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NOTICE OF APPEAL AND GROUNDS OF APPEAL.

New Jersey Supreme Court

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff*, *vs.* COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Appeal and Grounds of Appeal.*

To Atlantic City National Bank, a corporation of the United States of America, plaintiff, or Heine & Laird, its attorneys.

TAKE NOTICE that the defendant, Commercial Lumber Company, a corporation, hereby appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above-entitled matter on the following grounds, to wit:

1. That the affidavits filed herein by the plaintiff and defendant presented a question of fact for a jury;

2. That the affidavits filed herein by the defendant presented sufficient facts to rebut the presumption that the plaintiff was a holder in due course of the negotiable instrument sued upon;

3. That the order for summary judgment entered herein was improvidently entered on the

ground that the whole case presented a question of fact for the jury and not a question of law for a Court.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

SUMMONS.

The State of New Jersey to Commercial Lumber Company: YOU ARE (L. S.) SUMMONED to answer the annexed complaint of Atlantic City National Bank, in an action at law in the New Jersey Supreme Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HON. WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court at Trenton, this eleventh day of December, nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

HEINE & LAIRD,
Attorneys.

COMPLAINT.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff*, *vs.* COMMERCIAL LUMBER COMPANY, a corporation, *Defendant*.	*Action at Law.* *Complaint.*

Plaintiff, a corporation of the United States of America, having its principal office in Atlantic City, New Jersey, says:

1. It demands from the defendant the sum of $1,112.35 on a certain promissory note together with $2.72 protest fees on said note of which said defendant is the maker and of which the plaintiff is a holder in due course, a copy of said note being the following:

Complaint.

COLUMBUS TRUST COMPANY

Newark, N. J. Dec. 29th, 1928

Pay to the order of ATLANTIC WOODWORKING COMPANY $1112.35....1112 and 35cts...

Dollars

COMMERCIAL LUMBER COMPANY

By John J. Gallagher,
President.

Endorsements:
For deposit only
to the Credit of
Atlantic Woodworking Co. Inc.

Judgment is claimed in the amount of $1115.07 together with interest and costs of suit.

HEINE & LAIRD,
Attorneys of Plaintiff.

ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff,* *vs.* COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*	*Action at Law.* *Answer.*

The defendant, having its principal office in the City of Newark, County of Essex and State of New Jersey, answering the complaint of the plaintiff filed herein, says that:

1. It admits the execution of the instrument set out in the complaint but denies that said instrument is a promissory note and denies that the plaintiff is a holder in due course of said check.

FIRST SEPARATE DEFENSE.

The plaintiff herein, a banking institution, accepted said check for deposit to the credit of the account of its depositor, the Atlantic Woodworking Co., Inc., and in so doing the said plaintiff acted only as the depositor's agent and accepted said item for deposit and credit, subject to final payment thereof in cash or solvent credits. This plaintiff has no interest in said check except as the agent of the Atlantic Woodworking Co., Inc., for the collection of same.

Answer.

SECOND SEPARATE DEFENSE.

When said check was returned to the plaintiff herein unpaid and protested, plaintiff herein charged said item back against the account of its depositor, the Atlantic Woodworking Co., Inc., and therefore said plaintiff has no further interest in said check, and is no longer the holder thereof.

THIRD SEPARATE DEFENSE.

The defendant herein received no consideration for the making of said check.

FOURTH SEPARATE DEFENSE.

Said check was received by the plaintiff herein "for deposit only to the credit of Atlantic Woodworking Co., Inc.," as appears by the endorsement on said check and the plaintiff herein did not become the owner of said check prior to maturity and for a valuable consideration, but on the contrary accepted said check merely as the agent of the payee thereof for collection.

FIFTH SEPARATE DEFENSE.

On or about December 29, 1928, the Atlantic Woodworking Co., Inc., the payee of said check, was indebted to the defendant herein in the amount of said check, on a certain note which was then and there due and payable at the plaintiff. The Atlantic Woodworking Co., Inc., requested the defendant to send it its check in the amount of said note and interest, which it would deposit in its account with the plaintiff so that said note would be paid on presentation thereof, and would not be protested for nonpayment. In accordance with said request, the

defendant did send the check on which this suit is based and in return therefor the defendant was to receive from the Atlantic Woodworking Co., Inc., its certified check for the amount of said note, but defendant has never received said certified check from the Atlantic Woodworking Co., Inc.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

NOTICE OF MOTION TO STRIKE OUT ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff,* *vs.* COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Motion to Strike Out Answer.*

To Stein, McGlynn & Hannoch, attorneys of defendant, or to whom it may concern:

SIRS:

PLEASE TAKE NOTICE that we shall apply to his Honor, William S. Gummere, Esquire, Chief Justice of the Supreme Court, at the Hall of Records, on the 18th day of January, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the answer filed by you in the above-stated cause, and for an order for summary judgment for the amount of the check, together with interest and protest fees, for which the complaint herein was brought, on the ground that the allegations contained in the said answer are sham and frivolous, untrue in fact and do not constitute a legal defense and we shall support our application by the affidavit of the plaintiff hereto attached.

HEINE & LAIRD,
Attorneys for Plaintiff.

Affidavit of Lemuel E. Conover.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff,* *vs.* COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*	*Action at Law.* *Affidavit.*

STATE OF NEW JERSEY, COUNTY OF ATLANTIC, } *ss.*

LEMUEL E. CONOVER, of full age, being duly sworn, deposes and says that:

1. I am the Vice-President of the Atlantic City National Bank, the plaintiff in the above action and am familiar with all the matters concerning which this suit arose.

