioner through his deputy notified A. W. Barney, Jr., in writing as follows: "You filed claim against  
10 Roseville Trust Company for surrender of note or for right of off set. I wish to notify you under the provisions of Chapter 171 Laws of 1913, that said claim is rejected." On or about the 24th day of October, 1913, the Mutual Bank of Roseville sent to A. W. Barney, Jr., a copy of a circular letter which was received in evidence; on the 27th day of October, 1913, A. W. Barney, Jr., executed an assignment which was received in evidence and  
20 marked P-3, which said assignment on or about said day was delivered to said bank.

After all the evidence was received the attorneys for the respective parties submitted briefs; in the brief submitted on behalf of defendant A. W. Barney, Jr., the following points were made:

## POINT 1

The defendant's set off which is in excess of the amount of the note and represents in part the  
30 "proceeds" (if the entry of June 6, 1913, can be so called) of the note must be allowed in complete extinguishment of the amount of the note.

## POINT 2

The assignment from Barney to the bank, if it ever become effective and has not lost its force by virtue of a failure of consideration, operated  
40 only to assign to said bank the sum of \$67.99, to

## State of Case of Appeal

wit, the balance remaining after deducting of the amount of the note, \$400.00, from the \$467.99, due to Barney from the Trust Company.

## POINT 3

If there was no mutual understanding as to what was in contemplation with respect to what was assigned by virtue of the instrument of assignment aforesaid, there was no contract at all between the Mutual Bank of Roseville and defendant A. W. Barney, Jr. 10

## POINT 4

This suit must be determined and judgment rendered without regard to the assignment because the same became effective after commencement of the suit. 20

## POINT 5

There was a failure of consideration with respect to the note, the Trust Company being insolvent at the time of delivery of said note to said Trust Company.

## POINT 6

30

The Court should give judgment in favor of defendant Barney, Jr., and against the plaintiff by the excess of the amount of the set off over the plaintiff's claim (plus interest) that is to say, in the sum of \$67.99 plus interest from August 13, 1913.

Judgment against the defendant was rendered in favor of the plaintiff for the full amount of the note with interest. 40

## Court's Opinion

All of which is respectfully submitted this 11th day of May, A. D., nineteen hundred and fifteen.

CECIL H. MACMAHON,  
Judge.

10

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**Court's Opinion**

*(Filed April 9, 1915)*

FIRST DISTRICT COURT OF THE CITY OF  
NEWARK

|    |                          |   |
|----|--------------------------|---|
| 20 | ROSEVILLE TRUST COMPANY, | } |
|    | VS.                      |   |
|    | BARNEY.                  |   |

In this case, the defendant, A. W. Barney, Jr., took a note made by his father to the order of the maker and endorsed by the maker and the defendant, to the Roseville Trust Company and there discounted or sold the note for the sum of \$394.00. The note was dated, June 6, 1913, for \$400.00 payable three months after date. The transaction with the bank occurred on June 6th, 1913, and although no money passed at that time from the Trust Company to the defendant, he did on that day receive credit on his account as a depositor in the Trust Company for \$394.00. This in my opinion is just the same as though the Trust Company had handed him \$394.00 in cash and he had thereupon deposited that sum to his account with

## Court's Opinion

the Trust Company. The defendant, in fact did draw upon his credit thereafter as is disclosed by the ledger sheet of the bank.

Before the note became due and on August 14, 1913, the Trust Company was taken over by the Commissioner of Banking and Insurance under authority of the act concerning Trust Company as amended P. L. 1913, page 282, etc. 10

On September 8, 1913, the defendant drew his check upon the Roseville Trust Company to the order of George M. LaMonte, Commissioner, Banking and Insurance State of New Jersey for \$400.00, and endorsed thereon "to be used to pay note of A. W. Barney, for \$400.00 due 9/8/13." This the defendant did because he had a balance on August 14, 1913, of \$467.99. 20

Suit is now brought on the note and the defendant attempts to set off his balance of \$467.99, and, as a defense to the suit, also claims that the transaction between him and the bank is void, because as a matter of fact, and I find it to be so, the bank was insolvent when it took the note and credited the account of the defendant with the proceed thereof.

It is in evidence that depositors will not get the full amount of their balance at the time of the failure, but will receive a dividend not yet determined. The set off for \$467.99 not being liquidated damages cannot be allowed. 30

In my opinion the defense of failure of consideration falls to the ground. The defendant did discount or sell the note to the bank and he did get credit for its value, of which he did avail himself from time to time between June 6th and August 14th. It seems to me that he is in the position 40

## State of Demand

of any other depositor, so far as his balance is concerned and that he will be entitled to receive the same dividend as any other depositor upon his balance of \$467.99.

10 As to the note, I believe it to be a valid asset in the hands of the bank and there being no legal defense by way of set off or want of consideration judgment will be entered for plaintiff against the defendant for \$400.00 with interest from September 6, 1913, to the date of entering judgment.

Dated, April 9, 1915.

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**State of Demand**

20

(Filed January 7, 1914)

FIRST DISTRICT COURT OF THE CITY OF  
NEWARK

|   |   |              |
|---|---|--------------|
| ROSEVILLE TRUST COMPANY, a<br>corporation,<br>vs.<br>30 A. W. BARNEY, A. W. BARNEY, JR. | } | On Contract. |
|---|---|--------------|

The plaintiff demands of the defendants the sum of Four Hundred Dollars (\$400.00) and interest amounting to Eight Dollars (\$8.00) on a certain promissory note, dated, June 6, 1913, payable, three months, to the order of "myself" of which the defendant, A. W. Barney, is the maker;  
 40 that the said note has been endorsed over by the

## Set-off

said A. W. Barney to the plaintiff herein; that the said defendant, A. W. Barney, Jr., is also an endorser to the said note; that attached hereto and made a part hereof is a true copy of said note.

Judgment will be claimed for the sum of Four Hundred and Eight Dollars (\$408.00) together 10 with costs of suit.

PEIRCE AND HOOVER,  
Attorneys of Plaintiff.

---

**Set-Off**

*(Filed, January 15, 1914)*

20

FIRST DISTRICT COURT OF THE CITY OF  
NEWARK

ROSEVILLE TRUST COMPANY, (a  
corporation),

Plaintiff,

vs.

