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Notice of Appeal.

New Jersey Supreme Court.

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Notice of Appeal.

To: WILLIAM SUMNER, ESQ.,
Attorney of Plaintiff.

Sir:

Please Take Notice that the defendant appeals to the New Jersey Court of Errors and Appeals, court of last resort of all causes in New Jersey, from the whole of the judgment entered in this cause in the New Jersey Supreme Court.

AARON L. SIMON,
Attorney of Defendant, *Pro-se.*

Dated: June 17, 1930.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 17th day of June, 1930.

CORBIN & HARTY,
Attorneys for Plaintiff.

Substitution of Attorneys.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Substitution of Attorneys.

It is hereby agreed and stipulated that Aaron L. Simon, be and the same is hereby substituted as attorney *pro se* in place and stead of Minturn & Weinberger.

MINTURN & WEINBERGER.

Dated: June 17, 1930.

Judgment Record.

Filed April 2, 1930.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Judgment Record. Action at Law. Summary Judgment. Corbin & Harty, Attorneys.

Aaron L. Simon, M. D., the defendant in this cause was summoned to answer unto Passaic National Bank and Trust Company, a National Banking Corporation of the United States of America, the plaintiff therein in an action at law upon the following complaint:

(Summons issued March 15, 1930).

The plaintiff, Passaic National Bank and Trust Company, a National Banking corporation of the United States of America, having its principal office in the City of Passaic, County of Passaic and State of New Jersey, says that:

(1) On December 4, 1929, Reuben B. Kantrowitz made and delivered his certain promissory note of that date, for $7,250.00, payable to the order of "myself" one month after date, at the Passaic National Bank and Trust Company, a true copy of which note is annexed hereto as Exhibit A and made a part hereof.

(2) The said defendant, Aaron L. Simon, M. D., thereafter on the date of said note endorsed said note, and it was delivered on said date to said plaintiff by said Reuben B. Kantrowitz, endorsed to said plaintiff by said Aaron L. Simon, M. D. and said Reuben B. Kantrowitz.

(3) The said note was presented for payment on the Sixth day of January, 1930, at the place where it was payable but was not paid.

(4) Notice thereof was duly given to said Aaron L. Simon, M. D., and the costs of protest of said note, to wit, $2.24, were paid by plaintiff.

5. Notice of presentation, demand and protest with respect to said note was waived by said Aaron L. Simon, M. D., by agreement between said Aaron L. Simon, M. D. and plaintiff, a copy of which agreement is annexed hereto as Exhibt B and made a part hereof.

(6) The said note is still the property of plaintiff and has not been paid.

Plaintiff demands as damages, the sum of $7,252.24 together with interest at 6% per annum from January 6, 1930, besides costs of suit.

CORBIN & HARTY,
Attorneys of Plaintiff.

EXHIBIT A.

Copy of Note:

$7250.00 Passaic, N. J. Dec. 4, 1929.

One (1) month after date I promise to pay to the order of Myself Seventy-two hundred and fifty—no/100 Dollars at Passaic National Bank and Trust Company
Value received

(signed) REUBEN B. KANTROWITZ.

No. 5974 Due Jan. 6.

Endorsed: Aaron L. Simon, M. D.

EXHIBIT B.

To the Passaic National Bank and Trust Company, Passaic, New Jersey.

This is to certify that I have deposited with you as collateral security for the payment of any note or notes discounted by you, made by myself or/ and bearing my endorsement (notice of presentation, demand and protest being hereby waived), the following property, viz:

Bond and Mortgage—Aaron L. Simon (unmarried) to Matthew H. Scheel, Trustee, $10,000., dated July 21st, 1926.

The market value of which is now $.....
Said securities and all securities deposited by the undersigned with said company, as collateral for any loan or indebtedness of the undersigned to said company, shall also be held by said company as security for any liability of the undersigned to said company, whether now existing or hereafter contracted; and said company shall also have a lien upon any balance of the deposit account of the undersigned with said company existing from time to time, and upon all property of the undersigned of every description left with the said company for safe keeping or otherwise, or coming to the hands of said company in any way, as security for any liability of the undersigned to said company now existing or hereafter contracted.

Said company shall at all times have the right to require from the undersigned that there shall be lodged with said company as security for all existing liabilities of the undersigned to said com pany, approved collateral securities to an amount satisfactory to said company; and upon the failure of the undersigned at all times to keep a margin of securities with said company for such lia-

bilities satisfactory to said company, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said company shall at the option of said company come immediately due and payable notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

Upon the failure of the undersigned either to pay the above sum or any indebtedness to said company when becoming or made due, or to keep up required margin of collateral securities, then and in either event said company may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at public or private sale, or at any Broker's Board in New Jersey or the City of New York or elsewhere, and apply the proceeds of such sale as far as needed toward the payment of the above sum and towards any or all of such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction, said company may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said company may also apply toward the payment as said liabilities all balances of any deposit account of the undersigned with said company then existing.

AARON L. SIMON, M. D.

Answer.

Filed April 3, 1930.

Defendant, answering the amended complaint filed in the above entitled action, says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Defendant denies the allegations alleged in paragraph 3.

4. Defendant denies the allegations alleged in paragraph 4, except as to the payment of fees by the plaintiff, concerning which the defendant says he has no knowledge or information sufficient to form a belief.

5. Defendant denies that notice of presentation, demand and protest, with respect to the note sued upon, was waived by the said defendant, under and by virtue of the agreement attached to the said complaint and made a part thereof.

6. Defendant alleges that he has no knowledge sufficient to form a belief with reference to the allegations contained in paragraph 6.

FIRST SEPARATE DEFENSE.

Defendant denies any liability on the said note in that the said negotiable instrument upon which the said defendant's name appears as an endorser, should have been dishonored for non-acceptance or non-payment, and notice of dishonor given to the endorser. That the said defendant did not receive notice of dishonor, in accordance with law and as required by law, and is therefore not liable on said obligation.

SECOND SEPARATE DEFENSE.

That the notice contemplated under the Statute, was not given in accordance with law, in that the same was not mailed or deposited in the Post Office in time to reach him within the time prescribed by law.

THIRD SEPARATE DEFENSE

The defendant alleges that the agreement marked "Exhibit B" and attached to the complaint has no relation to or bearing with the note upon which this action is brought; the said note was not discounted by the plaintiff and is not an obligation such as is contemplated by or under the terms of the said agreement marked "Exhibt B", and that it was not the intention of the said defendant or of the plaintiff, that the said note upon which suit was instituted, should be regarded as coming within the purview of the said agreement; that there is no liability on said note.

FOURTH SEPARATE DEFENSE.

That the said defendant denies that was any intention on his part or on the part of the plaintiff, and that there was no agreement between the plaintiff and the said defendant wherein and whereby notice of presentation, demand and protest were ever waived on the note upon which this action is brought.

MINTURN & WEINBERGER,
Attorneys of Defendant.

Judgment.

Afterwards upon proceedings duly had according to the Statute the Court ordered the said answer stricken out as frivolous.

Whereupon it is adjudged that the plaintiff Passaic National Bank and Trust Company, a National Banking Corporation of the United States of America, do recover of the said defendant Aaron L. Simon, M. D., the sum of Seven thousand four hundred forty dollars and seventy-four cents damages together with its costs which have been taxed at the sum of Sixty-four dollars and twelve cents making in the whole the sum of Seven thousand five hundred four dollars and eighty-six cents.

$7440.74
64.12

$7504.86

Judgment signed and entered June 12, 1930.

WM. S. GUMMERE,
C. J.

Clerk's Certificate.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In Testimony Whereof I have set my hand and the seal of said Court at Trenton, this third day of July, A. D. nineteen hundred and thirty.

(Seal)

FRED L. BLOODGOOD,
Clerk.

Order for Summary Judgment.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Order for Summary Judgment.

It appearing by affidavits filed in the above action that the defenses made by defendant's answer are frivolous, and the defendant, after due notice, having failed to show such facts as entitled him to defend:

IT IS ORDERED that the answer be struck out.

W. B. MACKAY,
S. S. C. sitting as C. C. J.

Affidavit of Merits.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Affidavit of Merits.

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

Aaron L. Simon, M. D., of full age, being duly sworn on his oath says:

1. That he is the defendant in the above stated cause, and that he believes that he has a just and legal defense to the said action on the merits of the case.

AARON L. SIMON.

Sworn and subscribed before me
this 20th day of March, 1930.
Irving Simon,
Attorney at Law
of New Jersey.

Notice of Motion.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Notice of Motion.

Sirs:

Please Take Notice that we shall apply before the Honorable Charles C. Black, a Justice of the Supreme Court, at the Court House in the City of Paterson, on Tuesday, April 22nd instant at 11 A. M., or as soon thereafter as counsel can be heard, for an order to strike out the answer and defenses filed by the defendant in the above entitled action on the ground that the same are sham and frivolous, and for judgment final in said action in favor of the plaintiff, and that upon such motion we shall present affidavits, copies of which are herewith also served upon you.

Dated, April 16, 1930.

Yours, etc.,

CORBIN & HARTY,
Attorneys of Plaintiff.

To: Messrs. MINTURN & WEINBERGER,
Attorneys of Defendant.

Affidavit of Matthew H. Scheel.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Affidavit.

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

Matthew H. Scheel, being duly sworn according to law, deposes and says as follows:

1. I reside in the City of Passaic, and I am an assistant cashier of the Passaic National Bank and Trust Company, the above named plaintiff.

2. On December 4, 1929 Reuben B. Kantrowitz made and delivered to the plaintiff his certain promissory note of that date for $7250 payable one month after date at the Passaic National Bank and Trust Company, of which the following is a true copy:

$7250.00 Passaic, N. J., Dec. 4, 1929.

One (1) month after date I promise to pay to the order of Myself Seventy-two hundred and fifty no/100 Dollars, at Passaic National Bank and Trust Company.

Value received

No. 5974 Due Jan. 6

(signed) REUBEN B. KANTROWITZ

Endorsed: Aaron L. Simon, M. D.
Reuben B. Kantrowitz.

3. The said note, prior to its delivery to the plaintiff, was endorsed by the defendant, Aaron L. Simon, M. D.

4. The said note was presented by the said Passaic National Bank and Trust Company, the holder thereof, for payment at or about 3 P. M. on January 6, 1930, the date when it fell due, January 4, 1930, one month after the date of said note, having been a Saturday, at the said Passaic National Bank and Trust Company, where it was payable, but the said note was not paid.

5. Notice of presentation, demand and protest, with respect to the aforesaid note, was waived by the said defendant, Aaron L. Simon, by the terms of an agreement between him and the plaintiff, a copy of which agreement is annexed as Exhibit B to the amended complaint filed by the plaintiff in the above stated action, and a copy whereof is hereunto annexed and made a part hereof. Said agreement was made by the said defendant as hereinafter stated.

6. On July 21, 1926 said Passaic National National Bank and Trust Company loaned to said Aaron L. Simon $10,000 on his promissory note bearing that date and payable August 10, 1926. To secure payment thereof, and any note or notes discounted by said Bank made by himself or/and bearing his endorsement he executed and delivered the said agreement whereby he certified that he had deposited a certain bond and mortgage therein particularly mentioned as collateral security for the payment of any note or notes discounted by the said Bank made by himself or/and bearing his endorsement, and in and by the said agreement,

he expressly waived notice of presentation, demand and protest in respect to any such note or notes discounted by the said Bank made by himself, or bearing his endorsement.

7. The aforesaid note of $7250 dated December 4, 1929, endorsed by said Aaron L. Simon, was discounted by the said Bank for said Reuben B. Kantrowitz, the maker thereof, who paid the discount at the rate of 6% per annum, amounting to $39.88 for the period of thirty-three days from December 4, 1929, the date of said discount, to January 6, 1930, the date upon which the said note was payable.

8. I personally transacted the business for the said Bank in respect to the discount of the said note, and in agreeing to make said discount for the said Bank I relied not only on the endorsement of the said Aaron L. Simon, but particularly on his aforesaid agreement, whereby he had deposited the said bond and mortgage therein particularly mentioned as collateral security, and whereby, by its express terms, he waived notice of presentation, demand and protest of any note so discounted.

9. The said plaintiff still holds and owns the said note, and there is due to the said plaintiff thereon the said sum of $7250, with interest thereon from January 6, 1930, and deponent believes that there is no defense to the action.

MATTHEW H. SCHEEL.

Subscribed and sworn to before me
this 15th day of April, 1930.
Alice M. Beswick,
(L.S.) Notary Public of N. J.
My commission expires April 29, 1933.

EXHIBIT B.

To the Passaic National Bank and Trust Company, Passaic, New Jersey.