2. On the second day of January, 1929, a note maturing on January 2, 1929, and made by the Atlantic Woodworking Company and payable to the Commercial Lumber Company, the above-named defendant, in the amount of $1,113.45 was delivered to the plaintiff to be paid by the plaintiff on the due date out of the account of the Atlantic Woodworking Company with the plaintiff.

3. On the second day of January, 1929, the beforementioned Atlantic Woodworking Company stated it was unable to meet said notes and produced the check, or bill of exchange upon

which this suit was brought and which is annexed hereto, delivered same to the abovementioned plaintiff on the second day of January, 1929, endorsing same in blank to the abovementioned plaintiff on said date, the abovementioned plaintiff thereupon agreeing to pay the amount of the note and to look for its compensation to the Commercial Lumber Company, the maker of the beforementioned check.

4. On January 2, 1929, the plaintiff paid the amount of the beforementioned note which was $1,113.45 but the check annexed hereto, which had in the meantime been deposited for collection, was returned to the plaintiff marked "insufficient funds."

5. The check which is annexed hereto and upon which this suit was brought was delivered and endorsed to the plaintiff on the second day of January, 1929, before the beforementioned note was due.

6. The plaintiff in this transaction was not the agent of its depositor, Atlantic Woodworking Company but became the actual owner and holder in due course of the annexed check.

7. The plaintiff was compelled to pay an additional fee of $2.72 protest fees. I believe that there is no defense to the above action.

LEMUEL E. CONOVER.

Subscribed and sworn to before
me this 11th day of January,
1930.

JOHN D. MCMULLIN,
Master in Chancery of New Jersey.

Schedule "A."

SCHEDULE "A."

COLUMBUS TRUST COMPANY

Newark, N. J. Dec. 29th, 1928.

Pay to the order of ATLANTIC WOODWORKING COMPANY $1112.35.....1112 and 35 cts. .....Dollars

COMMERCIAL LUMBER COMPANY

By John J. Gallagher,
President.

Endorsements:

For deposit only
to the Credit of
Atlantic Woodworking Co. Inc.

Affidavit of Mary G. Monaghan.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff,*

vs.

COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*

Action at Law.

Affidavit.

STATE OF NEW JERSEY, COUNTY OF ESSEX, } *ss.*

MARY G. MONAGHAN, being duly sworn according to law, upon her oath deposes and says:

1. That I am the Secretary-Treasurer of the Commercial Lumber Company, a corporation of New Jersey, and the defendant in the foregoing action, and as such am familiar with the transactions out of which this litigation arises, and am duly authorized to make this affidavit.

2. At the time the check on which this suit is based was given to the Atlantic Woodworking Co., Inc., the said Atlantic Woodworking Co., Inc., the payee of said check, was indebted to the defendant on a certain note in a sum equal to the amount of the said check, which said note was at the time of the giving of the said check, presently to become due.

3. The Atlantic Woodworking Co., Inc., being desirous of having said note paid and prevent-

ing said note from being protested, and thus maintaining its credit standing, requested the defendant herein to give it its check for the amount of said note, which it, the Atlantic Woodworking Co., Inc., would deposit to its account with the plaintiff bank in order to make said note good when it should be presented for payment.

4. In return for the giving of said check, for which this defendant received nothing, the Atlantic Woodworking Co., Inc., being then indebted to this defendant in the amount of said check in the aforementioned note, the said Atlantic Woodworking Co., Inc., agreed that within the next few days following the payment of said note, it would send to the defendant herein its certified check for the amount of the check so advanced by the defendant herein.

5. The defendant herein did not receive the certified check from the Atlantic Woodworking Co., Inc., within the time agreed upon, and therefore stopped payment on its check, being the check upon which this suit is brought.

6. I have read the affidavit filed herein by the plaintiff and it is not true that the check on which this suit is brought is endorsed "in blank," but on the contrary the said check as appears by the copy thereof annexed to the complaint filed herein and also annexed to the affidavit, is endorsed with the restrictive endorsement, "For deposit only to the credit of the Atlantic Woodworking Co., Inc." I therefore verily believe and charge the fact to be, that the plaintiff herein did not at any time become the owner of said check at all, but at all times was merely the agent for its

depositor, the payee of said check, for the collection thereof.

7. Moreover, I believe that the note described in the affidavit of the plaintiff was paid out of the general funds on deposit with the plaintiff to the credit of the Atlantic Woodworking Co., Inc., and that the check on which this suit is brought was deposited in said general account with other items.

8. When the check was returned to the plaintiff herein unpaid by reason of the fact that the defendant stopped payment on the same, the plaintiff herein charged the amount of said check back to the account of the Atlantic Woodworking Co., Inc., and it was therefore no longer the holder of the said check and has no interest therein, but is bringing this suit on behalf of and for the benefit of the Atlantic Woodworking Co., Inc., and claiming to be a holder in due course of said check, so that this defendant will not be able to avail itself of its just and legal defense to the said check.

MARY G. MONAGHAN.

Sworn to and subscribed before me,
this 16th day of January, 1930.

LOIS E. WHITE,
A Notary Public of New Jersey.

Supplemental Affidavit of Lemuel E. Conover.

Supplemental Affidavit of Lemuel E. Conover, Jr.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff,* *vs.* COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*	*Action at Law.* *Affidavit.*

STATE OF NEW JERSEY, COUNTY OF ATLANTIC. } *ss.*

LEMUEL E. CONOVER, JR., of full age, being duly sworn on his oath according to law deposes and says:

1. I am the Vice-President of the Atlantic City National Bank, the plaintiff in the above action and am familiar with the transactions out of which this suit arose.

