It is evident that in the present case it would not be fair or in accord with the law to deny an appeal to the employer. Under the Declaratory Judgments Law he is entitled to have his uncertainty cleared up. He is acting in good faith, and is not attempting to obstruct the path of the employee's suit with technical barriers. There will be no undue delay if this matter is allowed to be reviewed, but the injury to the employer will be unnecessarily severe if his appeal is denied. We find here a judgment which is clearly "final" in accord with judicial decisions and construction of the term "final", and which is brought by a party entitled to a declaration of his rights.

The employer is certainly entitled to have the action of the employee restrained temporarily until the obligation of the employer's insurance carrier is determined.

It is submitted that this appeal is not premature, and that in regard to the facts of the case it will be in accord with the law and with sound reasoning to allow this appeal.

Bills and Notes—Indorser's Liability—Timely Notice Required—Plaintiff was indorser of two notes held by defendant bank, in which plaintiff's funds were deposited. The notes were not paid on the date of maturity, and at the close of business on that day defendant bank debited plaintiff's account the amounts of the notes. Later that day, before 4:45 p.m., defendant mailed the notes to plaintiff, together with a letter explaining that plaintiff's account had been charged the value of the notes. Plaintiff alleged that his liability as indorser was secondary to that of the maker, and conditional upon the bank's having given the indorser due notice of dishonor upon presentment to the maker. *Held,* an indorser is liable on a note only after notice of dishonor has been given by the holder, and set-off of the amount against an account due the indorser may not be made before he is given such notice. It was improper for defendant bank to charge plaintiff's account as indorser for the amount of the notes when plaintiff had not been previously notified of the maker's

dishonor. Judgment reversed. *John Wills, Inc. v. Citizens National Bank of Netcong,* 125 N.J.L. 546, 16 A. (2d) 804 (E. & A. 1940).

The settled rule is that the right of A to set off A's debt to B against B's debt to A does not accrue until the parties each owe a liquidated sum to the other. Each claim must be a matured debt.[1] Under the New Jersey Revised Statutes, "if any two or more persons be indebted to each other, such debts or demands, not being for unliquidated damages, may be set off against each other." [2] The holding of the New Jersey Court of Errors and Appeals is that there was no debt due from plaintiff to defendant until after notice had been made. According to the Negotiable Instruments Law, "every indorser who indorses without qualification . . . engages that . . . if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."[3] But notice is an absolute prerequisite to liability; "notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged."[4] Since the notices in this case had not yet been deposited in the mails at the time the plaintiff's account was charged with the amounts of the notes, and since under New Jersey statutes an indorser is not liable on the note of another until notice has been given (R. S. 7:2-66), there was no debt due the bank from the plaintiff at the time the latter's account was charged, and such debit or set-off was therefore unauthorized (R. S. 2:26-190). "The indorser's liability is therefore contingent on the default of the maker and the *taking on dishonor of the requisite statutory proceedings.*"[5]

It is apparent that the legal right to charge the indorser's account existed a few minutes after the actual charge was made. A dissenting opinion in the leading case suggests that there was sufficient notice to charge the indorser. "If the charge was premature no harm was done because the bank was closed for the day when it was made. On the

1. Scammon v. Kimball, 92 U.S. 362, 23 L. Ed. 485 (S. Ct. 1876).
2. R. S. 2:26-190.
3. R. S. 7:2-66.
4. R. S. 7:2-89.
5. Corn Exchange Bank & Tr. Co. v. Taubel, 113 N.J.L. 605, 613, 175 A. 55, 60 (E. & A., 1934).

next morning, on any theory of the case, the right existed. To invalidate the charge as premature by a fraction of an hour would be due to too great a nicety in bookkeeping requirements." (*Wills, Inc. v. Bank,* supra.)