This is to certify that I have deposited with you as collateral security for the payment of any note or notes discounted by you, made by myself or/ and bearing my endorsement (notice of presentation, demand and protest being hereby waived), the following property, viz:

Bond and Mortgage—Aaron L. Simon (unmarried) to Matthew H. Scheel, Trustee, $10,000., dated July 21st, 1926.

The market value of which is now $..... Said securities and all securities deposited by the undersigned with said company, as collateral for any loan or indebtedness of the undersigned to said company, shall also be held by said company as security for any liability of the undersigned to said company, whether now existing or hereafter contracted; and said company shall also have a lien upon any balance of the deposit account of the undersigned with said company existing from time to time, and upon all property of the undersigned of every description left with the said company for safe keeping or otherwise, or coming to the hands of said company in any way, as security for any liability of the undersigned to said company now existing or hereafter contracted.

Said company shall at all times have the right to require from the undersigned that there shall be lodged with said company as security for all existing liabilities of the undersigned to said com pany, approved collateral securities to an amount satisfactory to said company; and upon the failure of the undersigned at all times to keep a margin of securities with said company for such lia-

bilities satisfactory to said company, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said company shall at the option of said company come immediately due and payable notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

Upon the failure of the undersigned either to pay the above sum or any indebtedness to said company when becoming or made due, or to keep up required margin of collateral securities, then and in either event said company may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at public or private sale, or at any Broker's Board in New Jersey or the City of New York or elsewhere, and apply the proceeds of such sale as far as needed toward the payment of the above sum and towards any or all of such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction, said company may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said company may also apply toward the payment as said liabilities all balances of any deposit account of the undersigned with said company then existing.

AARON L. SIMON, M. D.

Affidavit of J. Hosey Osborne.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Affidavit.

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

J. Hosey Osborne, being duly sworn according to law, deposes and says:

1. I am the Postmaster in charge of the United States post-office at the corner of Washington Place and William Street, in the City of Passaic. I have charge and superintendence over the receipt and delivery of mails in said City.

2. A letter, with proper postage thereon, addressed to 24 Grove Terrace, in the City of Passaic, deposited in the post-office in the City of Passaic on or about ten o'clock in the forenoon on January 7th last, would, in the ordinary course of the mails, have been delivered at said address on or before three o'clock in the afternoon of the same day.

J. HOSEY OSBORN.

Sworn to and subscribed before me,
this 14th day of April, 1930.
Joseph A. Lyons,
(L.S.) Notary Public of N. J.

Affidavit of Helen S. Finn.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Affidavit.

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

Helen S. Finn, being duly sworn according to law, deposes and says:

1. I am employed in the law office of William F. Gaston in the City of Passaic, New Jersey.

2. On January 7, 1930, at or about ten o'clock in the forenoon of that day, and not later than fifteen (15) minutes past that hour, I personally deposited in the United States Post Office, at the corner of Washington Place and William Street, in the City of Passaic, New Jersey, a notice, a copy of which is hereunto annexed, enclosed in an envelope, with proper postage thereon, addressed to Aaron L. Simon, M. D. at his residence, 24 Grove Terrace, Passaic, New Jersey.

HELEN S. FINN.

Sworn to and subscribed before me
this 14th day of April, 1930.
Helen Cakall,
Notary Public of
(L.S.) New Jersey.

Affidavit of Helen S. Finn.

PASSAIC NATIONAL BANK & TRUST COMPANY

Passaic, N. J., Jan. 6th, 1930.

Take notice that a Note made
by Reuben B. Kantrowitz
to himself
Dated Dec. 4th, 1929 for
$7,250.00
Dollars, endorsed by you, was this evening protested for non-payment, and that the holders look to you for the payment thereof, payment having been duly demanded and refused.

Yours respectfully,

W. F. GASTON,
Notary Public.

To Aaron L. Simon, M. D.

Affidavit of Aaron L. Simon.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff,	Action at Law.
vs.	Affidavit.
AARON L. SIMON, M. D. Defendant.	

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

I, Aaron L. Simon, of full age, being duly sworn on my oath, according to law, depose and say:

1. I am the defendant named in the above-entitled action.

2. I have read the affidavit of J. Hosey Osborne, Postmaster in charge of the United States Post Office in the City of Passaic. Replying to this affidavit, I desire to especially call the Court's attention to the fact that this affidavit refers to a general course of conduct, to wit: it assumes that if a letter with proper postage is addressed to 24 Grove Street and is deposited in the Post Office at about ten o'clock in the forenoon, that it would, in the ordinary course of the mails, be delivered on or before three o'clock in the afternoon of the same day.

3. In reply to this affidavit, I aver that I deny that the said letter bore postmark showing de-

posit of the same at ten o'clock in the morning, and deny further that the same was delivered on the same day, as is alleged in said affidavit, but on the contrary aver that it was not received that day but much later, and further deny that the same was addressed to 24 Grove Terrace, as is alleged in said affidavit, and shall offer proof at the time of trial with regard to all of the aforementioned items. I therefore charge that the affidavit of Mr. Osborne has no application to the facts in controversy, being based upon an erroneous hypothesis, and that there was no compliance in law with the giving of notice of dishonor provided for under the negotiable instrument law of the State of New Jersey.

4. Referring now to the affidavit of Mr. Matthew H. Scheel, which I have also read, and replying thereto, I admit endorsing a note bearing date December 4th, 1929, referred to in said affidavit. I deny, however, that I ever waived notice of presentation, of demand and protest, with respect to the said note, under and by virtue of an agreement marked "Exhibit B" appearing in the amended complaint, but on the contrary allege that the said agreement was never intended to apply to said note and never had any relation to the same. That at the time of the signing of the said agreement, the said Passaic National Bank and Trust Company held collateral of the said Reuben B. Kantrowitz for and in whose behalf the said note was endorsed, which collateral I understand was sufficient to take care of the said obligation then due and owing by the said Reuben B. Kantrowitz. That I never intended that my collateral, the bond and mortgage which I delivered to

Matthew H. Scheel, bearing date July 21st, 1926 was in anywise to be security for the said note of Reuben B. Kantrowitz. The said note was made merely for one month, as was also the said bond and mortgage. That there was an express understanding and agreement made between the said Matthew H. Scheel and myself that the said bond and mortgage, upon the payment of the note of Ten thousand dollars, would be returned and delivered to me.

5. That I have filed a bill of complaint in the Court of Chancery, naming the Passaic National Bank and Trust Company as a defendant, as well as Matthew H. Scheel, as trustee, and beg leave to refer to said bill of complaint, rule to show cause and all of the proceedings had in connection with said matter on the argument of said motion, so that the Court may be in a position to have before it all of the facts relating to the subject matter now at issue. That in said bill of complaint, I, as complainant, charge that I offered to pay the said Passaic National Bank and Trust Company, or Matthew H. Scheel, as trustee, the sum of Seventeen hundred eighty-one dollars and ten cents ($1781.10), representing the balance due on account of said note of Ten thousand dollars ($10,000.00), for which the bond and mortgage were given as collateral, and which the said Passaic National Bank and Trust Company is now attempting to hold as security for the said Seventy-two hundred fifty dollars ($7250.00). That it was therein claimed that the said $7250.00 was never intended to be supported by the said bond and mortgage, as collateral, but on the contrary the said defendant herein alleges that the said note of

$7250.00 which he endorsed for the said Reuben B. Kantrowitz, was in fact supported by collateral owned and possessed by Rueben B. Kantrowitz and which the said Passaic National Bank and Trust Company had in its possession at the time when the said defendant herein, became endorser, at the special instance and request of the said Reuben B. Kantrowitz, on said note upon which there is now due and owing the said sum of $7250.

6. That in each instance when the said note became due and payable and was not paid, alleged notices of protest were sent to the said defendant herein, clearly showing that there was no intention to waive notice of protest.

7. With regard to the last alleged notice of protest, I contend that the same was not mailed in conformity with law and within the time required by law, and therefore is a nullity and discharges me, the said defendant, of and from any and all liability thereunder.

8. That the answer made by me is not sham and/or frivolous.

9. I am prepared to prove the foregoing facts at the time of the trial of this case, and respectfully submit that the plaintiff is not entitled to summary judgment, but on the contrary aver that I am entitled to have the complaint dismissed, for failure on the part of the plaintiff to resort to the collateral which it has, in its possession, delivered to it by the said Reuben B. Kantrowitz, and which I charge must first be resorted to before there is any liability on the part of defendant on said endorsement, if in fact any exists.

AARON L. SIMON.

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

Irving Simon
An Attorney at Law of New Jersey.

Memoranda Opinion.

PASSAIC CIRCUIT COURT CHAMBERS
Paterson, New Jersey
WILLIAM B. MACKAY
Judge

William A. Sumner, Esq.
Attorney for Plaintiff,
First National Bank Building,
Paterson, New Jersey.

Messrs. Minturn & Weinberger,
Attorneys of Defendant,
Military Park Building,
Newark, New Jersey.

Gentlemen:

June 3, 1930.

I have not had an opportunity to prepare an opinion in the case of Passaic National Bank and Trust Company, plaintiff, vs. Aaron L. Simon, defendant. I will say, however, that the plaintiff's claim is founded upon a note bearing date December 4, 1929, in the sum of $7,250.00 and was made by Reuben B. Kantrowitz to the order of "Myself" payable one month after date. The note became due January 6th, 1930, due to the fact that January 4th fell on a Saturday. It was presented for payment January 6th, 1930, at or about 3 P. M. and was protested the same day for nonpayment. Notice was mailed January 7th, 1930, at 10 A. M. Defendant claims the letter is not postmarked "10 A. M." That is immaterial. He said it was not received by him January 7th, 1930, but much later. He does not say how much later.

I am rather inclined to think under these circumstances if this is all there was to the case, that a jury question would arise as to the question of

notice of dishonor, particularly in view of the additional fact as to the place to which the notice was mailed, but it appears that an agreement was entered into between plaintiff and defendant prior to the making of the note in question wherein it was agreed between the plaintiff and defendant that a bond and mortgage by Simon to Scheel, trustee, &c. for $10,000, dated July 21st, 1926, had been deposited with the plaintiff as collateral security for the payment of any note or notes discounted by you (plaintiff) made by myself (defendant) or/and bearing my endorsement (notice of presentation, demand and protest being hereby waived)."

This agreement further provides "Said securities and all securities deposited by the undersigned (defendant) with said company, as collateral for any loan or indebtedness of the undersigned to said company, shall also be held by said company as security for any liability of the undersigned to said company, whether now existing or hereafter contracted; and &c."

Counsel for defendant claims that the agreement as to the future related to the holding of the collateral security for any new debt that might be incurred, but that the notice of presentation, demand and protest waiver was simply for the specific note made July 21st, 1926, at the time of the making of the agreement in question.

I am unable to place this narrow construction upon the agreement in question. I am inclined to believe from reading the entire agreement that not only did the defendant agree that the collateral security should remain in the possession of the plaintiff as collateral security for the purpose of paying any future loans, but that it was his inten-

tion to endorse notes in the future and also to waive notice of presentation, demand and protest.

I will recommend that the answer be struck out and judgment entered in favor of the plaintiff for the amount due with interest.

I am returning papers in the case to William A. Sumner.

Very truly yours,

WILLIAM B. MACKAY.

WBM:LA

Exception.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff, vs. AARON L. SIMON, M. D. Defendant.	Action at Law. Exception.

An Exception to the letter of William B. Mackay, Circuit Court Judge, sitting as Supreme Court Commissioner, purporting to be a memoranda opinion striking out the answer of the defendant in the above entitled matter, dated June 3, 1930, and an Exception to the order of the Court striking out the answer of the defendant, Aaron L. Simon, M. D., on the grounds that the same is frivolous dated June 12, 1930, are hereby allowed and duly noted as grounds of appeal to defendant, and it is ORDERED that the same be entered in the minutes of the above entitled matter.

WILLIAM B. MACKAY,
Judge.

Dated: June 17, 1930.

Grounds of Appeal.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC NATIONAL BANK AND TRUST COMPANY, a National Banking corporation of the United States of America, Plaintiff-Appellee, vs. AARON L. SIMON, M. D. Defendant-Appellant.	Action at Law. Grounds of Appeal.

The defendant appellant hereby sets up the following specifications and grounds of appeal.

1. The Court was without jurisdiction to grant the motion of the plaintiff striking out the answer of the defendant, as the same presented a jury question and judgment was therefore erroneously entered.

2. The Court erred in granting the motion of the plaintiff striking out the answer of the defendant, as plaintiff had failed to comply with service of notice of protest as required by the Negotiable Instrument Law, the defendant was therefore discharged from liability and judgment was erroneously entered.

3. The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the collateral agreement set up in the plaintiff's amended complaint did not relieve the plaintiff from its legal obligation of giving notice of protest because it did not refer or relate to this particular note, and judgment was therefore erroneously entered.