A. W. BARNEY and A. W. BAR-  
NEY, JR.,

Defendants.

On Contract.

30

The said defendant A. W. Barney, Jr., by way of set-off claims of the said plaintiff, the sum of \$500.00 on account of the following:

On the 13th day of August, 1913, the said plaintiff was indebted to the said defendant in the sum of \$467.99 lawful money of the United States, 40

## Set-off

for money lent by the said defendant to the said plaintiff at its request; and in the like sum for money paid by the said defendant for the use of the said plaintiff, at its request; and in the like sum for money received by the said plaintiff for  
10 the use of the said defendant; and in the like sum for interest for the forbearance by the defendant at the plaintiff's request of money due and owing from the plaintiff to the defendant; and in the like sum for money due from the plaintiff to the said defendant, on an account stated between them; and in the like sum for moneys theretofore deposited by the said defendant with the said plaintiff; and being so indebted, the said plaintiff afterwards, to wit, on the day and year  
20 last aforesaid, in consideration of the premises, promised to pay the said several last mentioned moneys respectively to the said defendant on request; yet the said plaintiff has disregarded its promises and has not paid any of said moneys or any part thereof; in consequence, the whole of said sum of \$467.99, together with lawful interest thereon, from the 13th day of August, 1913, is and remains due and owing from the plaintiff to the said defendant, and was so due and owing at  
30 the time of the commencement of the above entitled action.

This set-off is filed without waiver of any defense to the action of the plaintiff, in the above entitled suit, and especially the defense of total or partial failure of consideration upon the endorsement, by the said defendant, alleged in the plaintiff's state of demand.

The defendant will claim on the trial of the  
40 cause, that his set-off is sufficient to extinguish

## Set-off

the alleged demand of the plaintiff, and to operate as a discharge of the note mentioned in said state of demand, and will claim judgment against the said plaintiff, affirmatively—in any event—in the sum of \$67.99, together with lawful interest thereon from the 13th day of August, 1913, together with this defendant's costs of suit. 10

OTTO C. STIEFEL,  
Attorney of Defendant.

State of New Jersey, }  
County of Essex. } ss:

Augustus W. Barney, Jr., being duly sworn according to law on his oath says:

That he is the A. W. Barney, Jr., who is one of the defendants in the suit now pending in the First District Court of the City of Newark, in which Roseville Trust Company is plaintiff, and A. W. Barney and A. W. Barney, Jr., are defendants; that the above set-off is not filed by him for the purpose of delay, and that said Roseville Trust Company is indebted to deponent in the sum of \$467.99, together with lawful interest thereon from August 13th, 1913. 20

AUGUSTUS W. BARNEY, JR., 30

Sworn and subscribed to, before me, this  
14th day of January, A. D., 1914.

Casimiro Seoppettone,  
Master in Chancery of  
New Jersey.

**Transcript**

(Filed, May 14, 1915)

FIRST DISTRICT COURT, NEWARK, N. J.

Peirce and Hoover

10

|   |   |  |
|---|---|--|
| ROSEVILLE TRUST COMPANY, (a<br>corporation),<br><br>Plaintiff,<br><br>and<br>A. W. BARNEY, A. W. BARNEY,<br>JR. | } | On Contract<br>Summons .....\$ 2.50<br>Mileage ..... .08<br>Listing fee ..... 1.50<br>Jan. 14.<br>Attorney's fee 21.90<br><hr style="width: 50px; margin-left: auto; margin-right: 0;"/> Total cost ....\$25.98<br>Execution .... 1.43 |
|---|---|--|

20

A summons in the above stated cause was issued on the seventh day of January, 1914, returnable on the fifteenth day of January, 1914, wherein the plaintiff demands of the defendant the sum of five hundred dollars.

The plaintiff filed its state of demand January 7, 1914.

30

The summons was served and returned as follows:

The said Defendants not being found I served the within summons January 8, 1914 by leaving a copy thereof at their residence with a member of their family above the age of fourteen years, informing her of its contents.

JOHN McNELLEN,  
 Sergeant at Arms,  
 First District Court.

40

## Transcript

January 15, 1914. This cause was adjourned to January 22, 29, February, 5, 17, 24, March 3, 17, 31, April 21, May 19, June 9.

January 15, 1914. Defendant filed set off.

June 9, 1914. This was adjourned to June 30, August 6, 20, September 3, 17, October 1, 15, 29, 10  
November 12, 27, December 11, 18.

December 18, 1914. The plaintiff and the defendant appearing the cause was tried.

A. W. Barney died before case came to trial.

Jessie L. Conger, L. R. Vredenburgh, sworn.

Defendant sworn.

The Court reserved decision.

April 9, 1915, the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of four hundred and thirty-eight dol- 20  
lars damages with costs whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of four hundred and thirty-eight dollars damages with costs (\$438.00).

April 14, 1915. Execution was issued and returned as follows:

I return this execution April 21, 1915 unsatisfied I have made diligent search and inquiry and could not find any goods or chattels of the defendant whereon to levy to make the debt and costs, or any 30  
part thereof.

JOHN McNELLEN,  
Sergeant at Arms,  
First District Court.

April 17, 1915. Notice of appeal and appeal bond filed. \$1.00.

April 23, 1915. Order filed extending time to 40  
May 4th. \$1.00.

## Exhibit P-2

I, Charles R. Baldwin, Clerk of the First District Court, do hereby certify that the foregoing is a true copy of the record and proceedings had in the case of the Roseville Trust Company, a corporation, plaintiff; and A. W. Barney, Jr., and A. W. Barney, defendants, as taken from the docket  
10 of the First District Court.

May 13th, 1915.

CHARLES R. BALDWIN,  
Clerk.

---

**Exhibit P-2**

20 *To the Depositors of Roseville Trust Company:*

The Mutual Bank of Roseville has been organized as a State Bank under the laws of New Jersey, with a paid-up capital of Fifty Thousand Dollars (\$50,000.00) for the purpose of providing a means by which the depositors of the Roseville Trust Company may acquire the assets of the Roseville Trust Company. The new Bank submits the following statement and offer, for the  
30 immediate consideration and action of said Depositors.

