the court in fact upheld the appointment, and this result is in accord with the views expressed above and the evident tendency of the Ohio decisions, as well as the actual practice.

EDWIN R. TEPLE.

SET-OFF AND COUNTERCLAIM

RIGHT OF SET-OFF BETWEEN BANKER AND DEPOSITOR.

In *H. & G. Coleman, Inc., et al.* v. *Winters National Bank & Tr. Co.*, 48 Ohio App. 98, 192 N.E. 478, 16 Abs. 415 (1934), the Union Trust Co. of Dayton under a written contract leased to the defendants certain offices in the Union Tr. Co. Bldg. for a term of five years commencing May 1, 1931. The rent was payable in monthly installments. The Union Tr. Co. became insolvent, and on October 1, 1931, the Superintendent of Banks took possession of the property and sold and assigned all right and interests therein to the plaintiff, Winters Bank. At the time of the insolvency the defendant, Coleman, Inc., had a large deposit in the bank, which he seeks to set off against the rent which had accrued from the time that the Superintendent of Banks took charge to the date of the suit and for which the plaintiff bank here sues. The court denied the set-off.

The courts have often said that the relationship between the bank and the depositor is that of debtor and creditor. *Shaw* v. *Bauman*, 34 Ohio St. 25 (1877), *Cincinnati etc. Co.* v. *Metrop. Nat. Bank*, 54 Ohio St. 60, 42 N.E. 700 (1896); *Blake* v. *Hamilton Dime Savings Bank*, 79 Ohio St. 189, 20 L.R.A. (N.S.) 290 (1908) *Smith* v. *Fuller*, 86 Ohio St. 57, 99 N.E. 214 (1912); *Cleveland Tr. Co.* v. *Scobie*, 114 Ohio St. 241, 48 A.L.R. 182 (1926); *Guaranty Tr. Co.* v. *State*, 36 Ohio App. 45, 172 N.E. 674 (1931). And in Ohio the reciprocal rights of set-off, both legal and equitable, exist between a bank and its customers, with the same general force and effect as between debtors and creditors generally. *Smith* v. *Fulton*, 31 N.P. (N.S.) 49 (1933).

We have a situation for the applicability of legal set-off when a debtor-creditor relationship exists, and mutual and matured debts exist as against each other. See Sec. 11319 and 11321, G.C. It is necessary that the claims of both parties be matured and that the demands be in the same right and capacity, or as it is ordinarily expressed, that there be mutuality of time and parties. *Andrews* v. *State*, 124 Ohio St. 348, 178 N.E. 581 (1931); *Shoneberg* v. *Platt*, 36 Ohio App. 118, 172 N.E. 685 (1931). Hence, in law, a debt not yet due and payable may not

be set off against one presently due and payable. *Patterson* v. *Patterson*, 59 N.Y. 574, 579, 17 Am. Rep. 384 (1875). Nor can one having a deposit in his own name as executor set off against the claim of the receiver of an insolvent bank his individual promissory note, because the executor does not seek the set-off in the same right. *A. A. Stasel, Recr., etc.*, v. *G. Daugherty*, 7. O.N.P. (N.S.), 424, 19 O.D. (N.P.) 720 (1908). Thus too, a joint debt may not be set off against a separate debt because of lack of mutuality as to parties. *Western Coal Co.* v. *Hollenbeck*, 72 Ark. 44, 80 S.W. 145 (1903); *Doyle* v. *Nesting*, 37 Colo. 522, 88 Pac. 862 (1906); *Niblack* v. *Adler*, 209 Ill. App. 156 (1917).