Grounds of Appeal.

4. The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the collateral agreement set up in the plaintiff's amended complaint is void, and of no legal effect, in that it attempts to affect obligations not in existence and is against public policy, and judgment was erroneously entered.

5. The Court erred in granting the motion of the plaintiff in striking out the defendant's answer on the ground that the collateral agreement therein mentioned was without the contemplation of the parties and was not intended by either party to refer to the note mentioned in the complaint, and judgment was therefore erroneously entered.

6. The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the defendant could not legally execute a waiver to a note not then in existence, or existing in the contemplation of the parties at that time, and judgment was therefore erroneously entered.

7. The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the collateral agreement herein mentioned contained ambiguous language which, together with the affidavits submitted in support of the answer presented a mixed question of law and fact and therefore should have been presented to a jury with instructions.

AARON L. SIMON,
Attorney Pro se.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 7th day of July, 1930.

CORBIN & HARTY,
Attorneys for Plaintiff.

New Jersey Court of Errors and Appeals

PASSAIC NATIONAL BANK AND TRUST COMPANY, Plaintiff-Respondent, and AARON L. SIMON, M. D., Defendant-Appellant.	Action at Law. On Appeal from Supreme Court. Rule Striking out Answer and for Final Judgment. Sat below: MACKAY, *C. C. J.* acting as Supreme Court Commissioner.

BRIEF OF DEFENDANT-APPELLANT.

(Italics, etc. ours except where otherwise noted).

Statement of the Case.

The suit was by plaintiff against defendant upon a promissory note, dated *December 4, 1929,* for $7,250., payable one month after date, at plaintiff's bank, made by Reuben B. Kantrowitz, and endorsed by defendant Simon (pp. 3, 4).

Annexed to the complaint is a copy of an instrument executed by Simon on or about *July 21, 1926,* addressed to plaintiff bank and reading, so far as material to the present controversy, as follows:

> "This is to certify that I have *deposited with you as collateral security for the payment of any note or notes discounted by you, made by myself or/and bearing my endorsement (notice of presentation, demand and*

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protest being hereby waived), the following property, viz:

Bond and Mortgage—Aaron L. Simon (unmarried) to Matthew H. Scheel, Trustee, $10,000., dated July 21st, 1926.

The market value of which is now $.....

Said securities *and all securities deposited by the undersigned with said company, as collateral for any loan or indebtedness of the undersigned to said company, shall also be held by said company as security, for any liability of the undersigned to said company, whether now existing or hereafter contracted*; * * * * *"

The answer denied presentation of the note and protest and proper notice of presentation, demand and protest to Simon and set up four separate defenses (p. 7) which summarized alleged:

1. That notice of presentation, demand and protest was not given to Simon as required by law.

2. That the note was not discounted by plaintiff and that the waiver of notice of protest contained in the agreement of July 21, 1926 did not apply to it because—

(a) It was not within the express terms of the agreement.

(b) It was not the intention of the parties that such a note should be considered as within the purview of the agreement.

The motion to strike was made upon the ground that the answer and the separate defenses were "sham and frivolous."

Witterman v. Giele, 95 N. J. L 478.
Fidelity Mutual v. Wilkes Barre, 98 N. J. L. 507.

Affidavits were presented by plaintiff (p. 13 to 20), the purport of which was that due notice of protest had been given to Simon and that the note had been discounted, December 4, 1929, by the Bank for Kantrowitz. There is no suggestion that Simon had anything to do with, or knew of, the discount or received any benefit therefrom.

Simon presented an affidavit (p. 21 to 24) the purpose of which was that proper notice of protest had *not* been given and that the note was not within the intent of the agreement of July 21, 1926, with respect to the waiving of protest.. It appeared from that affidavit that; the reason for the agreement of July 21, 1926 was a note for $10,000. made by Simon and discounted by plaintiff on or about July 21, 1926; at which time Kantrowitz was in no wise a party involved, being a complete stranger to the entire transaction. It was further agreed, that a mortgage, given by Simon as collateral, was to be redelivered to him upon the payment of the note of $10,000.

The affidavit of Simon also stated that: whenever the note or a renewal became due and was not paid, notice of protest was sent Simon; no collateral other than the mortgage referred to in the agreement of July 21, 1926 was ever called for or furnished by Simon; the original $10,000. note, for which the bond and mortgage was specifically pledged by Simon to the Bank on July 21, 1926, had been reduced to $1781.10; Simon had tendered the bank that sum and demanded the bond and mortgage; the bank having refused, Simon had instituted suit in the Court of Chancery to recover the bond and mortgage (p. 23).

The Court, Mackay, *C. C. J.*, acting as Supreme Court Commissioner, decided the case in a memorandum opinion (p. 26). He held—that:

1. It was a jury question whether notice of protest had been properly given.

2. By the agreement of July 21, 1926 Simon had waived notice of protest of the note sued on, executed and discounted December 4, 1929.

An exception was duly taken (p. 30).

Thereupon an order was made striking out the defense as frivolous (p. 10) and judgment final was entered (p. 9) against Simon for $7504.86.

From that judgment this appeal was taken (Notice of Appeal p. 1; Grounds of Appeal p. 31).

The defenses having been struck out as frivolous, the appeal is here under the provisions of section 15 of the Practice Act, 2 Cum. Supp. to C. S. of N. J. 1911-1924, p. 2816 as amended by Chapter 151 P. L. 1928, p. 306. The court held that the matter of whether due notice of protest had been given Simon was a jury question. Hence so much of the defense was not sham. That conclusion of the court is binding here for there is no appeal from an order *declining* to strike out a pleading as frivolous or sham. The right to strike a pleading upon either ground is a prerogative of the Supreme Court, not reviewable on appeal if decided in favor of defendant.

The pleadings put in issue whether due notice of protest had been given to Simon and the pleadings, upon that point, are conclusive here, else this Court would be substituting its *discretion* for the *discretion* of the Supreme Court. The judgment, therefore, must be sustained, if at all, upon the sole ground upon which the court below struck the answer and defenses.

The court having concluded that the answer, insofar as it sought to raise the question of fact of due notice to Simon, was not sham, then proceeded to strike the answer and defenses as frivolous

upon the ground that, *as matter of law, the agreement of July 21, 1926 operated as a waiver of notice of protest to Simon.*

The Court did not hold that the attempt of Simon in the answer and defenses to raise an issue of fact by alleging the intent of the parties as to the agreement of July 21, 1926 was sham but must have held that it could not be injected under the parol evidence rule, and that the agreement of July 21, 1926 should be construed without resort to parol evidence and, so construed, operated as a waiver of notice of protest to Simon.

The result is that the judgment rests not as if upon a motion to strike as frivolous or sham but as if upon a motion for judgment upon the pleadings which is as if, prior to the new Practice Act, judgment for plaintiff had gone *upon a demurrer to a plea.*

Therefore, the statements of fact contained in the answer and defenses must be considered as true, and this leaves the only point to be considered, i. e., under the terms of the agreement of *July 21st, 1926* did Simon waive notice of protest upon the note of Kantrowitz executed *December 4, 1929?*

POINT I.

The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the collateral agreement set up in the plaintiff's amended complaint did not relieve the plaintiff from its legal obligation of giving notice of protest because it did not refer or relate to this particular note, and judgment was therefore erroneously entered. (3rd gound of appeal, Case, page 31)

The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the collateral agreement therein mentioned was without the contemplation of the parties and was not intended by either party to refer to the note mentioned in the complaint, and judgment was therefore erroneously entered. (5th ground of appeal, Case, page 32)

By the terms of the instrument of July 21st, 1926 Simon did not waive notice of protest of the note sued upon if the construction of that instrument be solely for the Court.

Before considering the language of the agreement of July 21, 1926 there are certain admitted facts which may be resorted to as aids to the construction to be put upon the instrument.

The agreement of July 21, 1926 was executed coincident with the discount of a note made by Simon for $10,000., payable in one month (p. 23). A specific bond and mortgage payable likewise *in one month* (p. 23) made by *Simon* to a trustee for the bank (p. 16) was deposited by Simon as collat-

eral for the payment of the note and it was to evidence *that* deposit and its purpose that the instrument of July 21st, 1926 was executed. The collateral deposit was mentioned in the instrument of ment of July 21st, 1926 was executed. The collateral deposit was mentioned in the instrument of July 21st, 1926. It is apparent from the face of the instrument, taken in connection with the fact that the note for $10,000. was discounted on July 21st, 1926, the date of the execution of the instrument, that the *primary* purpose was to prescribe the terms of the deposit of the bond and mortgage to secure the payment of the *particular note.*

The note discounted by plaintiff upon which the suit was brought had no connection with the note of $10,000. of July 21st, 1926. It was dated December 4, 1929, to run for one month from that date, more than three years subsequent to the execution of the deposit agreement of July 21st, 1926.

There are established principles of law to be applied in the construction of the instrument.

At the time of its execution the matter of waiver of notice of protest was governed by sections 109 and 110 of the Negotiable Instruments Act, 3 C. S. of N. J., p. 3747.

The language of these sections is precisely the same as that of the Uniform Negotiable Instruments Act.

The sections read as follows:

> "109. *Waiver of Notice.* Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied."
>
> "110. *Persons bound by waiver of notice.* Where the waiver is embodied in the instrument itself, it is binding upon all parties;

but where it is written above the signature of an indorser, it binds him only."

It is not necessary, in considering the point now argued, to determine whether the statutory right to notice of protest, which becomes as much a part of the endorsement of every negotiable instrument as if the language giving the right were embodied in or on the back of the instrument itself, can be waived by a writing made prior to the execution of the negotiable instrument for, even if that be possible, a proper construction of the instrument of July 21st, 1926 will, we submit, exclude the instrument sued on in this suit.

It has been determined that the statutory provisions are declaratory of the prior law.

Linthicum v. Bagby, Court of Appeals of Maryland, 102 Atl. 997, 131 Md. 644.
8 Corpus Juris, title "Bills and Notes" sec. 976, p. 696.

and cases cited in Uniform Laws Annotated, Vol. 5, Uniform Negotiable Instruments Act, p. 552, Ed. of 1930.

A waiver of demand or notice of protest is to be *strictly* construed and *clear* and *unequivocal* evidence is required. It will *not* be presumed and the burden is upon the holder of the instrument to prove it. It will not be inferred from doubtful acts or *language of the indorser* being in derrogation of a statutory right of the indorser.

8 Corpus Juris, title "Bills and Notes", sec. 983, p. 699.
Cases cited "Uniform Laws Annotated," vol. 5, Edition of 1930, "Negotiable Instruments" p. 560.
Hurlburt v. Bradley, 1920, 94 Conn. 95, 109 Atl. 171.

In speaking of a waiver embodied in a separate instrument, 8 Corpus Juris, title "Bills and Notes" sec. 986, p. 706 states the rule:

> "A waiver may also be made by letter, telegram, or other separate instrument sufficiently evincing an intent on the part of the indorser to dispense with demand and notice, but the letter or instrument must be addressed to the owner or holder of the note at the time, *and the reference to a particular obligation must be clear and unambiguous.* However, a separate instrument may constitute an estoppel without any intent to waive."

With these rules in mind let us look at the instrument executed on July 21, 1926, which is claimed to be a waiver of notice of protest by an indorser of an instrument which did not come into being until December 4, 1929, three years and more after the execution of the instrument of July 21, 1926, and which had no connection whatever with the note which was, in fact, executed on July 21, 1926, and to secure the payment of which a bond and mortgage was deposited under the terms of the instrument of July 21st, 1926.

That the instrument of July 21, 1926 was *primarily* intended as a *deposit* agreement is indicated by the very first words used. It begins: "This is to certify that I have deposited with you as collateral security", and as collateral security for what?—the instrument proceeds "for the payment of any note or notes *discounted* by you *made* by myself or *bearing* my endorsement."

It is now said that the words "discounted" and "made" and "bearing" in this portion of the instrument are to be interpreted as follows: "which shall have been or may hereafter be discounted and which shall have been or may hereafter be made,

or which may now be bearing or hereafter may bear."

Unless these words "discounted" and "made" and "bearing" are to be so interpreted there was no waiver, by the instrument of July 21st, 1926, of notice of protest of the note sued on because the *only* waiver is contained in the language following the word "endorsement" in parenthesis "notice of presentation, demand and protest being hereby waived." This language can *only* refer to the preceding words "notes discounted" by you, made by myself or/and bearing my endorsement." From a grammatical standpoint the words "discounted" and "made" are past tense, the word "bearing" is the present. Plaintiff desires to read them as passive future perfect.