The Roseville Trust Company was closed, by order of the Commissioner of Banking and Insurance on August 14, 1913. Since that date the Special Deputy Commissioner and his assistants have been engaged in the examination and audit of the accounts of the Bank and in attempting to realize on its assets. As a result of this examination and audit the Special Deputy Commissioner  
40

## Exhibit P-2

is of the opinion that the sum of all payments to depositors upon liquidation of the assets of the Roseville Trust Company will not exceed 42 per cent of their claims. It is likely that such liquidation will require several years before all the assets have been realized upon or finally found to be worthless and before suits against directors can be finally concluded. Representatives of the depositors have been trying constantly to find some method by which the long delay and heavy expense of liquidation might be avoided and depositors enabled to obtain as large a portion as possible of their money at once. 10

Two courses are open to the Depositors: they may do nothing, allowing the liquidation to continue, getting such dividends as they may be able to obtain from time to time (the amount of cash on hand at the present time in the possession of the Commissioner is about Eighty Thousand (\$80,000.00) dollars, or about eight cents on the dollar for the depositors) and await the final outcome of the suit against directors and the final liquidation of the affairs of the Company; or they may, if the Commissioner of Banking and Insurance and the Court of Chancery approve, have all of the assets of the Roseville Trust Company turned over to the Depositors, including all claims against directors or any person or persons whatever, and, in the form of a new bank, with new capital and new management (to be chosen by the Depositors themselves) collect on the assets and start suit, if necessary, against directors. If the latter plan be adopted, forty per cent of the amount of their deposits will be available for use by the Depositors as soon as the plan becomes op- 20 30 40

## Exhibit P-2

erative and the new Bank opened. For the remaining portion of their accounts the Depositors will collectively receive 450 shares, out of the total of 500 shares of the stock in the new Bank, which Bank will own all of the assets now owned by the  
10 Roseville Trust Company, and all claims against directors and against any other persons.

The Mutual Bank of Roseville has been organized solely for the purpose of carrying out this plan for the benefit of Depositors. It will be owned, except for the shares the new Directors must own, under the law in their own names (and for which they have paid in cash at the price of \$100.00 per share) wholly by the Depositors. The Mutual Bank of Roseville expects to acquire,  
20 in the interest of all the depositors, the assets of the Roseville Trust Company, and, acting for the Depositors, in order to acquire such assets, it must receive from each depositor an assignment of his account. Upon receiving such assignments, the new Bank will, subject to the approval of the Commissioner of Banking and Insurance and the Court of Chancery, acquire all of the assets of the Roseville Trust Company, including claims against directors and others. It will then, all under  
30 the supervision and direction of the Commissioner of Banking and Insurance, give to each Depositor, assigning his account to it, a credit on its books, for an amount equal to forty-per cent of the amount of the Depositor's claim against Roseville Trust Company, to become available when the new Bank opens for business. It will also give to each of said Depositors assigning his account his proportionate share of Forty-five  
40 thousand dollars (\$45,000.00) par value of the

## Exhibit P-2

full-paid stock of the new Bank. The amount of stock which each Depositor will receive will be in the proportion that the Depositors' account, as assigned, bears to the aggregate amount of all accounts assigned to the new Bank. This will keep the same relative ownership in the assets among all Depositors assigning their accounts. 10

The new stock which each depositor will receive has been paid in at the price of one hundred dollars per share. It is expected that collections may be made on account of items which the Department of Banking and Insurance has not allowed as good, from suits, against directors, and from action on the former Treasurer's bond which will, in time, substantially increase the value of said stock, apart from such earning power as it will have. 20

The determination of the exact amount of the balance due each depositor on the books of Roseville Trust Company, of the amount with which each Depositor is to be credited as a deposit upon the books of the new Bank, and the amount of the *pro rata* distribution of stock to each of said Depositors, will be approved as to accuracy by the Commissioner of Banking and Insurance or his authorized representative. 30

The new Bank expects to receive, from certain of the directors of the Roseville Trust Company, cash payment to be added to the assets of the new Bank. Directors, making payments accepted as satisfactory, will be released from liability on account of any claim against them for negligence; but they will receive no stock or other return expect the releases referred to. Cash payments aggregating Forty-five thousand Dollars have al- 40

## Exhibit P-2

ready been tendered by two Directors which, if accepted, will procure for them release from liability. Other Directors are expected to make offers of settlement. Any director who fails to make such payment to the new Bank or the Commissioner, as the Commissioner of Banking, the officers of the new Bank, and the Court of Chancery, by approving the plan, decide to be a satisfactory settlement, will be sued, following the opening of the new Bank, either by the Commissioner of Banking or by the new Bank, as will be later determined. Depositors will therefore see that there is no intent to relieve the directors of the Roseville Trust Company from responsibility. As a matter of business, it is considered better to obtain, in this manner and at this time, substantial payments from these directors and get the new bank opened for and owned by the Depositors, than to continue the liquidation and attempt, through costly legal proceedings extending over a period of years, to collect about Five hundred thousand dollars from said directors.

None of the former directors or officers of the Roseville Trust Company will be directors of the new Bank. The gentlemen who have consented to act as directors have done so with great reluctance and without thought of any financial gain to themselves. A very heavy burden of work will be placed upon them. At the regular annual meeting of the new Bank, which will be held in less than three months, the Depositors may then choose an entirely different Board of Directors if they do so desire.

There is enclosed herewith a form of assignment of account which should be signed by each

## Exhibit P-2

depositor in the same manner in which the depositor has been accustomed to signing checks on his account in the Roseville Trust Company; which assignment should be witnessed at the place marked therefor and, when signed and witnessed, should be forwarded at once, in the enclosed envelope, to the Mutual Bank of Roseville, at its temporary office, Number 505 Orange St., Newark, New Jersey. It is essential that all depositors should at once deliver their pass books to the representative of the Department of Banking and Insurance, in charge of the Roseville Trust Company, so that all may be examined. The Mutual Bank of Roseville reserves the right to withdraw this offer, if less than all of the depositors having claims against the Roseville Trust Company shall assign their accounts to the Bank under the conditions herein set forth.

The offer herein contained will be made to creditors of the Roseville Trust Company who are not depositors, such as holders of drafts drawn on the Roseville Trust Company, etc.

