

INDEX.

	Page
Notice of Appeal and Grounds	1
Judgment of Affirmance	2
Notice of Appeal to Supreme Court	2
Affidavit of Service	3
Specification of Determinations	3
Summons	4
State of Demand	5
Note Annexed to State of Demand	6
Counterclaim	9
Note (Same as note printed herein at pp. 6 to 8 incl.)	9
State of Case Agreed Upon	10
Note (Same as note printed herein at pp. 6 to 8 incl.)	12
Clerk's Transcript	12
Findings	14
Opinion	15

Judgment of Affirmance.

Filed January 27, 1932.

10 This case having been heard before our Supreme Court at the October term, 1931, and judgment of affirmance having been rendered in favor of the plaintiff-respondent on January 20, 1932, and the appeal dismissed, it is thereupon

ORDERED and ADJUDGED that the judgment of the First District Court of the City of Newark in this cause be affirmed with costs, and the appeal dismissed, and that the record be remitted to the First District Court to be proceeded with in accordance with this judgment and the practice in such case made and provided.

20

Notice of Appeal to Supreme Court.

Filed April 25, 1931.

TO MORRIS LANGER, and/or MORRIS ISSERMAN, Esq.,
his Attorney:

30 TAKE NOTICE that the defendant Morris Plan Corporation of New Jersey, a corporation, hereby appeals to the New Jersey Supreme Court from the judgment rendered by the First District Court of the City of Newark in the above stated action, on the 10 th day of April, 1931.

GREEN & GREEN,
Attorneys for Defendant.

Dated, April 21, 1931.

40

Affidavit of Service.

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

Hyman Mintz, being duly sworn according to law on his oath deposes and says, that on the 22nd day of April, 1931, he served the within upon Morris Isserman by delivering copy thereof to his secretary at 24 Commerce Street, Newark, N. J., and explaining contents. 10

HYMAN MINTZ.

Sworn and subscribed this
23rd day of April, 1931.

Yetta L. Stone,
Notary Public
of N. J.

My Commission expires Feb. 20, 1936.

20

Specification of Determinations.

Filed July 24, 1931.

The following is a specification of the determinations or directions of the District Court, with respect to which appellant is dissatisfied in point of law:

1. The trial court erred in finding that the state of demand properly alleged a violation of P. L. 1914, Ch. 49 and the amendments thereof and supplements thereto. 30

2. The trial court erred in finding that the case was governed by Morris Plan v. Schwartz, 8 N. J. Misc. 417.

3. The trial court erred in finding that the state of demand was sufficient to support a judgment for the plaintiff. 40

Specification of Determinations.

4. The trial court erred as a matter of law in finding in favor of the plaintiff and against the defendant on the state of demand.

5. The trial court erred as a matter of law in finding in favor of the plaintiff and against the defendant on the counterclaim.

10

GREEN & GREEN,
Attorneys for Defendant-Appellant.

Dated, July 22, 1931.

Summons.

DISTRICT COURT SUMMONS ON CONTRACT.

20

Essex County, The State of New Jersey, ss. To any Constable of said County, or to the Sergeant-at-Arms of the First District Court of the City of Newark:

30

SUMMON The Morris Plan Corporation of New Jersey to appear before the First District Court of the City of Newark to be held at the City Hall Annex, Third Floor, Rear of City Hall, between Green and Franklin Streets, in said City, on the 6th day of November, Nineteen Hundred and thirty, at Ten o'clock in the forenoon, to answer unto Morris Langer in an action upon Contract wherein the Plaintiff demands from the Defendant Five Hundred dollars. Hereof fail not.

Witness, CECIL H. MACMAHON, Esq., Judge of said Court at Newark, as aforesaid, the Twenty-third day of October, in the year One Thousand Nine Hundred and thirty.

40.

LOUIS HECHT,
Clerk.

State of Demand.

Filed October 23, 1930.

The plaintiff demands of the defendant the sum of Five Hundred Dollars (\$500.00) and says that:

1. On or about the 25th day of November, 1929, the defendant was a New Jersey corporation, authorized to make loans in accordance with P. L. 1914, Chapter 49, and the acts amendatory thereof. 10

2. On or about the said date the said corporation loaned to the plaintiff herein and to Nathan Mack, Michael Brounstein, & Samuel Verger the sum of \$330.00, for which the defendant demanded, and the plaintiff and the said Nathan Mack, Michael Brounstein and Samuel Verger executed a note, a copy of which is hereunto annexed and made a part hereof. 20

3. Said note so demanded by the defendant was in violation of Section 5 of P. L. 1914, Chapter 49, in that the note itself called upon the plaintiff and the said Nathan Mack, Michael Brounstein and Samuel Verger to pay a sum in excess of that allowed by Section 5 of P. L. 1914, Chapter 49.