2. On the 2nd day of January, 1929, a note maturing on that date and made by the Atlantic Woodworking Company and payable to the Commercial Lumber Company, the above named defendant, in the amount of $1,113.45 was delivered to the plaintiff to be paid by the plaintiff on the due date out of the account of the Atlantic Woodworking Company with the plaintiff.

3. When this note was first presented to the plaintiff for payment, payment was refused inas-

much as the account of the Atlantic Woodworking Company was insufficient to cover the same, but later a check drawn by the Commercial Lumber Company to the order of the Atlantic Woodworking Company in the amount of $1,112.35 was received by the bank and thereafter on the 2nd or 3rd day of January, 1929, on the strength of said check, upon which this suit is brought, a copy of which is annexed hereto, plaintiff actually paid the note in question to the Guarantee Trust Company Atlantic City which was the bank which presented it to the plaintiff for payment.

4. In a previous affidavit made by me in this cause it was erroneously stated that this check was endorsed in blank. This is an obvious error as the check was actually endorsed for the credit of the Atlantic Woodworking Company and was, as a matter of bookkeeping credited to their account when deposited.

5. There had been a previous course of dealing between the parties in which transactions similar to that above outlined had been consummated, that is to say, previous notes of the Atlantic Woodworking Company to the order of the Commercial Lumber Company had been paid by means of checks received from the Commercial Lumber Company and deposited to the credit of the Atlantic Woodworking Company by the plaintiff and in the present instance plaintiff in paying the note of the Atlantic Woodworking Company to the Guarantee Trust Company of Atlantic City actually paid the note out of its funds and looked for its compensation to the Commercial Lumber Company, the maker of the above-mentioned check.

6. After payment of the said note by the plaintiff, the check in question, which in the mean-

time had been deposited for collection, was returned to the plaintiff marked "insufficient funds" as of January 5, 1929.

7. The plaintiff in this transaction was not the agent of its depositor, the Atlantic Woodworking Company, but became the actual owner and holder in due course of said check having actually paid out the amount of said check to the Guarantee Trust Company, Atlantic City.

8. I am informed, and believe that the note presented for payment was originally discounted by the defendant at the Commercial Trust Company of Jersey City and that the said Guarantee Trust Company of Atlantic City paid the Commercial Trust Company, who therewith cancelled the obligation of this defendant to them.

9. Plaintiff was compelled to pay an additional fee of $2.72 protest fees.

I believe that there is no just and legal defense to the above action.

LEMUEL E. CONOVER, JR.

Sworn and subscribed before me,
this 28th day of February, 1930.

FLORA J. COXE,
Notary Public of N. J.

Affidavit of Harry T. Sickler.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff,* *vs.* COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*	*Action at Law.* *Affidavit.*

STATE OF NEW JERSEY, COUNTY OF ATLANTIC, } *ss.*

HARRY T. SICKLER, of full age, being duly sworn on his oath according to law deposes and says:

1. I am the Treasurer of the Guarantee Trust Company of Atlantic City.

2. Our records show that on the 28th day of December, 1928, we received for collection from the Commercial Trust Company, Jersey City, a certain promissory note made by the Atlantic Woodworking Company for $1,113.45, the due date of said note being January 2, 1929, and the place of payment the Atlantic City National Bank.

2. That on January 2nd said note was presented by us to said Atlantic City National Bank and that we actually received payment of said note from the Atlantic City National Bank on January 3, 1929, and that we in turn transmitted

said funds to the Commercial Trust Company, Jersey City, N. J., on the 9th day of January, 1929.

HARRY T. STICKLER,

Sworn and subscribed before me,
this 4th day of March, 1930.

IRVIN R. GESTE,
Notary Public of N. J.

ORDER FOR SUMMARY JUDGMENT.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, *Plaintiff,*	*Action at Law.*
vs.	*Order for Summary Judgment.*
COMMERCIAL LUMBER COMPANY, a corporation, *Defendant.*	

It appearing by affidavits filed in this cause that the defense made by defendant's answer is frivolous, and the defendant after due notice having failed to show such facts as entitled it to defend, it is on this 15th day of May, 1930,

ORDERED, that the defense be struck out, and that final judgment be entered for the plaintiff in the sum of $1,207.05 and costs.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
Chief Justice.

On motion of

HEINE & LAIRD,
Attorneys for Plaintiff.

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

New Jersey Court of Errors and Appeals

Atlantic City National Bank, a corporation of the United States of America, *Plaintiff,* *vs.* Commercial Lumber Company, a corporation, *Defendant.*	*On Appeal.* *Action at Law.*

BRIEF OF DEFENDANT-APPELLANT.

The Facts.

This appeal brings before this Honorable Court for review a judgment entered pursuant to an order made in the Supreme Court by the Chief Justice, striking out the answer filed herein by the defendant-appellant and ordering summary judgment on plaintiff's complaint, on the ground that the allegations contained in said answer were frivolous.

The complaint was in the usual form of a complaint on a negotiable instrument, with the exception that the instrument sued upon was a check, whereas it was referred to in the complaint as a note.