Continuing with the language of the instrument we find that the parties had a clear understanding of English grammar for, after reciting the bond and mortgage deposited as collateral, there is injected the following: "said securities * * * * shall *also* be held by said company as security for any liability of the undersigned to said company, *whether now existing or hereafter contracted.*"

If the words "discounted" and "made" and "bearing" in the first paragraph of the agreement are to be read (with respect to the waiver of notice of presentation, demand and protest) as if they meant "which shall have been or may hereafter be" discounted or made or "which may now or hereafter bear" as the case may be, then the language to the effect that the collateral shall *also* be held by said company as security for any liability of the undersigned to said company whether now *existing or hereafter contracted* are superfluous because, if the words "discounted" are "made" and "bearing" are to be read both past, present and future potential, with respect to the waiver of pres-

entation, demand and protest, they are likewise to be read in the same way with respect to the deposit of the collateral.

It is not to be assumed that the parties used language for no purpose and the use of this language, with respect to the deposit of the collateral specifically referring to a liability which might be created in the future, is a clear indication that the parties used in the first paragraph, the words "discounted" and "made" and "bearing" as referring only to an obligation then discounted or made and this coincides with a grammatical use of those words.

It is one thing for Simon to have agreed that the collateral deposit should be held to secure the payment of any negotiable instruments which he might make or endorse in the future. It is quite another thing for him to have waived notice of protest of negotiable instruments to be made or endorsed by him in the future. He might endorse notes in the future without knowledge as to with what bank they were to be discounted. He might believe that the notes were to be discounted in quite another bank. If they were to be discounted in any other bank he would be entitled to notice of protest. But the person for whom he endorsed the note might take it to plaintiff bank without the knowledge of Simon. In that event he would be entitled, according to plaintiff and the court below, to no notice of protest. The note might go to protest and his collateral be applied to its payment without notice to him. On the other hand, if he was entitled to notice and received it he could protect his collateral. There is a clear distinction, therefore, between an agreement to permit the collateral to remain as security for the payment of a note which he might endorse in the future and a waiver of notice of protest of

that note. When we add to that clearly distinction in the consequence of the two things, can there be any doubt but that the language in the instrument should be construed in its grammatical sense? If construed in its grammatical sense, there is a distinction in the instrument itself. If not construed in its grammatical sense, then there is no distinction and the language used with respect to the collateral being security for any obligations thereafter created is entirely superfluous.

Upon the face of the instrument of July 21, 1926 it clearly appears, we submit, that there was no waiver of notice of presentation, demand and protest of such an instrument as the one here sued on which did not come into existence until December 4, 1929.

POINT II.

If there be doubt as to whether there was waiver of notice of protest of the note sued on by the instrument of July 21, 1926, it must be held that there was no waiver.

We have already cited cases to the effect that, the right of the indorser to notice being a part of the contract of endorsement by the terms of the statute waiver must be strictly proved, the burden being upon him who asserts it to produce clear and unequivocal proof.

It is submitted that the most that can be argued from the language of the instrument is that it *may* be capable of two interpretations. If that be so, then there is no waiver.

The agreement of July 21, 1926 having been prepared by the Bank is to be construed most strongly against the bank.

The agreement of July 21st, 1926 is a printed form used by plaintiff but not generally used by other banks.

Its language, therefore, is to be construed most strongly against the bank.

> Benwell v. Mayor, etc. of City of Newark, 55 N. J. E. 260.
>
> Williston on Contracts, Vol. 2, (1920 Ed.) p. 1203, sec. 621.

Had the bank desired a waiver of notice of protest of notes to come into existence after July 21, 1926, appropriate language could have been used in the agreement so that the matter would be beyond question.

It is apparent that the bank *did* desire that the collateral should be held for obligations to come into existence and it had no difficulty in using appropriate language to cover *that* situation.

POINT III.

The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the collateral agreement herein mentioned contained ambiguous language which, together with the affidavits submitted in support of the answer presented a mixed question of law and fact and therefore should have been presented to a jury with instructions. (7th ground of appeal, Case, page 32).

If the language of the agreement of July 21, 1926 is such as that it **may** operate as a waiver of notice of protest of obligations to come into existence parol evidence was admissible to identify the subject matter of the agreement and the matter was one for the jury.

It is fundamental that the construction of a written instrument is for the court but, where the effect of such instrument depends not merely upon its construction and meaning but upon collateral facts in pais and extrinsic circumstances, the inferences of facts to be drawn from them are to be left to the jury.

Hope v. The Maccabees, 91 N. J. L. 148, 102 Atl. 689.

Sommer Faucet Co. v. Commercial Casualty Insur. Co., 89 N. J. L. 693, 99 Atl. 342.

It is always permissible to identify the subject matter of a contract by the use of parol evidence.

Axford v. Meeks, 59 N. J. L. 502.

In a case of doubtful construction, the conduct of the parties may be taken into consideration.

Naughton v. Elliott, 68 N. J. E. 259.
22 Corpus Juris, p. 1179, sec. 1572, title "Evidence".

Under these rules the matter as to whether, by the agreement of July 21, 1926, there was a waiver of notice as to instruments to come into existence in the future was one for the jury.

Not only was there to be taken into consideration the terms of the instrument but also the circumstances present at the time of its execution, including the fact that the note for which the collateral was specifically deposited ran for a period of one month and that the bond and mortgage ran for the same period; the circumstances under which the agreement was delivered, including the manner in which it was prepared and by whom; the subsequent conduct of the bank.

That conduct is important for, according to the affidavit of Simon, which is not denied, whenever a note or renewal made after July 21, 1926 became due, it was duly presented and notice of protest given to Simon (p. 24). The sending of the notice of protest of the note sued upon was defective.

If notice of protest was not required under the agreement of July 21, 1926 then why did the bank, in each instance, assume to send such notice?

In Toole v. Crafts, 196 Mass. 397, 82 N. E. 22 where a waiver had been written on the back of the note, but the question was as to whether that waiv-

er referred to a protest which may have been made or a protest thereafter to be made, oral evidence was offered to explain the intent. The court held that the parol evidence could not be considered for the purpose of varying the language used, and then proceeded:

> "But it does not follow that the plaintiff's exceptions can be sustained. The parol evidence received was competent, not only upon the issues of fraud or mistake, *but also for the purpose of applying the language, of the written agreement to its subject matter, and for the further purpose of showing the circumstances under which the agreement was made, and thus giving the court the light of those circumstances in ascertaining the true construction of the agreement.* Sutton v. Bowker, 5 Gray (Mass) 416; Blanchard v. Page, 8 Gray (Mass) 281, 287, 288; Alvord v. Cook, 174 Mass. 120, 54 N. E. 499; Scaplen v. Blanchard, 187 Mass. 73, 72 N. E. 346; Germania Fire Ins. Co. v. Lange, 193 Mass. 67, 78 N. E. 746. And without stating this evidence in detail we are of opinion that the *jury* had a right to find upon it that in the conversation between Allyn and the defendant, which proceeded and brought about his new indorsement, two protests of the note in question were in the minds of the parties; one, which, if it had been made within 60 days of the date of the note, would have fixed the liability of the defendant (Rev. Laws, c. 73, sec. 88; Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987); and another, which the plaintiff's agent contemplated making in the immediate future, which of itself would have been wholly inefficacious to affect the rights of the parties. Under these circumstances it was for the jury to say upon the evidence *which of these two separate protests (using this word to include demand and notice)*

> *was the subject matter of the agreement, or in other words to which one of them the defendant's waiver related.* Toole v. Crafts, 193 Mass. 110, 78 N. E. 775; Fisk v. Fisk, 12 Cush. (Mass) 150."

Inasmuch, to say the best for plaintiff, the language of the agreement of July 21st, 1926 was ambiguous, we submit a jury would be entitled to take into consideration parol evidence in defining the subject matter of that agreement to waive protest, i. e.—whether only notes then in existence or those to come into existence in the future.

The court erred, we submit, in holding that there was no jury question present upon this phase of the case.

POINT IV.

The Court erred in granting the motion of the plaintiff in striking out the answer of the defendant on the ground that the defendant could not legally execute a waiver to a note not then in existence, or existing in the contemplation of the parties at that time, and judgment was therefore erroneously entered. (6th ground of appeal, Case, page 32).

The agreement of July 21, 1926 could not legally be given the effect of a waiver of notice of protest of the note not in existence at the time it was executed.

So far as we have been able to discover there are no cases specifically dealing with instruments assuming to waive notice of protest of obligations to come into existence in the future.

The statutory language with respect to waiver, sec. 109, of the Negotiable Instruments Act, 3 C. S. of N. J. p. 3747, is that notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give notice. The words "before the time of giving notice has arrived" import that the obligation must be in existence at the time of the execution of the waiver. It implies that there is in existence an obligation and that *a* time may come for the giving of notice of dishonor. Having specifically provided for the waiver *before* the time of giving of notice has arrived, it would seem as if, had the legislature intended that there might be a waiver of notice of protest of an instrument yet to come in existence, it would have provided for such a contingency. So the language

of section 110 seems to comprehend that a written waiver should be either embodied "in the instrument itself" or "written above the signature of the indorser", for those are the only contingencies mentioned in the section.

Waiver is generally defined as the voluntary intentional giving up, relinquishing or surrendering some known right.

> Freeman v. Conover, 95 N. J. L. 89, at p. 93.
> 40 Cyc title "Waiver", p. 252.
> Bouvier's Law Dictionary.

In McCarty v. Piedmont Mutual Ins. Co., 62 S. E. 1, 18 L. R. A. (N. S.) 729, at p. 730 the court said:

> "Hence, generally, *representations de futuro do not form the basis of waiver or estoppel.* A leading authority on this subject is Union Mut. L. Ins. Co. v. Mowry, 86 U. S. 546, 24 L. Ed. 675, in which the court said: 'The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the *policy subsequently issued alone expressed its contract,* an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact—to a present or past state of things. If the representations relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion liable to modification or abandonment upon a change of circumstances, of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to

> influence others, and by which they have been induced to act. An estoppel cannot arise from a *promise as to future action with respect to a right to be acquired upon an agreement not yet made.'* This language is made the basis of the text in 11 Am. & Eng. Enc. Law p. 425, 16 Am. & Eng. Enc. Law, p. 944, and in 16 Cyc. Law & Proc. p. 752, where cases are collated. Among the cases enforcing the doctrine of Mowry's Case, supra, may be cited Morris v. Orient Ins. Co., 106 Ga. 472; 33 S. E. 430, distinguishing Carrugi v. Atlantic F. Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; Elliot v. Whitmore, 23 Utah, 342, 90 Am. St. Rep. 700, 65 Pac. 70; Gray v. Germania F. Ins. Co., 155 N. Y. 180, 49 N. E. 675."

To the same effect is United Firemens Insur. Co. v. Thomas, Circuit Court of Appeals, 7th Circuit, 82 Fed. 406, 92 Fed. 127, 47 L. R. A. 450.

In Continental Ins. Co. v. Ruckman, (Ill) 127 Ill. 364, 20 N. E. 77, at p. 80, 11 American State Reporter 121, the court said:

> "A waiver is the voluntary yielding up by a party of some *existing* right, but, until the contract is consummated, the company has no rights which are susceptible of waiver, nor can any condition be properly said to be modified or stricken from a policy until there is a policy; that is, until after the terms of the contract have been agreed upon, and the policy issued."

In Bird v. Kay, 40 Appellate Division, 533, 58 N. Y. Supp. 170, the contention was that there had been a parol waiver prior to the execution of the note. The court said at p. 173:

> "In our judgment, these facts were not admissible to show a waiver. *The alleged statement was made before the contract of*

> *indorsement was executed. The nature and extent of that contract are implied by law from the fact that the name of the indorser is written across the back of the note. When the endorsement is signed, the contract arises from it and its terms are as well settled as though they had been written out above the name of the indorser.* It is a contract in writing and all prior negotiations in regard to the papers are just as much merged in the contract made by the indorsement as they would have been had the terms of the indorsement been written out above the signature of the indorser. Parol evidence of what was said before the indorsement by way of establishing the nature of the contract is just as much inadmissible in regard to this contract as in regard to any other contract in writing and the nature and extent of it cannot be varied by any prior conversation between the parties. Bank v. Smith, 27 Barb. 489, 4 Enc. Law (2nd Ed) 458."

It is true that the court placed its decision *primarily* upon the ground that the parol waiver, prior to the execution of the note, was ineffective because the negotiations between the parties had been superseded by the written contract of endorsement.

But not only do parol negotiations become merged in a written contract but a written contract, which fully covers the subject-matter, supersedes all prior written contracts. In the case at bar, when the note of December 4, 1929 was endorsed by Simon a full written contract came into effect. No State has held more firmly that a contract evidenced by a promissory note or other negotiable instrument and its endorsement is full and complete than New Jersey.

