INDEX

Summons.

(Filed April 19, 1934)

STATE OF NEW JERSEY,

TO: THERMOID COMPANY, a corporation of the State of Delaware:

(L. S.)

GREETING: YOU ARE SUMMONED to answer the annexed complaint of RALPH J. M. BULLOWA, 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 said 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 will be entered against you.

WITNESS, THOMAS J. BROGAN, Esquire Chief Justice of the Supreme Court at Trenton, this 19th day of April, nineteen hundred and thirty-four.

FRED L. BLOODGOOD,
Clerk.

CHANDLESS, WELLER & SELSER,
Attorneys for Plaintiff.

Complaint.

(Filed April 19, 1934)

NEW JERSEY SUPREME COURT
BERGEN COUNTY.

RALPH J. M. BULLOWA, *Plaintiff*, vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant*.	ACTION AT LAW. Complaint.

The plaintiff, residing in the City of Hackensack, Bergen County, New Jersey, complaining of the defendant says:

1. On or about February 1st, 1929, the defendant made, executed, delivered, issued and sold for value a large issue of bonds of the said defendant corporation known as Five Year Six Per Cent Sinking Fund Gold Notes, authorized issue Three Million ($3,000,000.00) Dollars, by the terms of which said bonds or notes the defendant promised to pay on February 1st, 1934, to the bearer, or in case of registration thereof to the registered holder thereof, the amount therein particularly specified, a copy of which said bonds or notes is annexed hereof and designated as Schedule A.

2. Subsequent to the issuance of said bonds or notes and prior to the due date thereof the plaintiff purchased for value two of said bonds or notes, each in the amount of One Thousand ($1,000.00) Dollars, which said notes or bonds bore the numbers M-2339 and M-2483, and plaintiff is now the holder thereof.

3. Said bonds or notes were issued under an

indenture of trust dated as of February 1st, 1929, executed and delivered by the defendant to National Bank of Commerce in New York as Trustee, in which said indenture of trust it was provided that nothing therein contained or in the notes themselves or in the coupons should affect or impair the obligation of the defendant, which is declared to be unconditional and absolute, to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or to affect or impair the right of action, which is also declared to be absolute and unconditional, of such holder to enforce such payment.

4. Plaintiff is advised and verily believes that subsequent to the issuance of the aforementioned bonds or notes the Guaranty Trust Company of New York was substituted as trustee for the said National Bank of Commerce in New York.

5. Said bonds or notes became due and payable to the plaintiff as the holder thereof as aforementioned on February 1st, 1934.

6. Although plaintiff has done and performed in respect to said bonds and notes, all things required of him and has demanded of defendant and of the trustee referred to in said bonds or notes, that said defendant or said trustee pay to plaintiff the amount due him on the two said bonds or notes held by him as aforesaid, both the defendant and the trustee have failed and refused to make payment of the principal amount of said notes or any part thereof and said bonds or notes held by the plaintiff are still due and unpaid.

7. There is therefore due to the plaintiff from the defendant the sum of Two Thousand ($2,000.00) Dollars together with interest thereon from February 1st, 1934.

WHEREFORE plaintiff demands judgment against the defendant in the sum of Two Thousand ($2,000.00) together with interest and costs of suit.

CHANDLESS, WELLER & SELSER,
Attorneys of Plaintiff.

Schedule "A"

United States of America
State of Delaware

No. M-1304 $1,000

THERMOID COMPANY

Five Year Six Per Cent Sinking Fund Gold Note
Authorized issue $3,000,000.
Due February 1, 1934.

THERMOID COMPANY, a Delaware corporation (hereinafter referred to as the Company), for value received, promises to pay to the bearer, or in case of registration to the registered holder hereof,

ONE THOUSAND DOLLARS

in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1929, at the principal office of National Bank of Commerce in New York, in the Borough of Manhattan, City and State of New York, on February 1, 1934, with interest thereon from February 1, 1929, until said principal sum is paid, at the rate of six (6) per cent per annum, payable semi-annually in like gold coin on the first day of August and the first day of February in each year, at said office upon surrender of the respective coupons attached hereto as they severally become due.

Both principal of and interest on this note are payable without deduction therefrom for any Federal Income Tax not in excess of Two per cent (2%) per annum of the interest hereon, which

the Company or the Trustee may be required or permitted to pay thereon or to deduct or retain therefrom. As provided in the indenture hereinafter referred to, the Company will reimburse to the bearer or, if this note be registered, to the registered owner hereof, any tax which may be lawfully imposed upon such bearer or registered owner on account of his ownership hereof under any present or future law of Connecticut or Pennsylvania up to but not exceeding 4 mills on each dollar of the taxable value hereof in any one year, and under any present or future law of Maryland up to but not exceeding 4½ mills on each dollar of the taxable value hereof in any one year, and under any present or future law of the District of Columbia up to but not exceeding 5 mills on each dollar of the taxable value hereof in any one year, and any income tax which may be lawfully imposed on account of the interest on this note under any present or future law of Massachusetts up to but not exceeding 6% of such interest in any one year, but if the bearer or registered owner hereof is a resident of the State or Commonwealth under whose laws such tax is imposed, and only upon the terms and conditions, and in the manner more fully set forth in the indenture hereinafter referred to, and provided that application for such reimbursement shall be made, as in said indenture required within sixty days after each payment of such tax and otherwise as in the indenture provided.

This note is one of a duly authorized issue of notes of the Company known as its Five Year Six Per Cent Sinking Fund Gold Notes (herein called the notes), limited to an aggregate principal amount of Three Million ($3,000,000.00) Dollars issued or to be issued under an Indenture of Trust (hereinafter called the indenture), dated as

of February, 1, 1929, executed and delivered by Thermoid Company, to National Bank of Commerce in New York, as Trustee, to which indenture reference is hereby made for the terms and conditions on and under which the notes have been or are to be issued and the nature and extent of the rights of the holders of notes, of the Company and of the Trustee.

The notes of this issue are callable as a whole or in part on any interest payment date on not less than thirty (30) days' notice given by publication in a daily newspaper of general circulation in the Borough of Manhattan, City and State of New York, at the principal amount thereof and accrued interest, plus a premium of two per cent (2%) of such principal amount if redeemed on or before February 1, 1930, a premium of one and one-half per cent (1½%) of such principal amount if redeemed after February 1, 1930, and on or before February 1, 1931, and a premium of one per cent (1%) of such principal amount if redeemed thereafter and prior to maturity, all in the manner and on the conditions provided in the indenture. Interest will cease to be payable to the holder of this note, if it is so called and payment is duly provided, from and after the date fixed in the call for payment.

The notes are entitled to the benefits of the sinking fund provided for in the indenture.

In case an event of default as defined in the indenture shall occur, the principal of the notes may become or be declared due and payable in the manner and with the effect provided in the indenture.

No recourse shall be had for the payment of the principal of or interest on this note or any part thereof or for any claim based hereon or otherwise in respect hereof or of the indebtedness

represented hereby or of the indenture, against any incorporator, stockholder, officer or director, past, present or future, of the Company or any successor company, either directly or through the Company or any successor company, whether by virtue of any statute or constitutional provision or rule of law or by the enforcement of any assessment or otherwise, all such liability being, by the acceptance of this note and as part of the consideration for the issue hereof, expressly waived and released.

This note shall pass by delivery, unless registered as to principal in the owner's name on the register to be kept by the Company at the office of the Trustee in the Borough of Manhattan, City and State of New York, such registration being noted heron. After such registration no transfer shall be valid unless made on such register by the registered owner in person, or by attorney duly authorized in writing, and similarly noted hereon; but this note may be discharged from registry by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored; but again from time to time the note may be registered or transferred to bearer. Such registration shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery and payable to bearer. The Company and the Trustee and their respective successors, each in its discretion, may deem and treat the bearer of any coupon as the absolute owner thereof, for the purpose of receiving payment thereof and for all other purposes whatsoever, whether such coupon shall be overdue or not, and may treat the bearer of any note not registered as to principal and the registered owner of any not registered as to principal as the absolute owner thereof for the purpose of receiv-

ing payment of the principal thereof and for all other purposes whatsoever, except for the purpose of receiving payment of outstanding coupons, and neither the Company nor the Trustee nor their respective successors shall be affected by any notice to the contrary.

This note shall not be valid or obligatory for any purpose until the certificate hereon shall have been duly and properly signed by the Trustee.

IN WITNESS WHEREOF Thermoid Company has caused these presents to be executed in its name and behalf by its President or a Vice-President and its corporate seal to be hereunto affixed and attested by its Treasurer or an Assistant Treasurer, thereunto duly authorized, and has likewise caused the annexed coupons to be authenticated by a fac-simile of the signature of its Treasurer, all as of the first day of February, 1929.

THERMOID COMPANY,
By W. Probeck,
Vice-President.

Attest:
L. G. Smith,
Treasurer.

Notice of Motion.

(Filed May 21, 1934)

NEW JERSEY SUPREME COURT
BERGEN COUNTY.

RALPH J. M. BULLOWA, *Plaintiff,* vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant.*	ACTION AT LAW. Notice of Motion to Strike out Complaint.

To the Plaintiff, Ralph J. M. Bullowa, or Chandless, Weller & Selser, his Attorneys:

PLEASE TAKE NOTICE that on the first day of June, 1934, we shall appear in behalf of the defendant, Thermoid Company, before the Honorable Edwin C. Caffrey, Judge of the Bergen County Circuit Court, sitting as Supreme Court Commissioner, at the Court House, Hackensack, N. J., at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and move to strike out the complaint filed in the above entitled cause on the following grounds:

1. That the said complaint is sham.
2. That the said complaint is frivolous.
3. That the said complaint does not set forth sufficient facts to disclose a cause of action on the part of the plaintiff against the defendant.
4. That the defendant is barred from instituting any action against the defendant on the notes referred to in the complaint because of the fact that all remedies to enforce the payment of said

promissory notes in the absence of certain conditions, are under the terms of the Indenture of Trust under which said notes were issued, vested in the National Bank of Commerce in New York, the Trustee named in said Indenture of Trust.

5. That the plaintiff is not a proper party in the suit upon the notes referred to in the complaint.

6. That before any owner of any note issued under the Indenture of Trust covering said notes has a legal right to enter suit thereon, certain conditions must be fulfilled, and there is no allegation in the complaint that there has been a fulfillment of the conditions precedent.

Defendant will rely in support of its motion upon the affidavit annexed hereto.

Respectfully,
KATZENBACH, GILDEA & RUDNER,
Attorneys for Defendant.

Dated May 12, 1934.

NEW JERSEY SUPREME COURT
BERGEN COUNTY.

RALPH J. M. BULLOWA, *Plaintiff,* vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant.*	ACTION AT LAW. On Motion to Strike out Complaint. Affidavit.

STATE OF NEW JERSEY,
COUNTY OF MERCER } ss.

H. J. Koch, being duly sworn according to law, upon his oath, deposes and says:

1. I am a resident of the City of New York, County of New York and State of New York. I am Treasurer of the Thermoid Company, the defendant herein, a Delaware corporation which also has a place of business in the State of New Jersey, located at Trenton. I am familiar with the facts of this case and am duly authorized to take this affidavit in behalf of the defendant company.

2. On February 1, 1929, the defendant, Thermoid Company, after due corporate action, entered into a certain Indenture of Trust with the National Bank of Commerce in New York, a banking association organized under the laws of the United States, as Trustee, under the terms of which the said Thermoid Company made, executed and delivered its Five Year Six Per Cent Sinking Fund Gold Notes in the aggregate amount of $3,000,000.00, all maturing on February 1, 1934, numbered consecutively, dated February 1, 1929, payable to bearer, or to the registered own-

er thereof on the date of maturity, together with interest from February 1, 1929, at the rate of six (6) per cent per annum until maturity, payable semi-annually on the first day of August and the first day of February in each year. In and by each of said notes the said Thermoid Company promised and agreed to pay to the bearer, or registered holder thereof, the sum of $500.00 or $1,000.00, as the case may be, on February 1, 1934. All of said notes are in the same form except as to the number thereon and the amount thereof, and they are now held by a large number of persons residing in many states of the United States of America and elsewhere, and they are outstanding obligations of the Thermoid Company and entitled to the provisions of the Indenture of Trust hereinabove referred to. A true copy of the form of the note as issued is annexed to the complaint as Exhibit A.

3. In order to promote and protect the equal and ratable rights of every owner of said notes, the aforesaid Indenture of Trust was entered into containing numerous clauses protective of the interests of all the note owners, and said clauses were intended for the equal benefit of all of the owners of said notes. The original of said Indenture of Trust is available for production in court. Annexed hereto and made a part hereof as Exhibit A is a true and exact copy of the whole of Article VI as taken from the original Indenture of Trust above referred to. The notes referred to and described in the complaint filed by the plaintiff in this cause and which are the subject matter of this suit, are among those notes for the benefit of which the aforesaid Indenture of Trust was entered into between the Thermoid Company and the National Bank of Commerce in New York.

4. There are now issued and outstanding notes

under said Indenture of Trust in the aggregate amount of $2,847,500.00, which amount includes notes in the amount of $163,500.00 repurchased by the Thermoid Company and held in its treasury. Said notes other than those which have been repurchased are now held by a large number of persons residing in many States of the United States of America and elsewhere.

H. J. KOCH.

Sworn and subscribed to before
me this 10th day of May, 1934.

MAY G. BAILEY,
Notary Public of N. J.

Exhibit A.

ARTICLE VI.

Default.

Section 1. No coupon which in any way shall have been extended, whether or not by or with the consent of the Company, in contravention of the provisions of Section 7 of Article IV of this indenture, or which shall have been transferred or pledged separate and apart from the notes to which it relates shall, unless accompanied by the notes to which it relates, be entitled in case of default under this indenture to any benefit of or from this indenture, except after the prior payment in full of the principal of the notes and of the notes and of all coupons not so extended, transferred or pledged.

Section 2. If one or more of the following events, hereinafter called events of default, shall happen, that is to say:

(a) default shall be made in the payment of any installment of interest on any of the notes when and as the the same shall become payable, as therein and in this indenture expressed, and such default shall continue for thirty days;

(b) default shall be made in the payment of the principal of or premium, if any, on any of the notes when the same shall become due and payable, whether at maturity, by call for redemption, by declaration or otherwise;

(c) default shall be made in the payment of any installment of the sinking fund hereunder and such default shall continue for sixty days;

(d) default shall be made in the observance or performance of any other of the convenants, conditions and agreements on the part of the Company, its successors or assigns, in the notes, in the warrants or in this indenture contained, and such default shall continue for sixty days after written notice thereof shall have been given to the Company by the Trustee or by the holders of ten per cent in principal amount of the notes then outstanding;

(e) the Company shall be adjudicated a bankrupt or become insolvent, or a receiver shall be appointed of the property of the Company and not be discharged within sixty days after appointment;

(f) the Company shall file a petition in voluntary bankruptcy, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver of its property; or

(g) a judgment shall be recovered against the Company or any attachment or other court process shall become or create a lien on any property of the Company and such judgment, attachment or other court process shall not be discharged, or secured (on appeal or otherwise) within ninety days after such judgment shall be entered or such attachment or other court process become a lien as aforesaid,

then and in any such case the Trustee, by notice in writing delivered to the Company, may, and upon the written request of the holders of twenty-five per cent in principal amount of the notes at the time outstanding shall, declare the principal of all the notes, if not already due and payable,

to be forthwith due and payable, and, upon such declaration, the same forthwith shall become and be immediately due and payable, anything in this indenture or in the notes contained to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time after the happening of an event of default, and either before or after the principal of the notes shall have so become due and payable, prior to the date of maturity thereof stated in the notes, all arrears of interest upon all the notes (with interest at the rate of six per cent per annum on any overdue installment of interest), and the expenses of the Trustee, and every other default in the observance or performance of the covenants and conditions of the notes, of the warrants and of this indenture shall be made good or be secured to the satisfaction of the Trustee or provision deemed by the Trustee to be adequate shall be made therefor, then and in every such case the holders of a majority in principal amount of the notes then outstanding, by written notice to the Company and to the Trustee, may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default, or impair any right consequent thereon.

Section 3. In case

(a) default shall be made in the payment of any installment of interest on any of the notes when and as the same shall become payable, as therein and in this indenture expressed, and such default shall continue for thirty days; or

(b) default shall be made in the payment of the principal of or premium, if any, on any of the notes when the same shall become due and payable, whether at matur-

ity, by call for redemption, by declaration or otherwise;

then in every such case, upon demand of the Trustee (which demand the Trustee may make in its discretion and shall make upon the written request of the holders of twenty-five per cent in principal amount of the notes then outstanding), the Company will pay to the Trustee, for the benefit of the holders of the notes and coupons issued hereunder and then outstanding, the whole amount that then shall have become due and payable on all such notes and coupons then outstanding, for interest and/or principal and/or premium, if any, as the case may be, with interest at the rate of six per cent per annum on the overdue principal, premium, if any, and installments of interest, and in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Trustee hereunder.

Section 4. In case the Company shall fail to pay such amounts upon such demand, the Trustee in its own name and as trustee of an express trust shall be entitled and empowered to, and upon the request in writing of the holders of twenty-five per cent in principal amount of the notes outstanding, and upon being furnished with satisfactory security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, the Trustee shall, institute such action or proceeding at law or in equity as it may be advised by counsel, for the collection of the sums so due and unpaid, and may prosecute any such action or proceeding to judgment or final decree and may enforce any such judgment or final decree against

the Company and collect the moneys adjudged or decreed to be payable out of the property of the Company, wherever situate, in the manner provided by law. If an event of default shall occur, the Company, upon the commencement of any action, suit or legal proceedings by the Trustee to obtain a judgment or decree for the principal of or interest upon any of the notes, or both, shall waive the issue and service of process, enter its voluntary appearance in such action, suit or proceeding, and consent to the entry of a judgment or decree for such principal, premium, if any, and interest, and interest upon overdue principal, premium, if any, and installments of interest, and for the costs and expenses and compensation of the Trustee and of its agents and attorneys, and for such other relief as the Trustee may be entitled to hereunder. Upon the commencement of any such action, suit or proceeding, the Company will, if required by the Trustee, consent to the appointment of a receiver or receivers of its property and business and of the earnings, income and profits thereof, with such powers as the court making such appointment shall confer.