The answer filed by the defendant admitted the execution of the check but denied that the plaintiff was a holder in due course and set up as affirmative matter that the plaintiff, a banking institution, had accepted the check upon which suit was brought for deposit to the account of its depositor, the Atlantic Woodworking Co., Inc., and in so doing had acted only as its depos-

itor's agent and had accepted the check for deposit and credit subject to final payment in cash or solvent credits. This defense further averred that the plaintiff had no interest in the check except as the agent of its depositor for its collection.

The second separate defense alleged that when the check upon which suit was brought was returned to the plaintiff unpaid, the plaintiff thereupon charged the check back against the account of its depositor, the Atlantic Woodworking Co., Inc., and as a consequence had no further interest in the check and was no longer the holder of it.

The third separate defense set up that the defendant had received no consideration for the making of the instrument sued on.

The fourth separate defense was substantially the same as the first, except that it included a reference to the endorsement appearing on said check, to wit, "for deposit only to the credit of Atlantic Woodworking Co., Inc.," with the further allegation that the plaintiff did not become the owner of the check for a valuable consideration, but accepted it merely as its depositor's agent for collection.

The fifth separate defense alleged that the Atlantic Woodworking Co., Inc., being indebted to the defendant in the amount of the check on a note, which was then and there due and payable at the plaintiff bank, the Atlantic Woodworking Co., Inc., requested the defendant to send its check in the amount of said note and interest, which it would deposit in its account with the plaintiff, so that the note would be paid on presentation and would not be protested. Accordingly, defendant did send a check on which

this suit was brought, and in return therefor the defendant was to receive from the Atlantic Woodworking Co., Inc., its certified check for the amount of the note, but that the defendant has never received the said certified check from the Atlantic Woodworking Co., Inc.

Shortly after the filing of the answer plaintiff caused to be served upon the defendant's attorneys a notice of motion wherein they advised that they would apply to the Court for an order striking out the answer and for summary judgment on the ground that the allegations contained in the answer were sham and frivolous, untrue in fact and did not constitute a legal defense. Annexed to the notice of motion was an affidavit by Lemuel E. Conover, wherein he described himself as Vice-President of the plaintiff and familiar with the case. He described a note of the Atlantic Woodworking Co., Inc., payable to the order of the defendant which was due on January 2, 1929, at the plaintiff bank. He then proceeded to describe the check which he swore was delivered to his bank by the Atlantic Woodworking Co., Inc., endorsed in blank, and that thereupon the plaintiff agreed to pay the note and look for its compensation to the defendant. The affidavit further stated that the note was paid but the check was returned marked "insufficient funds."

The defendant appeared in court on the day mentioned in the notice, January 18, 1930, and presented a copy of its affidavit in support of its answer to plaintiff's attorneys. The affidavit set forth in brief that the affiant was the Secretary-Treasurer of the defendant and familiar with the transactions out of which this suit arose. The affidavit further set forth that at the time the check in suit was given to the Atlantic Wood-

working Co., Inc., the latter was indebted to the defendant on a note in a sum equal to the amount of the check, and that the note was, on the date of the check, presently to become due. That upon the earnest solicitation of the Atlantic Woodworking Co., Inc., the defendant finally gave its check to the Atlantic Woodworking Co., Inc., to make good the note in order that the Atlantic Woodworking Co., Inc. would not be embarrassed by having the note protested. That the defendant received nothing for the check and that the Atlantic Woodworking Co., Inc. agreed that within the next few days following the payment of the note it would send to the defendant its certified check for the amount of the check so advanced by the defendant. That the defendant never received this certified check and therefore stopped payment on its check. The affidavit called to the attention of the Court the fact that in the plaintiff's affidavit the check was described as being endorsed "in blank" and that, on the contrary, the check, according to the copy of it annexed to the complaint was actually endorsed "for deposit only to the credit of the Atlantic Woodworking Co., Inc." The affidavit further set forth that the plaintiff never became the actual owner of the check, but on the contrary was merely the agent of its depositor for its collection, and that the note in question was paid out of the general funds of the maker on deposit with the plaintiff, and that the check was deposited in said general account with other items, and when the check was returned unpaid the plaintiff charged the amount of the check to the account of its depositor and was therefore no longer the holder of it and had no interest in it but was bringing the suit on behalf of and for the benefit of its depositor, and claiming to be a holder in due course so that the defendant

would not be able to assert its just and legal defense to the action on said check.

The argument on the motion was thereupon adjourned at the request of the plaintiff's attorneys until May 15, 1930, at which time plaintiff served upon the defendant two more affidavits, one by Lemuel E. Conover, who had made the previous affidavit, in which he corrected certain statements in his first affidavit, particularly to the effect that the check had been endorsed "in blank." The affidavit further stated that there had been a previous course of dealings between the parties in which similar transactions had taken place, in other words, that previous notes of its depositor had been paid on the strength of checks of the defendant, and that the plaintiff when it paid the note in question actually paid it out of its funds and looked for its compensation to the defendant. It was further stated in the affidavit that the note had been originally discounted by the defendant at the Commercial Trust Company of Jersey City. There was also presented to the Court an affidavit by Harry T. Sickler, who described himself as the Treasurer of the Guaranty Trust Company of Atlantic City. The affidavit was simply to the effect that on December 28, 1928, his bank had received for collection from the Commercial Trust Company of Jersey City the note in question and had presented it to the plaintiff and received payment therefor, which it in turn had returned to the Commercial Trust Company of Jersey City.

The matter was duly argued before the Chief Justice and after consideration thereof an order was entered striking out the answer as frivolous and for summary judgment, from which order and the judgment entered thereon defendant appeals.

THE ARGUMENT.