4. The said loan and the note given thereunder were null and void, and of no legal effect. The plaintiff has paid to the defendant the sum of \$165 on account of said void transaction. 30

5. Plaintiff is entitled to recover from the defendant the sum of \$165.00 so paid on account under Section 6 of the aforementioned Act.

Judgment will be claimed in the sum of One 40

State of Demand.

hundred sixty-five Dollars (\$165.00) together
with lawful interest and costs of suit.

MORRIS ISSERMAN,
Plaintiff's Attorney.

10 **Note Annexed to State of Demand.**

Loan No. 10-97

THE MORRIS PLAN CORPORATION
OF NEW JERSEY.

Principal	\$300.00
Interest	\$ 30.00
Total	\$330.00

Newark, N. J. Nov. 25, 1929.

20 For Value Received, we, jointly and severally,
promise to pay to the order of The Morris Plan
Corporation of New Jersey, at its office in the
City of Newark, the sum of Three Hundred &
Thirty Dollars, in amounts as follows: \$33.00 one
month after date and the balance in nine equal
successive monthly instalments of \$33.00 each on
the same day of each month beginning two
months after the date hereof, with interest on
30 each instalment after its maturity at the rate of
3% per month.

If any instalment of this note is not paid at the
time specified herein, the entire amount unpaid
shall become due and payable forthwith at the
election of the holder of the note.

Each of the undersigned and each of the en-
dorsers on the back hereof hereby waives pre-
sentment, demand, protest and notice of demand,

40

Note Annexed to State of Demand.

protest and non-payment and each of the undersigned hereby assents to the subsequent addition of any signature above or below his signature.

Any payments on principal and interest made after default, shall not be deemed a waiver of the rights which the holder may have against the maker, co-makers, endorsers and guarantors by reason of such default, and the co-makers, endorsers and guarantors hereby authorize the Corporation to accept payments on principal and interest after default. The co-makers, endorsers and guarantors hereby agree to the extension or renewal of this note, and agree that their liability shall continue until this note and all interest is paid in full and satisfied. 10

The undersigned, endorsers and guarantors hereby authorize irrevocably any attorney-at-law to appear in any court of record in the United States and waive the issue and service of process and confess a judgment against the undersigned, endorsers and guarantors in favor of the holder hereof, for such amount as may appear to be unpaid hereon after maturity, together with costs and reasonable attorney's fees, and release all errors and waive all right of appeal. 20

Signatures:	Addresses:	30
Morris Langer		
Nathan Mack	168 Ferry St., Newark, N. J.	
Michael Brounstein	164 Grumman Ave., Newark, N. J.	
Samuel Verger	313 Fabyan Pl., Newark, N. J.	

THE MORRIS PLAN CORP. OF N. J.

E. W. ADAMS,	
Asst. Cashier.	
S. S. METZGER,	40
Asst. V. P.	

Note Annexed to State of Demand.

Chapter 49, Laws of 1914; amended—Chapter 251, Laws of 1928, State of New Jersey.

- Section 5. "No such licensee shall charge or receive of the borrower or borrowers, or any other person on his, her or their behalf, a greater rate of interest than three per centum per month.
- 10 Such interest shall not be payable in advance and shall be computed on unpaid balances. No charges, bonus, fees, expense or demands of any nature whatsoever other than interest as above provided shall be made upon such loans or advancements except upon actual foreclosure of the security or upon the entry of judgment. Every such licensee shall furnish the borrower at the
- 20 time the loan is made a statement in the English language showing in clear and distinct terms the amount of the loan, and the date when loaned and when due, the person to whom the loan is made, the name of the lender, and the amount and rate of interest charged. On the back of such statement there shall be printed in English a copy of section five (5) of this act. The lender shall give to the borrower a plain and complete receipt for all payments made on account of the loan at the
- 30 time such payments are made. No loan or advancement greater than three hundred (300) dollars shall be made to any person under this act nor shall any one person owe such licensee more than three hundred (300) dollars at any time either directly as maker or indirectly as endorser or guarantor."

Counterclaim.

Filed March 10, 1931.