Section 5. All rights of action under this indenture, or under any of the notes or coupons, may be enforced by the Trustee without the possession of any of the notes or coupons, or the production thereof on any trial or other proceeding relative thereto, but the Trustee may in its discretion require the deposit of such notes and coupons with it, as a condition precedent to the enforcement of any such rights of action; and any such suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery of judgment shall be for the ratable benefit of the holders of said notes and coupons. In any such

event the warrants shall continue enforcible by the respective owners thereof and nothing in this Article VI and no act of the Trustee under this article shall impair or affect the right of the warrantholders.

Section 6. Any moneys collected by the Trustee under this Article shall be applied by the Trustee as follows:

(1) to the payment of costs and expenses, including a reasonable compensation to the Trustee, its agents, attorneys and counsel;

(2) to the payment of the amounts then due and unpaid upon the notes and coupons in respect of which such moneys shall have been collected, ratably and without any preference or priority of any kind, according to the amounts due and payable upon such notes and coupons, respectively, with interest thereon as aforesaid, at the date fixed by the Trustee for the distribution of such moneys, upon presentation of the several notes and coupons and stamping the payment thereon, if only partly paid, and upon surrender and cancellation thereof, if paid in full; and

(3) to the payment of the surplus, if any, to the Company, its successors or assigns, or to whomsoever shall be lawfully entitled to receive the same.

These provisions are, however, not intended in anywise to modify the provisions of Section 1 of this Article, but are subject thereto.

Section 7. The Company will not at any time insist upon or plead, or in any manner whatever

claim or take the benefit or advantage of any stay or extension law now or at any time hereafter in force, wherever enacted and by whatsoever authority enacted, and it hereby expressly waives all benefit and advantage of any such law or laws, and convenants that it will not hinder, delay or impede the execution of any power herein granted and delegated to the Trustee, but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

Section 8. In order to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits, all the notes shall be subject to the condition that all rights of action thereon, or in respect thereof, or on or in respect of the coupons thereto appertaining, are vested exclusively in the Trustee, and that no holder of any of the notes or coupons appertaining thereto shall have any right to institute any action, at law or in equity, upon the notes or any of the appurtenant coupons, or growing out of any provision thereof, or of this indenture, or for the enforcement of this indenture, unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent in principal amount of notes then outstanding, filed with the Trustee, with an offer of satisfactory indemnity; and any recovery in any action or proceeding instituted by the holder of any of the notes or appurtenant coupons shall be for the equal pro rata benefit of all outstanding notes similarly situated, and, for the protection and enforcement of this Section 8, each and every noteholder and the Trustee shall be entitled to such relief as can be given either

at law or in equity; provided, however, that nothing herein or elsewhere in this indenture or in the notes or in the coupons shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment or shall affect or impair the right of the owner of any warrant to enforce the provisions thereof as provided by the terms of Section 10 of Article II hereof.

Section 9. No delay or omission of the Trustee, or of any holder of a note, to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or acquiscence therein; and every power and remedy given by this Article to the Trustee or to the noteholders may be exercised from time to time and as often as may be deemed expedient by the Trustee or by the noteholders.

Section 10. The holders of a majority in principal amount of the notes from time to time outstanding shall have the right by instrument in writing delivered to the Trustee to direct the method and place of conducting all proceedings to be taken under the provisions of this indenture for the enforcement thereof or of the notes or of proceedings by the Trustee on behalf of warrant holders as permitted by Section 10 of Article II.

Answering Affidavit.

(Filed July 18, 1934)

NEW JERSEY SUPREME COURT
BERGEN COUNTY.

RALPH J. M. BULLOWA, *Plaintiff,* vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant.*	ACTION AT LAW. Affidavit.

STATE OF NEW JERSEY
COUNTY OF BERGEN } ss:

John Frank, Jr., of full age being duly sworn on his oath deposes and says:

(1) I am an Attorney-at-Law, duly admitted to practice in the State of New Jersey, and am in the employ of Chandless, Weller & Selser, the attorneys for the plaintiff in the above entitled matter.

(2) Pursuant to instructions from Mr. Ralph W. Chandless, on May 31st, 1934, I visited the office of the defendant, Thermoid Company, on Whitehead Road, Trenton, New Jersey, and there saw Mr. H. J. Koch, the treasurer of the defendant corporation. I delivered to Mr. Koch for the defendant, a letter, a copy of which is annexed hereto, made part hereof and designated as Schedule A.

(3) Mr. Koch advised me that he could not furnish our client, the plaintiff herein, with a list of the names and addresses of the other owners or holders of bonds of the defendant and that the

only action that he could take would be to refer our letter to the Board of Directors of the defendant corporation.

(4) I requested him to advise me when the next meeting of the Board of Directors would be and he said it would be toward the latter part of June. Mr. Koch also informed me that the office of the defendant corporation which I visited on this occasion was the principal office of the defendant.

JOHN FRANK, JR.

Sworn and subscribed to before
me this 31st day of May, 1934.

MARJORIE I. OSTMAN,
A Notary Public of New Jersey.

"Schedule "A"

May 29th, 1934.

Thermoid Company,
Trenton, New Jersey,

Gentlemen:—

We represent Mr. Ralph J. M. Bullowa, who is, at the present time, the holder of certain of your Five-year 6% Sinking Fund Gold Notes, authorized issue $3,000,000.00, due February 1st, 1934.

Will you please deliver to the bearer hereof, for Mr. Bullowa, a list of the names and addresses of the other owners or holders of this issue of bonds?

Very truly yours,
CHANDLESS, WELLER & SELSER.

BY:

RWC/BD

Findings of the Court.

(Filed July 20, 1934)

NEW JERSEY SUPREME COURT
BERGEN COUNTY

RALPH J. M. BULLOWA, *Plaintiff,* vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant.*	MEMORANDUM.

CHANDLESS, WELLER & SELSER, ESQS.,
HACKENSACK, *Attorneys for Plaintiff.*

KATZENBACH, GILDEA & RUDNER, ESQS.,
TRENTON, *Attorneys for Defendant.*

CAFFREY, Circuit Judge.

This is a motion to strike the Complaint filed by the plaintiff to recover $2,000.00 from the defendant Corporation, based upon the default in the payment of two Bonds bearing numbers M-2339 and M-2483. These Bonds were issued on February 1, 1929, as part of a series known as FIVE YEAR SIX PER CENT SINKING FUND GOLD NOTES. The total authorized issue was $3,000,000. All of the Bonds in this series were issued under Indenture of Trust dated February 1, 1929, whereby the National Bank of Commerce of New York was designated as Trustee. According to the allegations in the Complaint, the Guaranty Trust Company of New York was later substituted as Trustee under the Indenture. From

the affidavit of H. J. Koch, Treasurer of the defendant Corporation, there appears to be now issued and outstanding, notes in the aggregate of $2,847,500, which amount includes notes amounting to $163,500 re-purchased by the Thermoid Company and held in its treasury.

There seems to be no question but that the bonds held by the plaintiff have not been honored according to their tenor and that there is now due and owing to him the sum of $2,000 with accrued interest.

There is no difficulty in ascertaining the plaintiff's right. The difficulty, as I see it, lies in the enforcement of it at this time, due to the language in the Indenture of Trust, which forms part of the contractual obligation. The bonds and the trust agreement are inseparable. It will serve no useful purpose to set out in full, either the bond itself or the Indenture of Trust - reference to certain paragraphs in both will clarify the issue. In the seventh paragraph of the bond (Exhibit "A" attached to the Complaint) this language is used, "in case an event of default as defined in the Indenture shall occur, the principal of the notes may become or be declared due and payable in the manner and with the effect provided in the Indenture."

The Indenture, in part attached to the affidavit of H. J. Koch, submitted by the defendant, and beginning at Article 6, enumerates events which constitute default, among which, is the non-payment of principal or premium when due, either by maturity, or call, or declaration, or otherwise. In the same Article, the following language is used, "then and in any case the Trustee, by notice in writing delivered to the Corporation, may, and upon written request of the holders of twenty-five per cent in principal amount of the notes at the

time outstanding, shall declare the principal of notes, if not already due and payable, to be forthwith due and payable, and upon such declaration the same shall become and may be immediately due and payable, anything in this Indenture or in the notes contained to the contrary notwithstanding."

Section 5 provides as follows:

> "All rights of action under this indenture, or under any of the notes or coupons, may be enforced by the Trustee without the possession of any of the notes or coupons, or the production thereof on any trial or other proceeding relative thereto, but the Trustee may in its discretion require the deposit of such notes and coupons with it, as a condition precedent to the enforcement of any such rights of action; and any such suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery of judgment shall be for the ratable benefit of the holders of said notes and coupons. In any such event the warrants shall continue enforcible by the respective owners thereof and nothing in this Article VI and no act of the Trustee under this article shall impair or affect the rights of the warrant holders."

In Section 8 the following language is used:

> "In order to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits, all the notes shall be subject to the condition that all rights of action thereon, or in

respect thereof, or on or in respect of the coupons thereto appertaining, are vested exclusively in the Trustee, and that no holder of any of the notes or coupons appertaining thereto shall have any right to institute any action, at law or equity, upon the notes or any of the appurtenant coupons, or growing out of any provision thereof, or of this indenture, or for the enforcement of this indenture, unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent in principal amount of notes then outstanding, filed with the Trustee, with an offer of satisfactory indemnity; and any recovery in any action or proceeding instituted by the holder of any of the notes or appurtenant coupons shall be for the equal pro rata benefit of all outstanding notes similarly situated, and, for the protection and enforcement of this Section 8, each and every noteholder and the Trustee shall be entitled to such relief as can be given either at law or in equity; provided, however, that nothing herein or elsewhere in this indenture or in the notes or in the coupons shall affect or impair the obligation of the Company, which is unconditional and absolute to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment or

shall affect or impair the right of the owner of any warrant to enforce the provisions thereof as provided by the terms of Section 10 of Article II hereof."

The plaintiff contends that the language used in Section 8, particularly this, that, "provided, however, that nothing herein or elsewhere in this Indenture or in the notes or in the coupons shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders, to enforce such payment" gives him the right of action with respect to his two bonds, irrespective of the other sections in the Indenture and with much insistance claims that the language in this excerpt nullifies all other provisions of the Indenture, limiting individual action when a default occurs. However, the acceptance of this theory would destroy the purpose of the Indenture, which by its language, anticipated the likelihood of legal proceedings by an individual bond holder and to guard against the multiplicity of suits, there was incorporated in Section 8 of the Indenture (above quoted) a provision vesting exclusively in the Trustee, the right of action, and further a clause providing that "no holder of any of the notes or coupons appertaining thereto shall have any right to institute any action at law or in equity."

There is nothing in the moving papers to indicate that any of these conditions were met by the plaintiff. The affidavit submitted in behalf of the plaintiff, signed by John Frank, Jr. (a repre-

sentative of the Attorneys for the plaintiff) sets forth that on May 31, 1934, a request was made of H. J. Koch, Treasurer of the defendant corporation, for a list of the bond holders of the defendant Corporation and their addresses. In passing, it might be noted that the Summons and Complaint in this cause, were issued on April 19, 1934, and served upon the defendant on April 25, 1934.

To permit the plaintiff to prevail at this time, would be destructive of the plan carefully thought out with a view to the safeguarding of the investors in general. Of course, an arbitrary or capricious attitude on the part of the Trustee might warrant the intervention of the Court, but if this came to pass, it would not be a subject for consideration by this tribunal.

The Motion to strike the Complaint will be granted and an Order in conformity with this Memorandum may be submitted.

Order Striking Complaint.

(Filed July 23, 1934)

NEW JERSEY SUPREME COURT
BERGEN COUNTY.

RALPH J. M. BULLOWA, *Plaintiff*, vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant*.	ACTION AT LAW. Order Striking out Complaint.

A motion having been made by defendant, Thermoid Company, to strike out the complaint on one or more of the several grounds set forth in the motion papers of the defendant now on file in this cause, and it appearing that due notice of this motion has been given to the plaintiff, and the Court having heard the arguments of Katzenbach, Gildea & Rudner, attorneys for the defendant, and of Chandless, Weller & Selser, attorneys for the plaintiff, and the Court being of the opinion that the motion of the defendant should be granted and the complaint struck:

IT IS, THEREUPON, on this sixteenth day of July, 1934, ORDERED that the complaint filed herein by Ralph J. M. Bullowa against the defendant, Thermoid Company, be and the same is hereby struck out.

EDWIN C. CAFFREY,
Circuit Court Judge sitting as Supreme Court Commissioner.

Entered July 23, 1934.
On Motion of

KATZENBACH, GILDEA & RUDNER,
Attorneys for Defendant.

Rule for Judgment.

(Filed August 28, 1934)

NEW JERSEY SUPREME COURT
BERGEN COUNTY

RALPH J. M. BULLOWA, *Plaintiff*, vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant*.	ACTION AT LAW. Rule for Judgment.

This matter being opened to the Court by Katzenbach, Gildea & Rudner, attorneys for the defendant, Thermoid Company, and it appearing that upon motion of the defendant to strike out the complaint of the plaintiff an order was entered herein on July 16, 1934, striking out the complaint filed herein by Ralph J. M. Bullowa against the defendant, Thermoid Company;

It is, therefore, on this 28th day of August, 1934, ORDERED that final judgment be entered herein in behalf of the defendant, Thermoid Company, and against the plaintiff, Ralph J. M. Bullowa, together with costs to be taxed.

Entered August 28, 1934.
On Motion of

KATZENBACH, GILDEA & RUDNER,
Attorneys for Defendant.

Notice and Grounds of Appeal.

(Filed September 11, 1934)

NEW JERSEY SUPREME COURT
BERGEN COUNTY.

RALPH J. M. BULLOWA, *Plaintiff-Appellant,* vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant-Appellee.*	ACTION AT LAW. Notice and Grounds of Appeal.

TO: Katzenbach, Gildea & Rudner, Esq.,
Attorneys of the Defendant.

SIRS:

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

(1) Because the trial court erroneously granted the motion of the defendant to strike out the complaint filed by the plaintiff herein.

(2) Because the trial court erroneously ordered that the complaint filed herein by the plaintiff be struck out.

(3) Because the trial court erroneously rejected as evidence on the motion to strike the complaint herein, and refused to consider on said motion, the facts alleged in the affidavit filed on behalf of the plaintiff on the said motion.

(4) Because the court erroneously entered

judgment in behalf of the defendant and against the plaintiff.

Dated: September 5th, 1934.

CHANDLESS, WELLER & SELSER,
Attorneys of Plaintiff.

NEW JERSEY

Court of Errors and Appeals

RALPH J. M. BULLOWA, *Plaintiff-Appellant,* vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant-Appellee.*	On Appeal from Supreme Court.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This is an appeal from the judgment rendered in favor of the defendant-appellee on a motion to strike out the complaint in the above entitled matter.

The suit was instituted in the Bergen Circuit of the New Jersey Supreme Court on two bonds, each in the amount of One Thousand ($1,000.00) Dollars, made by the defendant-appellee, payable to bearer and due on February 1st, 1934.

The complaint (R. p. 2) is in the usual form for a suit on a negotiable instrument, and alleges that the plaintiff is the holder for value, of the two bonds made by the defendant, that the same are due and that payment from the defendant was demanded by the plaintiff and refused. The complaint further alleges the performance of all conditions precedent and sets up a copy of the instrument on which the suit is brought.

The defendant-appellee moved to strike out the complaint on the ground that the same was sham,

frivolous and did not set forth a cause of action, and further, that the plaintiff was barred from instituting action, because under the terms of an indenture of trust, under which the notes were issued, all remedies to enforce the payment of said notes was vested in the National Bank of Commerce in New York, as trustee (R. p. 10).

POINT I.

The complaint is sufficient in law.

The complaint is plainly not frivolous, and on its face discloses a good cause of action.

There is nothing therein which is irregular, defective or so framed as to embarrass or delay a fair trial.

Neither is the complaint sham or false in fact. The plaintiff was the holder of the two notes; the defendant was the maker thereof; the notes were due and had not been paid.

It would only be because of a defect in one of the above respects that the trial court could properly strike the complaint. If the defendant contended that for some other reason, there was no liability on its part to the plaintiff, the same should have been set up as a defense by answer, rather than by a motion to strike the complaint.

The defendant maintains that the notes, for which the suit is brought, were issued under an indenture of trust which among other things provided as follows (R. p. 21, l. 18 to 33):

> "all the notes shall be subjected to the condition that all rights of action thereon, or in respect thereof, or on or in respect to the coupons thereto appertaining, are vested exclusively in the Trustee and that no holder of any of the notes or coupons appertaining thereto shall have any right to institute any action at law or in equity upon

> the notes or any of the appurtenant coupons, or growing out of any provision thereof, or of this indenture, or for the enforcement of this indenture, unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent in principal amount of notes then outstanding, filed with the Trustee, with an offer of satisfactory indemnity x x x."

Even if this were a condition precedent it would not be sufficient to warrant striking out the complaint. The 1903 Practice Act (P. L. 1903, p. 570) provides:

> "Either party to an action may aver performance of conditions precedent generally; and the opposite party shall not deny such averments generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest."

If the defendant wished to rely on the alleged non-performance of a condition precedent, the only manner in which he could do so, was by pleading the same in his answer.

However, a clause such as that set up by the defendant is not a condition precedent, but is plainly a condition subsequent.