It has also been generally held that a borrower from a saving department of a bank who has a desposit in the commercial or saving department may not set off either deposit when the bank becomes insolvent, where a statute gives the savings depositors a prior lien on all the assets or where there is some other regulatory statute which the courts will interpret as intending the assets of the savings department to be a trust fund for savings depositors. *Yardley* v. *Clothier*, 12 C.C.A. 342, 51 F. 506 (1896); *Lippett, et al. Bk. Commrs.*, v. *Thames Loan & Tr. Co.*, 88 Conn. 185, 90 A. 369 (1914); *Basset* v. *City Bank*, 115 Conn. 1, 160 A. 60 (1932). The theory of these cases is that to permit a set-off would give a greater share of the assets to the borrowing than to the non-borrowing depositor; and in the case of insolvency the savings depositors must share ratably, *Lippett*, v. *Thames, etc., Bank, supra; Tremont* v. *Baker*, 243 Mass. 530, 137 N.E. 915 (1923); *Bailey* v. *Comm'r of Banks*, 244 Mass. 499, 138 N.E. 915 (1923); *Upham* v. *Bramwell*, 105 Or. 597, 25 A.L.R. 919 (1922); *Basset* v. *City Bk. & Tr. Co.*, 115 Conn. 1, 160 A. 60 (1932). See 42 Yale L. J. 143 (1929); Clark Receivers, Vol. 2, P. 1323-4. Those cases which are contra are distinguished by the courts' different interpretation of the statute or by the absence of any statute relating to savings deposits. See *Pursiful* v. *First State Bank, etc.*, 251 Ky. 498, 65 S.W. (2d) 462 (1933). In the presence of statutory regulation giving savings depositors a lien on the assets the courts have usually deemed the relationship of the bank and the depositor as trustee and cestui que trust. *Bachrach* v. *Allen*, 239 Mass. 272 (1921). See also 5 O. Jur. Sec. 194. In the absence of such statutory regulation, however, the courts have generally considered the relationship that of debtor and creditor. *Pursiful* v. *First State Bk., supra.* Lack of mutuality of parties does not prevent a depositor from setting off a loan from the commercial department against a deposit in either the commercial or savings department. *Lippett* v.

Thames, etc., supra; cf. *Upham* v. *Bramwell,* 105 Or. 597, 209 Pac. 100 (1922). But when the loan has been transferred to the savings department for value no right of set-off exists. *Cosmopolitan Tr. Co.* v. *Rosenbush,* 239 Mass. 305, 131 N.E. 858 (1921); *Bieringer-Hanauer Co.* v. *Cosmopolitan Tr. Co.,* 247 Mass. 73, 141 N.E. 566 (1923); *Bachrach* v. *Allen, supra;* see 81 A.L.R. 1508 for a review of the cases. In regard to set-off in a building and loan association, a recent Ohio Statute, G.C. 9652-1, permits a set-off of 50% of the debt by certificates of deposit, and the time of the acquisition of these certificates is immaterial. On this subject, see 50 A.L.R. 526 (1927). In connection with the right of a surety to set off deposits in an insolvent bank, see 41 Yale Law J. 881 (1932) and 40 A.L.R. 1896.

Granted the mutuality of parties, the following factual situations raise important problems analogous to those raised in the principal case:

1. Where a bank seeks to offset a debtor's deposit against an insolvent depositor's matured debt to the bank. It has been held in Ohio and in most jurisdictions that a bank has a general lien in the nature of a set-off on the deposits in its possession. *Bank of Marysville* v. *W. M. Brewing Co.,* 50 Ohio St. 151, 33 N.E. 1054 (1893); *Hakman* v. *Schoof,* 8 O.D. Rep. 127 (1898); *German Amer. Sav. Bk.* v. *Grossman,* 15 O.C.C. 378, 8 O.C.D. 682 (1897). See also *State, etc.* v. *Fulton,* 128 Ohio St. 192, 190 N.E. 383 (1934); *Docking* v. *Commercial Nat. Bank,* 118 Kan. 566, 235 Pac. 1044 (1925). This lien must arise from deposits of money or funds belonging to the depositor himself. *McMillan* v. *Boyd,* 40 Ohio St. 35 (1883).

2. Where a bank seeks to offset the insolvent customer's deposit against his unmatured debt. The general rule is that for a bank to apply a deposit to a debt of a solvent deopsitor, the debt must be due and payable. But where a depositor is insolvent, the majority of courts will permit a bank, by way of equitable set-off, to apply the deposit to the payment of an unmatured note. 5 O. Jur. *Banks and Banking,* Sec. 139, *Grimm* v. *Columbus Sav. Bank,* 25 O.N.P. (N.S.) 203 (1924); *Martin* v. *Kunz-Miller,* 37 N.Y. 398 (1867); *Fera* v. *Wickham,* 135 N.Y. 223, 17 L.R.A. 456, 31 N.E. 1028 (1892). See Clark, *Set Off in Cases of Immature Claims,* 34 Harv. L. Rev. 178 (1920) notes, 76 U. of P. L. Rev. 101 (1927-28); 37 W. Va. L.Q. 304 (1930-1); 43 A.L.R. 1325.