The form of assignment to be executed by each depositor provides that said assignment shall not become effective until the Commissioner of Banking and Insurance has authorized the new Bank to commence business. Unless, therefore, the entire plan becomes effective and operative, the assignment will not take effect.

Depositors will be advised, through the press, as frequently as possible of the progress being made toward the carrying out of the entire plan; but, in order to make the plan effective, each Depositor should immediately on receipt hereof ex-



## Exhibit P-3

these presents do sell, assign, transfer and set over, unto Mutual Bank of Roseville, a corporation organized under the Banking Laws of the State of New Jersey, its successors and assigns, to its own proper use and benefit, any and all sums of money now due or to grow due to the under-  
 10  
 signed from the said Roseville Trust Company or from the Commissioner of Banking and Insurance of the State of New Jersey in possession of the assets and property of said Roseville Trust Company, or out of or from the assets and property of the said Roseville Trust Company.

And I do hereby give the said Mutual Bank of Roseville, its successors and assigns, full power and authority, for its own use and benefit, but at its own cost, to ask, demand, collect, receive,  
 20  
 compound and give acquittance for the same or any part thereof, and in my name or otherwise, to prosecute and withdraw any suits or proceedings at law or in equity therefor.

PROVIDED, however, that this assignment shall not be or become effective until such time as the Commissioner of Banking and Insurance of the State of New Jersey shall authorize the said Mutual Bank of Roseville to commence business upon or after the acquisition by the said Mutual Bank  
 30  
 of Roseville of the assets and property of the said Roseville Trust Company.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 27 October day of October, nineteen hundred and thirteen

In the presence of

A. W. BARNEY, JR., (L. S.)

Address .....

Witness: A. W. Barney,  
 240 N. 4 St.

**Exhibit P-4**

## IN THE CHANCERY OF NEW JERSEY

*Order Confirming Sale and Approving Certain  
Compromises*

10

In the Matter  
of  
THE ROSEVILLE TRUST COM-  
PANY in charge of the Commis-  
sioner of Banking and Insur-  
ance of the State of New Jer-  
sey, under the provisions of  
Chapter 171, Laws of 1913.

20

Order to show cause having heretofore been made in the above entitled matter on filing the Petition of George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, on the fifteenth day of December, Nineteen Hundred and Thirteen, ordering that the depositors, creditors and stockholders of the Roseville Trust Company, a corporation of the State of New Jersey, organized under the Act of the Legis-

30

lature of said State, entitled "An act concerning trust companies (Revision of 1899)," having its office and place of business in the City of Newark, County of Essex, and State of New Jersey, in charge of said Commissioner of Banking and Insurance, pursuant to the statutes in such case made and provided, show cause before the Court of Chancery, at the Chancery Chambers in the State House in the City of Trenton, on Tuesday,

40

the thirtieth day of December, Nineteen Hundred

## Exhibit P-4

and Thirteen, at the hour of 10:30 o'clock in the morning of that day or as soon thereafter as the matter could be brought to the attention of the Court, why the said George M. LaMonte, Commissioner of Banking and Insurance, should not be authorized and directed to sell the property and assets of said Roseville Trust Company, particularly mentioned and described in a certain contract bearing date the tenth day of December, Nineteen Hundred and Thirteen, a copy of which was annexed to said Petition, entered into between the said George M. LaMonte, Commissioner of Banking and Insurance, and the Mutual Bank of Roseville, a corporation of the State of New Jersey, pursuant to and on terms and conditions set forth in said Contract, and to compound certain claims against officers and directors of the said Roseville Trust Company for the amounts mentioned in said Contract, and in the name of said Roseville Trust Company to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate said sale of real and personal property, pursuant to said Contract and the compromises therein mentioned and set forth.

And notice having been given of the making of said Order to the depositors, creditors and stockholders of the said Roseville Trust Company, as required by said Order, and proof by affidavit thereof having been filed.

And the matter having been brought on before the Chancellor and having been opened to the Court by John R. Hardin, of Counsel for the said George M. LaMonte, Commissioner of Banking

## Exhibit P-4

and Insurance, and no person appearing in opposition, except James V. Herron, of Counsel with Michael Kane, Jr., having a claim as depositor of \$58.00, and with three other persons having claims as depositors aggregating, with the said Kane's  
10 claim, less than Nine hundred dollars, and the Court having heard the argument of the said James V. Herron in opposition, and the arguments of Mr. Ralph E. Lum, of Counsel with certain of the directors of the said Roseville Trust Company with whom compromises had been recommended by the said Commissioner of Banking and Insurance, in his said Petition, and Mr. Edward F. Clark (of the New York Bar), representing the  
20 Depositors' Association, composed of depositors and creditors of the said Roseville Trust Company who have assigned their claims to the Mutual Bank of Roseville, referred to in the said petition.

And the Court being of opinion that the sale of the property and assets of said Roseville Trust Company particularly mentioned and described in the Contract, copy of which was attached to said Petition, pursuant to and on the terms and conditions set forth in said Contract, should be approved, and that the compounding of certain  
30 claims against the officers and directors of the said Roseville Trust Company referred to in said Petition and Contract should be approved, and that the said Commissioner of Banking and Insurance should be authorized to execute, acknowledge and deliver in the name of the said Roseville Trust Company any and all deeds, assignments, releases and other instruments necessary and proper to effectuate said sale of real and personal  
40 property pursuant to said Contract and the Compromises therein mentioned and set forth.