Speaking in reference to the effect of conditions precedent and conditions subsequent, this Court in the case of *Board of Education vs. Richmond, &c. Co.* 92 N. J. L. p. 496, says at page 498:

> "The provision for the architect's audit was either a condition precedent or else it was a condition subsequent. If the former, it was essential to the creation of the right

> to recover. If the latter, it was simply the means of maintaining that right. 3 Cyc. 558, note 20; 12 C. J. 411. If the former, suit could not be commenced until it had taken place. If the latter, it could be offered in evidence at the trial as a binding guide to the jury, although only completed on the day of trial and long after the suit was instituted."

Inasmuch as the condition in our case was a condition subsequent, the plaintiff had the right, even on the day of trial to show that the trustee refused or neglected to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent of the notes outstanding, or to otherwise show that the condition subsequent was not applicable to the present case.

POINT II.

The provision in the Indenture of Trust is no defense to plaintiff's suit.

Assuming without conceding that the trial court could entertain a motion to strike a complaint in a suit on a note because of a condition subsequent, the condition subsequent in this case did not warrant the granting of the motion.

The defendant urges that because of the language of Section 8 of Article 6, of an instrument separate and apart from the notes, referred to as an indenture of trust, the motion to strike out was properly granted.

The material portion of the section referred to (R. p. 21 L 18 to 40 p. 22 L 1 to 20) reads as follows:

> " * * * all the notes shall be subject to the condition that all rights of action

> thereon, or in respect thereof * * * are vested exclusively in the Trustee, and that no holder of any of the notes * * * shall have any right to institute any action, at law or in equity upon the notes * * * *provided, however, that nothing herein or elsewhere in this indenture or in the notes, or in the coupons shall affect or impair the obligation of the Company, which is unconditional and absolute to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or affect or impair the right of action which is also absolute and unconditional, of such holders to enforce such payment * * *.*"

It is to be borne in mind, that this clause is to be found in the middle of a long complicated trust agreement which does not accompany the notes issued by the defendant Company. If this clause is to be interpreted as depriving the holders of notes of the defendant Company from maintaining an action against the defendant to collect what is due them, it would be closely akin to the perpetration of a fraud on the investing public, who certainly believed when they bought these notes in the open market, that they would have a legal right on and after the due date to sue on the promise to pay.

If this clause is not a fraud, it is at least highly ambiguous when read with the proviso. Condensed the clause reads:

> "no holder of any of the notes shall have any right to institute any action upon the notes, provided, however, nothing herein shall affect or impair the right of action

which is absolute and unconditional of such holders to enforce such payment."

To give to these words the meaning contended by the defendant, if not actually doing an injustice to the English language, would at least violate three rules of law.

(a) The proviso limits the preceding matter:

Any meaning that the clause might otherwise have, is restricted by the proviso which guarantees to plaintiff the right of action.

(b) The clause must be construed in favor of the negotiability of the notes.

The notes in this case were payable to bearer and specifically provide (R. p. 8, l. 15) that they shall pass by delivery. If the clause in the trust agreement is to be given the meaning contended by the defendant and cannot be sued upon, the effect of the same would be to declare that all of these notes dealt in, in the public market are non-negotiable, for the reason that they would not then be an unconditional promise to pay on or at a fixed period after the occurrence of a specific event which is certain to happen (U. N. I. Act Sec. 4). Since the clause is ambiguous, the ambiguity must be construed to give negotiability to the notes.

(c) The clause must be resolved against the covenator.

In view of the ambiguity, the meaning of the words must be resolved in favor of the note holders and against the defendant who is the covenantor.

This is the view of the Delaware Courts where the notes in the present case were made (R. p. 5). In the case of *Noble vs. European Mortgage and Investment Corporation,* (Del.) 165 Atl. 157, in construing a trust agreement of a form almost identical to that relied upon by the defendant, the Court says:

> "The last paragraph of the quoted excerpts is quite clear in reserving to the bondholders complete liberty of action to enforce all payments due them whether for principal or coupons so long as the procedure they adopt is not under the indenture. Restrictions of the character found in this indenture are not to be extended by implication. They are effective only so far as they are clear and reasonably free from doubt. *Fleming v. Fairmount & M. R. Co.,* 72 W. Va. 835, 79 S. E. 826, 49 L. R. A. (N. S.) 155, Ann. Ca. 1915D, 978. Being restrictive of the common law rights of creditors, they are to be strictly construed. *Guaranty Trust & Safe-Deposit Co.,* 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116; *Reinhardt v. Inter-State Telephone Co.,* 71 N. J. Eq. 70, 63 A. 1097."

The notes on which the plaintiff has sued are payable at New York (R. p. 5, l. 29). The New York Courts have passed upon identical notes and identical trust agreements. In the case of *Lubin v. Pressed Steel Car Co.,* 263 N. Y. Supp. 433, the Court says:

> "In *Rothschild v. Rio Grande Western Railway Co.,* 84 Hun, 103, 32 N. Y. S. 37, affirmed 164 N. Y. 594, 58 N. E. 1092, we have an enunciation of the same principles of law. It is very aptly stated in that opinion by the Court that the provisions of

the bond meet the eye of the purchaser and are designed by the corporation to enforce their sale, and that they cannot be nullified by an inconsistent provision contained in the trust deed. It is evident that the mere general reference contained in the bond, that the bond is created under a certain indenture and that for the terms thereof the holder is referred to the contents of the indenture, is not sufficiently explicit to place the holder on notice of the nature of the inhibitions thrown about the enforcement of the rights of the bondholders, as contained in the indenture herein pleaded. While it is true that the bond and the indenture must be read together in order to arrive at the intent of the parties, this rule is limited by the further proviso that the two instruments must be consistent, and that where an inconsistency exists as between the two instruments the provisions of the bond must prevail because that is the instrument on which the holder primarily relies when he is making his purchase. See *Rothschild v. Rio Grande Western Railway Co., supra,* at page 109 of 84 Hun, 32 N. Y. S. 37, 40, where it is stated as follows: 'Undoubtedly the bond and trust deed are to be construed together, but in case there is any ambiguity in any of the provisions of the mortgage, such ambiguity must be construed against the corporation. It is an elementary rule for the construction of contracts that ambiguous phrases are to be taken most strongly against the covenantor, whose words they are. This rule is universally applied to contracts of insurance, and to instruments which are wholly devised by or in behalf of the covenantor, and it should be rigorously applied to the construction of trust deeds or mortgages which purport to

be designed for securing the payment of the bonds of the obligor. It is true that these deeds are matters of record, but the records are often in a State distant from the place at which the bonds are sold, and the purchaser seldom has an opportunity of examining the terms of the instrument.'

"And at page 110 of 84 Hun, 32 N. Y. S. 37, 41: 'The provisions of the bonds meet the eye of the purchaser and are designed by the corporation to influence their sale, and they cannot be nullified by an inconsistent provision contained in the trust deed. As before stated, these bonds and coupons contain an absolute promise to pay definite sums on specific dates, which implies a right of action in case of failure, and if the eighth article is capable of the construction contended for by the corporation it is utterly inconsistent with the bonds, which in that case must prevail.' See, also *General Investment Co. vs. Interborough Rapid Transit Co.*, 200 App. Div. 794, 193 N. Y. S. 903, affirmed 235 N. Y. 133, 139 N. E. 216; *Beach v. Supreme Tent of Knights of Maccabees of World*, 177 N. Y. 100, 69 N. E. 281."

The decisions in *Cunningham v. Pressed Steel Car. Co.*, 265 N. Y. Supp. 256 and *Enoch v. Brandon* (N. Y.) 165 N. E. 45, are both to the same effect.

POINT III.

The provision in the trust agreement is no bar to plaintiff's suit.

Even if the clause in the trust agreement was to be given the meaning contended for by the defendant the same would not bar plaintiff's suit.

The plaintiff is the holder of notes of the defendant which admittedly are absolute promises to pay. The defendant admits the promise to pay, but says that by a separate agreement, called an indenture of trust, the note holders covenanted they would not sue until certain contingencies happened.

Plainly, this does not affect the right of the plaintiff to sue. It might constitute a breach of covenant in the trust agreement for which defendant possibly could counter-claim for any expenses or loss sustained by it through the institution of plaintiff's suit *(Woodruff v. Woodruff* 44 N. J. Eq. 349 at p. 353). But even if this right existed in the defendant, it would not bar plaintiff's suit, and certainly would not be sufficient to sustain a motion to strike plaintiff's complaint.

A contract which undertook to bar the plaintiff from suing to collect what was due him, would be void as against public policy.

The policy of our law is to furnish every citizen with a speedy redress for any injury that he may receive either to his person or his property, and a contract which undertakes to destroy that right, or impose a penalty upon seeking the redress which the law intends him to have, is contrary to that policy, and therefore, void. *Chicago, Burlington and Quincey Railroad v. Healy* (Neb.) 111 N. W. 598, 10 L.R.A. (N. S.) 198.

POINT IV.

By defendant's default, plaintiff was relieved and discharged from complying with the terms of the trust agreement.

The trust agreement although referred to in the notes is not by the reference incorporated therein (P. 6 l. 34 to 40, P. 7 l. 1 to 12). It therefore was a separate and distinct contract to be

considered in conjunction with the notes only so long as it remained in force and effect.

The defendant, by the default in the payment of the principal of the notes breached the contract. Thereupon the trust agreement in its entirety was discharged, relieving the other parties (the noteholders and trustees) from any duty of performance on their part. *Vickers v. Electrozone Commercial Co. (E. & A.)* 67 N. J. L. 665 at p. 671; *Holt v. United Security Life Ins. Co. (E. & A.)* 76 N. J. L. 585 at p. 595.

This is treating the trust agreement as an entire contract with the clause relied on in this case by the defendant as a condition therein.

If the indenture of trust is to be treated as a severable contract, the clause relied upon by the defendant must be considered as an independent covenant and not a condition. But the defendant would then be confronted with the reasoning of the Court in *Woodruff vs. Woodruff, supra,* and would be relegated merely to a right to counterclaim for any damages sustained through plaintiff's non-compliance with the covenant.

In either event, plaintiff has a good cause of action on the notes.

POINT V.

The plaintiff had the legal right to plead and prove at the trial the impossibility of performance of the condition relied upon by defendant.

The trial court in granting the motion of the defendant to strike the complaint, declined to take into consideration, the facts alleged in the affidavit filed by the plaintiff (R. p. 23), taking the view that the same dealt with an occurrence after the issuance and service of the Summons and Complaint (R. p. 30, 1. 37 to 40, P. 31, 1. 1 to 13).

When the defendant objected to the suit, relying on the above mentioned clause in the trust agreement, the plaintiff undertook to show that the clause was inapplicable for the reason that the condition through the act of defendant itself was impossible of performance, and that as a matter of fact, defendant controlled more than seventy-five per cent of the outstanding notes, making it impossible for any noteholder to secure the consent of twenty-five per cent of the outstanding notes. It was for this purpose, that demand was made on the defendant for the names and addresses of the holders of the notes (R. p. 23).

If the defendant relied on a clause in the trust agreement, as a defense to the suit, it was entirely within the plaintiff's rights to reply thereto and show that the condition through the act of the defendant had been rendered impossible of performance. This would have been a complete answer to defendant's contention.

The Supreme Court in *Mutual Benefit Life Insurance Company vs. Hillyard,* 35 N. J. L. 415, lays down the rule that the non-performance of a condition is no defense if the condition is impossible of performance, and says at page 419:

> "Lord-Coke, 1 Inst. 216, a, b, expresses the same rule saying, 'that where a condition of a bond or recognizance becomes impossible by the act of God, or of the law, or of the obligee there the obligation is saved * * *.' "

Again in the case of *Steelman vs. Mattix,* 38 N. J. L. 247, the Court says at page 249:

> "The cases almost uniformly recognized the rule, that where the condition of a bond or recognizance becomes impossible of performance by the act of God or of the law, or of the obligee, the obligation is saved.

> *People v. Manning,* 8 Cowen 297; *Taylor v. Taintor,* 16 Wall. 366."

On appeal to this Court, the judgment in *Mutual Benefit Life Insurance Co. vs. Hillyard, supra,* was affirmed, and in the opinion reported in 37 N. J. L. 445, this Court at page 470 says:

> "If the condition subsequent is void or impossible, the estate having vested remains undisturbed."

Since the clause relied upon by the defendant is a condition subsequent, and not a condition precedent, as pointed out in the case of *Board of Education v. Richmond &c. Co., supra,* the plaintiff had until the day of trial to comply with the condition subsequent, or at that time to prove that it was impossible to comply with.

POINT VI.

The plaintiff had the legal right to plead and prove at the trial an estoppel.

As mentioned in Point 1, under the rule laid down in *Board of Education vs. Richmond supra,* if and when the defendant relied on the non-performance of a condition subsequent, the plaintiff might at the trial prove full performance on his part and also as referred to in Point V, the plaintiff had the legal right to plead and prove impossibility of performance.

Likewise the trial court by proceeding to strike out plaintiff's complaint, acting on the clause in the trust agreement, deprived plaintiff of the opportunity to plead and prove an estoppel as against the provisions of the indenture of trust.

The defendant either willfully refused plaintiff a list of the other noteholders or else had negligently failed to keep a record of them and as the

result, could not furnish them (R. p. 23 to 24), thereby preventing plaintiff from undertaking to obtain the consent of twenty-five per cent of the other noteholders as to the institution of suit.

A pleas of estoppel was legally good. *Musconetcong Iron Works vs. D. L. &c. R. R. Co.* (E. & A.) 78 N. J. L. 717 at 719. But the granting of the motion to strike the complaint improperly took away from plaintiff his legal right to submit to a jury facts to prove an estoppel.

POINT VII.

The Indenture of Trust established a trust for the benefit of the noteholders, but the plaintiff may waive his rights thereunder.

Even a casual reading of the provisions of the trust indenture show many inconsistencies and ambiguities. Consequently, we may look to the entire transaction to ascertain the intention of the parties thereto.

The defendant by the transaction, undertook to raise the sum of Three Million Dollars through the sale of its notes or obligations. For the benefit of the purchasers of the notes and the supposed purpose of better protecting them, and affording additional security to them, the defendant executed a trust agreement providing for a sinking fund for the payment of the notes. It is in this trust agreement that we find the provisions now relied upon by the defendant.

The trust agreement specifically provides in Section 8 of Article 6, that nothing therein contained should affect or impair the obligation of the company which is unconditional and absolute to pay at the date of maturity, *to the respective holders of the notes,* or affect or impair the right of action which is also absolute and unconditional, of such holders to enforce such payment.

Certainly this clearly demonstrates that the

trust indenture and all its terms and provisions was intended to be an additional benefit to be conferred upon the noteholders. Therefore, the plaintiff, as a noteholder, has a right to waive any and all of its rights under the trust indenture and proceed against the defendant at law on the notes themselves. *Tannenbaum Son & Co. v. Oxford Dye Works (E. & A.)* 107 N. J. L. 386.

In short, the rights and remedies provided for under the trust indenture must be in their entirety construed to be cumulative and additional to the naked legal rights of a noteholder.

CONCLUSION.

For the above reasons, we respectfully submit that the trial court should have denied the motion of the defendant to strike out plaintiff's complaint and that, therefore, the judgment of the Supreme Court should be reversed.

CHANDLESS, WELLER & SELSER,
Attorneys of Plaintiff-Appellant.

JOHN E. SELSER,
Of Counsel.

New Jersey Court of Errors and Appeals

RALPH J. M. BULLOWA, Plaintiff-Appellant, *against* THERMOID COMPANY, a Delaware corporation, Defendant-Appellee.	At Law. On Appeal from the Supreme Court.

BRIEF OF DEFENDANT-APPELLEE.

Nature of Proceedings.

Plaintiff-appellant (hereinafter referred to as plaintiff) sued at law to recover from the defendant-appellee (hereinafter referred to as defendant) the principal amount of two gold notes in the aggregate sum of $2,000.00 (issued by the defendant) and maturing on February 1, 1934. These notes were part of an authorized issue of like notes in the aggregate principal amount of $3,000,000.00 dated February 1, 1929, all maturing on February 1, 1934, and issued under an Indenture of Trust (R., p. 6, ll. 35-40, and p. 7, ll. 1-12). Upon motion of the defendant to strike out the complaint upon any one or more of the grounds set forth in its notice to the plaintiff, the complaint was struck out upon a memorandum opinion of Circuit Court Judge Caffrey sitting as a Supreme Court Commissioner (R., pp. 26-31), and a final judgment was entered thereon on August 28, 1934 (R., pp. 32-34).

Abstract of Pleadings.

The plaintiff's complaint alleged the following facts (R., pp. 2-9): That on February 1, 1934 the defendant issued its Six Per Cent. Notes in the aggregate amount of $3,000,000, payable on February 1, 1934 to bearer or in case of registration thereof, to the registered holders; that a copy of one of the notes in suit is annexed to the complaint as Exhibit A (R., pp. 5-9); that prior to the date of the maturity of the notes plaintiff purchased two notes, each in the amount of $1,000, and that he is still the holder and owner thereof; these notes were issued under an Indenture of Trust dated as of February 1, 1929 made by the defendant to the National Bank of Commerce in New York as Trustee, and that under the terms of this Indenture it was declared that the obligation of the defendant to pay the amounts due on the notes was absolute and unconditional; that the National Bank of Commerce in New York has been merged into the Guaranty Trust Company of New York; that the notes held by plaintiff became due and payable on February 1, 1934; that "although plaintiff has done and performed in respect to said bonds and notes all things required of him and has demanded of defendant and of the trustee referred to in said bonds or notes" that they be paid, both the defendant and the Trustee have refused to make payment; and that there is due from defendant to plaintiff the sum of $2,000 together with interest from February 1, 1934 (R., pp. 2 and 3).