1. Defendant is the holder of a certain promissory note, jointly and severally made and delivered by Morris Langer, plaintiff, and Nathan Mack, Michael Brounstein, and Samuel Verger, to the Morris Plan Corporation of New Jersey, a true copy of which is annexed hereto and made a part hereof. 10

2. At the time of the making of said note, The Morris Plan Corporation of New Jersey, was and still is, a New Jersey Corporation, duly authorized to make loans in accordance with P. L. 1914, Chapter 49, and the Acts amendatory thereof.

3. On the 25th day of May, 1930, an installment together with interest became due and payable on said note, but the same was not paid. 20

4. As a result, defendant elected that the unpaid principal of said note, amounting to \$165.00, be due and payable immediately.

Judgment will be demanded in the sum of \$165.00, together with interest and costs of suit to be taxed.

GREEN & GREEN,
Attorneys for Defendant.

30

Note.

This note is identical with that printed herein on pages 6 to 8 incl.

40

State of Case Agreed Upon.

Filed May 5, 1931.

MORRIS ISSERMAN, Attorney for Plaintiff-Appellee.

GREEN & GREEN, Attorneys for Defendant-Appellant.

10 The parties hereto, by their respective attorneys, submit the following as the state of case for appeal.

20 The action was brought under P. L. 1914 Ch. 49, to recover the amount repaid by the plaintiff to the defendant on behalf of a loan made by the defendant to the plaintiff on November 25, 1929. The defendant is a corporation of the State of New Jersey, authorized to do business in accordance with P. L. 1914 Chapter 49, and the Acts amendatory thereof, commonly known as the Small Loan Act governing loans up to the amount of \$300.00. The defendant filed a counterclaim for the amount remaining unpaid on account of said loan.

30 The plaintiff was sworn and testified that on November 25, 1929, he borrowed the sum of \$300.00 from the defendant, at which time he signed a promissory note which was admitted into evidence, and marked Exhibit P-1. He further testified that he repaid \$165.00 on account of said loan and that nothing further was paid by him or any one else on account of said loan. The Court reserved decision, and after the submission of memoranda, found in favor of the plaintiff for \$165.00 on the state of demand, and in favor of the plaintiff on the counterclaim, and judgment was

State of Case Agreed Upon.

thereupon ordered and entered in favor of the plaintiff for the said amount and costs, in all \$176.93.

GREEN & GREEN,
Attorneys for Plaintiff.

MORRIS ISSERMAN,
Attorneys for Defendant. 10

20

30

40

Note Admitted in Evidence.

This note is identical with that printed herein
on pages 6 to 8 incl.

Clerk's Transcript.

10

FIRST DISTRICT COURT**NEWARK, N. J.**

MORRIS LANGER,
Plaintiff,

vs.

20

THE MORRIS PLAN CORPORATION
OF NEW JERSEY,
Defendant.

MORRIS ISSERMAN,
Pltf's Atty.

30

Pltf's Costs		
Summons	\$2.10	Oct. 23
Mileage	.08	
Listing	1.50	Nov. 5
Atty fee	8.25	

\$11.93

Appeal Bond \$1.00 4/28
210 Market St.

40

A state of demand was filed, and a summons
in the above stated cause was issued on the twen-

Clerk's Transcript.

ty-third day of October, 1930, returnable on the sixth day of November, 1930, wherein the plaintiff demands of defendant the sum of Five hundred dollars.

The summons was served and returned as follows:

I served the within summons Oct. 31, 1930, on D. A. Healey, he being the registered agent of said The Morris Plan Corporation by reading it to him and giving him a copy thereof.

Walton E. Wright,
Constable.

Nov. 6/30. This Cause was adjourned to Nov. 13, Dec. 4, Jan. 6, 13, 20, Feb. 3, 17, 24, March 10.

Mar. 10/31. Counter-claim filed.

Mar. 10/31. The plaintiff and the defendant appearing, the cause was tried and determined at this time.

Plaintiff sworn. Note in evidence.

Chas. L. Zimmerman sworn for defendant.

The evidence being closed the Court reserved decision.

April 10/31. The Court rendered judgment in favor of the plaintiff and against the defendant in the sum of One hundred sixty-five and no/100 Dollars damages with costs, whereupon judgment is rendered in favor of the plaintiff and against the defendant in the sum of One hundred sixty-five and no/100 Dollars damages with costs.

Judgment against defendant on the counter-claim.

April 25/31. Notice of appeal.

April 28/31. Appeal bond filed.

Clerk's Transcript.