3. Where the depositor is indebted to an insolvent bank and seeks to offset his deposit against his mature debt. There is no question but that this many be done today in either law or equity. *State* v. *Alward,* 44 Ohio App. 281, 185 N.E. 560 (1933); *Coburn* v. *Carstarphen,*

194 N.C. 368, 139 S.E. 596 (1927); *In re Merchant's Bank*, 204 N.C. 472, 168 S.E. 676 (1927); *Barrington* v. *Miner*, 24 F. 2d 917 (1932). See 81 A.L.R. 665. The theory in permitting set-offs in this situation is that the assignor or receiver stands in the same position as the insolvent bank, and so takes subject to set-off. *People* v. *Calif., etc., Co.*, 168 Cal. 211, 141 P. 1181 (1914). While a set-off is permitted, it must be remembered that this right against the receiver is governed by the condition existing at the time the receiver is appointed; and the claims assigned to the debtor thereafter may not be set off even though mature. *Williams* v. *Williams*, 192 N.C. 405, 135 S.E. 39 (1926); *U. S. Fidelity & Guar Co.* v. *Maxwell*, 152 Ark. 64, 237 S.W. 708 (1922). The objection to assignments acquired after insolvency is that there is no mutuality of parties and that a preference accrues to the general creditor for the one who demands the set-off.

In *Hensch* v. *Metropolitan Savings & Loan Co.*, 50 Ohio App. 25, OHIO BAR (Sept. 16, 1935), decided since the principal case, the depositors were indebted to the bank on a note secured by a mortgage, the obligation being due and payable. The bank was not under obligation to pay the deposit presently by reason of its regulations restricting payment, to which the depositors had consented. The court held that the savings depositors could compel the bank to set off their account against their indebtedness, although the payment of the account had been postponed so that no independent action at law could be brought to recover said account.

4. Where a depositor is indebted to an insolvent bank and seeks to offset his deposit against his unmatured debt. While in this situation a set-off in law is not permitted, *Coffin* v. *McLean*, 80 N.Y. 563 (1891); *Bank* v. *Hemingray*, 34 Ohio St. 381 (1878), in equity, when justice requires it, the set-off will generally be allowed. The weight of authority in America is to allow the set-off in this situation although there is no strict mutuality. *Andrew* v. *Dundee Sav. Bank*, 216 Iowa 240, 249 N.W. 154 (1933); *Cooper* v. *Fidelity Tr. Co.*, 170 A. 726 (Me., 1934); *Merchants Ice Co.* v. *Holland Banking Co.*, 223 Mo. App. 93, 8 S.W. (2d) 1030 (1928). The doctrine upon which these cases are based, termed the "waiver theory," is that a depositor if he chooses may expedite payment of a debt due from himself, for in so doing, he is merely waiving the provision of a credit period which is in his favor. *Clute* v. *Warner*, 8 App. Div. 40, 40 N.Y.S. 392 (1896); *Nashville Tr. Co.* v. *Bank*, 91 Tenn. 336, 18 S.W. 822 (1892); and 80 U. of Pa. L.Rev. 420, 421 (1931). See The Current Account and Set-offs Between an Insolvent Bank and Its Customers, 41 Yale L. J. 1109 (1932).

The principal case may well be considered under the fourth category above. A claim to set off rent accruing after a receiver is appointed involves not only an unmatured debt but one which is strictly not even an inchoate or a contingent one. The better authorities will not allow the set-off. The principal case relied upon *Butler* v. *Tuncliffe*, 104 Fla. 477, 140 So. 201 (1932), and *Wasson* v. *White*, 12 F. (2d) 809 (1925). In both of these cases the operative facts were like those in the principal case, and in both cases the ground for denial was that the right of set-off against a receiver is to be governed by the state of affairs existing at the time of the insolvency and not by the conditions created afterwards; that the total rent stipulated in the contract is not such a present debt that it may be set off; and that a set-off in this situation would in effect be a preference. See *Maxcy* v. *City of Washburn*, 196 Wis. 566, 218 N.W. 825 (1928). The Iowa courts, on the other hand, allow a set-off of rent which accrues after the appointment of a receiver. In *Patch* v. *Boyle*, 197 Iowa 1314, 197 N.W. 35 (1924) under circumstances similar to those in the principal case, the court held that the rent on the lease was an existing debt but only "time is wanting to render it due." For a review of the cases on set-off of rents accruing after the appointment of a receiver or trustee in bankruptcy, see 71 A.L.R. 117.

When we recognize the distinction between unmatured rent not yet due and an unmatured note, the principal case seems clearly based on the better reasoning. The distinction is found well stated in *Bank of Baltimore* v. *Page*, 164 Md. 500, 503, 165 A. 701, 702 (1933): "The principle which applies in the case of a note does not apply in the case of unmatured rent. The note is owed immediately, but the rent is not a debt until it becomes due." Although in *Funk & Son* v. *Young*, 138 Ark. 38, 44, 210 S.W. 143, 144 (1919), the court said that "the trend of modern decisions is toward liberality in the allowance of set-off in the case of insolvency against whom the set-off is claimed." Yet apparently the courts are not willing to go so far as to sanction the set-off of rent which accrues after the appointment of a receiver.

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