The defendant formally moved to strike out the complaint upon any one or more of six grounds specifically set forth, namely (R., pp. 10 and 11) (1) the complaint is sham; (2) the complaint is frivolous; (3) the complaint does not set forth sufficient facts to disclose a cause of action; (4)

the plaintiff is barred from instituting any action against the defendant on the notes because all remedies to enforce the payment thereof in the absence of certain conditions are under the terms of the Indenture of Trust under which the notes were issued, vested in the Trustee named in the Indenture; (5) the plaintiff is not a proper party plaintiff in a suit upon the notes; and (6) before any noteholder has a legal right to sue on the notes, certain conditions must be fulfilled, and there is no allegation in the complaint that there has been a fulfillment of these conditions precedent. The notice of the motion to strike out the complaint had annexed thereto an affidavit by H. J. Koch, the treasurer of the defendant company (R., pp. 12-22), containing the following facts: The defendant did on February 1, 1929 execute an Indenture of Trust to secure notes dated February 1, 1929 in the aggregate principal amount of $3,000,000, all maturing on February 1, 1934; these notes were payable to bearer or to the registered owners thereof; that the notes are all in the same form except as to the respective numbers and amounts appearing thereon; that the form of note annexed to plaintiff's complaint is a true copy of the notes issued; that the notes are held by a large number of persons residing in many states of the United States and elsewhere; that the Indenture of Trust contained certain special clauses which were intended to promote and protect the equal and ratable rights of every owner of the notes, and that these clauses were intended for the equal benefit of all the owners of these notes; that Article VI of the Indenture contains certain clauses barring the right of the plaintiff to sue and a copy of that Article was annexed to his affidavit as Exhibit A (R., pp. 15-22), and that of the authorized note issue of $3,000,000, notes aggregating the sum of $2,847,500 were is-

sued under the Trust Indenture and outstanding, and that this amount included notes in the sum of $163,500 repurchased by the defendant and held in its treasury (R., p. 14, ll. 1-12).

The plaintiff filed an affidavit in opposition to defendant's motion (R., pp. 23-25). The affiant stated that on May 31, 1934 he had made demand upon the treasurer of the defendant company for a list of the names and addresses of the owners of notes under the issue in question, and that the treasurer had informed him that he was unable to give him such a list and that his request would be referred to the Board of Directors.

Statement of Question Involved.

Considering the provisions of the notes covered by the Indenture of Trust under which they were issued, the references in the notes to the Indenture and the provisions of the Indenture applying to the rights of noteholders, is a noteholder prohibited from bringing a suit to enforce collection of his note upon a default at maturity unless and until the requisite number of noteholders prescribed by the Indenture collectively shall have requested the Trustee designated in the Indenture to sue on the notes?

Statement of the Case.

On February 1, 1929 the defendant issued gold notes in denominations of $500 and $1,000 payable on February 1, 1934 with interest payable semi-annually. These notes were issued under an Indenture of Trust dated February 1, 1929 wherein the National Bank of Commerce of New York (since merged into the Guaranty Trust Company of New York) was named as Trustee. A true copy of the note issued under this Indenture

is annexed as Exhibit A to plaintiff's complaint (R., pp. 5-9). The sections of the Indenture pertinent to the legal issues now before the Court appear in Exhibit A annexed to the affidavit of Mr. Koch (R., pp. 15-22).

Each note issued as aforesaid contained the following direct references to the Trust Indenture:

> "* * * As provided in the *indenture* hereinafter referred to, the Company will reimburse to the bearer or, if this note be registered, to the registered owner hereof, any tax which may be lawfully imposed upon such bearer or registered owner (R., p. 6, ll. 7-12) * * * and only upon the terms and conditions, and in the manner more fully set forth in the *indenture* hereinafter referred to, and provided that application for such reimbursement shall be made, as in said *indenture* required * * *" (R., p. 6, ll. 28-32). (Italics ours.)
>
> "This note is one of a duly authorized issue of notes of the Company known as its Five Year Six Per Cent. Sinking Fund Gold Notes (herein called the notes), limited to an aggregate principal amount of Three Million Dollars ($3,000,000), issued or to be issued under an *Indenture of Trust* (hereinafter called the indenture), dated as of February 1, 1929, executed and delivered by Thermoid Company to National Bank of Commerce in New York as Trustee, *to which indenture reference is hereby made for the terms and conditions on and under which the notes have been or are to be issued and the nature and extent of the rights of the holders of notes, of the Company and of the Trustee*" (R., p. 6, ll. 35-40, p. 7, ll. 1-12). (Italics ours.)
>
> "The notes of this issue are callable * * *, all in the manner and on the conditions provided in the *indenture* * * *" (R., p. 7, l. 13, and ll. 25-27). (Italics ours.)
>
> "The notes are entitled to the benefits of the sinking fund provided for in the *indenture*" (R., p. 7, ll. 31 and 32). (Italics ours.)

"In case an event of default as defined in the *indenture* shall occur, the principal of the notes may become or be declared due and payable in the manner and with the effect provided in the *indenture*" (R., p. 7, ll. 33-37). (Italics ours).

"No recourse shall be had * * * in respect hereof or of the indebtedness represented hereby or of the *indenture,* against any incorporator, stockholder, * * *" (R., p. 7, ll. 37-40, p. 8, ll. 1 and 2). (Italics ours.)

The following sections and parts of sections of the Trust Indenture are pertinent to the legal issues being considered:

"Section 2. If one or more of the following events, hereinafter called events of default, shall happen, that is to say (R., p. 15, ll. 24-27):

(b) default shall be made in the payment of the principal of or premium, if any, on any of the notes when the same shall become due and payable, whether *at maturity,* by call for redemption, by declaration or otherwise: (R., p. 15, ll. 31-35) * * *

then and in any such case the Trustee, by notice in writing delivered to the Company, may, and upon the written request of the holders of twenty-five per cent. in principal amount of the notes at the time outstanding shall, declare the principal of all the notes, *if not already due and payable,* to be forthwith due and payable * * *." (R., p. 16, ll. 35-40, p. 17, l. 1). (Italics ours.)

"Section 3. In case * * *

(b) default shall be made in the payment of the principal of or premium, if any, on any of the notes when the same shall become due and payable, whether *at maturity,* by call for redemption, by declaration or otherwise;

then in every such case, upon demand of the Trustee * * *, the Company will pay to the Trustee, for the benefit of the holders of the notes and coupons * * * the whole amount that then shall have become due and payable * * *." (R., p. 17, l. 30, ll. 37-40). (Italics ours.)

"Section 5. *All rights of action under this indenture, or under any of the notes or coupons,* may be enforced by the Trustee without the possession of any of the notes or coupons * * * and any such suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, *and any recovery of judgment shall be for the ratable benefit of the holders of said notes and coupons* * * *." (R., p. 19, ll. 28-31, p. 19, ll. 37-40). (Italics ours.)

"Section 6. Any moneys collected by the Trustee under this Article shall be applied by the Trustee as follows:

(1) to the payment of costs and expenses, including a reasonable compensation to the Trustee, its agents, attorneys and counsel;

(2) to the payment of the amounts then due and unpaid upon the notes and coupons * * *, ratably and without any preference or priority of any kind * * *." (R., p. 20, ll. 11-21).

"Section 8. *In order to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits, all the notes shall be subject to the condition that all rights of action thereon, or in respect thereof,* or on or in respect of the coupons thereto appertaining, *are vested exclusively in the Trustee, and that no holder of any of the notes* or coupons appertaining thereto *shall have any right to institute any action, at law or in equity, upon the notes or any of the appurtenant coupons, or growing out of any provision thereof, or of this in-*

denture, or for the enforcement of this indenture, unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent. in principal amount of notes then outstanding, filed with the Trustee, with an offer of satisfactory indemnity; *and any recovery in any action or proceeding instituted by the holder of any of the notes or appurtenant coupons shall be for the equal pro rata benefit of all outstanding notes similarly situated,* and, for the protection and enforcement of this Section 8, each and every noteholder and the Trustee shall be entitled to such relief as can be given either at law or in equity; provided, however, that nothing herein or elsewhere in this indenture or in the notes or in the coupons shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment or shall affect or impair the right of the owner of any warrant to enforce the provisions thereof as provided by the terms of Section 10 of Article II hereof'' (R., p. 21, ll. 16-40, p. 22, ll. 1-18). (Italics ours.)

The notes issued under the Indenture of Trust matured on February 1, 1934 and were not paid. The authorized issue of notes was $3,000,000. The notes issued and outstanding on the date of maturity amounted to $2,847,500. These notes were held by a large number of persons residing in many states of the United States and elsewhere (R., p. 14, ll. 1-12). Among the notes so issued and outstanding were the two notes which are the subject-matter of these proceedings. The Ther-

moid Company, the defendant, was on February 1, 1934 in the same position in which all large manufacturing corporations have found themselves which have had note or bond issues maturing within the last several years, and not being able to pay the obligations upon maturity submitted to its noteholders a plan for the extension of the time of payment of the notes for a period of three years. The plans for this extension were embodied in a pamphlet known as the "Thermoid Company Noteholders' Plan." At the time plaintiff filed his action notes in excess of eighty per centum of the principal amount then outstanding had been deposited and extended under the plan submitted. The percentage of extended noteholders is now in excess of ninety per centum.

In its motion to strike the complaint, the defendant relied upon any one or all, or upon the combination of grounds 1, 4, 5 and 6 set forth in its notice of the motion to strike (R., pp. 10 and 11). The defendant contends that having regard for the provisions of the notes issued under the Trust Indenture, the references in the notes to the Indenture, and the provisions of the Indenture applying to the rights of noteholders, a noteholder is precluded from bringing any suit or action to enforce collection of his note upon a default either before or at maturity—

> "* * * unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent. in principal amount of notes then outstanding, filed with the Trustee * * *." (R., p. 21, ll. 27-33).

The defendant contends that until the requisite number of noteholders collectively shall have requested the Trustee to sue on the notes, and the Trustee shall refuse to sue after demand, no note-

holder has the legal right to institute an independent action either before or after maturity. The complaint (R., pp. 2-4) contains no allegations with respect to demand upon the Trustee by the prescribed number of noteholders and refusal after such demand, and is therefore sham and otherwise, as urged, legally insufficient. The complaint was therefore properly struck out.

The plaintiff seeks to contend that the contentions of the defendant and the law as urged by it are correct in all cases except where the notes have matured and have not been paid. In other words, he urges that a default prior to ultimate maturity is not the same in legal contemplation as a default at maturity; that at maturity the Trust Indenture falls of its own weight, and has no legal significance whatsoever because it has run its full course.

Argument.

Plaintiff's brief contains protracted legal and factual arguments on certain questions which are entirely extraneous to the limited legal question before the Court. It requires no citation of authorities to sustain the proposition that Courts deal only with legal issues presented by the motion papers, and not with legal questions of academic interest and not directly involved. This suggestion applies to the argument of plaintiff in respect of the negotiability of the notes. Plaintiff's brief also contains a long discussion as to what law should control in the consideration of the legal questions before us. The note carries on its face and at the top thereof the state of the incorporation of the defendant Company. That is Delaware. The notes provide for their payment at the office of the Trustee in New York City. Plaintiff therefore assumes without proof that the

contract was made in New York or in Delaware, but since the greater number of cases upon which he relies were decided by the New York Courts, he expresses an overwhelming preference for New York as the place of making the contract. We contend that this is an improper assumption. If that legal question has legal competency, it can be considered only upon formal proofs and not assumptions. The contract might well have been made in Trenton, New Jersey, which is the sole and central plant of the whole organization. The defendant has no business offices either in Delaware or New York. We are dealing with a pure common law question where the law of no state is controlling. The cases in the Courts of other States can be considered only in so far as they may be helpful on principle. The legal questions presented have been in the greater number of cases in the Federal Courts. The cases in the Federal Courts are uniformly favorable to the contentions of the defendant.

A significant circumstance in connection with this case is that the same legal questions now before the Court were submitted to the United States District Court for the District of New Jersey at the very time that this case was being considered by Circuit Judge Caffrey, whose opinion was filed on July 10, 1934. We have reference to the case of *Milton Mermelstein* v. *Thermoid Company*. The notes in that case were of the same issue as those involved in this case. The motion papers were in all respects the same in both cases. District Judge Forman struck the complaint, as did Circuit Judge Caffrey. Judge Caffrey's decision was also filed on July 10, 1934. Both Judge Forman and Judge Caffrey came to the same legal conclusions without having the benefit of each other's decisions. The case of *Mermelstein* v. *Thermoid Company* is not as yet reported in any of the official reports.

A copy of Judge Forman's memorandum opinion appears in the Appendix at the end of this brief. The following two excerpts are taken from his opinion appearing in the Appendix:

> "The provision giving the right to twenty-five per centum to control the remedy was placed in the trust agreement for the protection of the holders of the notes and not for the benefit of the maker. It was calculated to be advantageous to the holders as a class. The noteholders have agreed in advance for their mutual protection to prevent an uncompromising minority to disorganize and endanger the assets of the maker of the notes and to avoid preferences."
>
> * * * * * *
>
> "The plaintiff bought these notes under no compulsion. He was advised in advance, or should have been, in what this court considers plain language as to his rights in cases of default on the notes. Indeed, the reasonableness of the provision he now attacks would likely appeal to a prospective purchaser as a point for purchasing the notes as it secured him against the action of a minority who might be inimical to the interest of the noteholders and the maker. The plaintiff must pursue the method to which he agreed, in order to enforce the promise in the notes.
>
> The motion to strike should be
> Granted."

I.

The plaintiff has no legal right to sue on his notes until the requisite number of noteholders collectively shall have requested the Trustee to sue on the notes, and the Trustee shall refuse to sue after demand.

The plaintiff argues that a noteholder who acquires one of the notes in suit in the ordinary course sees the unconditional promise to pay. His attention is not directed to any restriction upon his right to enforce appellee's obligation at maturity by suit in the usual course, nor to any warning that might compel him to examine the Indenture for any such restriction merely because of reference to the Indenture for a statement of "the nature and extent of the rights of the holders of notes." We have set out at length numerous portions of the notes which have a direct reference and tie-up with the Indenture. One may examine into notes generally without end without being able to discover another case where there is so numerous a mention of and reference to the Indenture as will be found in the notes here in suit. The references deal with tax payments, redemption, sinking funds and numerous other things. As to sinking fund provisions the notes state that:

> "The notes are entitled to the benefits of the sinking fund provided for in the indenture." (R., p. 7, ll. 31 and 32.)

No noteholder can conceivably even imagine what the provisions in respect of the sinking fund are unless he actually examines the Trust Indenture. If he chooses not to examine it, the fault lies with him and not the company. The notes specifically refer to the Indenture in the following language:

> "* * * to which indenture reference is hereby made for the terms and conditions on and under which the notes have been or are to be issued and the nature and extent of the rights of the holders of the notes, of the Company and of the Trustee." (R., p. 7, ll. 7-12.)

It is to be noted that the reference covers rights of three separate parties: (1) noteholders; (2) the Company, and (3) the Trustee.

In the case of *Crosthwaite* v. *Moline Plow Co.*, 298 Fed. 466 (S. D., N. Y.), the Court had before it a case involving serial notes covered by an indenture of trust. The plaintiff sued at law to collect the amount due on several notes. He moved for judgment on the pleadings and the defendant moved to dismiss the complaint. Each note contained the statement that it is issued under a trust agreement—

> "to which agreement reference is hereby made for a description of the terms under which the said notes are issued, and of the rights and obligations of the company and the trustee with respect thereto."

Judge Winslow said on page 468:

> "I am of the opinion that the notes and the trust agreement are not inconsistent, but must be read together in order to ascertain the provisions of the entire contract. The provisions incorporated in the trust agreement are not at all unusual, and, in order to find that these provisions are inconsistent with or contradictory of the language of the notes, it would be necessary to entirely ignore the express language of the notes calling attention to the provisions of the mortgage.
>
> *The court is of the opinion that the holders of the notes under the language quoted were charged with notice of all of the terms of the agreement.* To hold otherwise would be to

> find that the reference to the agreement was meaningless." (Italics ours.)

The complaint was dismissed.

In the case of *Allan* v. *Moline Plow Co.*, 14 Fed. (2d) 912 (Eighth Circuit), each note contained on its face the following recital:

> "This note is one of an issue of notes of the company * * * all issued under and pursuant to a certain agreement, dated September 1, 1918, executed by the company and the Central Union Trust Company of New York, as trustee, to which agreement reference is hereby made for a description of the terms under which the said notes are issued and of the rights and obligations of the company and the trustee with respect thereto."

Judge Phillips, speaking for the Court, said on page 915:

> "This recital clearly makes the applicable provisions of the trust agreement a part and parcel of the terms of the notes as effectually as if they were written into the notes themselves."

The notes contain the following clause covering defaults:

> "In case *an event of default as defined in the indenture* shall occur, the principal of the notes may become or be declared due and payable in the manner and with the effect provided in the indenture." (R., p. 7, ll. 33-37.) (Italics ours.)

An "event of default" is defined in the Indenture in two places. In Article VI, Section 2, subsection (b), it is defined as a default made in the payment of the principal "whether *at maturity,* by call for redemption, by declaration or otherwise." (R., p. 15, ll. 35-37.) (Italics ours.) The

same section declares that the Trustee shall upon the request of the prescribed number of noteholders, declare the principal of the notes to be forthwith due and payable *"if not already due and payable"* (R., p. 16, l. 40). (Italics ours.) In other words, here is an express declaration reaffirming the contention that an event of default occurs at maturity or before maturity. Again in the same Article in Section 3, sub-section (b), the words "event of default" as similarly defined to arise *at maturity* or otherwise (R., p. 17, ll. 37-40).

We then come to Section 8 of Article VI (R., pp. 21 and 22), wherein it is provided that:

> *"In order to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits,* * * * all rights of action thereon (referring to the notes), or in respect thereof, * * * are vested exclusively in the Trustee, and that no holder of any of the notes * * * shall have any right to institute any action, at law or in equity, upon the notes, * * * unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent. in principal amount of notes then outstanding * * *." (Italics ours.)