Beers v. Broad and Market Nat Bank, 102 N. J. L. 5.
Church v. National, Newark, &c. Banking Co., 97 N. J. L. 237.

When the note of December 4, 1929, therefore, was endorsed, there sprung up a contract in writing between the parties under the terms of which, by force of the statute, the endorser was entitled to notice. This contract being full and complete superseded any prior oral or written contract between the parties upon the same subject matter.

Williston on Contracts, vol. 2, p. 1224, sec. 632, in which section Williston says:

> "All courts agree that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject-matter are excluded from consideration *whether they were oral or written.*"

The language of the Appellate Division in the case above cited can be applied as well to written prior negotiations or agreements as to parol.

If an agreement such as that evidenced by the document of July 21st, 1926 is to be construed as an effective waiver of notice of protest with respect to any notes then in existence and to any thereafter coming into existence which, by any chance, should come to the possession of plaintiff bank it is exteremely wide and all-embracing. It means that although Simon might endorse notes which originally were not discounted with plaintiff's bank, but which subsequently no matter how long after the execution of the agreement of July 21st, 1926 came into the possession of plaintiff's bank by discount, the bank would not be obliged to notify Simon of dishonor. It might apply his col-

lateral. It might safely wait for any length of time before commencing suit against Simon. In the meantime the maker or prior endorsers might, without the knowledge of Simon, dispose of their property and otherwise act to his damage.

We have already argued that it might be the understanding between him and the maker of the note which he might endorse that it was to be discounted at another bank and yet the maker might discount it with plaintiff. Simon might rest secure that he would receive notice of protest because the note was to be discounted at a different bank. But if discounted with plaintiff's bank he would receive no notice of protest, would be deprived of the opportunity of protecting his collateral and the other consequences would follow hereinbefore mentioned. If legally it be possible that parties may make such agreements which are binding, there should be found in the agreement *clear and unambiguous language before any such effect is given to it.*

We submit that it is not necessary to determine the point here argued for the instrument lacks that clear and unambiguous language, without which it will not be given effect contended for by plaintiff.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

AARON L. SIMON,
Attorney *pro se.*

MERRITT LANE,
Of Counsel.

New Jersey Court of Errors and Appeals

PASSAIC NATIONAL BANK AND TRUST COMPANY, Plaintiff-Respondent, *and* AARON L. SIMON, M. D., Defendant-Appellant.	Action at Law. On Appeal from Supreme Court. Sat Below: Mackay, C. C. J., acting as Supreme Court Commissioner. Rule Striking Out Answer and for Final Judgment.

(Italics, etc., ours, except where otherwise noted.)

REPLY BRIEF FOR APPELLANT.

1.

Respondent argues in its brief, pp. 4, 5, and under Point I, in effect that the answer should have been stricken out as *sham* as well as frivolous, it having been stricken out only as frivolous (p. 10), (Memorandum opinion pp. 27, 28), and *this* Court is asked to examine into the facts and to sustain the judgment if it determines as matter of fact that the answer was sham.

As authority the cases of *National Surety Company* v. *Mulligan,* 105 N. J. L. 336-338; *McCarty* v. *West Hoboken,* 93 N. J. L. 247, and *Sculthorpe* v. *Commonwealth Cas. Co.,* 98 N. J. L. 845 are cited.

The answer to this contention is found on pp. 4 and 5 of our original brief.

Whether an answer should be stricken out as *sham* is wholly within the discretion of the trial court. Upon a denial of a motion to so strike no appeal lies and no ground of appeal, after final judgment, can be based on the action of the trial

judge. It is only by force of the statute that an appeal lies if the motion be granted.

Upon the granting of a motion to strike as frivolous an appeal lies after final judgment by force of the statute. Were there no statutory provision for an appeal, if the trial court struck an answer as *frivolous* under the conditions existing in the instant case, on appeal, a ground of appeal could be based upon the action of the court for the reason that the striking of the answer in the instant case would not be upon the ground that it was "frivolous" within the meaning of those cases which hold that no appeal will lie from the striking of such a plea by the trial court. The word "frivolous" in such cases means a plea "palpably insufficient as a legal defense to the action and hence legally insufficient or frivolous and therefore presumably interposed for the purpose of delay", which imports insincerity, which was the understanding of the word at common law. The trial court was empowered to relieve its records of a palpably insincere plea.

But as used in the Practice Act of 1912 the word not only imports *such* an answer but also an answer which, while though not insincere, yet is legally insufficient, which kind of a plea would, at common law, be attacked by demurrer and error might be assigned upon the action of the court on the demurrer.

And if the court refused to strike such a plea, plaintiff might secure a review on error by permitting judgment to go against him on the pleadings, and then assigning as error the ruling of the court on the demurrer.

But that was never the practice with respect to striking a plea as sham for the theory of striking a sham plea was that the plea, being palpably without basis *in fact,* was interposed for the purpose of delay, and, therefore, insincere and the

trial court might relieve its records of such an insincere plea *as matter of discretion.*

As already pointed out, the statute permits an appeal by *the defendant* from a rule striking out his answer *either* as sham or frivolous, but *allows no appeal from the denial of such a motion.*

Still, if the court should decline to strike the answer as frivolous upon the ground that it was insufficient in law, but not upon the ground that it was "frivolous" in the sense used at the common law, the plaintiff may still secure a review by following the course of the common law and permitting judgment to go against him upon the pleadings and then assign as a ground of appeal the refusal of the court to strike the answer upon the ground that it was insufficient in law, and this Court, will, we submit, review the entire record.

It is one thing, therefore, for this Court as in *National Surety Company* v. *Mulligan,* 105 N. J. L. 336-338 and *Sculthorpe* v. *Commonwealth Cas.* Co., 98 N. J. L. 845, to sustain a judgment of the trial court striking a plea upon the ground that it is *sham,* when it should have struck out the plea upon the ground that it is *frivolous.*

This Court always having the power to determine the question as to whether a plea or answer is *legally sufficient,* there is no interference by this Court with the *discretion* of the trial court, when it sustains a judgment based upon a rule adjudicating that the plea is *sham* when the real ground upon which the rule should have been based is that it is frivolous.

But when this Court, which neither at common law nor under the statute had nor has any power to review the *discretion* of the Trial Court in *declining* to strike a plea or answer as sham or frivolous or in granting such a rule (frivolous being understood in its common law sense), reviews such discretion it substitutes *its* discretion

for the discretion of the Trial Court, and to that extent acts as a court of original jurisdiction.

We have already pointed out, in our original brief, that the judgment in this case was in reality based not upon a rule striking out the pleading as "frivolous" as that word is understood at common law, but as upon a rule sustaining a demurrer to a plea at common law.

In this Court the allegations of the answer denying notice of presentation, demand and protest must be considered as true.

2.

Even if this Court is privileged to examine the affidavits for the purpose of determining whether the Trial Court should have stricken the answer as sham, there is no doubt, we submit, that the Trial Court was right in declining to so strike.

There were two defects in the sending of the notice of protest. Both plaintiff and defendant resided in the same town. The statute, uniform negotiable instrument law, 3 Comp. Stat., p. 3747, Sec. 103, as far as applicable to the case at Bar, provides that, if the notice "is sent by mail, it must be deposited in the post office in time to reach him (the endorser) in the usual course of the day following" and the notice must be addressed "to the post office nearest to his place of business or residence or to the post office where he is accustomed to receive his letters".

It is conceded by both sides that the notice should have been sent to Simon in time to reach him before the usual hours of rest on January 7th. The affidavit of Helen S. Finn, an employee of the bank, states that she deposited the notice in the post office in the City of Passaic "on January 7, 1930, at or about 10 o'clock in the forenoon of that day, and not later than fifteen minutes past that hour".

Observe that January 7th was *not* the day upon which the note was protested. It was protested January 6th and notice of protest might have been mailed on that day (Respondent's Brief, p. 11).

The Postmaster made an affidavit to the effect that, if a letter addressed to *24* Grove Terrace in the City of Passaic were deposited in the post office in the City of Passaic "on or about 10 o'clock in the forenoon of January 7th last" it would "in the ordinary course of the mails, have been delivered *at said address* on or before 3 o'clock in the afternoon of the same day".

The affidavit of Simon is to the effect that the letter was not in fact received by him "that day, but much later" (p. 22).

The envelope of the letter was exhibited at the hearing before the circuit judge acting as Supreme Court Commissioner, and was stamped by the Post Office authorities as having been received in the post office 1 P. M.

It is argued by respondent that the fact that the letter was stamped "1 P. M." does not establish the hour in which it was deposited in the post office by the sender and only indicates the time when the postal employee collected it from the receptacle into which it had been dropped by the sender.

It does more than that. It casts a doubt upon the statement of Helen S. Finn that she posted the letter in the post office at 10 A. M., for it is passing strange that a letter deposited in the post office in Passaic at 10 o'clock should not be collected from the receptacle in which it was placed and put in the process of delivery before 1 P. M. It casts such a doubt at least as would warrant the Court in the exercise of its *discretion,* in holding the case for trial upon this issue permitting appellant to cross-examine the witness Helen S. Finn and to examine such other wit-

nesses as might be produced to indicate that, if she had deposited the letter at 10 A. M. it would have been sooner marked and sooner delivered.

The time between 1 P. M. when the letter was postmarked and the usual hours of rest *on the same day* is so short as to justify an inference that, if the letter were postmarked at 1 P. M., it would *not* be delivered to the place where addressed before the usual hours of rest on the same day.

Had respondent desired the Court to determine, *upon a summary motion,* that the affidavit of Helen S. Finn was entitled to *absolute* verity, it should, we submit, have produced a further affidavit by the Postmaster, *i. e.,* to the effect that, in the usual course, a letter mailed at the post office at 10 A. M. would not be postmarked until 1 P. M., and that, *in the usual course,* a letter *so postmarked* would be delivered before the usual hours of rest upon the same day.

Upon a summary motion such as was here involved the Court could take into consideration, as bearing upon what might possibly be brought out upon the trial, the fact that, according to Simon's affidavit, the letter was not received upon the same day, but much later.

The presumption is that the United States mails operate effectively and in the usual course. In this case, either Helen S. Finn did not correctly state in her affidavit the hour at which she deposited the letter in the post office, or the United States mails did not operate effectively. This alone was sufficient to permit the trial judge, *as a matter of discretion,* to decline to strike the defense *as sham,* leaving the matter to be determined upon an examination and cross-examination of witnesses.

In the second place, the affidavit of Simon and the letter produced to the Court indicated that it

was *not* addressed, as Helen S. Finn swore, to 24 Grove Terrace, but to 32 Grove Terrace, a place at which defendant Simon never resided, and the Trial Court, in its memorandum, directs particular attention to the fact that the letter was not addressed as indicated (p. 28) in the affidavit of Helen S. Finn. (Photostatic copies of the envelope are submitted.)

The effect of this mistaken address is two-fold. First, it throws doubt upon the affidavit of Helen S. Finn. She swore that the letter was addressed to 24 Grove Terrace. She was mistaken. She may likewise be mistaken as to the time at which she mailed this notice. Simon is entitled to cross-examine her before a jury. Secondly, the defect in the address may have been the reason that Simon did not receive the notice before the usual hours of rest on January 7th.

It is no answer for respondent to say, as it does (p. 9 of its brief) that ordinarily an address upon a notice which contains the name of the endorser with the town and state is sufficient, although the street and number are omitted.

If a notice is *so* addressed the statute *may* be complied with, the presumption being either that the Post Office Department will ascertain the correct street and number and deliver the letter, or that the person to whom it is addressed will call at the post office nearest to his place of residence or business or at the post office where he is accustomed to receive his letters. But respondent was not content with this. It added an *incorrect* address. The Post Office Department in the usual course would send the letter out to be delivered at the *incorrect* address and it would be taken to that incorrect address, and, the addressee not having been found, it would be taken back to the post office and there held until the correct address was ascertained. In the meantime, the letter was

neither at the post office nearest to the place of residence or business of Simon nor at the post office where he was accustomed to receive his mail, and, had he gone to those post offices, he would not have received the notice.

Respondent says in its brief (p. 8) that the error was obviously "a typographical error of the typist who addressed the envelope". That may be true, but it is no excuse, for the typist was an *employee of respondent.*

But the statute contemplates that, if there is an address by street and number, the notice should be addressed to *that* address and the burden is on the person who is under the obligation to send the notice to use due diligence in ascertaining the correct address, and usually the question is one for the jury. *Second National Bank of Hoboken* v. *Smith,* 91 N. J. L. 531; *First National Bank of Belmar* v. *Gray,* 101 N. J. L. 179; *Radin* v. *Creran,* 8 Adv. Rep. 82; *First Mechanics National Bank of Trenton* v. *Niedt,* opinion of Oliphant, 8 N. J. Misc. 701, Circuit Judge sitting as Supreme Court Commissioner, in which he said:

> "The denial of the receipt of the notice through the postal authorities clearly raises a question of fact which must be decided by a jury and not by the court on a motion to strike. South Side Trust Co. *v.* Lamb, 57 Pa. Sup. Ct. 645; Continental Bank *v.* Great Lakes, &c., Corp., 220 N. W. Rep. 668; Union Bank of Brooklyn *v.* Deshel, 123 N. Y. Supp. 585."