The gravamen of the argument of the defendant at present in this Court rests almost exclusively on its contention that the affidavits which were before the Court and the matters and things set forth in the appellant's answer presented a pure question of fact which should have been left to the determination of a jury sitting as judges of the fact.

At the outset we believe that the matter of the affidavit of Harry T. Sickler may be disregarded as entirely irrelevant, and for the further reason that there is no dispute as to the fact that the note in question was actually paid by the plaintiff.

The case therefore narrows itself to the consideration of the affidavits of the officers of the appellant and appellee, and in this argument we shall consider only the supplemental affidavit of Conover, as the first one is quite obviously replete with misstatements, unintentional to be sure, but nevertheless erroneous.

It was admitted in the argument before the Chief Justice that the only question necessary for the Court's decision was whether or not the appellant, under the facts set forth in both affidavits, had not as a matter of law rebutted the presumption that the appellee was a holder in due course of the instrument sued upon.

It was admitted that if the appellee was such a holder, the matters and things set forth in the appellant's answer by way of defense to the action were insufficient in law. It was, however, strongly contended and the contention is reiterated in this Court that a reading of the affidavits indicated clearly that a grave question of fact

existed in this case as to whether or not the appellee was a holder in due course of the check in question.

It is most strongly urged on behalf of the appellant that upon the affidavits presented by the appellant and appellee, it became a question of fact for the determination of a jury as to whether or not the appellee had paid full value for the instrument, as to the amount of money in the account of its depositor at the time the note in question was paid, and also at the time the check was returned unpaid, and that none of these questions were properly decided by the lower Court in a summary manner on mere affidavits.

The appellant on such a hearing had no opportunity to obtain testimony from the mouths of the plaintiff's witnesses; it had no right of cross examination of the plaintiff's witnesses; it had no opportunity to subpoena plaintiff's book of account so far as they had reference to its dealings with its depositor, the payee of the check, and on the whole was foreclosed of the right which it otherwise would have been in a position to exercise in a trial of the matter before a jury.

It was alleged in the affidavit provided on behalf of the appellant that the check in question had been charged back to the account of the depositor and that therefore the appellee was no longer the holder of it.

It is significant to note that in the supplemental affidavit of Conover no mention is made of the amount of the balance in the account of its depositor, either at the time the note was paid or at the time the check was returned protested for non-payment, and this particularly in view of the universal custom among banks of invariably looking to their own depositors for re-

imbursement when an item which has been presented for deposit has been returned unpaid. Undoubtedly when the check in suit was returned unpaid it was charged against the account of the Atlantic Woodworking Co. Inc. The question naturally arises what was the balance in that account at the time this check was charged against it, and if this check was charged against it was this balance still a credit balance, or did it then constitute an overdraft, and if so, what was the amount of the overdraft.

The affidavit of the appellee is silent on this point although the allegation is contained in the affidavit presented on the behalf of the appellant; in fact, it is admitted in the affidavit of Conover that the check was actually credited to the account of the Atlantic Woodworking Co. Inc. when deposited by it.

It is contended on behalf of the appellant that the endorsement on the back of the check in question was a restrictive endorsement, and that this endorsement alone, standing by itself and without any reference to the affidavits, conclussively rebutted the presumption existing in favor of the holder, that it was a holder in due course of the instrument.

Section 36 of the Uniform Negotiable Instruments Act, 3 Compiled Statutes, page 3739, is as follows:

> "An endorsement is restrictive which either: I. prohibits the further negotiation of the intrument; or II. constitutes the endorsee the agent of the endorsers; or III. vests the title in the endorsement in trust for or to the use of some other person; but the mere absence of words implying power to negotiate does not make an endorsement restrictive."

It has been held that endorsements "for credit to the account of," "for deposit only," "for deposit" constitute restrictive endorsements.

See:

Werner Piano Co. v. *Henderson,* 180 S. W. 495;

Gulbranson-Dickenson Co. v. *Hopkins,* 170 Wis. 326, 175 N. W. 93;

Sioux City First National Bank v. *Morrell,* 221 N. W. 95;

Hoffman v. *First National Bank,* 46 N. J. L. 604.

Section 37 of the Negotiable Instruments Act, 3 Compiled Statutes, page 3739, reads as follows:

> "A restrictive endorsement confers upon the endorsee the right: 1. To receive payment of the instrument; 2. To bring any action thereon which the endorser could bring; 3. To transfer his rights as such endorsee when the form of the endorsement authorizes him to do so, but all subsequent endorsees acquire only the title of the first endorsee under the restrictve endorsement."

Therefore under the second subdivision of this Section the appellant contends that the only right which the appellee acquired by the endorsement to it of the check with the restrictive endorsement was to bring any action thereon that the endorser could bring, but that by obvious legislative intendment such an action would be subject to any and all defenses by the maker which would be good against the original payee. Among others the defense of want of consideration for the making of the instrument was certainly available in this case to the appellant. The principle is stated in 8 *Corpus Juris,* page 366, as follows:

> "An endorsement using the words 'for collection' or words of similar import, is re-

> strictive and merely makes the endorsee agent for the endorser to collect the paper, but does not vest in him the legal title to the paper, nor authorize him to sell or to endorse the paper to another although it is held that such an endorsement transfers a sufficient title to support an action by the endorsee."

A large number of cases are cited in support of this proposition among which are the following:

> *Clarke County Bank* v. *Gilman,* 30 N. Y. S. 1111, affirmed 153 N. Y. 634;
>
> *Freemans National Bank* v. *National Tube Works,* 151 Mass. 413; 24 N. E. 779.