Most certainly the words "at maturity," as used in the foregoing sections, have some definite legal meaning and significance. They mean just exactly what they say—a default in the payment of principal at maturity. Section 8, above quoted, lays down the fundamental declaration of principles that the right to institute suits on the notes rests exclusively in the first instance with the Trustee *"to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits."* If plaintiff has

the rights which he now claims for himself, every other one of several thousand holders has similar rights, and the suggestion that such rights might exist in several thousand persons at the same time destroys the language used as regards the promotion of "equal and ratable rights" and the avoiding of "multiplicity of suits." Furthermore, if plaintiff can obtain judgment and collect on his notes he is most certainly obtaining a preference as against other noteholders. The section goes on to provide that for the purpose of accomplishing these purposes "all the notes shall be subject to the condition that all rights of action thereon, or in respect thereof * * * are vested exclusively in the Trustee, and that no holder of any of the notes * * * shall have any right to institute any action * * * upon the notes * * * or growing out of any provision thereof, or of this indenture, or for the enforcement of this indenture, unless * * *." We call the Court's particular attention to the language here used and particularly that it is framed in the disjunctive. The holder of notes is barred from suing on the notes themselves, *or* "growing out of any provision thereof," *or* "of this indenture," *or* "for the enforcement of this indenture." No holder can sue on the notes because of a breach arising upon or under the notes, or arising upon or under the indenture. Most certainly language which is so carefully and clearly expressed must mean exactly what it says. There is no reservation of any right in the noteholder to sue at maturity.

Judge Caffrey, in his opinion striking out the complaint, said in part (R., p. 27, ll. 17-30; p. 31, ll. 14-20):

> "There is no difficulty in ascertaining the plaintiff's right. The difficulty, as I see it, lies in the enforcement of it at this time, due to the language in the Indenture of Trust,

> which forms part of the contractual obligation. The bonds and the trust agreement are inseparable. It will serve no useful purpose to set out in full, either the bond itself or the Indenture of Trust—reference to certain paragraphs in both will clarify the issue. In the seventh paragraph of the bond (Exhibit 'A' attached to the Complaint) this language is used, 'in case an event of default as defined in the Indenture shall occur, the principal of the notes may become or be declared due and payable in the manner, and with the effect provided in the Indenture.' ''
>
> * * * * * *
>
> ''To permit the plaintiff to prevail at this time, would be destructive of the plan carefully thought out with a view to the safeguarding of the investors in general. Of course, an arbitrary or capricious attitude on the part of the Trustee might warrant the intervention of the Court, but if this came to pass, it would not be a subject for consideration by this tribunal.''

Judge Forman in his opinion in the case of *Mermelstein* v. *Thermoid Company, supra,* suggested the same line of thought when he said:

> ''* * * The noteholders have agreed in advance for their mutual protection to prevent an uncompromising minority to disorganize and endanger the assets of the maker of the notes and to avoid preferences.''

Furthermore, under Section 6 of Article VI, it is provided that all moneys collected by the Trustee shall be used in the first instance to pay costs and expenses, including reasonable compensation to the Trustee, its agents and attorneys (R., p. 20, ll. 11-17). If every noteholder has the legal right to sue without regard to the Trustee and without regard to each other, then the situation might well develop where the noteholders will recover and

leave no assets for the Trustee as its compensation.

The allegations of the complaint are legally insufficient to place the plaintiff in the position of sustaining his complaint. Under the terms of the Trust Indenture securing the notes in question, all remedies to enforce the payment of the notes mentioned in the complaint are vested in the Trustee appointed in the Trust Indenture, at least until the Trustee has been requested to enforce payment in the manner therein provided and has refused or failed to do so. The rights of noteholders, by the terms of the plaintiff's notes, are fixed and determined by the Trust Indenture. The notes and the Trust Indenture taken and construed together constitute the entire contract between this defendant and the holders of the notes secured by the Trust Indenture. The Trust Indenture was obviously made for the purpose of securing equally all of the noteholders and to prevent one noteholder from securing an advantage over the others. The plaintiff purchased his notes with actual or constructive notice of the terms and conditions of the trust indenture. As was said by Judge Phillips in the case of *Allan* v. *Moline Plow Co., supra,* on page 915:

> "The recital above referred to clearly gave notice to the purchaser of a note that its terms were limited by the provisions of the trust agreement, and charged such purchaser with notice of every applicable provision in the agreement * * *."

As long ago as 1882 the United States Supreme Court considered restrictions of this nature in the case of *Chicago, Danville and Vincennes R. R. Co., et al.* v. *Fosdick,* 106 U. S. 47, 27 L. Ed. 47. In that case a bond issue secured by a mortgage was involved. Article 8 of the mortgage provided that the trustees "Upon the written request of the

holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided." Mr. Justice Matthews said on page 77:

> "* * * The whole article must be taken together. * * * It is an agreement which the parties were at liberty to make. There is nothing in it illegal or contrary to public policy * * *.
>
> The stipulation, nevertheless, is in the nature of a penalty, and may be regarded as *stricti juris,* to be construed fairly and reasonably, according to the meaning of the parties, but leaning, if need be, in any case of ambiguity, in favor of the debtor * * *; yet it is apparent, that one purpose at least of the clause in question was to protect the bondholders as a class against the views of individuals and combinations of individuals, being a minority, pursuing separate interests."

In the case of *McGeorge, et al.* v. *Bigstone Gap Imp. Co.,* 57 Fed. 262, the Circuit Court of the Western District of Virginia had before it the following provision which was contained in a mortgage made by the Bigstone Gap Imp. Co. to secure bonds, some of which were held by complainants:

> "No suit, action, or proceeding in law or in equity for the foreclosure of this mortgage or deed of trust, or the execution of the trusts thereof, or for any other remedy, shall be brought or instituted except by, through, or in the name of the Trustee for the time being—; and such request and offer of indemnity are hereby declared to be conditions precedent for the execution of the powers and trusts of this mortgage or deed of trusts to any action or cause of action for the foreclosure, or for any other remedy hereunder."

In that case certain bondholders sought to have a receiver appointed for the company. With reference to the power of bondholders to file a bill asking for the appointment of a receiver, the Court said, speaking of the limitations contained in the section of the mortgage above quoted (p. 266):

> "They are part of the consideration offered by the company and accepted by the bondholders when the contract was made, and they are as valid as the other provisions of the trust, and as binding on the bondholders as those other stipulations are on the company. State *vs.* Northern Cent. R. Co., 18 Md. 193. This requirement of the deed of trust has been entirely ignored by the complainants as bondholders, although, in the absence of proof showing fraud or mismanagement on the part of the company, it is binding upon them. They have not given the notice in writing to the trustee of the alleged default, nor has any request to institute suit been made by one-fifth of the holders of the outstanding bonds and neither has the trustee been offered security against costs and charges. No ground whatever is shown why the court should ignore the manner of procedure provided by the parties themselves for their mutual protection. I therefore hold that, as bondholders, complainants, on the case as now made, have no standing in this court, and cannot have until they have first exhausted the remedies provided for them in the trust, or have shown their inability to do so because of the fault of the defendant or of its management."

In the case of *Hoyt* v. *E. I. DuPont DeNemours Powder Co.,* 102 Atl. 666, an action in the Court of Chancery of New Jersey, Vice-Chancellor Backes held as follows (p. 667):

> "The provision in the trust deed requiring a demand by twenty-five per cent. in value

> of the bondholders to move the trustee to action, *restricts collection* or foreclosure proceedings, but is not a limitation upon the inherent rights of bondholders to protect their interest." (Italics ours.)

In that case an injunction was allowed restraining the defendant and the trustee under the mortgage from permitting the removal of certain securities from the trustee's possession.

In the case of *Home Mortgage Co.* v. *Ramsey,* 49 Fed. (2d) 738 (Fourth Circuit), certain bondholders filed their bill for the appointment of a receiver. Section 12 of the mortgage or deed of trust provided that:

> "Anything in this Article or elsewhere in this Trust Indenture to the contrary notwithstanding, no holder of any bond or coupon issued hereunder, and hereby secured shall have any right to institute any suit, action or proceeding at law or in equity or take any other steps or proceedings for any remedy hereunder, unless such holder previously shall have given to the Trustee written notice of such default and the continuation thereof as hereinbefore provided * * *."

On page 743, Judge Cochran, speaking for the Court, said:

> "Moreover, we think that the plaintiff is precluded from maintaining this suit by the terms of her bonds and the indenture securing them which provide in substance that action can be taken for the protection of the interest of the bondholders only where a certain number of the bondholders join. These provisions have already been quoted. The plaintiff argues that these provisions are void because it is an attempt to oust the jurisdiction of the courts. We do not so regard them. Under the terms of the bonds and indenture, the trustee is the representative of the plaintiff, and entitled to bring suit.

> The provisions are merely reasonable conditions precedent to the right of the plaintiff to bring the suit herself. They are intended for the security of all the bondholders, and no doubt rendered the bonds more salable. They were devised for just such a case as is presented here, where one bondholder, or a small minority, is determined upon action which a large majority believe hostile to their interests. The limitations imposed by the contract have not been met in this case. The plaintiff has not only not complied with the provision, but has made no demand whatever upon the trustee to take action, nor is there any showing that if such demand had been made, it would be futile."

Again on page 744, he said:

> "The plaintiff insists, however, that the terms of the indenture prohibit suit to enforce any right 'hereunder,' and that this suit is not of such a nature. We do not think this contention can be sustained. The rights claimed by the plaintiff are under her bonds and the indenture. If she does not stand upon the indenture, she has no standing at all. The suit, therefore, clearly is one under the terms of the indenture, and embraced in the restrictive clause."

In the case of *Crosthwaite* v. *Moline Plow Co., supra,* the trust indenture contained as part thereof Section 4, reading as follows:

> "Section 4. No holder of any note issued hereunder shall have the right to institute any suit, action, or proceeding, at law or in equity, for the collection of any sum due from the company on such note, for principal or interest, or upon or in respect of this agreement, or for the execution of any trust or power hereof, or for any other remedy under or upon this agreement, unless such holder shall previously have given to the trustee written notice of an existing default, and unless, also, such holder or holders shall have

> tendered to the trustee security and indemnity satisfactory to it against all costs, expenses, and liabilities which might be incurred in or by reason of such action, suit, or proceeding, and unless, also, the holders of 25 per cent. in amount of the notes then outstanding shall have requested the trustee in writing to take action in respect of such default, and the trustee shall have declined or failed to take such action; it being intended that no one or more holders of notes shall have any right in any manner to enforce any right hereunder, or under or in respect of any of the notes, except in the manner herein provided, and for the equal proportionate benefit of all holders of the outstanding notes."

Judge Winslow made the following pertinent comments with respect to this section on page 469:

> "It has been held in this court, and also in the United States Supreme Court, that it would be most inequitable to allow a small minority of bondholders, or a comparatively insignificant number of creditors, in the absence of even any pretense of fraud or unfairness to defeat the wishes of the overwhelming majority of those associated with them in the benefits of their common security, provided the benefits of an equitable readjustment are extended to all classes of creditors or security holders in like manner. * * *
>
> In the instant case, the notes are not secured by any property, and the restrictive provision under consideration, by its terms, expressly deprives the noteholder of his right to proceed at law or in equity for the collection of the note. Its effect is to modify the remedy for its enforcement, and the parties to the contract—*i. e.*, the noteholders—have accepted the notes with notice of the limitation. I am of the opinion that the trust agreement and the notes must be read together and must be given full effect. The plaintiff's right, of course, to share in the plan of dis-

tribution equally with others of the same class, must be preserved."

In the case of *Allan* v. *Moline Plow Co., supra,* the following statement taken from page 916 of the opinion of the Court sets out the position urged by the plaintiff and the answer of the court thereto:

> "Plaintiff asserts that the notes and coupons contain a direct and unequivocal promise to pay, and that such promise cannot be limited by inconsistent provisions in the trust agreement.
>
> The limitations in the trust agreement on the right of note holders to sue are not inconsistent with the promise of the Illinois Company to pay. They do not prohibit action against the Illinois Company for the enforcement of the notes, but they protect against action by less than 25 per cent. of the note holders which the other note holders believe would be disadvantageous to the note holders as a class. These provisions were not written into the trust agreement for the benefit and protection of the Illinois Company, but for the benefit and protection of the note holders. They, in effect, provide that, if the Illinois Company shall fail to pay the notes, not less than 25 per cent. in amount of the note holders shall determine upon a course of action which will best subserve the interest of the note holders as a class. These provisions, therefore, do not in any wise limit the liability of the Illinois Company to pay, but they restrict the method of enforcing payment in the event of default."

The plaintiff in that case admitted that the provisions of the trust agreement limited the right of noteholders to prosecute actions to enforce notes at law.

Again the case of *Harvey* v. *Illinois Power & Light Corporation,* 3 Fed. Supp. 489 (D. C., E. D.

Ill.), contains the following statement by Judge Lindley (p. 490):

> "Such provisions in trust deeds are entirely reasonable in the execution of trusts to the end that there may not be miscellaneous and promiscuous attempts to interfere by litigation by numerous individuals holding interests under such conveyances, and the courts have repeatedly put their stamp of approval thereon. Allan *v.* Moline Plow Co. (CCA 8), 14 F. (2d) 912; McGeorge *v.* Big Stone Gap Improvement Co. (C. C.), 57 F. 262; Crosthwaite *v.* Moline Plow Co. (D. C.), 298 F. 466; Batchelder *v.* Council Grove Water Co., 131 N. Y. 42, 29 N. E. 801; Home Mortgage Co. *v.* Ramsey (C. C. A.), 49 F. (2d) 738. The unity of interest of bondholders and the desirability of cooperation, rather than multiplicitous controversies, have inspired these provisions and the courts' approval thereof. There are no averments in the bill of complaint which would bring the plaintiff within any exception to the rule or create in him any exemption from the all-inclusive effect of the provisions quoted. It follows, therefore, that the plaintiff under the present showing may not as a lienholder maintain the present suit under the showing of his complaint. This applies with special force to the averments concerning depreciation charges, in view of the provisions of the trust deed applicable thereto."

The case of *Schoeler* v. *Chancery Lane Corporation, et al.,* 10 N. J. Misc. 932, 161 Atl. 644, is very interesting and helpful. It arose out of a suit on certain mortgage bonds. There were two defendants named—Chancery Lane Corporation and Charles Hildebrecht. The Chancery Lane Corporation was named in certain counts of the complaint as the maker of the bonds in suit. The particular bonds sued on had not matured, but plaintiff sought to accelerate their due dates. The

trust mortgage required the giving of notice to the Trustee by bondholders holding bonds aggregating the sum of at least $10,000.00 in order to declare due the bonds, and that upon the failure of the Trustee to do so, the Indenture authorized the bondholders to declare them to be due. The Indenture also authorized the Trustee to institute foreclosure proceedings in the event of a default, and provided that the Trustee shall do so upon being requested by bondholders aggregating the sum of $10,000.00. Charles Hildebrecht was made a party defendant not as the maker of the bonds, but as the guarantor thereof. The causes of action as against him were contained in separate counts, and were predicated upon the guaranty. The guaranty was absolute in form and read as follows:

> "The undersigned unconditionally guarantees the payment of the principal of and the interest on the within bond and the performance of all of the terms of said bond and/or the indenture therein referred to and securing the same and hereby waives notice, demand, or protest for nonpayment of the said bond, or any interest coupon attached thereto."

The *Schoeler* case was exhaustively argued and briefs presented, and on motion papers entirely similar to those now before the Court. Judge Lawrence struck out the complaint as to both defendants. Judge Lawrence did not decide the case at all on the New Jersey statute requiring foreclosure prior to suit on the bonds although that legal question was raised. That this is so will appear from the statement of the Court on page 933:

> "While the statute said to be applicable * * * is invoked, stress is laid on the provision of the bond and mortgage * * *."

Judge Lawrence made the following pertinent comments in his opinion (p. 934):

> "The instruments evidencing the debt were manifestly prepared with meticulous care for the evident purpose, among others, of forestalling a contingency such as the present suit which if maintainable, would likewise be available to all bondholders, no matter how widely scattered they might be (as in fact they appear to be), and so swamp the corporation and the guarantor in litigation wholly unnecessary, if not indeed vexatious and uncalled for. The bonds and the mortgage were therefore made, by their terms, parts of one and the same contract and subject to enforcement through the medium of a trustee, in the first instance, by foreclosure and sale of the property involved, as in the ordinary case. They are in the usual form of corporate bonds and the accompanying mortgage or trust deed, commonly used in building operations, and are hedged about with the detailed and customary terms and provisions found in such documents. The motion to strike the complaint as to both defendants will be granted."

In so far as the guaranty is concerned, the Court had before it a covenant which was absolute and unequivocal in form and without any restrictions. It has been uniformly held that on a guaranty of this kind the creditor may proceed against the guarantor without exhausting his remedies against the obligor. *Hoey* v. *Jarman,* 39 N. J. L. 523, affirmed 40 N. J. L. 379; *Wilkinson-Gaddis Co.* v. *Van Riper,* 63 N. J. L. 394, 43 Atl. 394; *Pfeiffer* v. *Crossley,* 91 N. J. L. 433, 103 Atl. 1000. In the last mentioned case the Court said:

> "In cases of this class the party guaranteed is under no obligation to sue on the obligation guaranteed, need not allege an unsuccessful suit as a condition of recovery against the guarantor; is not barred by delay

> in calling on the debtor for payment, and need not even notify the surety of non-payment * * *."

Judge Lawrence on page 934 said that the indenture contained salutary provisions in the absence of which suits could be brought which would—

> "* * * so swamp the corporation and the guarantor in litigation wholly unnecessary, if not indeed vexatious and uncalled for."

This statement is equally applicable to the situation now before us.

II.