## Exhibit P-4

It is on this thirtieth day of December, Nineteen Hundred and Thirteen, on motion of Pitney, Hardin and Skinner, Solicitors of the said George M. LaMonte, Commissioner of Banking and Insurance, by Edwin R. Walker, Chancellor of the State of New Jersey, pursuant to and in accordance with the provisions of an Act of the Legislature of the State of New Jersey entitled "An act to amend the act entitled 'An act concerning trust companies (Revision of 1899)', approved March twenty-fourth, One thousand eight hundred and ninety-nine," which amendment was approved April first, One thousand nine hundred and thirteen, being Chapter 171, of the Laws of 1913 ordered that George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, be and he is hereby authorized and directed to sell all the business, good-will, real, personal and mixed property and assets of every kind and nature, moneys, bills, notes, negotiable instruments and securities for money, bonds and mortgages, book accounts and other documents and choses in action, all contracts and agreements, books of account, papers, documents, furniture, fixtures, supplies and generally all property of every kind and nature of the Roseville Trust Company, a corporation of the State of New Jersey, organized under the act of the Legislature of the State of New Jersey, entitled "An act concerning trust companies (Revision of 1899)," having its office and place of business in the City of Newark, in the County of Essex and State of New Jersey, now in charge of said Commissioner of Banking and Insurance pursuant to statutes in such case made and provided, including all in-

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## Exhibit P-4

terest accrued or earned on any claim or asset to the date of the conveyance thereof, except, however, any right of action upon surety bonds of former officers or employes of said Roseville Trust Company on account of the negligence or the improper conduct of said officers and directors (exclusive of officers and directors with whom settlements may be made pursuant to compromises hereinafter referred to), and excepting also any concealed or undiscovered assets belonging to said Roseville Trust Company hereafter discovered; subject, however, to mortgages or liens existing as of the date of conveyance, and also subject to offsets, counterclaims and defenses, if any, to the Mutual Bank of Roseville, a banking corporation organized under and pursuant to the laws of the State of New Jersey, for the consideration of Five hundred thirty-one thousand four hundred thirty-four dollars and ninety-seven cents (\$531,434.97), payable at the time and in the manner set forth in a certain Contract made the tenth day of December, One thousand nine hundred and thirteen, by and between the said George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, and the said Mutual Bank of Roseville, a copy of which Contract is annexed to and a part of the Petition of the said Commissioner of Banking and Insurance in the recital of this Order referred to, and on the further terms and conditions set forth in said Contract.

And it is further ordered that the said George M. LaMonte, Commissioner of Banking and Insurance, be and he is hereby authorized to complete and carry out the compromises and settlements by reason of any liability of said persons for loss or

## Exhibit P-4

damage caused or produced to the said Roseville Trust Company by any act of commission or omission of said persons while acting as directors or officers of said Roseville Trust Company, with William P. Odell, William Fairlie, John S. Bell, Fred Kilgus, William J. Banister, Clinton F. McCord, James B. Banister, William W. Woodward and Elmer K. Sexton, in the amounts and upon the terms and conditions set forth in the said Contract between the said Commissioner of Banking and Insurance and the said Mutual Bank of Roseville, dated December tenth, One thousand nine hundred and thirteen, above referred to, and expressly subject to the provisions of said Contract that no release in pursuance of such compromise shall acquit or relieve any such person of or from any liability for money due said Roseville Trust Company, either on notes, overdrafts, or other instruments of indebtedness or for money had or received or otherwise, or in any way relieve, acquit or absolve any of such persons of or from any responsibility or liability for any violation of any law or statute imposing criminal liability.

And it is further ordered that the said George M. LaMonte, Commissioner of Banking and Insurance of the State of New Jersey, be and he is hereby authorized in the name of the said Roseville Trust Company to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate the sale of real and personal property above authorized and the compromise or compounding with the persons above mentioned, as above authorized.

And the Court being of opinion that the said

## Exhibit P-4

10 Mutual Bank of Roseville, should continue to accept and receive assignments of claims from depositors or creditors who have not heretofore executed and delivered such assignments, as contemplated by paragraph nine of said Contract between the said Commissioner of Banking and Insurance and the said Mutual Bank of Roseville, dated December tenth, One thousand nine hundred and thirteen, hereinabove referred to, until the expiration of thirty days from the date of this Order.

20 It is further ordered as a condition of and a term of the sale to said Mutual Bank of Roseville hereby authorized, that the said Mutual Bank of Roseville shall continue to accept and receive assignments of claims from depositors or creditors who have not heretofore executed and delivered such assignments, on the same terms and conditions as heretofore, until the expiration of thirty days from the date of this Order, and that a copy of this Order (which need not be certified) be mailed to each of such creditors within ten days from the date hereof, directed to them at their several and respective post office addresses if the same can be ascertained.

30

E. R. WALKER. C.

A true copy.  
Sam. K. Robbins,  
Clerk.

## Exhibit P-5

*To the Depositors and Creditors of the Roseville  
Trust Company:*

TAKE NOTICE of the provisions of the foregoing  
order of the Court of Chancery, made on this date.

PITNEY, HARDIN & SKINNER, 10  
763 Broad Street, Newark, N. J.,  
Solicitors for George M. LaMonte,

Commissioner of Banking and Insurance.  
December 30th, 1913.

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**Exhibit P-5**

ROSEVILLE TRUST COMPANY 20

IN LIQUIDATION

Newark, N. J.

February 10, 1914.

Mr. Augustus W. Barney, Jr.,  
407 Seventh Ave.,  
Newark, N. J. 30

Dear Sir:

You filed claim against the Roseville Trust  
Company for surrender of not or for right of off-  
set. I wish to notify you under the provisions of  
Chapter 171, Laws of 1913, that the said claim is  
rejected.

## Exhibit P-6

Under the provisions of the said Act, any suit you may wish to bring to establish this claim must be brought within six months from this date.

Yours truly,

10 (signed) L. R. VREDENBURGH,  
Special Assistant Deputy  
Commissioner of Banking & Insurance.

---

**Exhibit P-6**

Sheet No.....

20 A. W. BARNEY, JR.

Mutual Bank of Roseville, Newark, N. J.

| 1913 |    |     | DR.   | CR.    | BALANCE |
|------|----|-----|-------|--------|---------|
| DATE |    |     |       |        |         |
| May  | 14 | Bal |       | 444.46 | 444.46  |
|      | 15 |     | 100   |        | 344.46  |
|      | 16 |     |       | 40     | 384.46  |
|      | 19 |     | 71    |        | 313.46  |
| 30   |    |     |       | 76     | 289.46  |
|      |    |     | 95    |        | 294.46  |
|      | 21 |     |       | 59.70  | 354.16  |
|      |    |     | 16.54 |        | 337.62  |
|      | 22 |     | 18    |        | 319.62  |
|      | 22 |     |       | 22     | 341.62  |
|      | 23 |     | 8.06  |        | 333.56  |
|      | 24 |     | 8.55  |        | 325.01  |
|      |    |     |       | 50     | 375.01  |
| 40   |    |     | 29.37 |        | 345.64  |