The case of *National Butchers & Drovers Bank* v. *Hubbell,* 117 N. Y. 384, is pertinent on this point. In this case the paper was endorsed as follows: "Pay Wilkinson & Co. an order for collection for account of National Butchers & Drovers Bank of the City of New York."

The action was by the plaintiff against the defendant who was a trustee in bankruptcy or receiver of Wilkinson & Co. and was an attempt by the plaintiff to follow into his hands the exact moneys represented by the drafts, notes, etc. forwarded to Wilkinson & Co. for collection, so that these same moneys might be paid over to the plaintiff, rather than have the plaintiff in the position of a general creditor.

The Court by Peckham, Justice, said:

> "The defendant, Hubbell, as one defense to the claim of the plaintiff, insists that Wilkinson & Co. upon the receipt by them, of the various checks and drafts or other pieces of paper payable on demand, and upon the crediting of the amounts thereof to the plaintiff on their books, without waiting for the payment of same, became the owners

thereof, and that these facts amounted to a transfer of the title to the paper or its proceeds, to Wilkinson & Co. In that, we think he is mistaken. The indorsement upon each piece of paper was for collection simply, and by virtue of that indorsement, no title passed to the firm, but, on the contrary, it became simply the agent of the plaintiff to present the paper, demand payment thereof and remit to it. Under such circumstances the title to the paper remained in the party sending it.

Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Dickerson v. Wason, 47 *Id.* 439, White *v.* National Bank, 102 U. S. 658.

The letter accompanying the inclosures of paper amounted simply to a direction to credit after the collection was made; and up to the time that the funds were acually received by the firm, it certainly would make no alteration in the law relative to indorsement for collection only.

Nor does the finding of the learned justice at Special Term as to the custom pursued between the parties alter the law in regard to the title to the paper before the funds arising from the payment thereof were acually received by the firm. The finding shows that the credit was a provisional one only. It was a mere matter of bookkeeping. It would seem to have been more in the form of a memorandum of the different pieces of paper received; because if any were not paid, such as went to protest were at once charged back against the plaintiff and returned to it, with expenses of protest charged to it. The firm never became absolutely responsible to the plaintiff for the amount of these collections until the collections were actually made and the proceeds received by them.

The property in these different pieces of paper, therefore, never vested in them and the firm never purchased them or advanced

any money on them. Hence the firm never owned them."

In a later case, *Clarke County Bank* v. *Gilman,* reported in 117 N. Y. S. 1111, at page 1116, the Court quotes with approval a portion of the opinion in *Bank* v. *Hubbell, supra,* and then goes on to say as follows:

> "So, here, the defendants intended the credit to stand, provided the check was paid, but not otherwise. It was a conditional credit—a matter of convenient bookkeeping. A mere statement of the facts, such as has been made, makes it sufficiently clear that there is no foundation for the claim that the defendants purchased the paper. The transaction was, in effect, an advancement on general account, which, both on principle and authority, did not operate to divest the plaintiff of nor invest the defendants with title to the check."

In the case of *First National Bank* v. *John Morrell & Co.,* reported 221 N. W. 95 (a North Dakota case), the defendant was a depositor in a bank and had given to that bank early in January, 1924, some twenty checks totalling $3,900 all endorsed as follows: "Pay to the order of Sioux Falls National Bank for deposit only. John Morrell & Co." On January 11, 1924, the bank suspended payment, whereupon the defendant wired the makers of all the checks to stop payment thereon and thereafter the defendant collected the amounts thereof, direct. This was an action by a correspondent bank seeking to recover the amounts of the checks of which it claimed to be the owner.

The Court, speaking through Brown, Justice, said as follows:

> "Plaintiff, in accordance with a custom between it and the Sioux Falls Bank, credited the latter conditionally with the amount

of the checks, and forwarded them for collection to banks in the localities on which they were drawn * * * The dishonored checks were returned to plaintiff, and plaintiff brings this action, claiming that defendant is liable to it as indorser of the checks

* * * * * * * *

Appellant contends that, because defendant received credit in his account in the Sioux Falls National Bank for the amount of the checks, the relation of debtor and creditor existed between defendant and the bank; that the bank became the owner of the checks, and that, by its indorsement of them to plaintiff, plaintiff became the owner of the checks, with a right of recourse, in the event of their dishonor, against any prior indorser. But this contention entirely ignores the contract between defendant and the Sioux Falls Bank, created by the indorsement on the checks. The indorsement 'for deposit only' is a restrictive indorsement, and clearly vests title in the indorsee in trust for the indorser. Such an indorsement confers upon the indorsee the right to transfer its rights as indorsee, because the indorsement authorizes payment 'to the order of Sioux Falls National Bank'; but the subsequent indorsee, (in this case, plaintiff) acquires only the title of the first indorsee under the restrictive indorsement, and, irrespective of the directions contained in the letters of transmittal, plaintiff could only have the rights of an agent or trustee for the defendant, clothed with authority to collect the checks."

Another case which is in point and to which appellant desires to call the Court's attention is that of *Werner Piano Co.* v. *Henderson & Reese,* reported in 180 S. W. 495 (an Arkansas case). The notes involved in this litigation were payable to the Bernard Mfg. Co. and endorsed by it "pay to the order of the First National

Bank, Iowa City, Iowa, for credit account of Werner Piano Company."