10 I, Louis Hecht, Clerk of the First District Court of the City of Newark, in the County of Essex and State of New Jersey, do hereby certify that the foregoing is a true copy of the record and proceedings in the case of Morris Langer v. The Morris Plan Corporation of New Jersey held in the First District Court of the City of Newark, in the County of Essex and State of New Jersey, as taken from the First District Court Docket #299, page #143971.

LOUIS HECHT,
Clerk.

(Seal)

Dated, July 20, 1931.

20

Findings.

Filed April 10, 1931.

30 The law of this case seems to have been settled in this State in the *Schwartz* suit, 150 Atl. 390, 8 N. J. Misc. 417. The note in question in this case would appear to be invalid and the plaintiff entitled to judgment against the defendant on the counterclaim and against the defendant in the sum of \$165.

CECIL H. MACMAHON,
Judge.

40

Opinion.

Filed January 20, 1932.

NEW JERSEY SUPREME COURT.

No. 434, OCTOBER TERM, 1931.

MORRIS LANGER,
Plaintiff-Respondent,

10

vs.

MORRIS PLAN CORPORATION OF
NEW JERSEY, a corporation,
Defendant-Appellant.

For defendant-appellant, GREEN & GREEN.

For plaintiff-respondent, MORRIS ISSER- 20

MAN.

Before Justices CAMPBELL, LLOYD and BODINE.

Per Curiam: The defendant appeals from a judgment in favor of the plaintiff in the sum of \$165. On November 25, 1929, plaintiff gave defendant his note in the principal sum of \$300, to which was added \$30 for interest, making a total of \$330, and agreed to repay the same at the rate of \$33 each and every month thereafter. Having paid \$165 on account of said note, the plaintiff sought to recover the amount so paid under section 6 of Chapter 49, Pamphlet Laws 1914, alleging that the transaction violated section 5 of that act as amended. The district court gave judgment in favor of the plaintiff relying upon *Morris Plan Corporation of New Jersey v. Schwartz*, 150 Atl. Rep. 390. The case of *Consolidated Plan of New Jersey v. Shanholtz*, 147 30 40

Opinion.

Atl. Rep. 401, affirmed 153 Id. 906 also seems controlling.

Chapter 49, Pamphlet Laws, 1914, was amended by Chapter 251 Pamphlet Laws, 1928, and section 8 of the amendatory act provides that its provisions shall not apply to any loan greater than for the principal sum of \$300.

10 The appellant contends that the principal sum of the note signed by the plaintiff was \$330. We do not so read the note. The note upon the upper left hand corner of its face bears the words "principal" and the figures \$300; "interest" and the figures, \$30, making a total of \$330. Obviously, the note was not for a principal sum in excess of \$300. A copy of the note was annexed to the State of Demand and the facts and statements as therein appearing are controlling.

20 It is sufficient perhaps to notice that the defendant company did that which it was not permitted to do under section 5 of the act, as amended, Pamphlet Laws 1928, Chapter 251. That act provides, in part, as follows: "No such licensee shall charge or receive of the borrower * * * * *

30 a greater rate of interest than three per centum per month. Such interest shall not be payable in advance and shall be computed on unpaid balances." Although the amount of interest exacted was less than 3% the act provides that interest shall not be payable in advance and shall be computed on unpaid balances. The loan company could have complied with the statute had they desired so to do. Since the note given violates both the spirit and the law of the statute, the plaintiff was entitled to recover.

40 The judgment is affirmed with costs.

New Jersey Court of Errors and Appeals

MORRIS LANGER,

Plaintiff-Respondent,

vs.

MORRIS PLAN CORPORATION OF

NEW JERSEY, a corporation,

Defendant-Appellant.

*On Appeal
from the
New Jersey
Supreme
Court.*

BRIEF OF PLAINTIFF-RESPONDENT.

(N. B. Italics throughout this brief, unless otherwise noted, are by the attorney for the plaintiff-respondent.)

Facts.

The plaintiff-respondent, Morris Langer, brought suit against the Morris Plan Corporation of New Jersey in the First District Court of the City of Newark to recover the sum of One Hundred Sixty-five Dollars (\$165.00) which the plaintiff-respondent had paid to the defendant-appellant on account of a certain notice, which was annexed to the State of Demand, and which the plaintiff-respondent alleged was void and of no effect, as being in violation of Section 5 of P. L. 1914, Chapter 49 (Small Loan Act).

The plaintiff-respondent based his right to recover the sum paid on account of said void note on Section 6 of P. L. 1914, Chapter 49 (State of Case, p. 5, l. 36). The defendant-appellant filed a counter-claim to recover One Hundred Sixty-five Dollars (\$165.00) being the balance alleged to be due on the alleged note (State of Case, p. 9).