And further:

> "Even though the court be well satisfied with the justice of plaintiff's demand, it must allow the jury to pass upon the facts raised. In every case where the issue depends upon the determination of facts, the existence of which is not admitted, the jury, and not the court, must determine them. Schmidt *v.* Marconi, 86 N. J. L. 183."

Respondent says in its brief, that if the evidence which was before the Commissioner at the time he made his determination was *all* the evidence before the jury "the plaintiff would have been entitled to a direction of a verdict" (p. 13).

We, by no means, concede this, but, if it be true, it is no reason why the determination of the Supreme Court Commissioner in refusing to strike the answer as sham is incorrect. A pleading will not be struck as sham unless it is clear not only that there is no jury question presented by the papers before the Court but that there can be no jury question presented at the trial.

It may be that Simon is not in a position to contradict affidavits which are filed by respondent, but it may also be that, when it comes to the trial, the witnesses of respondent will not stand up and a jury question may be presented as a result of cross-examination.

Respondent seems to feel that a motion to strike a pleading as sham should be granted as a matter of law if, upon the papers presented, no legal proof of a defense appears. That is not the law. A pleading cannot be stricken as sham unless it clearly appears that no legal proof can be presented and that the pleading is interposed solely for the purpose of delay.

In any event, as we have before stated, the matter is one for the *discretion* of the Trial Court and this Court will not substitute *its* discretion for that of the Trial Court.

3.

On pages 17, 18, 19 and 20 respondent proceeds to interpret the words "discounted", "made" and "bearing my endorsement" used in the instrument of July 21, 1926, Exhibit B, page 16, and urges that they "are used descriptively to define

the character of the notes embraced in the agreement without restriction in respect to time''.

We have placed our construction upon these words (p. 10 of our original brief) and do not desire to repeat what we there said.

Respondent seeks to avoid the effect of the subsequent language in the instrument which, when dealing with the securities deposited, provides that they should ''also be held by said company as security for any liability of the undersigned to said company, *whether now existing, or hereafter contracted''* by asserting that it is not the fact that *all* the language is superfluous if the words ''discounted'', ''made'', and ''bearing my endorsement'' are to be construed as contended by respondent (p. 19 of Respondent's Brief). But it is forced to concede (p. 20) that, if the words ''discounted'', ''made'' and ''bearing my endorsement'' bear the construction put upon them by respondent, the words ''whether now existing, or hereafter contracted'' *are superfluous* ''as they add nothing to the effect''.

It excuses the inclusion of these words either upon the score of bad draftsmanship or because the draftsman might have desired to call the attention of the parties signing the agreement to its all inclusive terms.

It calls the inclusion of the phrase ''redundancy, a besetting sin of draftsmen of legal documents''.

The Court will, we submit, hesitate to convict the draftsman either of bad draftsmanship or of redundancy in which event these words are given no effect whatever, if the instrument can be so construed as to give effect to the words.

The instrument may be so construed.

The use of the words is a clear indication that the draftsman fully realized that the words'' discounted'', ''made'' and ''bearing'' employed in the first part of the instrument in dealing with the

waiver had reference to instruments *then in existence* and did *not* apply to instruments "whether now existing, or herafter contracted" and, so realizing, when he came to deal with the collateral, intending that collateral to be pleadged for obligations both then in existence or thereafter contracted, *he deliberately inserted the words "whether now existing, or hereafter contracted".*

Upon our construction of the meaning of the words contained in the instrument every word speaks. Upon the construction of respondent, it concedes that these words "whether now existing, or hereafter contracted" *are wholly superfluous.*

4.

Under its Point 3, respondent argues that the language is plain and there can be no ambiguity in the sense that the language is susceptible of a double meaning and that either its interpretation or ours is correct and "both cannot be correct" (p. 22).

This argument is made in answer to the contention that to say the best for respondent the language of the instrument is ambiguous and, being ambiguous, there can be no waiver because of the rule that waiver must be strictly proven and will not be based upon a doubtful construction of an instrument.

Of course, both interpretations cannot be correct. One is wrong and the other is right, but that does not mean that the instrument as a whole is not of *doubtful* construction (we should have used the word "doubtful" and not ambiguous") and under our Point 2 we have argued that, if it be of *doubtful* construction, it must be held that there was no waiver and, under our Point 3, that, in any event, if the instrument "may operate as a waiver, because of the doubtful construction parol evidence was admissible and the matter was one for the jury".

5.

We have nothing to add to what we said under our Point 4 (p. 18).

Respondent argues that the case referred to by us are not in point. We concede that no one of the cases cited is precisely in point and we rely not upon the *decisions* of the Court but upon *language taken from the opinions.*

It is respectfully submitted that the judgment should be reversed.

MERRITT LANE,
Of Counsel for Appellant.

AARON L. SIMON,
Pro Se.

(5635) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

New Jersey Court of Errors and Appeals

Passaic National Bank and Trust Company, a National Banking Corporation of the United States of America, Plaintiff-Appellee, vs Aaron L. Simon, M. D., Defendant-Appellant.	ACTION-AT-LAW.

Brief For Plaintiff-Appellee

STATEMENT OF THE CASE

This is a suit against the defendant as endorser of a promissory note.

The allegations in paragraphs 1 and 2 of the complaint in regard to the making of the note, and the endorsement thereof by the defendant (p. 3, line 33 to p. 4, line 8) are admitted in the answer (p. 7, lines 8-10).

Paragraphs 3 and 4 contain the usual allegations regarding the presentment of the note for payment, and that notice of non-payment was duly given to the defendant (p. 4, lines 9-15).

The complaint contains the further allegation (paragraph 5) that notice of protest was waived by the defendant by an agreement between him and the plaintiff, a copy of which is annexed to the complaint and made part thereof (p. 4, lines 15-21).

These allegations of the complaint are denied in the answer, (paragraphs 3, 4 and 5); (p. 7, lines 11-24).

Four separate defenses are added to the foregoing denials in the answer, the first and second defenses relating to the notice of dishonor, and the third and fourth relating to the alleged agreement waiving notice.

By the first separate defense it is alleged "that the said defendant did not **receive** notice of dishonor, in accordance with law, and as required by law" (p. 7, lines 36-39).

In the second separate defense it is alleged "that the notice contemplated under the statute was not given in accordance with law, in that the same was not mailed or deposited in the Post Office in time to reach him within the time prescribed by law" (p. 8, lines 1-9).

In the third separate defense it is alleged that the agreement (waiving notice) "has no relation to or bearing with the note upon which this action is brought; the said note was not discounted by the plaintiff, and is not an obligation such as is contemplated by or under the terms of the said agreement————————and that it was not the intention of the said defendant or of the plaintiff, that the said note upon which suit was instituted, should be regarded as coming within the purview of the said agreement; that there is no liability on said note" (p. 8, lines 13-24).

By the fourth separate defense the defendant denies "that there was any intention on his part, or on the part of the plaintiff, and that there was no agreement between the plaintiff and the said defendant wherein and whereby notice of presentation, demand and protest were ever waived on the note" (p. 8, lines 28-34).

THE ARGUMENT

The four separate defenses are all bad pleading, inasmuch as they add nothing to the previous denials in the answer; that is to say, the denial in the fourth paragraph of the answer that notice of protest (as alleged in the fourth paragraph of the complaint) was duly given, and in the fifth paragraph that such notice was waived by the agreement alleged in the fifth paragraph of the complaint attached thereto.

None of the said defenses set up any affirmative matter in avoidance of the allegations of the complaint.

The first separate defense, which, ~~was~~ with unnecessary verbiage, alleges that "defendant did not receive notice of dishonor, in accordance with law"; and the second separate defense, which alleges that notice of dishonor was not given in accordance with law, adds nothing to the previous denial in the fourth paragraph of the answer.

Likewise, the third separate defense, which alleges that the agreement attached to the complaint

has no relation to the note in suit; said note was not discounted by the plaintiff, and is not an obligation such as is contemplated by said agreement; and that it was not the intention that said note should be regarded as coming within the purview of said agreement, adds nothing to the previous denial in paragraph 5 of the answer, that notice of protest was waived by said agreement. All such matters attempted to be set up in this defense were within the issue raised by the allegation in the fifth paragraph of the complaint, and denied by the fifth paragraph of the answer. There is nothing of an affirmative defense set up by way of avoidance of the agreement, the existence of which is admitted.

The fourth separate defense is subject to the same criticism. It denies any intention or agreement between the parties whereby notice of protest was waived, and adds nothing to the denial in the fifth paragraph of the answer.

For these reasons, the four separate defenses were frivolous, being legally insufficient, as defined by this court.

Sculthorpe vs. Casaulty Co., 98 N. J. L., 845-848.

Plaintiff gave notice to strike out the answer and defenses on the ground that the same are sham and frivolous (page 12).

Counsel being aware of the rule that the same defense cannot be both sham and frivolous (Fidelity, &c., Co. vs. Wilkes-Barre, &c., Co., 98 N. J. L.,

507), nevertheless contended on the motion, and we now contend upon this appeal, that some of the foregoing defenses were sham, being false in fact, and that the remaining defenses, so far as they related to questions of law, were frivolous.

The order made by Judge Mackay, as Supreme Court Commissioner, terms the defenses frivolous, and after reciting that the defendant had failed to show such facts as entitle him to defend, orders the answer to be stricken out (page 10).

Whether or not the order correctly characterizes the defenses as frivolous, this court, upon the appeal, will sustain the judgment, if, after an examination of the whole case, it appears the substantial rights of the parties have not been affected, the essential thing being striking out the answer, and not the reason for so doing.

National Surety Company vs. Mulligan, 105 N. J. L., 336-338.

In McCarty vs. West Hoboken, 93 N. J. L., 247, the opinion of this court states (p. 248): "The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it."

In Sculthorpe vs. Commonwealth Cas. Co., 98 N. J. L., 845, this court held that the fact that an answer was stricken out as "sham", when it should have been stricken out as "frivolous" is not cause for reversal.

See also Yale Electric Corp. vs. Morrisey, 8 Adv. Rep., 128, February 3, 1930; Fidelity & C. Co. vs. Decker Bldg. Co., 8 Adv. Rep., p. 138; Feb. 3, 1930.

We submit that some of the defenses set up in the answer are sham, being false in fact, and that the remainder are frivolous; that as to the third defense, it is sham in its denial that the note was discounted by the plaintiff, and frivolous in respect to its other allegations, and that the fourth defense is likewise sham in some respects and frivolous in others.

Two distinct questions are raised by the pleadings. The first question is, whether due notice of dishonor was in fact given. The second question is, whether the defendant had waived such notice by the terms of the agreement annexed to the complaint (pp. 5 and 6).

The complaint alleges that due notice was given, and that notice has been waived. The answer denies both allegations; that is to say, it denies that notice was duly given, and further denies that the giving of such notice has been waived.

THE PROOFS

The cause of action was verified (pursuant to Rule 81) by the affidavit of William H. Scheel, assistant cashier of the plaintiff bank. (p. 13, et seq.).

After proving the non-payment of the note (page 14, lines 9-16) the affiant proved the agreement by which the defendant waived notice of protest (p. 14, lines 16-26). His evidence was that the defendant executed the agreement at the time the bank made a certain loan to the defendant on his promissory note, prior to the endorsement of the note in suit. The agreement was to secure payment of that note, and any note or notes discounted by the bank made by defendant or and endorsed by him (p. 14, lines 27-35). By the agreement defendant expressly waived notice of presentation, demand and protest in respect to any such note or notes discounted by the said bank made by himself or bearing his endorsement (p. 14, line 40 to p. 15, line 4).

The note in suit was endorsed by the defendant and discounted by the bank (p. 15, lines 10-15).

The fact that, notwithstanding the aforesaid agreement, notice of protest was mailed to the defendant was proved by the affidavit of Helen S. Finn (p. 19). She swore that on Jan. 7, 1930 (the note having fallen due on the day previous, Jan. 6th) at about ten o'clock in the morning she personally deposited the notice of protest in the Post Office at the corner of Washington Place and William Street, addressed to the defendant at his residence, 24 Grove Terrace, Passaic, N. J.

The Post Master, J. Hosey Osborne, swore in his affidavit that a letter addressed as aforesaid, deposited in the Post Office, on or about ten o'clock

in the forenoon on January 7th last would, in the ordinary course of the mails, have been delivered at said address on or before three o'clock in the afternoon of the same day (page 18).