The opinion of the Court was delivered by Wood, Justice, who speaks as follows:

"Under Section 36 of the Law of Negotiable Instruments provides:— 'An indorsement is restrictive which either, * * * (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person.' Under this statute the indorsement on the notes in suit was a restrictive indorsement. It was a specific direction to pay to the order of the First National Bank 'for the credit' or 'on account of' the appellant, and thus was a limitation upon the power of the indorsee to use the proceeds of the note in any other manner.

In 3 R. C. L. p. 972, speaking of the restrictive indorsement under negotiable instruments law, it is said:

'Such an indorsement may consists in a direction to pay "to my use" "on account" of the indorser, "to the credit of" the indorser, or another.'

Under the statute, (Section 37) a restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument, (2) to bring any action thereon that the indorser could bring.' The indorsement under review was tantamount to an indorsement to the bank 'for collection, proceeds to be credited to the account of' appellant. It was said in 3 R. C. L. p. 973:

'The contract in such case is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment to his use. The contract constitutes the indorsee the agent of the indorser to present the paper, demand and receive payment, and remit the proceeds or apply as directed.'

> It follows that the Court should have declared as a matter of law that the appellant was not an innocent purchaser for value of the notes in suit, inasmuch as it had notice, by the restrictive indorsement, of any defenses that the makers of the notes might have as against the payee."

To the same effect is *National City Bank* v. *Westcott,* 118 N. Y. 468, page 475, where the Court makes this significant statement:

> "The restrictive indorsement denied to the defendant the apparent title, and rendered the check non-negotiable, of which the plaintiff was advised by the restrictive indorsement. The defendant company took no title to it and could transfer none."

The appellant respectfully contends that the endorsement of the check on which this suit is based, to wit, "for deposit only to the credit of" was decidedly a restrictive endorsement and that this endorsement alone prevented the appellee from ever becoming a holder in due course of the paper.

The Negotiable Instruments Act itself, without regard to the large number of cases cited above, defines in unmistakable terms the character of a restrictive endorsement and the rights of a holder of an instrument by virtue of a restrictive endorsement.

Therefore, since the endorsement on the instrument was a restrictive endorsement, and since the Negotiable Instruments Act limits the right of the holder under such an endorsement to the bringing of any action thereon that the endorsee could bring, it is obvious that the holder of an instrument by such an endorsement is subject to the same defenses as the original payee would be if the action were brought in his name. The whole intent of the statute is to make one who

acts under a restrictive endorsement the mere agent of the payee for the collection of the instrument.

It is therefore respectfully submitted that the answer filed herein by the appellant should not have been stricken out, but that the case should have been held for trial by jury. The making, therefore, of the order for summary judgment was legal error which entitles the appellant to a reversal of the judgment in this court.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant-Appellant.

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61.

New Jersey Court of Errors and Appeals

ATLANTIC CITY NATIONAL BANK, a corporation of the United States of America, Plaintiff, vs. COMMERCIAL LUMBER COMPANY, a corporation, Defendant.	On Appeal Action at Law.

BRIEF OF PLAINTIFF-APPELLEE.

Statement of Facts.

If this transaction is not a conscious effort to defraud on the part of the defendant, it bears every ear-mark of the same and inasmuch as the law of this case depends in a large measure on the intention of the contracting parties, we feel it permissible to call to the attention of this court that this same defendant, the Commercial Lumber Company, has attempted in other instances and on other banks to practice the same course of dealing that is apparent in the instant case and we would refer this court to the case of Miners Bank of Wilkes-Barre vs. Commercial Lumber Company in the New Jersey Supreme Court, Essex Circuit, case #205 on the court list of that county, wherein a verdict was directed against the defendant on October 2, 1930, and also to the case of Montclair Trust Company vs. Commercial Lumber Company,

in the Essex County Circuit Court, wherein the defendant's answer was stricken out and judgment final entered on April 26, 1930, both of which cases are on similar lines as the pleadings will indicate.

Briefly summarized, the facts are that a concern known as the Atlantic Woodworking Company owed a debt to the Commercial Lumber Company which was evidenced by a promissory note held by the latter and discounted by them with the Columbus Trust Company and due January 2, 1929. The Atlantic Woodworking Company being unable to meet this note when due informed the Commercial Lumber Company of this state of facts whereupon the Commercial Lumber Company sent to the Atlantic Woodworking Company its check to cover the amount of the note which check was drawn on the Columbus Trust Company and was dated December 29th, 1928 or two business days before the note was to become due at Atlantic City. The affidavit filed by the plaintiff in support of its motion to strike out the defendants' answer and to enter summary judgment shows that payment of the note in question was refused by them when the said note was presented on January 2, 1929 by reason of the fact that Atlantic Woodworking Company's account was insufficient but that later in the day the check beforementioned was deposited in the Atlantic Woodworking Company's account and was treated by the plaintiff bank as cash in that the note in question was immediately paid in full to the representative of the Columbus Trust Company of Jersey City on the strength of the check in question. Thereafter the Commercial Lumber Company either stopped payment on this check or the check was protested for insufficient funds, it being immaterial to this issue as to which was the true fact.

Apart from the dispute on this immaterial point, there seems to be no facts in dispute between the parties, so that the sole questions in the case are whether or not the plaintiff bank became the owner of the check in question so that the alleged defenses which the defendant had against the Atlantic Woodworking Company could not be set up as against this plaintiff, and whether the proposed defense is either sham or frivolous.

ARGUMENT.