## Exhibit P-6

| DATE   | DR.                                    | CR.    | BALANCE |
|--------|--|--------|---------|
| 26     |  | 67.25  | 412.89  |
| 27     | 13.50                                  |        | 399.39  |
| June 3 | 10                                     |        | 389.39  |
|        | 35                                     |        | 354.39  |
|        | 35.50                                  |        | 318.89  |
|        |  | 129    | 447.89  |
| 4      | 37.81                                  |        | 410.08  |
| 5      |  | 35     | 445.08  |
| 6      | 4.60                                   |        | 440.48  |
|        | x Note dis-<br>counted or<br>purchased | 394    | 834.48  |
| 9      | 495                                    |        | 339.48  |
|        |  | 10.50  | 349.98  |
| 10     |  | 101.25 | 451.23  |
| 11     | 20.33                                  |        | 430.90  |
| 11     |  | 21.25  | 452.15  |
| 13     | 120                                    |        | 332.15  |
| 14     |  | 14.75  | 346.90  |
|        | 52.50                                  |        | 294.40  |
| 16     | 35                                     |        | 259.40  |
| 17     |  | 11     | 270.40  |
| 17     |  | 60     | 330.40  |
| 19     | 60                                     |        | 270.40  |
| 20     | 10.73                                  |        | 259.67  |
| 21     | 61.60                                  |        | 198.07  |
|        |  | 8      | 206.07  |
|        |  | 23.75  | 229.82  |
| 23     | —                                      |        |         |
|        | 20                                     |        | 209.82  |
| 24     | 18                                     |        | 191.82  |
| 25     |  | 94     | 285.82  |
|        | 15                                     |        | 270.82  |
|        |  | 30.33  | 301.15  |

## Exhibit P-6

| DATE |    | DR.     | CR.     | BALANCE |
|------|----|---------|---------|---------|
|      |    | 301.15  |         |         |
|      |    | <hr/>   | <hr/>   |         |
|      |    | 1692.24 | 1692.24 |         |
|      |    | <hr/>   | <hr/>   |         |
|      | 27 | Bal     | 301.15  | 301.15  |
| 10   | 28 |         | 9.05    | 292.10  |
|      |    |         | 22.25   | 269.85  |
|      | 30 |         | 11      | 280.85  |
| July | 1  | 5.50    |         | 275.35  |
|      | 2  |         | 90      | 365.35  |
|      |    | 35.50   |         | 329.85  |
|      | 3  |         | 17.45   | 347.30  |
|      | 5  | 23.17   |         | 324.13  |
|      | 7  |         | 104     | 428.13  |
|      | 8  |         | 30.75   | 458.88  |
| 20   | 9  | 22.25   |         | 436.63  |
|      | 10 |         | 25      | 461.63  |
|      | 11 |         | 40.50   | 502.13  |
|      |    | 1       |         | 501.13  |
|      | 12 | 4.25    |         | 511.13  |
|      |    | C 50.25 |         | 456.88  |
|      | 14 |         | 93.75   | 550.63  |
|      | 15 | 22      |         | 528.63  |
|      | 21 | 13.75   |         | 514.88  |
|      | 22 | 108     |         | 406.88  |
| 30   | 24 | 98.26   |         | 308.62  |
|      |    |         | 25      | 333.62  |
|      |    | C 50.40 |         | 283.22  |
|      |    |         | 50      | 333.22  |
|      | 25 | 29      |         | 304.22  |
|      | 26 | 25      |         | 279.22  |
|      | 28 | 21.32   |         | 257.90  |
|      | 29 |         | 50      | 307.90  |
| 40   |    | 8.30    |         | 299.60  |

## Exhibit D-2

| DATE  | DR.     | CR.    | BALANCE |
|-------|---------|--------|---------|
|       |         | 62     | 361.60  |
| 30    | 20.50   |        | 341.10  |
| 31    | 26.99   |        | 314.11  |
| Aug 1 | 7       |        | 307.11  |
| 4     | 10      |        | 297.11  |
|       | 297.11  |        | 10      |
|       | <hr/>   |        |         |
|       | 910.85  | 910.85 |         |
|       | <hr/>   |        |         |
|       | Bal     | 297.11 | 297.11  |
| 7     |         | 169.25 | 466.36  |
| 8     | 22      |        | 444.36  |
|       | 30      |        | 423.36  |
|       |         | 9      | 453.36  |
|       | 12.62   |        | 410.74  |
|       |         | 107.75 | 518.49  |
|       | C 50.50 |        | 467.99  |
|       |         |        | Balance |

**Exhibit D-2**

State of New Jersey, }  
 County of Essex. } ss:

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Augustus W. Barney, Sr., being duly sworn according to law on his oath says:

That for a long period of time, to wit, from at least the 9th day of April, 1912, until the 14th day of August, 1913, he on behalf of his son, Augustus W. Barney, Jr. deposited large sums of money, checks and negotiable paper with the Roseville Trust Company at the banking house of said Company, at the corner of Roseville Avenue 40

## Exhibit D-2

and Orange Street, in the City of Newark, County of Essex aforesaid, and that during said period he had charge of said sons transactions with said bank; that during the same period said son drew upon said company and against the moneys and the proceeds of said checks and of said negotiable paper so deposited by him—checks in various sums; that also within said period deponent, on behalf of his son, discounted with or sold to said company certain promissory notes for sums less than the amount payable according to the terms of said notes, and deponents said son received credit on the books of said company in sums less than the face of said notes upon the sale thereof or the discount thereof, and deponents said son likewise drew checks against the proceeds of said notes sold or discounted as just mentioned; that on the 7th day of August, 1913, the said Roseville Trust Company was indebted to said Augustus W. Barney, Jr., by reason of the aforesaid transactions, in the sum of \$297.11; that on said day deponent received from said company a certain bank pass book (theretofore issued by said company) and showing the account of said Augustus W. Barney, Jr., with said company, and showing in particular that on said 7th day of August, 1913, said bank was indebted to said A. W. Barney, Jr. on account of the balance remaining due to him after giving him credit for all deposits as aforesaid, up to said day and after deducting therefrom all debits by reason of drafts on said deposits—in the aforesaid sum of \$297.11; that the balance thus shown to be due as just mentioned was correct and was accepted as correct by deponent on said day; that thereafter deponent on

## Exhibit D-2

behalf of his son deposited the following sums with said bank, to wit: on August 7th, \$169.25, on August 9th, \$9.00 and on August 12th, \$107.75, and said A. W. Barney, Jr. drew against his said account in the aggregate in the sum of \$115.12; that by reason of said deposits and drafts on said account there remained due on August 13th and 14th, 1913, the sum of \$467.99; that since the aforesaid bank has been in charge of the Commissioner of Banking & Insurance of the State of New Jersey, deponent has presented said bank book to said bank in order that the same might be "balanced"; that said bank book has been so balanced by the agents of said Commissioner and shows a balance due to deponents said son at the time the said Commissioner went into possession of said bank and thereafter in the sum of \$467.99 as of the 14th day of August, 1913.