Defendant offered no proof in denial of the evidence of Helen S. Finn that she deposited the notice in the Post Office at ten o'clock in the morning, or in denial of the Post Master's evidence that in the ordinary course of the mails a letter so mailed would have been delivered the same afternoon.

Instead of attempting to disprove the evidence of Mrs. Finn and the Post Master, defendant, in his affidavit, avers that he denies (sic) "that the said letter bore post mark showing deposit of the same at ten o'clock in the morning" (page 21, lines 39 to page 22, line 1).

Defendant further denies in his affidavit that the letter "was **delivered** on the same day", but avers "that it was not **received** that day, but much later" (p. 22, lines 2-5).

Defendant also denies in his affidavit that the letter was addressed to 24 Grove Terrace, as alleged in the Finn affidavit (p. 22, lines 5-7). He does not state how the letter was addressed, although he admitted having received it, and in fact had it in his possession and produced it upon the argument of the motion. Upon being so produced it appeared that it was addressed in typewriting, not to **24** Grove Terrace, but to another number on that street in the immediate vicinity of No. 24. It was obviously a typographical error of the typist who addressed the envelope.

Ordinarily an address upon a notice which contains the name of the endorser, with the town and state, is sufficient, although the street and number are omitted.

Eaton & Gilbert (1903), Section 115, page 517.

Section 108 of the Negotiable Instrument Act provides that where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent either to the Post Office nearest to his place of residence, or to the Post Office where he is accustomed to receive his letters, etc.

In the present case the defendant had not added an address to his signature.

In respect to the agreement waiving notice, the defendant admits endorsing the note, but he denies that he ever waived notice in respect to said note, by virtue of said agreement, but on the contrary he alleges, "that the said agreement was never intended to apply to said note, and never had any relation to the same" (p. 22, lines 19-31).

Upon the foregoing proofs the questions to be decided upon the motion were first, was the denial by the defendant of due notice of protest, false in fact, and therefore a sham defense; and second, were the defenses relating to the agreement waiving notice, so far as the answer denied the existence of such agreement, false in fact, and therefore sham, and frivolous, insofar as it was attempt-

ed to vary the terms of the contract by the allegations regarding the intention of the parties in respect to the same, and insofar as it was attempted to deny its legal effects.

If the court determines that due notice of protest was in fact given, then it will be unnecessary to consider the question whether notice had been waived by the terms of the agreement. We shall consequently deal with these questions in the order stated, for, if the court decides the first question against the appellant, affirming the judgment upon the ground that notice of protest was in fact given, then it will be unnecessary for the court to deal with the second question relating to the waiver of notice.

POINT I

NOTICE OF PROTEST WAS IN FACT DULY GIVEN.

The provisions relevant to giving notice are contained in sections 103 and 105 of the Negotiable Instrument Act. They provide that where the person giving and the person to receive notice reside in the same place, as they do in the present case, if given at the residence of the person to receive notice, it must be given before the usual hours of rest on the day following the due date, and if sent by mail, the notice must be deposited in the Post Office in time to reach him in the **usual course** on such day following; and where notice of dishonor is duly addressed and deposited in the

Post Office, the sender is deemed to have given due notice, **notwithstanding any miscarriage in the mails.** C. S. Vol. 3, page 3747.

In this case the note was dated December 4th and was payable in one month after date, which was January 4th. As January 4th fell on Saturday, the note was payable on the following Monday, January 6th (p. 14, lines 9-16), so that if notice was sent by mail to the defendant's residence, it should have been deposited in the Post Office in time to reach him before the usual hours of rest on Tuesday, January 7th.

It is therefore sufficient if it is established that notice has been deposited in the Post Office in time to reach the party notified in the **usual course of the mails** within the time limited.

If because of any miscarriage in the mails the notice is not actually received, or is not received within the time limited, it is immaterial.

In the affidavit of Helen S. Finn, she swears that she deposited the notice of protest addressed to the defendant at his residence, 24 Grove Terrace, Passaic, N. J. on January 7th at about ten o'clock in the forenoon in the Post Office (p. 19). The Postmaster swears that a letter so addressed and deposited in the Post Office at ten o'clock in the morning of that day would, in the **ordinary course of the mails,** have been delivered on or before three o'clock in the afternoon of the same day (p. 18).

The defendant in his affidavit denies that the "said letter bore a post mark showing deposit of the same at ten o'clock in the morning", and denies that it was delivered on the same day; and says that it was not **received** that day, but much later (p. 21, line 40 to p. 22, line 8).

Such denials are immaterial. The post mark on a letter does not establish the hour in which it has been deposited in the Post Office by the sender. The post mark simply shows the time when the postal employee has collected it from the receptacle into which it has been dropped by the sender. Mrs. Finn's statement that she mailed the notice at the Post Office at ten o'clock in the morning is not refuted, and the fact stands undisputed that the notice was mailed at that time.

It is also undisputed that a letter addressed as stated mailed at ten o'clock in the morning would, in the **ordinary course of the mails,** have been delivered on the same day.

The statement in defendant's affidavit that he did not actually receive the notice on January 7th is immaterial.

The evidence, therefore, is entirely undisputed that the Bank complied with the statutory requirements regarding the giving of the notice by causing it to be deposited in the Post Office in time to reach the defendant in the **usual course** on the day following the date on which the note was payable.

Judge Mackay in his memorandum, after stating the facts regarding the mailing of the notice, namely, that it was mailed January 7th at 10 A. M., nevertheless states that he is inclined to think a jury question is presented as to the giving of the notice. But we respectfully submit that as the evidence was uncontradicted, it was conclusive.

We submit that if the case had gone to a jury trial the plaintiff would have been entitled to direction of a verdict.

Belcher vs. Manchester Building & Loan Assn., 74 N. J. L., 833.

Quotation page 839:

> "When the facts are not in dispute, and the inferences from them are not in doubt, the question at issue is one at law for the court, and the direction of a verdict is not erroneous."

In the case cited, at the conclusion of the plaintiff's testimony, counsel for the defendant contended that it was its right to go to the jury. That contention was denied by the trial judge. Plaintiff then moved for the direction of a verdict in his favor, and the same was allowed. Upon error to this court judgment for the plaintiff was affirmed.

New Jersey Flax Company vs. Mills, 26 N. J. L., p. 60:

3rd head note:

The jury are the judges of the weight of evi-

dence, but they have no right to disregard competent evidence that is unimpeached.

Morril vs. Morril, 104 N. J. L., 557:

Where there are no disputed facts, there is nothing of an issuable character for the jury to decide, and it devolves upon the court to declare the judgment which the law imposes.

In Wittemann vs. Giele, 99 N. J. L., 478, the defendants, in appealing from an order striking out answers as sham, contended that the order was erroneous because the questions involved, being questions of fact, the defendants were entitled to have them submitted to and passed upon by a jury. In answer to that contention this court said, in its opinion (page 479), "The complete answer, making defendants' contention untenable, is to be found in the opinion of this court in Eisele & King vs. Raphael, 90 N. J. L., 219."

See also Larner vs. Montclair, 99 N. J. L., 510.

In Waring vs. Jobs, 104 N. J. L., 158, as stated in the opinion of this court (p. 161) "on motion to strike out an answer the question is not whether the facts alleged are sufficient to constitute an answer to the complaint, but, whether taken as a whole, the pleading and proofs state facts sufficient to constitute a defense to the action."

POINT II

NOTICE OF PROTEST WAS WAIVED BY THE AGREEMENT

The existence of the agreement was proved by the affidavit of Matthew H. Scheel (p. 14, line 17, et seq.), and defendant admitted signing it (p. 22, lines 19-32).

The agreement speaks for itself. It is not competent for the defendant to attempt to vary its terms by parol evidence.

Rogers vs. Colt, 21 N. J. L., p. 704.

Quotation from the opinion of this court in the case cited: (page 708)

> "The contract must undoubtedly be construed according to the intention of the parties. But that intention is to be gathered from the contract itself. If there be no ambiguity in the contract; if the contracting parties have declared their intention in plain and unequivocal language, there can be no construction against the words of the contract. We may not alter the terms which the parties themselves have adopted, or make a new contract for them."

The construction and effect of the agreement being a matter of law to be determined by the court, (Rogers vs. Colt, supra), it is a matter for the court to determine whether the terms of the agreement are applicable to the note in suit.

Bandholz vs. Judge, 62 N. J. L., 526-529.

Grueber Engr. Co. vs. Waldron, 71 N. J. L., 597-599.

In order to reach such determination, it is only necessary to give proper construction to the language of the agreement.

The agreement is that defendant has deposited a certain bond and mortgage with the Bank as collateral security for the payment of any note or notes discounted by it, made by defendant, or and bearing his endorsement, and that notice of presentation, demand and protest of any such note or notes is thereby waived.

It is argued in appellant's brief that the language of the agreement must be construed as being applicable only to notes in existence at the time the agreement was made; that from a grammatical standpoint the words "discounted" and "made" are past tense, and that consequently it is impossible to interpret the language of the agreement as if it read: "Any note or notes which shall have been, or may hereafter be, discounted, and which shall have been, or may hereafter be, made, or which may now be bearing, or hereafter may bear, my endorsement."

We insist, nevertheless, that that is exactly the correct interpretation of the words "discounted", "made" and "bearing"; that those words are used as adjective participles, not as past or present participles, as the appellant argues, and that those

words are intended to describe or define the character or class of notes for which the securities are to be held as collateral.

It was the purpose, by the use of those words, to specify the character of the notes to which the terms of the agreement were to be applicable.

The first specification is that any note to which the terms of the agreement shall be applicable must be one that has been discounted by the Bank. This has no reference to time, past, present or future. It refers to the manner in which the note shall have come into the possession of the Bank. It must be a note which has come into its possession by discount, as distinguished from purchase, gift or other manner of acquisition.

The distinction between a note discounted and one purchased is well established. For instance, under the act concerning Trust Companies (C. S. Vol. 4, Section 6 (10), p. 5657) Trust Companies are empowered to **purchase** promissory notes, but Section 7 (p. 5658) provides that no Trust Company created under the act shall have power to discount commercial paper.

The Bank cannot enforce the agreement in respect to any particular note, unless it can establish the fact that it is a "discounted" note, and not one purchased, or otherwise acquired.

The second specification is that the note must be signed by the defendant, either as maker or endorser; that is to say, that the note must either

be "made" by the defendant, or be "one bearing his endorsement"; that is, he must be either the borrower or the endorser.

This second specification is a requirement that the note as a physical fact shall bear the defendant's signature, either at the bottom of the note as the maker, or upon its back as the endorser, and this requirement has no reference to time.

It is impossible to draw a distinction between the words "bearing an endorsement", and the single word "endorsed".

Both expressions are simply descriptive, and have no reference to time, and are applicable therefore to any note which, as a physical fact, contains on its back the signature of the endorser.

Likewise, the expression, a note "made" by the defendant is equivalent to a note "signed" by the defendant, or "bearing his signature". The requirement is that the note shall be signed by the defendant, and has no reference to the time when such signature may have been made.

It must be a note which the Bank has discounted for the defendant, as the maker or borrower, or, if it is discounted for another person, then it must bear defendant's endorsement, so that the defendant is liable thereon as such endorser.

Protest is waived in respect to any note discounted by the Bank at any time while the Bank continues to hold the securities deposited under

the agreement, upon which the defendant is liable either as maker or endorser.

The fact that the words of the agreement "discounted", "made", etc. are used descriptively, in order to define the character of notes to which the agreement shall apply, is not altered by the subsequent language of the agreement.

After defining the character of notes for which the securities are to be held as collateral, the agreement further provides that "said securities shall also be held by said Company as security for any liability of the undersigned to said Company, whether now existing, or hereafter contracted".

It is argued in appellant's brief that this clause of the agreement is superfluous, if the preceding clause dealing with discount of notes made or endorsed by defendant is applicable to all notes discounted in the past, present or future.

The effect of this additional clause is very sweeping. It includes any liability of any character whatsoever. It would include notes made or endorsed by the defendant, and purchased by the Bank, as distinguished from a discount. The language is sufficiently sweeping to include a liability to the Bank arising out of a transaction of any character.

The effect of this additional clause is in nowise to limit or restrict the preceding clause of the

agreement relating to a discounted note and the waiver of protest, but to amplify that clause so as to provide that the security shall be held not only as collateral for a discounted note endorsed by the defendant, but for any other liability by him to the Bank.

The words of the clause defining the character of the liability "whether now existing or hereafter contracted" are superfluous, as they add nothing to the effect. If the clause had simply read, omitting those words, that said security shall also be held by said Company as security for any liability of the undersigned to said Company, that language would have included any liability arising at any point in time, past, present or future, so that the omission of the words "whether now existing or hereafter contracted", would not have changed its effect in any respect.