The proviso contained in Article VI, Section 8 does not alter the legal situation and give noteholders the right to sue at maturity without a previous demand upon the Trustee by the prescribed number of noteholders.

This proviso is at the end of Section 8 (R., p. 22, ll. 1-18). This section constitutes a strong declaration of the rights sought to be preserved in all noteholders;—that it is the purpose of the Indenture to promote and protect the equal and ratable rights of all noteholders and to avoid multiplicity of suits. The section must be construed as a whole and not in parts. As was said by Mr. Justice Matthews in the case of *Chicago, Danville, etc. R. R. Co.* v. *Fosdick, supra,* on page 77:

> "* * * The whole article must be taken together. It is in fact, a unit, and is directed to a single end * * *."

What that proviso seeks to declare is that when the situation reaches the point where the proper

demand has been made upon the Trustee by the prescribed number of noteholders and the Trustee has failed or refused within a reasonable time thereafter to act, the noteholders are then released from the restrictions contained in the notes and the Indenture, and their right to sue becomes absolute. To accept the construction offered by the plaintiff as to this proviso would be nothing short of permitting the few lines covered by the proviso completely to destroy the whole of Section 8 and previous sections of Article VI. If there be any doubt about the intended effect of this proviso, it should, as suggested by Mr. Justice Matthews in the case of *Chicago, Danville, etc. R. R. Co.* v. *Fosdick, supra,* on page 77, be construed fairly and reasonably, according to the meaning of the parties, *"but leaning, if need be, in any case of ambiguity, in favor of the debtor."* (Italics ours.) Or again, the intention of the proviso may well have been to make for the more ready transferability of the notes by delivery. Judge Forman suggested in his opinion in the case of *Mermelstein* v. *Thermoid Company, supra,* that the proviso was inserted in the Indenture to assure the negotiability of the notes. He also suggests that the provision may well have been placed in the Indenture to eliminate the possibility of a conflict with the general rule that an agreement to oust the courts of jurisdiction is generally unenforceable. Judge Caffrey said in respect of this provision in his decision in this case (R., p. 30, ll. 10-37):

> "The plaintiff contends that the language used in section 8, particularly this, that, 'provided, however, that nothing herein or elsewhere in this indenture or in the notes or in the coupons shall affect or impair the obligation of the company, which is unconditional and absolute, to pay at the date of maturity therein expressed the principal of the notes

> and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment' gives him the right of action with respect to his two bonds, irrespective of the other sections in the indenture and with much insistence claims that the language in this excerpt nullifies all other provisions of the indenture, limiting individual action when a default occurs. *However, the acceptance of this theory would destroy the purpose of the indenture which, by its language, anticipated the likelihood of legal proceedings by an individual bondholder and to guard against the multiplicity of suits, there was incorporated in section 8 of the indenture (above quoted) a provision vesting exclusively in the trustee, the right of action, and further a clause providing that 'no holder of any of the notes or coupons appertaining* thereto shall have any right to institute any action at law or in equity'." (Italics ours.)

In any event, it will readily appear that the whole section must be construed as a single unit in order not to permit it as a whole to be legally destroyed by just a few lines.

Plaintiff's brief discusses at length the question of negotiability of the notes, and urges that to give effect to the contention of the defendant would be the legal equivalent of declaring the notes non-negotiable. As we have heretofore suggested, the question of negotiability is not involved in this action. No one has questioned or even seeks to question the title to the notes upon which the plaintiff has instituted suit. Nor is the defendant seeking to set up any special equities as against the plaintiff on the ground that he is not a holder in due course under Section 57 of the Uniform Negotiable Instruments Act. What we are saying and contending is that in the present

state of the case and under the facts before us, the plaintiff cannot under the terms of the note and the indenture sue the defendant on the notes which which he holds. It is, furthermore, well to recognize that the normal incidents of negotiability are two in number—(1) transferability upon delivery, and (2) making the person acquiring the instrument before maturity, for value and without notice of outstanding equities free from defenses on the part of the maker. If he acquires the obligation by delivery after maturity, the instrument is still negotiable, but one of the incidents of negotiability has been discharged or lost so that he is no longer a holder in due course.

In the consideration of this case we must bear in mind the more recent adjudications involving corporations which have large note or bond issues which have matured, and which they are unable because of depressed economic conditions to meet. The Courts are considering the great depression of the past few years and the present trend for the better. The State and Federal Governments have declared it a definite policy that a few creditors should not be permitted to hold up the progress of a company by law proceedings, or by refusing to go along with a plan which has been adopted by a great majority of creditors. In so far as the defendant company is concerned, eighty per cent. of the noteholders had agreed to extend the time of payment of the notes at the time that the plaintiff instituted his suit, and the percentage is now in excess of ninety. The position of the plaintiff is therefore inequitable as a practical matter, and in addition is directly in conflict with the restrictions imposed by the notes and the Indenture. The attitude of the plaintiff is that of vested interests which consider only their own immediate needs and position with a limited outlook. It is that sort of attitude which has brought

about the several recent amendments to the Bankruptcy Act, the new amendments to the Agricultural Act providing a six year moratorium on farm mortgages, and similar legislation which is now available to individuals, private corporations, railroads and municipalities. Under these amendments creditors holding claims from 55% to 60% of the whole, can make the minority creditors accept the plan so adopted by the majority. This represents a definite governmental policy which should be followed by courts in dealing with minority interests who seek to destroy. In presenting the original amendments to the Bankruptcy Act to the United States Senate, Senator Hastings said:

> "The creditor has no anxiety in these days to possess the physical property of the debtor. In many instances he is willing to give him additional time in which to pay. In many instances he knows that his debtor will not be able to pay, certainly not at the present time, and, unless some relief is granted to the debtor, he will not be able to pay at any time in the future. It is no benefit to the creditor, whether that creditor be an individual or a financial institution, to carry on his or its books obligations which the creditor knows can not be paid. On the other hand, the ambition, the energy, and the hope of many debtors have been ofttimes destroyed by a realization of the impossibility of meeting the obligations which they have made. The constant pressure which greets them every day for payment adds to their misery. It is no advantage to the creditor of such a debtor arbitrarily to refuse to cancel or reduce the obligation, depending upon the condition of the debtor. If, however, the creditor agrees to make such adjustments with his debtor as will inspire the debtor to new energy and new life, he has not only done a magnanimous thing for the debtor, but from a purely selfish point of view, he has increased the value of his own claim."

III.

Discussion of authorities relied upon by plaintiff.

Cunningham v. *Pressed Steel Car,* 238 App. Div. (N. Y.) 624, aff'd. 263 N. Y. 671, 189 N. E. 750.

We do not have the benefit of all the terms of the mortgage indenture or even of the notes before the Court, and the opinion is not at all helpful in that respect. It is suggested that the bonds contained the following clause:

> "This bond is one of an issue * * * all of which bonds have been issued under and are equally secured by an Indenture * * * *to which reference is hereby made for a statement of the rights of the holders of said bonds.*" (Italics ours.)

It must in the first instance be recognized that the Indenture involved in that case was a mortgage wherein certain real estate was conveyed to a trustee as security for the bonds issued under the Indenture. The Indenture in the case *sub judice* does not constitute a mortgage and covers no collateral security whatsoever. It merely sets forth the rights and limitations as to the noteholders, debtor and trustee. The distinction between an ordinary Trust Indenture and a Mortgage Indenture is substantial. In the *Cunningham* case the reference to the Indenture is with respect to the "rights" of the bondholders. In our case the reference to the Indenture is for a statement of "*the nature and extent of the rights of the holders of the notes,*" thereby declaring in unequivocal language that these rights are definitely restricted. We have the additional cir-

cumstance discussed earlier in this brief of the numerous references to the Indenture contained in the notes. The sum and substance of the decision in the *Cunningham* case is that having regard to the provisions of the bonds before the Court—

> "* * * The reference to the indenture did not fairly place the bondholder on notice of any restrictions upon defendant's obligation to pay at maturity * * *. If there was to be a restriction upon the defendant's obligation to pay at maturity, then the bondholder was entitled to receive notice thereof in reasonably clear language expressed on the face of the bond * * *" (238 App. Div. at p. 626).

This case is therefore a positive declaration to the effect that where the bonds or notes do give notice to the bondholders or noteholders of restrictions as to their right to sue, the holders are barred by these restrictions and cannot sue. Judge Forman in his opinion in the case of *Mermelstein* v. *Thermoid Company, supra,* said:

> "The plaintiff bought these notes under no compulsion. *He was advised in advance, or should have been, in what this Court considers plain language as to his rights in cases of default on the note.* * * *" (Italics ours.)

Judge Caffrey in the instant case found to the same effect.

Enoch v. *Brandon,* 249 N. Y. 263.

The bonds involved in that suit were also mortgage bonds. The bonds contained a reference to the Mortgage Indenture—

> "* * * for a description of the property mortgaged and pledged, the rights and extent of the security, the rights of the holders of the bonds with respect thereto * * *."

It will at once become apparent that the reference in the bonds is limited to the property held as collateral under the mortgage and the rights of the bondholders "with respect thereto." The words "with respect thereto" have reference to the security under the mortgage and not to the mortgage provisions in other respects. This case is not in point and not at all helpful because of the limited nature of the reference.

Rothschild v. *Rio Grande Western R. Co.*,
84 Hun 103, aff'd. 164 N. Y. 594.

This case came before the Court by a suit on interest coupons. The bonds from which the coupons were detached were not involved. The bonds contained a reference to the trust deed which apparently also covered real estate for rights as to the bonds only, without regard to the coupons. The reference in the bonds to the Mortgage Indenture was also limited in nature and not as broad as the references in the plaintiff's notes. The suit being on interest coupons independent of the bonds, the provisions of the Indenture would not in any event be applicable in the light of the law of this State as declared in the case of *Fidelity, etc. Co.* v. *Wilkesbarre, etc. R. R.*, 98 N. J. L. 507. This case will be fully discussed hereinafter.

In the case of *Lubin* v. *Pressed Steel Car Co.*, 146 Misc. (N. Y.) 462, the Court also recognized and declared that where there was a sufficient reference in the bonds to the provisions of the Trust Indenture, the bondholders would be bound by the restrictions, conditions and limitations contained in the Indenture.

The foregoing cases, if they can be construed in the light suggested by the plaintiff, are in direct conflict with the great weight of the authorities and particularly with the very recent case of

Home Mortgage Co. v. *Ramsey,* 49 Fed. (2d), 738, cited at length above. They also do violence to the principle of law enunciated by Mr. Justice Matthews for the United States Supreme Court in the case of *Chicago, Danville, etc. R. R. Co.* v. *Fosdick, supra,* when he declared that restrictive provisions "should be construed fairly and reasonably, according to the meaning of the parties, *but leaning, if need be, in any case of ambiguity, in favor of the debtor.*"

Noble v. *European Mortgage and Investment Corporation,* 165 Atl. 157.

This case raises legal questions which are entirely beyond the scope of the matters now before the Court, and is not relevant. It arose on overdue coupons which had been detached from the bonds covered by the Indenture. In other words, the bonds had attached thereto interest coupons which were semi-annually or at other periods detached and deposited for collection. The use of such coupons was one of convenience to the company issuing them so that it might be relieved of the necessity of sending checks for interest to the bondholders at interest periods. That this is of more than passing importance will at once appear from a review of the two following cases decided by the courts of the State of New Jersey which appear to follow the rule generally adopted by the courts of this country. In the case of *Fidelity, etc. Co.* v. *Wilkesbarre, etc. R. R.,* 98 N. J. L. 507, the Court of Errors and Appeals had before it a suit on overdue interest coupons detached from mortgage bonds. The defendant complained that the trustee alone under the mortgage indenture could enforce payment of the bonds and notes. Mr. Justice Minturn said on page 509:

"Whatever diversity of view may exist in other jurisdictions concerning the legal status

> of such holder, his rights have been distinctly set at rest in this state by the declaration that detached defaulted coupons form a separate and distinct indebtedness * * * and may be sued upon as such regardless of the mortgage provision * * *."

In other words, the Court held that such detached overdue bond interest coupons were obligations separate and independent of the bonds themselves and therefore not controlled by the provisions of the trust indenture. The rule of law enunciated in this case was further elaborated in the case of *Dickerson* v. *Wilkes-Barre R. R. Co.,* 100 N. J. L. 80, aff'd 103 N. J. L. 175. That case also came before the Court by means of a suit to collect overdue bond interest coupons. The defendant set up the defense that the coupons were simple contract obligations and the suit being instituted after the lapse of six years was barred by the statute of limitations. The bonds themselves were under seal, but the coupons were not. The plaintiff contended that the seal of the bond carried over to the coupon and that therefore the action was not barred because the suit was brought within sixteen years, the period of limitation for sealed instruments. The defense was sustained. Mr. Justice Lloyd speaking for the Supreme Court said on page 82:

> "* * * If, therefore, the detached coupon constitutes in the hands of the holder a distinct and independent contract, represents a distinct and independent indebtedness, is free from the restrictions and limitations contained in the bond to which it was attached, it would be both illogical and unjust to attach to the coupon for the benefit of the holder the protection of the seal of the bond when considering the application of the statute of limitations, while denying to the maker the advantage of its protective features * * *."

Considering the foregoing cases pertaining to interest coupons, it will at once become apparent that the law applicable thereto is entirely different from the law which would prevail as against suits on bonds because the interest coupons are obligations entirely separate from and independent of the bonds and are not in fact protected by the trust indenture at all. The law as declared in the case of *Noble* v. *European Mortgage and Investment Corporation, supra,* is consonant with the laws of this State in holding that the provisions of the Indenture are not available in suits on interest coupons, because the coupons represent obligations entirely independent of the bonds. Furthermore, this case was decided by the Court of Chancery of Delaware on an application for the appointment of a Receiver. The obligations before the Court did not involve matured primary obligations. They related to interest coupons which had matured. The bonds from which the coupons had been detached had not matured. The limited question before the Court was whether the owner and holder of matured interest coupons could be a proper party complainant to apply for the appointment of a receiver under a state statute which was available to "any creditor or stockholders." The Court found in the first place that under the very terms of the Indenture the holders of defaulted coupons possess the right of suit thereon, and that aside from this fact, they as bondholders could make application for a receiver. In this connection the Court made reference to and relied upon the New Jersey case of *Hoyt* v. *E. I. DuPont DeNemours Powder Co.,* 88 N. J. Eq. 196, cited above, wherein Vice Chancellor Backes said that the Indenture *"restricts collection"* but not the right of bondholders to protect their interests.

IV.

Discussion of additional points argued in plaintiff's brief.

Under Point I plaintiff argues that assuming the defendant's legal position to be correct, it should have been set up by way of defense and not upon a motion to strike the complaint. This reasoning is urged on the theory that since defendant contends that plaintiff has not complied with certain conditions precedent imposed upon him by the notes and the Indenture, the defendant is required to set up the several respects in which plaintiff has fallen short in his compliance with these conditions by way of answer and not by a motion addressed to the complaint. Plaintiff relies on a section of the Practice Act of 1903 (P. L. 1903, p. 570, 3 C. S. 4089). Plaintiff's complaint contained certain allegations with respect to the issuance of the notes in question, and in Paragraph 3 alleges that the notes were issued under an indenture of trust which contained certain provisions giving the plaintiff the right to sue thereon. In Paragraph 6 of the complaint there is a general allegation of full compliance upon the part of the plaintiff with all conditions precedent (R., pp. 2 and 3). The section of the Practice Act upon which plaintiff relies and sets out in full in his brief was enacted in 1903. Whatever may have been the law with respect to the pleading of performance of conditions precedent and the denial of the performance of such conditions prior to 1928, the Practice Act was amended in 1928 to permit a defendant to attack a complaint as sham or frivolous, or a plaintiff to attack a counter-claim as sham or frivolous (P. L. 1912, p. 380, as amended by Chapter 151, Laws of 1928, p. 306; C. C. S. 1925-1930, p. 1449). Prior to 1928 only answers could be at-

tacked by way of a motion as being sham. As heretofore suggested, defendant in connection with its motion relied upon each of grounds Nos. 1, 4, 5 and 6, or the combination of any two or more of these grounds as set out in its motion papers (R., pp. 10 and 11). Judge Caffrey in his opinion said:

> "There is nothing in the moving papers to indicate that any of these conditions were met by the plaintiff * * *" (R., p. 30, ll. 37-40).

The practice in making the motion addressed to the complaint was that followed in the case of *Schoeler* v. *Chancery Lane Corporation, et al.* before Circuit Judge Lawrence, and in the case of *Mermelstein* v. *Thermoid Company, supra,* before United States District Judge Forman.

The argument of the plaintiff as advanced under Point I of his brief is being raised now for the first time. It was not raised at all before Judge Caffrey. In the argument before the Supreme Court, only matters of substantive law were argued, and the question of procedure was not even presented. An examination of the plaintiff's Grounds of Appeal discloses the fact that they do not cover the legal question of procedure now being raised for the first time (R., pp. 35 and 36). This Court held in the cases of *Lutlopp* v. *Heckman,* 70 N. J. L. 272, and *Hintz* v. *Roberts,* 98 N. J. L. 765, that causes for reversal must be definitely pointed out in the grounds of appeal with sufficient precision to apprise the Court and opposing counsel of the injury complained of. This Court further held in the case of *Castelbaum* v. *Wolfson,* 92 N. J. L. 165, that any contention which is unsupported by any ground of appeal will not receive consideration.