That on or about the 6th day of June, 1913, deponent presented to said bank a certain promissory note being one of the notes aforesaid made by deponent in the sum of \$400.00 and endorsed on the back of said note by deponents said son; and delivered said note to said bank; to wit, to Raymond Smith, the cashier and treasurer of said bank and thereupon received on said account with said bank, credit in the sum of \$394.00; that said note was a note payable three months after the date thereof, to wit, June 6, 1913; that said note while signed by deponent, was so signed by deponent merely as an accommodation maker and that that fact was fully known to the aforesaid officer of said bank, to whom said note was delivered; that said note was simply made in the form in which it was made in order that said bank

## Exhibit D-2

10 might have the additional security furnished by deponents liability on the said note; that deponent said son is the person primarily liable on said note and said note and said note should be paid out of the sum of \$467.99, remaining due to deponent's said son from said company as aforesaid. That said note remained in the possession of said bank and passed into the possession of said Commissioner.

That after deduction of the face of said note there will remain due to deponents said son on account of the premised matters, from said company, the sum of \$67.99, together with lawful interest thereon from the 14th day of August, 1913.

20 That deponents said son during the course of his transactions with said company to sign his name as follows: "A. W. Barney, Jr."; and that the bank book or pass book issued by said bank as aforesaid shows an account of said Trust Company with deponents said son as "A. W. Barney, Jr."

That this affidavit is made by deponent by authority of his said son and because of superior familiarity with the facts therein set forth.

A. W. BARNEY, SR.

30 Sworn and subscribed before me, this  
28th day of November, 1913.

James R. Mulligan,  
Master in Chancery of  
New Jersey.

## Points in Appellant's Brief on Argument in Supreme Court

POINT I. The defendants setoff against plaintiff should have been allowed.

POINT II: The insolvency of the Trust Company and the fact that the Commissioner of Banking & Insurance took control thereof cannot affect the result. 10

POINT III. The insolvency of Roseville Trust Company strengthens our right to setoff.

POINT IV. The fact that the Mutual Bank of Roseville purchased practically all assets of Roseville Trust Company, after this suit was commenced, cannot affect the situation.

POINT V. The set off of Barney involves liquidated damages. 20

POINT VI. The "assignment" from Barney to Mutual Bank of Roseville never became effective.

POINT VII. *The* "assignment" can only relate to the surplus of \$67.99 (plus interest) claimed by the defendant, after deduction of the amount of the note (\$400.00) from the amount of the deposit (\$467.99).

POINT VIII. We demand judgment in this Court in the sum of \$67.99, plus interest from August 13th, 1913, plus all costs. 30

POINT IX: To the extent to which Barney never availed himself of the fictitious credit on the books of the Trust Company—fictitious because the Bank was insolvent and continued so to be (page 6 top)—Barney never received the consideration upon the sale of the note.

**Opinion***(Filed, Dec. 21, 1915)*

## NEW JERSEY SUPREME COURT

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JUNE TERM, 1915

|  |   |
|--|---|
| ROSEVILLE TRUST COMPANY,<br>Plaintiff-Appellee,<br>vs.<br>A. W. BARNEY, JR.,<br>Defendant-Appellant. | } |
|--|---|

Argued June term 1915; Decided December,  
 20 1915. On Appeal from the First District Court of  
 Newark.

Before JUSTICES PARKER, MINTURN and KALISCH.

For the appellant, Otto Stiefel.  
 For the appellee, Pierce and Hoover.

The opinion of the Court was delivered by  
 KALISCH, J.

30 The question presented on this appeal is the  
 right of a depositor to set off a deposit to his  
 credit in a bank, in the hands of the Banking  
 Commissioner in the process of liquidation,  
 against an indebtedness due the bank upon a  
 promissory note upon which the appellant was an  
 endorser and for the amount of which note he re-  
 ceived credit in his account with the bank.

40 The case was tried by the Court, sitting without  
 a jury. The trial judge found, among other facts,

## Opinion

that on the sixth day of June, 1913, A. W. Barney, the appellant's father, made a promissory note payable in three months from the date thereof, to his own order for the sum of four hundred dollars, endorsed it in blank and delivered it to his son who likewise endorsed it in blank but with this addition: "For value received, presentation, demand, protest and notice of dishonor is hereby waived;" and that the appellant acting by and through his father delivered the note to the trust company, and in consideration therefor the appellant received a credit on the books of the company in the sum of three hundred and ninety-four dollars; that at that time the appellant was a customer of the trust company, depositing money and checks therein and drawing checks against his account in the regular course of business; that the bank was insolvent at the time it took the note and credited the appellant's account with the proceeds thereof, but that the fact of the insolvency was unknown to the appellant; that the appellant continued to make deposits and draw checks against his account which were paid until the 13th day of August, 1913, when the Commissioner of Banking and Insurance took charge of the trust company because of its insolvency under the provisions of an act entitled "An act concerning trust companies" (4 C. S., p. 5664) as amended by Chapter 171 of the laws of 1913 (P. L. 1913, p. 282).

Among the assets of the bank was found the note in controversy. By the books of the bank it appeared that the appellant had a balance of \$467.99 to his credit, on the 14th day of August, 1913. On the 8th day of September, 1913, the ap-

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## Opinion

pellant drew his check upon the Roseville Trust Company, the appellee, for \$400.00 to the order of the Commissioner of Banking and Insurance and endorsed thereon, to be used to pay note of A. W. Barney, for \$400.00 due 9/8/13, which  
10 check the banking commissioner refused to accept.