Unquestionably the rule is that the liability of an indorser is conditional upon his being given due notice of the maker's dishonor according to statutory prescription.[6] But the language of the courts is frequently general, and throws little light on what is necessary to constitute due notice of dishonor. "An indorsement is an implied contract to pay if the maker does not and the indorser has notice of the dishonor."[7] "Liability is conditional on notice" under the statute.[8] No case appears in which is discussed the view taken in the *Wills* case, that notice must precede the set-off chronologically even though the indorser is not damaged by a slight deviation in this respect. In Connecticut, it was said that the indorser contracted to become liable only on condition of presentment on exact date of maturity and due notice of dishonor, and that a failure in either particular discharged the indorser, "although he may suffer no actual damage."[9] According to a Tennessee dictum the right of an indorser is not changed because he suffers no apparent damage by reason of the holder's failure to demand payment and give notice of dishonor to him within the required time.[10] The holder must strictly comply with the statute.[11] The dissenting opinion in the *Wills* case cites authorities holding that set-off against deposits can be made if the debt due the bank has matured;[12] but without prior notice there

6. Goldstein v. Brastone Corp., 254 App. Div. 288, 4 N.Y.Supp. 2d, 909 (1938); Schumacher v. Miller, 111 Conn. 568, 150 A. 524 (1930); Woodlawn Fed. Sav. & Loan Assn. v. Williams, 237 Ala. 446, 187 So. 177 (1939); City Fuel Co. v. Brown, 254 Mass. 605, 150 N.E. 842 (1926); Bank of Laramie v. Oil Co., 34 Wyo. 405, 244 P. 372 (1926); Cowles v. Matthews, 179 Wash. 476, 36 P. 2d 537 (1932).

7. Fed. Res. Bank of Phila. v. Levy, 97 F. 2d, 50 (C.C.A. 3d, 1938).

8. O'Neal v. Clark, 229 Ala. 127, 155 So. 562, 94 A.L.R. 589 (1934).

9. Jaronski v. Czerwinski, 117 Conn. 15, 166 A. 388 (1933).

10. Nat. Life and Accident Ins. Co. v. Varner, 100 S.W. 2d 662 (Tenn., 1937).

11. Ross v. Rainwater, 133 S.C. 315, 131 S.E. 41 (1926).

12. Gibbons v. Hecox, 105 Mich. 509, 63 N.W. 519 (1895); Oatman v. Batavia Bank, 77 Wis. 501, 46 N.W. 881 (1890); Polkowitz v. Goldberger, 9 N.J.Misc. 880, 156 A. 1 (District Ct., 1931).

probably is no maturity of the bank's claim against the depositor. ([5], [6])

Several New Jersey cases indicate a relaxing of the strict rule. "The object of notice is to apprise the indorser that the note is dishonored, and that he is looked to for payment."[13] In another old case it was held generally sufficient to send notice by a mail leaving the next day after the dishonor. "A party is bound to exercise reasonable diligence only, not excessive."[14] Notice was held sufficient where it apprised the indorser of the instrument in question,[15] and if this be regarded as the purpose of giving notice, it would seem that notice should be adequate when given immediately after setting off the depositor's account. All these cases were decided before the adoption of the Negotiable Instruments Law in New Jersey, however.

In the leading case, the plaintiff got judgment for amounts deducted from his bank account. Since notice had been mailed to plaintiff immediately the set-off was made, defendant's right of action against plaintiff on the notes had accrued well before the trial, even if it had been defective when the set-off was made. It is submitted that defendant, now with a matured debt against plaintiff, ought to have counterclaimed for the amount of the notes in the same action by which plaintiff sought to defeat the premature set-off. A Maryland case holds that set-off can be made where a note comes due at or before the trial;[16] possibly such a rule would attain justice if applied to liability on an indorsement.

Conditional Sales—Reservation of Title—What Law Governs—A contract of conditional sale of an automobile was made in New York but not filed there in pursuance of New York statutes. The car was brought to New Jersey and levied upon under a judgment previously recovered by appellant against the conditional vendee. The assignee of the conditional vendor sued in replevin by reason of certain forfeiture pro-

13. Burgess v. Vreeland, 24 N.J.L. 71, 59 Am. Dec. 408 (S. Ct., 1853).
14. Sussex Bank v. Baldwin, 17 N.J.L. 487 (S. Ct., 1840).
15. Haines v. DuBois, 30 N.J.L. 259 (S. Ct., 1863); Dodson v. Taylor, 56 N.J.L. 11, 28 A. 316 (S. Ct., 1893).
16. Farmers' etc. Bank v. Franklin Bank, 31 Md. 404.