Plaintiff contends that Judge Caffrey erred in not holding that the affidavit of John Frank, Jr.

which was submitted in his behalf was a sufficient answer in point of law to the affidavits of the defendant. This affidavit was to the effect that Mr. Frank had made demand upon the treasurer of the defendant company for a list of the names and addresses of the owners and holders of notes, and that the treasurer advised him that he could not furnish such a list. In his Grounds of Appeal plaintiff states that the trial court erred in rejecting as evidence the affidavit of Mr. Frank and in refusing to consider the facts therein stated (R., p. 35, Ground No. 3). This Ground has no merit for the reason that the affidavit of Mr. Frank was in fact considered by the Court and found to be legally insufficient. Judge Caffrey held in the first instance that the record before him failed to show that the necessary conditions were met by the plaintiff, and then "in passing" called attention to the fact that the demand was made on May 31, 1934 whereas the summons and complaint were served on April 25, 1934 and issued on April 19, 1934 (R., p. 30, ll. 37-40, p. 31, ll. 1-13). Defendant's motion papers are dated May 12, 1934 and were filed on May 21, 1934. Service thereof was acknowledged sometimes between May 12 and May 21. The motion was returnable on June 1, 1934 (R., p. 10). The end sought to be accomplished by the demand for the list of names and addresses of noteholders was obviously impossible of fulfillment to the knowledge of the plaintiff. The notes being payable to bearer, it is impossible for the defendant company to know at any given time who might be the holders of its notes. Here we have again a legal contention which is not supported by a Ground of Appeal and the case of *Castelbaum* v. *Wolfson, supra,* is again applicable.

The other points argued by the plaintiff are without legal or factual merit, and in addition are not contained within the Grounds of Appeal.

V.

Conclusion.

The facts arising out of the notes and Indenture are clear. We have before us the case of a single noteholder who holds 2 notes of $1,000 each, aggregating $2,000. On a note issue of $3,000,000 of which notes aggregating the sum of $2,847,500 are outstanding, the plaintiff and a few other small noteholders owning notes the aggregate amount of which shrinks into insignificance as against the amount issued, are seeking in these strenuous days to enforce the payment of their notes. They want a preference, if they can get it, and this in absolute disregard of the interests and rights of their associate noteholders with whom a partnership relationship exists, and of the interests and future possibilities of the company and of its manufacturing subsidiaries. Their position is inequitable, and in case of doubt that construction should be accepted which will be most favorable to the defendant. The policy of the law as contained in judicial decisions and state and federal legislative enactments is definitely opposed to the position taken and urged by the plaintiff.

It is respectfully submitted that, applying the principles of law enunciated in the foregoing authorities to the facts of this case, the judgment of the Supreme Court should be affirmed.

Respectfully,

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LOUIS RUDNER,
Of Counsel.

Note: **Appendix containing the memorandum opinion of United States District Court Judge Forman follows, commencing on the next page.**

APPENDIX.

UNITED STATES DISTRICT COURT,

District of New Jersey.

Milton E. Mermelstein, Plaintiff, *v.* Thermoid Company, a Delaware Corporation, Defendant.	On Motion to Strike Complaint.

Milton E. Mermelstein, Esq., Newark, N. J., Attorney for Plaintiff;

Harry Hoffman, Esq., Guggenheimer & Untermyer, Esqs., of Counsel;

Katzenbach, Gildea & Rudner, Esqs., Attorneys for Defendant.

Memorandum.

Forman, District Judge:

This is a motion to strike the complaint in an action at law to recover the face value of twelve of the Thermoid Company's, the defendant, Five Year Six Percent Sinking Fund Gold Notes.

The plaintiff alleges that he is the legal owner and holder of the notes in suit; that he obtained title to the notes by purchase, transfer and delivery; and that on or after the date of the maturity of the notes, he presented the notes for payment and his demand was refused. A copy of one of the notes is attached to and made a part of the

complaint. The defendant moves that the court strike the complaint on the ground that the complaint is sham or frivolous and fails to set out sufficient facts to state a cause of action.

The face of the notes bears the unconditional promise of the Thermoid Company to pay the bearer or the registered owner the sum of one thousand dollars on February 1, 1934. It also sets out, in print of the same size as that in which the promise is borne, the following:

> "This note is one of a duly authorized issue of notes of the Company known as its Five Year Six Per Cent. Sinking Fund Gold Notes (herein called the notes), limited to an aggregate principal amount of Three Million Dollars ($3,000,000), issued or to be issued under an Indenture of Trust (hereinafter called the Indenture), dated as of February 1, 1929, executed and delivered by Thermoid Company to National Bank of Commerce in New York, as Trustee, to which indenture reference is hereby made for the terms and conditions on and under which the notes have been or are to be issued and the nature and extent of the rights of the holders of notes, of the Company and of the Trustee."

Other printed provisions of the notes provide for calling the issue prior to maturity; acceleration according to the terms of the indenture; and for passing title. The notes appear to be negotiable, but it is not necessary to determine that fact.

The trust indenture under which the notes were issued and which is incorporated in the notes by reference is an instrument of considerable detail and there need only be quoted the material part of section 8 of article VI on the subject of default:

> "Section 8. In order to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits, all the notes shall be subject to the

> condition that all rights of action thereon, or in respect thereof, or on or in respect of the coupons thereto appertaining, are vested exclusively in the Trustee, and that no holder of any of the notes or coupons appertaining thereto shall have any right to institute any action, at law or in equity, upon the notes unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent. in principal amount of notes then outstanding, filed with the Trustee, and any recovery in any action or proceeding instituted by the holder of any of the notes or appurtenant coupons shall be for the equal pro rata benefit of all outstanding notes similarly situated, and, for the protection and enforcement of this Section 8, each and every noteholder and the Trustee shall be entitled to such relief as can be given either at law or in equity; provided, however, that nothing herein or elsewhere in this indenture or in the notes shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes at the time and place in the notes and coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment."

It appears then that these notes contain the unconditional promise of the maker to pay their legal face value on the date of their maturity and that the notes are subject to the conditions of the trust indenture as to default. Section 8, which is applicable to this case, provides: 1. "All the notes" are subject to the condition that the right of action thereon is vested in the trustee and that "no holder of any of the notes" may sue thereon "unless and until" the trustee refuses or neg-

lects to begin proper proceedings on the notes "after request" of twenty-five per centum of the noteholders; 2. No provision of the indenture or the notes can impair the unconditional promise of the Thermoid Company to pay the notes on maturity; 3. Nothing in the indenture or notes can "affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment."

While the promise to pay is unconditional, the individual owner of a note cannot bring an action thereon in the case of default unless the trustee refuses or neglects to proceed after the request of twenty-five per centum of the noteholders. That much is clear. It is equally certain that no provision of the instruments can affect the unconditional promise of the maker of the notes to pay them on maturity. There is the possibility of an apparent conflict with the condition of section 8 to be found in the proviso of section 8 that nothing is to affect or impair the right of action of the respective holders to enforce payment on the date of maturity. The proviso was inserted in the indenture to assure the negotiability of the notes.

The issue of notes like those on which the suit is based aggregated $3,000,000. The issue matured on February 1, 1934, and there are $2,847,500 of these notes outstanding. Apparently, a large number of the noteholders have agreed to an extension of the time for the payment of the notes. The plaintiff is attempting to collect presently.

The defendant contends that the plaintiff has no right to sue on the notes until the condition of section 8 is fulfilled and that since there is no allegation to that effect in the complaint, it must be struck. The plaintiff asserts that the promise to pay the notes at maturity is absolute and un-

conditional and that the right to sue thereon is expressly reserved by the trust agreement and the provisions of the article of the indenture on default do not and cannot apply to the notes after the date of maturity.

The plaintiff contends first that the notes carried on their face an absolute promise to pay on the date of maturity and that a holder, who acquired one of the notes in the ordinary course of a commercial transaction, would have no notice of any restriction of his right to enforce the obligation on default. The plaintiff relies on the case of *Cunningham* v. *Pressed Steel Car Company,* 283 App. Div. 634, judgment affirmed 263 N. Y. 157, 189 N. E. 750, wherein the Court held that a mere reference to an indenture of trust in bonds containing an unconditional promise to pay and no restrictive language "upon defendant's obligation to pay at maturity" was not enough to place the holders of the bonds fairly on notice. In that case, the court stated that the bonds provided only that "reference is hereby made for a statement of the rights of a holder" to the indenture. The language of the notes in the case before the court expressly directs the holders of the notes to the indenture for the terms and conditions on which the notes were issued and for a statement of the nature and extent of their rights. The notes also provide that "In case an event of default as defined in the indenture shall occur, the principal of the notes may become or be declared due and payable in the manner and with the effect provided in the indenture."

It seems clear that the condition of section 8 was intended to be complied with by the holder after the note has matured. The article of which section 8 is a part defines default plainly and unmistakably as a failure in the payment of the principal of any of the notes when the same shall

become due and payable at maturity. There is no express language in the note or indenture that would negative the definition of default. The language of Section 8 stating the condition could be no plainer unless it included the words "default after maturity" as a matter of repetition and certainly one of the principal objects of section 8 was to meet the situation for which the plaintiff now contends it cannot apply.

It is necessary then to decide whether the condition of section 8 conflicts with its proviso.

The reservation that nothing shall affect or impair the right of action of the holders of the notes to enforce payment is a precautionary, general provision in the nature of a saving clause. It is well settled that any agreement to oust the courts of jurisdiction is generally unenforceable on the ground of public policy. *Guaranty Trust Company* v. *Green Cove Springs R. Company,* 139 U. S. 137. The provision was placed in the contract to avoid the danger of a possible conflict with that rule. It is to be read in conjunction with the provision placing the rights of action to enforce payment in the hands of the trustee until certain conditions are fulfilled in order to give full effect to the intention of the parties. By that provision, a holder of a note gives the trustee the right to sue in order to preserve equality among the class. It does not fall, and was not so intended, in the face of the general proviso. The latter prohibits anything that affects or impairs the right of action of *holders* of the notes to enforce payment. The condition is to insure protection and equal opportunity for the holders of the notes. It merely gives the trustee the right to bring an action for the benefit of all holders in the event of default. The condition was not inserted in an attempt to throw away the inherent rights of the holders of

the notes to collect on default at maturity but was the method chosen to protect those rights.

The plaintiff relies on *Noble* v. *European Mortgage and Investment Company* (Del. Ch.), 165 A. 157, and *Fleming* v. *Fairmount and M. R. Company,* 78 W. Va. 385, 79 S. E. 826, to show that the proviso of section 8 reserves the rights of the holders of the notes to sue after maturity and that the condition of section 8 merely relates to rights prior to maturity of the principal obligation. In those cases, the obligations sued on were detached interest coupons which had matured and were unpaid. The *Noble* case was a suit in equity for the appointment of a receiver. The court held that there was no language in the trust agreement forbidding a suit for a receiver; that the language of the limitation of the agreement restricting the bondholders was confined to remedies "under or upon this indenture"; and that the indenture must be construed strictly since it was in derogation of common law rights. The *Fleming* case was an action at law on past due coupons. The court held therein that there was nothing in the mortgage which secured the bonds, to prevent a suit on the coupons and that the common law right to bring suit on the coupons could not be affected unless the mortgage so provided expressly or by necessary implication.

The plaintiff is confusing the unconditional promise of the maker of the notes to pay on their date of maturity with the means whereby the holder may enforce the promise in the courts. The promise is absolute. It has no condition or contingency attached to it. The limitation of the trust agreement vesting the trustee with the right to sue does not infringe on or cut down the maker's promise to pay. The holder of a note is not in a position where the promise is made worthless by a prohibition against enforcing it on

default. The limitation on the individual noteholder does not limit the obligation of the maker to pay the note but merely restricts the method of enforcing the promise to pay in the event of default. *Allan* v. *Moline Plow Company,* 14 F. (2) 912, (C. C. A., 8); *Crosthwaite* v. *Moline Plow Company,* 298 F. 466.

The provision giving the right to twenty-five per centum to control the remedy was placed in the trust agreement for the protection of the holders of the notes and not for the benefit of the maker. It was calculated to be advantageous to the holders as a class. The noteholders have agreed in advance for their mutual protection to prevent an uncompromising minority to disorganize and endanger the assets of the maker of the notes and to avoid preferences.

The reasonableness of requiring a substantial number of the noteholders, all of whom stand in the same position as to rights and equities, compels a court of justice to reject any contention that such a provision is void on the ground of policy in that it tends to oust the jurisdiction of the court. *Home Mortgage Company* v. *Ramsey,* 49 F. (2) 738, (C. C. A., 4); *Lidgerwood* v. *Hale and Kilburn Corporation,* 47 F. (2) 318. It is clear that the provision in no way touches the power of a court to enforce payment other than to appeal to the court's sense of justice in protecting the whole of a class rather than an individual. A considerable number of cases support this conclusion. *Lidgerwood* v. *Hale and Kilburn Corporation,* 47 F. (2) 318; *Home Mortgage Company* v. *Ramsey,* 49 F. (2) 738; *Allan* v. *Moline Plow Company* (C. C. A., 8th), 14 F. (2) 912; *McGeorge* v. *Big Stone Gap Improvement Company* (C. C.), 57 F. 262; *Crosthwaite* v. *Moline Plow Company* (D. C.), 298 F. 466; *Batchelder* v. *Council Grove Water Company,* 131 N. Y. 42, 29 N. E. 801; *Cf.*

Southern Nat. Bank v. *Germania Manufacturing Company*, 176 N. C. 318, 97 S. E. 1; *Muren* v. *Southern Coal & Mining Company*, 177 Mo. App. 600, 160 S. W. 835.

The plaintiff bought these notes under no compulsion. He was advised in advance, or should have been, in what this court considers plain language as to his rights in cases of default on the notes. Indeed, the reasonableness of the provision he now attacks would likely appeal to a prospective purchaser as a point for purchasing the notes as it secured him against the action of a minority who might be inimical to the interest of the noteholders and the maker. The plaintiff must pursue the method to which he agreed, in order to enforce the promise in the notes.

The motion to strike should be

Granted.

NEW JERSEY

Court of Errors and Appeals

RALPH J. M. BULLOWA, *Plaintiff-Appellant,* vs. THERMOID COMPANY, a corporation of the State of Delaware, *Defendant-Appellee.*	On Appeal from Supreme Court.

REPLY BRIEF SUBMITTED ON BEHALF OF PLAINTIFF-APPELLANT.

An examination of the defendant's brief in the above matter discloses their contention to be that the trial court did not strike out plaintiff's complaint because it, in itself was insufficient, but apparently, because it thought the defendant had a good defense. The plaintiff could not anticipate the postition taken by the defendant, and therefore, there exists the necessity for a reply to the defendant.

Both the trial court and the defendant in its argument in this cause ignore what seems to us to be an elemental rule of practice and pleading—that even though the defendant had, what on its face might appear to be a good defense, still the plaintiff was entitled to plead in reply to it. The mere allegation of a defense is certainly no bar to a suit.

Granting for the present, the defendant's interpretation of Section 8 of Article 6 of the Trust Agreement, that no noteholder could institute a suit "unless and until the trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of

the holders of twenty-five per cent in principal amount of notes then outstanding," there is nothing in the record, and there was nothing before the trial court, either in defendant's affidavit, or otherwise, to show that the trustee had not refused to institute proper proceedings by way of remedy after request of the holders of twenty-five per cent in principal amount of notes then outstanding.

The plaintiff filed a complaint which is plainly good on its face. He alleged generally the performance of all conditions precedent. It was neither his duty, nor his right to anticipate any particular defense which might be interposed by the defendant.

However, it was the legal right of the plaintiff, as, if and when the defendant interposed the provisions of the Trust Agreement as a defense, to reply thereto, if he felt that he could prove any of the following facts to a jury at the trial; (a) that the law of New York where the contract was to be performed did not give to the defendant the rights claimed by him; (b) that the trustee had refused to institute suit although demanded to do so by the required number of noteholders; (c) that the defendant had listed the notes in question on the New York Curb Exchange as negotiable instruments and was now estopped from placing a construction on said notes which would make them non-negotiable; (d) that the defendant had rendered the provision of the Trust Agreement relied upon by it impossible of performance; or (e) that defendant itself, had breached the Trust Agreement, and therefore, could not set up its terms as a defense. These are just a few of the matters which it was plaintiff's legal right to plead in reply to the defense of the defendant.

It would seem to require no further argument to demonstrate that it was highly erroneous for the trial court to strike out the complaint merely on the proof that the defendant had a defense, but

without any proof that the defense was in fact true.

The defendant in its brief, (page 41) attempts to dispose of this entire question by arguing that our grounds of appeal do not cover this legal question, and cites *Lutlopp v. Heckmann,* 70 N. J. L. 272 and *Hintz v. Roberts,* 98 N. J. L. 765, as well as *Castlebaum v. Wolfson,* 92 N. J. L. 165.

The only question in this case is the propriety and legality of the trial court's action in granting defendant's motion to strike out plaintiff's complaint. Our objection in this respect is sufficiently set out in the Grounds of Appeal (R. p. 35) as follows:

> "Because the trial court erroneously granted the motion of the defendant to strike out the complaint filed by the plaintiff herein."

There is nothing in the cases cited by the defendant in its brief which would tend to indicate that our ground of appeal does not fully apprise the court and opposing counsel of our objection.

The defendant in its brief proceeds to argue its alleged defense, Section 8 of Article 6 of the Trust Agreement (R. p. 21), as being on its face a legal defense. Their argument may properly be divided under two heads; (1) their interpretation of the terms of the Trust Agreement and (2) the cases relied on by them.

A fair interpretation of the trust agreement does not justify the conclusion contended for by the defendant.

The defendant undertakes to show that the Trust Agreement operates as a bar to a noteholder's suit.

Section 2 of Article 6 is quoted. (Def. Brief page 6). This clause provides:

> "* * * the trustee * * * shall, declare the principal of all the notes, *if not already due and payable,* to be forthwith due and payable."

This clause clearly indicates by the use of the words "if not already due and payable," that the Trust Agreement is intended to deal with the rights of the noteholders under circumstances other than their rights at maturity.

The defendant quotes Section 3 of the same Article which provides in part as follows:

> "The Company will pay to the Trustee for the benefit of the holders of the notes and coupons * * * the whole amount that then shall have become due and payable." (Def. Brief page 7).