I. Defendant is estopped to deny that the plaintiff is a holder in due course.

At the out set we urge upon this court that the defendant is estopped to deny that the plaintiff bank is a holder in due course for the reason that the check in question was sent by them for the very purpose of inducing plaintiff bank to pay off the note in question by treating this check as cash. This state of facts is not only set up in the affidavit which the defendant filed in this cause, (State of the Case, page 12 & 13), but is admitted in the defendant's brief. We would refer this court to the fourth full paragraph on page 2 of defendant's brief as follows:

> "* * * the Atlantic Woodworking Company, Inc., requested the defendant to send its check in the amount of said note and interest, which it would deposit in its account with the plaintiff, so that the note would be paid on presentation and would not be protested. Accordingly, defendant did send a check on which this suit was brought * * *"

Bearing in mind that the check in question was dated December 29th and that the note was due and payable on January 2nd, and would be protested for non-payment on that date unless paid, it becomes self-evident that it was the intention not only of the Atlantic Woodworking Company but of the defendant itself that the plaintiff bank was to receive the check of the Commercial Lumber Company, treat the same as cash and pay off the note and accordingly the defendant is estopped to now say that the plaintiff bank should not have treated

the check as cash and that it only received the check as agent for the Atlantic Woodworking Company.

The situation above set forth is reiterated in the defendants' brief on page 3, last paragraph.

II. Apart from the question of estoppel, the law is settled in this state that when a bank receives a check which it credits to the depositor's account, that the bank thereupon takes title to the check in question regardless of whether or not the credit thus set up is actually drawn upon or not provided the check is not endorsed "for collection" Hoffman vs. First National Bank of New Jersey, 46 N. J. L., page 604 (New Jersey Court of Errors and Appeals).

The cases in point are collected in 11 A. L. R., page 1060. The editor of American Law Reports indicates that some other cases in this jurisdiction have cast some doubt upon the proposition that the mere giving of credit passes title to the bank and that something further must be shown, to wit, that this credit was actually used. Whatever be the correct view of the law, the bank in the present instance did take title to the check because it is undisputed that on the strength of this check it immediately paid the note presented to it for payment by the defendant, the Commercial Lumber Company.

The defendant in its argument has apparently combed over all the cases from the rock bound coast of Maine to the sunny slopes of the Pacific in an endeavor to find a case which would indicate that the plaintiff bank in this case was not a holder in due course and in so doing has overlooked

the fact that the Court of Errors and Appeals in the case of *Titus and Scudder* vs. *Mechanics National Bank,* 35 N. J. L., page 588, has already passed upon the question. The court there said, speaking through Chancellor Zabriskie:

> "They (certain checks) were received and credited in a cash account as cash, in part payment of an over-draft and in part to be drawn against. They were received and credited in the same way as bills or notes of other banks. By such crediting, the bank became the owners of these bills as they do of legal tender notes or bank bills so deposited."

Referring briefly to the cases cited by the defendant, but which the writer has not had sufficient time to read or digest in that defendant's brief has just been served upon him, the cases are for the most part readily distinguishable as for example the case of *National Butchers & Drovers Bank* vs. *Hubbell,* brief, page 10. In this case, as appears on page 11 of defendant's brief, line 4, the check was endorsed "for collection". *Montgomery County Bank* vs. *Albany City Bank* cited in the opinion likewise relates to "endorsement for collection only". The case of *Clarke County Bank* vs. *Gilman* cited on page 12 of defendant's brief only goes to sustain our position that the intention of the parties governs, for the court says that a "mere statement of the facts such as has been made, makes it sufficiently clear that there is no foundation for the claim that the defendants purchased the paper." In the case of *First National Bank* vs. *John Morrell & Co.* on page 12 of the brief, it would appear that the law of North Dakota is that the mere giving of credit by a bank to a depositor does not constitute the bank the owner of the instrument.

Authorities may be muliplied to the effect that the intention of the parties governs the interpretation to be placed upon the transaction regardless of whether or not a restrictive endorsement appears upon the instrument. Thus it is stated in 7 Corpus Juris, page 601, paragraph 248:

> "But the ordinary construction given to these endorsements may be affected, or changed by usage or agreement and so it is held that by an endorsement "for deposit to the credit of" the depositor passes the absolute title to the bank if the depositor is accustomed or has the right to draw at once against such deposit."

See also 7 Corpus Juris, page 602, section 249 as follows:

> "If, notwithstanding a restrictive endorsement, advances are actually made to the depositor, the title passes and in these cases the title can be passed on; * * * the crediting with the actual right to draw or the actual drawing may be regarded as negativing the effect of the endorsement, or of assuming the responsibility of its collection and ownership by the bank."

See also 3 R. C. L., paragraph 152:

> "When a check or other commercial paper is deposited in a bank, endorsed for collection, or where there is a definite understanding that such is the purpose of the parties at the time of the deposit, there is no question that the title to the paper remains in the depositor. * * * If, on the other hand, there is a definite understanding at the time of the deposit that such paper is deposited as cash, it is clear that the title passes to the bank."

Essentially, the defense which this defendant seeks permission to set up and litigate before a jury is that it has a right, as a defense, to "kite" checks between various banks.

From the fact that the same defendant has attempted to play the same game onto other banks (at least) it would appear that the answer not only presents no legal defense but is false in fact, and constitutes a scheme to defraud whereby the bank pays the defendant the debt which it cannot collect from its insolvent or (as was admitted) financially embarrassed debtor.

In conclusion we would point out that this defendant was an immediate party to this arrangement and to permit it to set up this alleged defense would be in essence to permit them to set up their own fraud as a defense to this action. The making, therefore, of the order for summary judgment was not a legal error and the summary judgment should be affirmed.

Respectfully submitted,

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