But the inclusion of those words may not have been bad draftsmanship, as they have the effect of calling the attention of the party signing the agreement to its all inclusive terms.

Nevertheless, so far as changing the meaning of the term "any liability", or adding to its effect, the use of the words "whether now existing or hereafter contracted", is nothing but redundancy, a besetting sin of draftsmen of legal documents.

It is true, as argued by appellant's counsel, that it is one thing to permit collateral to remain as security for the payment of a note to be endorsed in

the future, and another thing to waive notice of protest of any such note, but no such distinction is made by the terms of this agreement.

By the terms of the agreement notice is waived in respect to any note for which the securities are declared to be deposited as collateral. The securities are declared to be deposited as security for the payment of any note discounted by the Bank, and either made by defendant or endorsed by him.

According to our interpretation of the words "discounted", "made" and "bearing my endorsement", namely, that they are used descriptively to define the character of the notes embraced in the agreement, without restriction in respect to time, notice of protest is waived in respect to any note, which, as a physical fact, bears the signature of the defendant either as maker or endorser, and which as a further fact has been discounted by the plaintiff Bank, regardless of time, past, present or future, in respect to the date of the agreement.

We certainly insist that the language of the agreement must be construed in its grammatical sense, which, we insist, is as we have stated.

If we are correct in our interpretation of the language of the agreement, then there is no doubt that there was a waiver of notice in respect to the note in suit. If we are wrong, and counsel for appellant is correct in his interpretation, then there was no waiver. The construction of the lan-

guage of the agreement is a question to be determined by the court under the rule in Rogers vs. Colt, supra.

POINT III

THERE IS NO AMBIGUITY IN THE LANGUAGE OF THE AGREEMENT

The fact that counsel for the respective parties apparently cannot agree as to the correct interpretation or construction of the language of the agreement, as to whether certain words are used as past participles and relate only to the past, or are used as adjective participles, as descriptive terms, without reference to time, does not create any ambiguity in the language. The language itself is plain.

There is no ambiguity in the sense that the language is susceptible to a double meaning. Whether the language bears the interpretation put upon it in appellant's brief, or the interpretation which we insist is the correct one, it certainly does not bear both interpretations. One is correct, and the other is incorrect. Both cannot be correct.

Cases cited under Point III of appellant's brief are not applicable to the construction of a document depending upon the correct interpretation of its language. They are cases in which doubt arose in respect to the subject matter to which the terms of the contract should be held to be applicable, or to the application of the contract to the facts of the case as presented to the court.

In Hope vs. The Maccabees, 91 N. J. L., 148, cited in appellant's brief, (page 14) it was contended that the application for life benefits in the defendant society contained a misstatement of the applicant's age, and that the insurance had become void because the insured had engaged in prohibited occupations.

In dealing with these contentions the court stated in its opinion (page 152):

> "Although it is the province of the court to construe a written instrument, yet, where the effect of such instrument depends, not merely on its construction and meaning, but upon collateral facts **in pais** and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury."

In that case there was no dispute regarding the terms of the contract, or concerning the construction of its language. The dispute was in respect to the evidence which defendant claimed proved a breach of the contract.

In Summer Faucet Co. vs. Com. Cas. Ins. Co., 89 N. J. L., 693, cited on the same page of appellant's brief, the question related to what are "repairs usual and necessary to the care and maintenance of the premises"; "all usual or special operations incidental thereto", or "unusual alterations or repair of premises" in a liability insurance policy, as applied to the repair of a platform on the premises. There was no dispute about the meaning of the language, but the dispute arose regarding

its application to the particular case, as to whether the repair of the platform, was a usual or unusual repair. That necessarily raised a question of fact which this court held was for the jury.

It was admitted by the defendant, the appellant in this court, on motion to non-suit, that simply making the platform safe would have been a repair or alteration, usual and necessary, within the terms of the policy, but it was insisted that something more was done. This court held that whether that was done or not depended upon extrinsic facts, as to which there was a dispute, and that hence the jury, and not the court, must determine the question.

In Axford vs. Meeks, 59 N. J. L., p. 502, cited on page 15 of appellant's brief, this court held that extrinsic evidence may be resorted to for the purpose of explaining an ambiguity which is not apparent on the face of the written instrument, but which arises from circumstances, the evidence of which is not disclosed by the instrument.

The dispute in that case arose regarding the construction of a contract by the defendant to pay a commission to the plaintiff if he sent to the defendant a party to buy his "place".

The dispute related to the question whether the word "place" as used in the contract was synonymous with real estate, or included the defendant's saloon business located on premises which the defendant did not own. This court held that the word was susceptible of various meanings, and that it was permissible to resort to extrinsic evi-

dence for the purpose of ascertaining the subject matter to which the contract applied; and that by doing so it was manifest that what the plaintiff was to obtain a purchaser for was not the real estate of defendant, but his saloon business.

In that case the word "place" was ambiguous in the sense that it might include either real or personal property, and evidence was therefore permissible to identify the property to which the contract related.

Naughton vs. Elliot, 68 N. J. L., 259, also cited on the same page of appellant's brief, was a suit in equity on a bill for specific performance. The first two head notes indicate the nature of the decision. They are as follows:

> 1. Parol evidence which tends to vary the description of a lot in a lease is inadmissible in locating the boundaries.
>
> 2. Where a contract uncertain in its terms has been acted on and partly performed, the court, in order to relieve the objection of uncertainty, will, for the construction of the instrument, have regard in some cases to the use and course of dealing of the parties, to the surrounding circumstances, and to their conduct between the making of the agreement and the commencement of the suit.

We submit that none of the circumstances referred to on page 15 of appellant's brief throw any light on the true interpretation of the lan-

guage of the agreement. Evidence of those circumstances would not be competent to vary its terms, and would controvene the parol evidence rule.

Certainly the allegation that notices of protest had been given on previous occasions, and even in the present case, is no evidence that the defendant had not waived such notice. That fact simply indicates that the Bank did not take advantage of the waiver contained in the agreement. But that fact does not deprive the plaintiff from insisting upon the terms of the agreement waiving notice, in case the court shall determine, in the other branch of the case, discussed under Point I of our brief, that notice was not duly given.

Toole vs. Crafts, 196 Mass., 397, from which extensive quotation is made in appellant's brief (p. 16), was a suit upon a demand note.

Under the Massachusetts statute notice of demand should have been made upon the maker within sixty days to hold the endorser. Over four years later the endorser signed a waiver on the back of the note below his original endorsement. A question of fraud or mistake was raised in regard to the manner in which the waiver was obtained by the lawyer in whose hands the note had been placed for collection. That question was an issue in the suit, and evidence relevant to that issue the court held was properly submitted to the jury.

In the present case there is no difficulty about the subject matter of the waiver. Assuming its

language bears the construction upon which we insist, namely, that it relates to notes to be discounted in the future after the signing of the agreement, then there is no question that the provisions of the agreement are applicable to the note in suit. If, on the contrary, the language of the agreement does not bear that interpretation, then that conclusion is dispositive of this branch of the case, namely, upon the question of the waiver of protest.

We therefore submit, in answer to Points II and III of the appellant's brief, that there was no ambiguity in the language of the waiver agreement; that either one interpretation or the other is correct; that the language cannot correctly bear both interpretations, and that therefore there is no ambiguity to which parol evidence can be directed, to be submitted to a jury.

POINT IV

DEFENDANT COULD WAIVE NOTICE OF PROTEST OF NOTES WHICH HE CONTEMPLATED ENDORSING IN THE FUTURE

Under Point IV of appellant's brief, a novel proposition of law is stated, for which counsel frankly admit that so far as they have been able to discover there are no cases supporting the same.

It is argued, however, that the statutory language that notice of dishonor may be waived before the time of giving notice has arrived, relates

to a note in existence at the time of the waiver; that if the legislature had intended that there might be a waiver of notice of an instrument yet to come into existence, it would have provided for such contingency; but the language of the statute is sufficiently broad to include such an instrument and such a contingency. If the waiver is signed before the execution or endorsement of the note, it certainly is "before the time of giving notice has arrived", within the statutory language.

Counsel suggests no ground, upon reason, morals or public policy, why a person who contemplates giving or endorsing notes in the future, to be discounted in a particular bank, as was contemplated in the agreement in the present case, should not be permitted to agree in advance to waive notice of protest in respect to any of such notes; and no authorities are submitted to support the proposition that such a waiver cannot be made.

On the contrary, in Daniel's Negotiable Instruments (Ed. 6, 1913), Vol. 2, Section 1092-b, it is stated: "The waiver may also be upon a separate paper, written prior to, contemporaneously with, or subsequent to the endorsement".

Counsel state the rule that a written contract supersedes all prior written contracts, and argue that a full written contract came into effect upon the endorsement of the note, and that that contract supersedes all prior contracts of the endorser.

But counsel overlook, or fail to state, what the contract was which came into effect upon the endorsement. That contract was such as is declared by the Negotiable Instrument Act to arise out of an endorsement in blank. The provisions of the statute are read into and form the contract. One of those provisions in the statute, entering into the contract, was that notice of protest may be waived before the time of giving notice has arrived, which, as stated by Daniel, supra, may be prior to the endorsement, so that in the present case the waiver in the deposit agreement did enter into the contract of endorsement.

In Section 1090, Daniel's Negotiable Instruments, it is stated that when presentation of the bill or note at maturity has been dispensed with by prior agreement between the parties, or, in other words, has been waived by the party entitled to require it, the holder is excused for his failure to make it. It would be a fraud upon the holder to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper; and as prompt presentment is a requirement solely for the benefit of the drawer and endorsers, they are themselves the sole judges to determine whether or not they will enforce———. The like observation applies to the protest and notice.

None of the cases cited under Point IV of appellant's brief deal with the effect of a written waiver of notice of protest signed by an endorser prior to his endorsement, and are not in point upon that question.

In Bird vs. Kay, 40 App. Div., 533, upon which counsel lays such stress, the facts proposed to be proved as stated in the opinion (page 537) were that if Tarbel would accept the paper, Kay (the defendant endorser) would treat it as his own paper, and would see that it was paid at maturity, and that he considered it as his own obligation, so that while he was in fact a principal, it might not so appear upon the face of the paper. The court held that those facts were not admissible to show a waiver.

In McCarthy vs. Piedmont Mutual Insurance Co., 18 L. R. A. (N. S.) 729, from which there is a lengthy quotation in appellant's brief (p. 19), the question related to the authority of an insurance agent, in taking an application for fire insurance, to waive the provision in the policy requiring the consent by the insurer to an encumbrance upon the insured premises. The evidence was, that at the time of applying for the policy the applicant informed the agent that he proposed soon to place a mortgage upon the premises, and the agent stated that that would make no difference; but the insured accepted the policy containing the provision requiring the consent to an encumbrance.

The court decided that the provision in the policy requiring such consent was consistent with knowledge that the insured intended to place a mortgage; that a mere declaration of an intention to do something in the future could not be the basis of a waiver or estoppel.

Continental Insurance Co. vs. Ruckman, 1277 Ill., 364, from which a quotation is made in appellant's brief (p. 20) was a bill in chancery to reform a policy of insurance. The agent had agreed that the policy would provide that a vacancy of the premises not in excess of thirty days would not affect the insurance. Nevertheless the policy was delivered containing a clause that if the buildings became unoccupied without the consent of the Company, endorsed on the policy, the policy should be void. The policy also contained a clause that the agent had no authority to waive, modify or strike out from the policy any printed conditions.

The case hinged on the authority of the agent to agree regarding the vacancy. The complainant was illiterate, and so did not read the policy. The court held that the limitation of the agent's authority to waive the conditions of the policy related to its provisions after the policy had gone into effect, did not limit the agent's authority to agree to alter the terms before the policy was delivered; that is, that the agent had authority to make special terms whereby the policy would permit a vacancy for a thirty day period.

Decree for reformation was affirmed, and the insured property having been destroyed, decree for the amount of loss also affirmed.

United Firemen's Insurance Co. vs. Thomas, 92 Fed., 127, also cited in appellant's brief (p. 20) also depended upon the authority of an insurance agent, and upon a question of the construction of

the provisions of the Illinois statute respecting the authority of such agents.

If the appellant's novel contention is correct, that a waiver of notice agreed to in writing prior to the time of endorsement, is in legal effect null and void, it is a matter of importance to the banks of this state. We are confident the court will hesitate to give law to the proposition, for which no case in point is submitted as authority.

We respectfully submit that the judgment should be affirmed.

Corbin & Harty,
Attorneys of Plaintiff.

William A. Sumner,
Of counsel.