This merely indicates a cumulative or additional method or manner of payment, and certainly there is nothing in the words to restrict or limit the parties to that means of payment.

Continuing the defendant quotes, Section 5 of the same Article, which reads in part as follows:

> "All rights of action * * * *may* be enforced by the trustee." (Def. Brief page 7).

By the use of the word "may" there is a plain indication that it was intended to provide simply a cumulative or additional method of collection of the notes.

The defendant sets up Section 6 of the same Article, which is in part as follows:

> "Any money collected by the trustee *under this Article* shall be applied by the trustee as follows" (Def. Brief page 7).

The reference is plainly to a cumulative or ad-

ditional method of collection of the notes.

The defendant sets out in full the provisions of Section 8 of the same Article. (Def. Brief page 7 and 8) and italicizes the words:

> "In order to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits"

This plainly refers to the sinking fund for the payment of the notes provided for by the Trust Agreement and specifically referred to in the notes (R. p. 7, l. 31 and 32).

There is nothing in any of the Sections quoted by the defendant in its brief antagonistic to the view that the Trust Agreement, with its sinking fund, provided merely additional security to the noteholders and another or cumulative method for the payment of the notes separate and apart from the right of a noteholder to sue the defendant on its primary obligation, the notes themselves, without availing themselves of recourse to the sinking fund provided by the Trust Agreement. This harmonizes thoroughly with the proviso contained in Section 8 of Article 6 which reads:

> "provided, however, that nothing herein or elsewhere in this indenture or in the notes or in the coupons shall affect or impair the obligation of the Company which is unconditional and absolute to pay at the date of maturity therein expressed, the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes expressed, or affect or impair the right of action which is also absolute and unconditional of such holders to enforce such payment."

We need only to refer to the cases cited by the defendant to demonstrate the soundness of our position in this respect.

The notes on which the suit was brought are absolute promises to pay, separate and apart from any promises contained in the Trust Agreement. Although the notes referred to the Trust Agreement, such reference did not incorporate in the notes, the terms and provisions of the Trust Agreement, and did not alter the situation that there were two separate and distinct contracts; (a) the note and (b) the Trust Agreement.

We quote the defendant's brief, wherein at page 37, it cites the decision of *Fidelity Etc. Co. v. Wilkesbarre Etc. R. R. Co.* 98 N. J. L. 507, as follows:

> "Whatever diversity of view may exist in other jurisdictions concerning the legal status of such holder, his rights have been distinctly set at rest in this State by the declaration that detached, defaulted coupons for separate and distinct indebtedness * * * and may be sued upon as such, regardless of the mortgage provision * * *."

And again we quote from defendant's brief at page 38, where the case of *Dickerson vs. Wilkesbarre Etc. R. R. Co.* 100 N. J. L. 80, affirmed 103 N. J. L. 175, is cited as follows:

> "If, therefore, the detached coupon constitutes in the hands of the holder a distinct and independent contract, represents a distinct and independent indebtedness, is free from the restrictions and limitations contained in the bond to which it was attached, it would be both illogical and unjust to attach to the coupon for the benefit of the holder the protection of the seal of the bond when considering the application of the

> statute of limitations, while denying to the maker, the advantage of its protective features * * *."

We respectfully submit that if an interest coupon referred to in a bond is a distinct and independent contract, by the same token, a trust agreement, to which incidentally there are other parties, although referred to in a bond or note, must be treated and considered as a distinct and independent contract so that a suit might be instituted on the one regardless of the provisions of the other.

The authorities relied upon by the defendant do not sustain its contention.

The defendant says in its brief, at page 10 and 11:

> "The note carries on its face and at the top thereof the state of the incorporation of the defendant Company. That is Delaware. The notes provide for their payment at the office of the Trustee in New York City. Plaintiff therefore assumes without proof that the contract was made in New York or in Delaware, but since the greater number of cases upon which he relies were decided by the New York Courts, he expresses an overwhelming preference for New York as the place of making the contract."

We might point out at this juncture that the plaintiff was legally entitled to reply to the defendant's defense as, if and when it was interposed, that since the notes were payable at New York the law of New York was applicable to the construction of the contract, but that the granting by the trial court of the motion to strike out without requiring the defendant to plead his defense,

deprived plaintiff of his right to make this reply.

This Court, in the case of *Commercial Credit Corp. v. Boyko,* 103 N. J. L. 620, at page 626, says:

> "The law is firmly settled in this State that when a note is made payable at a particular place it is to be treated in all respects as if made there without regard to the place where it is dated or delivered. *Ball, et al, v. Consolidated Franklinite Co.,* 32 N. J. L. 102."

In the case of *Armour v. McMichael,* 36 N. J. L. 92, at page 94, the Court says:

> "This contract was made in the State of New York to be performed there, and in construing it it must be governed by the lex loci contractus."

Again, in the case of *Cockrell v. McKenna,* 104 N. J. L. 592, at page 593, this Court says:

> "The note was dated, made and delivered in the State of New York. The law of that State, i. e., the lex loci contractus, governs and controls the rights of the parties to the action."

Therefore, we are not concerned what the law may be in the Federal Courts or in any other jurisdiction, but, rather, what the law is in the State of New York.

The defendant, in its brief, does not call attention to any decisions of the New York courts laying down any rule different from that of the cases cited by us, namely; *Lubin v. Pressed Steel Car Co.,* 263 N. Y. Supp. 433; *Rothschild v. Rio Grande Western R. R. Co.,* 84 Hun. 103, affirmed 164 N. Y. 594; *Cunningham v. Pressed Steel Car Co.,* 265 N. Y. Supp. 256 238 App. Div. (N. Y.) 624, affirm-

ed 263 N. Y. 671; and *Enoch v. Brandon,* 164 N. E. 45 249 N. Y. 263, in which the New York courts held uniformly that the provisions of the trust agreement were no bar to the suit on the note, bond or coupons.

The defendant argues that these cases were based on facts different than those existing in the present case. In order to show that the New York courts have passed upon an identical trust agreement, holding it to be no bar to a suit, we quote from the opinion in *Lubin v. Pressed Steel Car Co., supra,* the facts as they appear from the opinion, as follows:

> "Plaintiff has instituted an action at law as the holder of a bond in the principal sum of $1,000, issued by the defendant, Pressed Steel Car Company, maturing on the 1st day of January, 1933. Said bond is one of a series of bonds issued by the defendant, designated by it ten year 5 per cent convertible gold bonds, aggregating the principal sum of $6,000,000, which said bond issue was created for the purpose of providing funds for the said defendant for the payment of indebtedness contracted by it and its subsidiaries in the usual course of its corporate business and to provide additional working capital.
>
> "The said bond issue was created under an indenture dated December 30, 1922, between the said defendant and the New York Trust Company, Trustee. Under the terms of the bond on which plaintiff instituted his suit it is provided therein that the defendant will unconditionally on January 1, 1933, pay the sum of $1,000 in gold coin of the United States of America of or equal to the present standard of weight and fineness, and will pay interest thereon from January 1, 1923, at the rate of 5 per cent

per annum, payable in like gold coin semi-annually on the first day of January and the first day of July upon the usual presentation and surrender of annexed coupons. The bond then further provides for the customary 2 per cent allowance for federal income tax and the customary allowances for State tax. Further provision is therein contained as follows: 'This bond is one of an issue of bonds aggregating Six Million ($6,000,000.00) Dollars, in denominations of $1,000.00 and $500.00 all of like date and of like tenor except as to denomination, all of which bonds have been issued under and are equally secured by an Indenture dated December 30, 1922, between the Company and the New York Trust Company as Trustee, to which Indenture reference is hereby made for a statement of the rights of the holders of said bonds.'

* * * * * * * * *

"The defendant does not seriously controvert any of the material allegations of the complaint, but sets up an alleged complete defense which alleges in substance that the bond sued on by plaintiff was created under the said indenture, and the plaintiff is bound by the provisions of said indenture, among which that contained in Article 4, Section 6, would act as a bar to plaintiff's recovery in this cause of action. The said provision reads as follows: 'Section 6. All rights of action on or because of the bonds and interest coupons or any of them, or under this indenture, except as hereinafter provided, are hereby expressly declared to be vested exclusively in the Trustees, and such rights may be enforced by the Trustee without the possession of any such bond or interest coupon. No holder of any such bond or interest coupon

> shall have any right to institute any suit, action or proceedings for the enforcement of any of the terms of this agreement or of such bonds or coupons without first giving to the Trustee written notice that one or more of the events of default hereinafter mentioned has occurred, nor unless the holders of one-fourth in principal amount of the then outstanding bonds shall have requested the Trustee in writing and shall have afforded it reasonable opportunity to institute such action, suit or proceeding in its own name and shall have offered indemnity satisfactory to the Trustee, and shall have deposited their bonds with the Trustee if so requested by the Trustee; but if the Trustee shall have failed to take such action for sixty days after such written notice, request, offer of indemnity and deposit of bonds, the holder of any bond or bonds may proceed thereon.' "

In this case the Court held that the plaintiff might recover in a suit on the bonds despite the provisions in the trust agreement and this was so even though there was no saving clause in the trust agreement, such as we have in our case, guaranteeing to a note-holder absolutely his right of action against the Company.

In the case of *Berman v. Consolidated Etc. Corp.*, 132 N. Y. Misc. 462, where an action was brought on bonds containing a reference to the indenture as to the rights of the holders and the indenture contained a provision that the holders should not have any right to institute action until after meeting certain conditions, the court says:

> "* * * The only conclusion to be drawn is that the unconditional obligation to pay contained in the bond * * * must prevail over the inconsistent provisions of the in-

> denture, which attempts to limit the right of the holders * * * to bring suit when the obligation of the bonds are not met."

The law of New York in respect to trust indentures of the character that we have in our case, seems to be well-settled. The Appellate Division of the New York Supreme Court, in the case of *Lieb v. New York, Chicago and St. Louis Railroad Co.*, 239 App. Div. 901, unanimously affirmed the decision of the Supreme Court, sitting at Special Term, permitting a recovery on notes containing the following provision:

> "* * * to which indenture reference is hereby made for a specification of the rights under said indenture of the Trustee, and of the rights and limitations of rights under said indenture of the holder of said notes and coupons."

The indenture contained clauses substantially identical with the provisions of the indenture in our case. The opinion of the Supreme Court is reported in N. Y. Law Journal, February 11, 1933, page 875, as follows:

> "In effect, the defenses allege that the notes are subject to the indenture and that the indenture places certain limitations upon the rights of the holders of the notes and that by reason of such limitations the plaintiff has no cause of action, *but the action is not brought under the indenture agreement or to enforce any rights of the plaintiff by virtue thereof.* The action is purely one to recover upon the primary indebtedness represented by the notes. The notes sued upon are absolute promises to pay by the defendant railway company and the right of the plaintiff as holder to en-

> force payment thereof after default to pay on the due date, namely, October 1, 1932, *is not impaired or limited* by the provisions contained in the indenture agreement dated October 1, 1929, made between the defendant railway company and the Guaranty Trust Co. of New York." (Italics ours).
>
> "I hold that the action is on the primary obligation and not on the indenture, and in any event in this case the indenture itself expressly provides: 'Nothing contained in this indenture or in the notes shall affect or impair the obligation of the company which is unconditional and absolute, to pay the principal and interest of the notes as therein promised, or shall affect or impair the right of action which is also absolute and unconditional of the holders of the notes to enforce such payment by virtue of the contract embodied in the notes, and not by virtue or by availing of any provision of this indenture.' "

The defendent in his brief relies on a number of Federal decisions, particularly the cases of *Crosthwaite vs. Moline Plow Co.*, 298 Fed. 466, and *Allan vs. Moline Plow Co.*, 14 Fed. (2nd) 912, which seem to hold that a defendant may set up as a defense the provisions of a trust indenture such as we have in our case.

However, we desire to call attention to the fact that the trust indenture in the Moline Plow Co. cases did not contain the provision which we find in Section 8 of Article 6 of the Thermoid trust indenture providing that nothing in the trust indenture should affect or impair the right of action possessed by a noteholder or the obligation of the Company to pay. This is disclosed by a reading of Section 4 of Article 4 of the Moline trust indenture, as the same is set out in the opinion in Allan vs. Moline Plow Co. supra.

The case of *Home Mortgage Co. v. Ramsey,* 49 Fed. (2nd) 738, cited by the defendant was a bill for the receivership of the property of the defendant in that case. This apparently involved the property under the trust indenture and naturally as to that property, the holder of the bonds would be compelled to proceed according to the terms of the trust indenture. It is to be distinguished from a suit at law for money judgment brought on the promise contained in the notes.

Furthermore, the rule laid down in the Federal cases cited by the defendant is no longer the law of the Federal Courts embracing New York, the decisions of which are pertinent to our case. In construing an identical trust agreement the Circuit Court of Appeals in the case of *In re United Cigar Stores Co.* 68 Fed. (2nd) 895, (Second Circuit), says:

> "We think that the proviso of Section 45 (nothing in this article or elsewhere in this agreement shall affect or impair the obligation of the company which is absolute or unconditional to pay at the date of maturity the principal and interest to the respective holders of the debentures) preserves the rights of bond holders even though it contradicted Section 39, insofar as that Section declared that the trustee should be the only person to be paid. The proviso was certainly intended to insure the negotiability of the bonds and for that reason, as well as because of its terms must be deemed imperative."

The defendant sets up in his brief the unreported memorandum opinion of the United States District Court for the District of New Jersey, in *Mermelstein vs. Thermoid Co.,* and quotes from the same extensively. There seems to be some confusion in the Federal decisions which may account

for Judge Forman's opinion in this case. The Court says, "The notes appear to be negotiable," (page 45) and further "The proviso was inserted in the indenture to assure the negotiability of the notes," (page 47). Granted this to be true, then the provisions of Section 90 of the New York Negotiable Instrument Law which is identical with Section 51 of our Statute (3 C. S. 3740), would come into operation. This section provides; "The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument." In short if these notes are negotiable, the trust agreement could not be a bar to the action.

At any event any rule in the Federal jurisdiction could not be considered applicable in our case, as against the rule laid down by the New York Courts, cited above, being the rule of the jurisdiction by the law of which our notes are to be construed.

Besides the Federal cases, the defendant also cites the case of *Hoyt vs. E. I. Dupont De Nemours Powder Co.* 102 Atl. 666. That was a bill in equity to restrain the use of corporate assets to retire capital stock, and not a suit on any of the notes or obligations of the corporation. Although the Court does say that the provision in the trust agreement requiring a demand by 25 per cent in value of the bondholders to move the trustee to action, restricts collection or foreclosure proceedings, its statement to that effect is pure dictum for the reason that that was not the question before the Court. On the question which was before the Court as to whether a bond holder could be heard in Court in the face of a provision in a trust agreement limiting that right, the Court squarely holds that the provision is inoperative.

Defendant also cites the case of *Schoeler vs. Chancery Lane Corporation,* 10 N. J. Misc. 932. This is an opinion of the Circuit Court, sitting as a Supreme Court Commissioner. It is not a nego-

tiable note case, but rather a mortgage bond case and the question in our case does not seem to have been raised or discussed. Although the Court cites no authority for the proposition, it does seem to hold that in the case of a mortgage bond, suit on the same must be brought through the trustee in order to avoid multiplicity of actions.

We respectfully submit, that although the decision may have been tenable on the grounds that there was a real estate mortgage involved, it could hardly be the law of this State, that because one owed a thousand individuals on separate legal obligations, no one of them could sue because others might do likewise.

However, any New Jersey rule for the construction of a New Jersey contract would not be applicable as against the rule of construction of the New York Courts, where the notes in our case were payable.

The defendant says in its brief, page 32 and 33, that it is a definite policy of the State and Federal Governments "that a few creditors should not be permitted to hold up the progress of a Company by law proceedings or by refusing to go along with the plan which has been adopted by a great majority of the creditors." This might be a policy to be pursued in bankruptcy or in insolvency proceedings, but we have never heard of this being suggested as a defense in a law action. The question of the inability of the defendant to pay is not at issue in the present case. If the defendant desires to resist payment of plaintiff's claim on the ground of its inability to meet its financial obligations, it would be within its rights to avail itself of the benefits of the insolvency and bankruptcy Statutes, but the policy underlying these Statutes, constitutes no defense in a law action.

CONCLUSION.

The defendant sums up its argument by urging with great stress, the adoption by this Court of the very novel legal proposition that one small noteholder should not be allowed to collect from a large corporation.

The defendant also declares that it cannot pay plaintiff because of the depression. We query whether it has not been corporate activities such as are brought to light by the defense interposed in this case, which have been highly instrumental in causing the depression.

Certainly, the type of corporate financing which is illustrated by the hidden incongruous provisions of the Trust Agreement in this case, has played no small part in the past few years in undermining and destroying the public's confidence in the wisdom of many of the features of our present economic structure.

The defendant would not have sold a single bond if it had admitted to a prospective purchaser that payment could not be enforced at maturity, except with the consent of twenty-five per cent of the other noteholders over whom such purchaser would have no control. If the defendant's interpretation of the Trust Agreement is correct, then these notes are non-negotiable because not payable at a determinable future time certain to occur. Yet the defendant sold them in the open market and permitted them to be dealt in on the security exchanges of this country, represented to be negotiable instruments.

It has been schemes of financing cloaked in the subtleties of ambiguous language, such as in this case, which has brought the entire country face to face with the necessity of the acceptance of the doctrine of the "regimentation" of finance and business in place of the "rugged individualism" of the past generation.

However, we respectfully submit that aside

from any sentimental ideas of either the defendant or ourselves, the law of contracts as we have had it heretofore, has successfully withstood the test of time and the assaults of shifting theories of economics. All of the extensive and learned argument of defendant's counsel cannot alter the fact that the Thermoid Company by its note, promised to pay on February 1st, 1934, which promise, in its own trust indenture, it reaffirmed as unconditional and absolute. The inviolability of that contract is the law of this State.

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