On the 30th day of December, 1913, the Chancellor made an order authorizing the Commissioner of Banking and Insurance to sell the business, good will, real and personal and mixed property and assets of every kind and nature, moneys, bills, notes, negotiable instruments, etc., to the Mutual Bank of Roseville.

The plaintiff brought its action on the note in question in January, 1914. The appellant filed  
20 a set-off for the sum of \$467.99, the amount credited to the appellant on the plaintiff's books. The trial judge disallowed the set-off and gave judgment for the plaintiff against the appellant for \$438.00 damages, with costs.

The set-off was properly disallowed.

Although the action is entitled in the name of the trust company, as plaintiff, it is not the real party in interest. The act under which the  
30 Commissioner of Banking and Insurance proceeded against the trust company expressly confers the power on him to prosecute and defend all suits and other legal proceedings in the name of such trust company.

The right of set-off rests upon statute. The statute authorizing a set-off in law relates solely to where there are mutual debts extending, however, the right of set-off to the executors or  
40 administrators of such debtors. 4 C. S., p. 4836.

## Opinion

In construing this statute in *Receivers v. Paterson Gas Light Co.*, 23 N. J. L., 283, a case growing out of insolvency proceedings under the corporation act, Green, C. J., on p. 288 says: "It is clear that the case is not within the provisions of the statute authorizing a set-off at law. As between the plaintiffs and the defendants the claims are not mutual debts. Where there are mutual debts there must be mutual remedies. But the defendants have no claim against the receivers. They could maintain no action against them. Nor could the defendants have judgment against the receivers in this action in case the set-off should exceed the plaintiff's demand." 10

The learned Chief Justice, having declared that the set-off was not authorized by the statute relating to setoffs, on p. 292, in commenting upon the corporation act relating to insolvent corporation, says: "The statute, moreover in cases of mutual dealing between the corporation and any other person or persons expressly authorizes the receivers to allow just set-offs, in favor of such persons, in all cases in which it shall appear to the receivers that the same ought to be allowed according to law." For this reason the set-off was allowed. 20

To the same effect is the construction given to the statute in *Stone v. N. J. & Hudson River Ry. Co.*, 75 N. J. L., 172. For a history of the statute relating to set-offs, see opinion of Mr. Justice Swayze, in *Godkin v. Bailey* (Court of Errors & Appeals) 74 N. J. L., 655. 30

The argument of the appellant for the allowance of the set-off rests upon the false assumption that the Commissioner of Banking and Insurance 40

## Judgment of Affirmance

is a Receiver within the contemplation and control of the Act relating to trust companies (4 C. S., 5664), and that section 25, which defines the powers and duties of Receivers appointed under the act, among other things, provides, that "in  
 10 case of mutual dealings between the corporation and any person to allow a just set-off in favor of such persons in all cases in which the same ought to be allowed according to law and equity," was applicable to the case at bar. But this is clearly not so.

The Commissioner of Banking and Insurance in the proceedings instituted by him against the trust company derived his power and authority from the act of 1913, Chap. 171, p. 282. This act  
 20 created an entirely independent method of procedure against insolvent trust companies, and points out in express terms what the duties and powers of the Commissioner of Banking and Insurance are in such cases. There is no provision in the act, under this procedure, regarding set-offs, as is contained in the original act, relating to trust companies, in cases where receivers are appointed. The provision in the trust act relating to set-offs is not applicable where the procedure  
 30 is such as was instituted in the present case.

The judgment will be affirmed, with costs.

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**Judgment of Affirmance**

Entered, December 27th, 1915.

A judgment of affirmance of the judgment of the First District Court, with costs, was entered in the New Jersey Supreme Court, upon the above  
 40 opinion, on December 27th, 1915.

**Notice of Appeal to Court of Errors  
and Appeals**

(Filed, January 12, 1916)

NEW JERSEY SUPREME COURT

|  |   |              |
|--|---|--------------|
| ROSEVILLE TRUST COMPANY,<br>Plaintiff-Appellee,<br>vs.<br>A. W. BARNEY, JR.,<br>Defendant-Appellant. | } | On Contract. |
|--|---|--------------|

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*To Messrs. Pierce & Hoover, Attorneys of Plaintiff-Appellee:*

TAKE NOTICE, that the defendant appeals from the whole of the judgment entered in this cause, on the following grounds:

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1. The New Jersey Supreme Court did not reverse the judgment of the First District Court of the City of Newark.

2. The New Jersey Supreme Court affirmed the judgment of the First District Court of the City of Newark.

3. The Supreme Court refused to allow the defendants set off. 30

4. The Supreme Court held that the claim set out in the defendants notice of set off in the District Court, could not be the subject of a set off.

5. The Supreme Court affirmed the judgment of the District Court for the full amount of plaintiff's demand, despite the fact that there was a failure of consideration upon the sale of the pro- 40

Notice of Appeal to Court of Errors and Appeals

missory note which is the subject of the action in the District Court.

6. The Supreme Court failed to give judgment in favor of the defendant as demanded and claimed in the defendants said notice of set off, and as demanded upon the appeal to the Supreme Court.

7. The Supreme Court affirmed the judgment of the District Court, despite the fact that said District Court had admitted evidence with respect to the insolvency of plaintiff, upon plaintiff's endeavor to defeat defendant's claim of set off.

8. Because the Supreme Court failed to determine that the suit below involved an action by plaintiff in the name of the plaintiff against defendant and (substantially) a cross action by defendant against plaintiff, which cross action was founded upon a demand which could with propriety be the subject-matter of the "common counts;" and it being an admitted fact in the case that at the time Roseville Trust Company ceased doing business such Trust Company was indebted to the defendant in the amount alleged in the notice of set off, and the said indebtedness not having been paid, liquidated or discharged at the time of the commencement of the suit below, the claim of set off should have been allowed in full to extinguish plaintiff's demand and to become the basis of a judgment in favor of defendant for the excess of defendant's demand over plaintiff's demand.

OTTO A. STIEFEL,  
Attorney of defendant-appellant,  
A. W. Barney, Jr.