The defendant-appellant admitted that it was authorized to make loans under P. L. 1914, Chapter 49, and there is no doubt that the loan in question was made and the plaintiff-respondent's note taken by the defendant-appellant in pursuance to said P. L. 1914, Chapter 49. See Counter-claim, paragraph 2, State of Case, p. 9, l. 12, *et seq.*; also State of Case Agreed upon, p. 10, l. 18, *et seq.*; see also copy of note annexed to State of Demand, State of Case, p. 8.) The note set up on page 6 *et seq.* of the State of Case was duly offered in evidence (see State of Case, p. 12), identical copies of which were annexed to the State of Demand and to the counter-claim. There was no dispute as to the terms of the note at the trial below.

The plaintiff-respondent's contention was that the note was void, being in violation of Section 5 of P. L. 1914, Chapter 49, "in that the note itself called upon the plaintiff-respondent and his endorsers to pay a sum in excess of that allowed by the aforesaid section" (State of the Case, p. 5, l. 21).

The District Court upheld the contention of the plaintiff-respondent that the note was void and invalid under the law laid down in the case of *Morris Plan Corporation of New Jersey v. Schwartz*, 8 Misc. 417, 150 Atl. 390, and gave the plaintiff-respondent judgment for One Hundred Sixty-five Dollars (\$165.00) and rendered a judgment against the defendant-appellant on its counter-claim (State of Case, p. 14, l. 21).

The New Jersey Supreme Court, relying on Sections 5 and 6 of Chapter 49, P. L. 1914, and upon the case of *Morris Plan Corporation of New Jersey v. Schwartz*, 8 Misc. 417, 150 Atl. 390, and upon the case of *Consolidated Plan of New Jer-*

sey v. Shanholtz, et al., 7 N. J. Misc. 876, 147 Atl. 401, affirmed by the Court of Errors and Appeals in 9 Adv. Rep. p. 151, 153 Atl. 906, held that "since the note given violates both the spirit and letter of the statute, the plaintiff was entitled to recover" and affirmed the judgment of the District Court, with costs (State of Case, pp. 15 and 16).

Summary of Points Relied on for Affirmance of Judgment Below.

The plaintiff-respondent contends that the judgment of the First District Court of the City of Newark should be sustained because:

1. The note sub judice is void, being taken by the defendant-appellant in violation of P. L. 1914, Chapter 49, Section 5.
2. The Supreme Court did not err in ruling that *Morris Plan Corporation of New Jersey v. Schwartz*, 8 Misc. 417, 150 Atl. 390, and *Consolidated Plan of New Jersey v. Meyer Shanholtz, et al.*, 7 N. J. Misc. 876; 147 Atl. 401, settle the law in this state governing the note in the case *sub judice*.
3. The plaintiff-respondent relies upon the statutory right to recover the amount paid on account of the void note granted in Section 6 P. L. 1914, Chapter 49.
4. The State of Demand was adequate to support the finding of the court below.
5. The defendant-appellant cannot urge lack of particularity in the State of Demand on appeal, no objection to the same having been taken at the trial in the District Court.
6. Inadequacy in the State of Demand as to particulars could have been cured by the

defendant-appellant before trial and presents no ground for reversal on appeal.

POINT I.

The note *sub judice* is void, being taken by the defendant-appellant in violation of P. L. 1914, Chapter 49, Section 5.

P. L. 1914, Chapter 49, Section 5, provides:

"No licensee shall charge or receive of the borrower or borrowers, or any other person on his, her or their behalf, a greater rate of interest than three per centum per month. Such interest shall not be payable in advance, and shall be computed on unpaid balances. *No charges, bonus, fees, expense or demands of any nature whatsoever, other than interest as above provided, shall be made upon such loans or advancements except upon the actual foreclosure of the security or upon the entry of judgment.* Every such licensee shall furnish the borrower at the time the loan is made a statement in the English language showing in clear and distinct terms the amount of the loan, and the date when loaned and when due, the person to whom the loan is made, the name of the lender, and the amount and rate of interest charged. On the back of such statement there shall be printed in English a copy of section five of this act. The lender shall give to the borrower a plain and complete receipt for all payments made on account of the loan at the time such payments are made. No loan or advancement greater than three hundred (300) dollars shall be made to any person nor shall any one person owe such licensee more than three hundred (300) dollars at any time."

(A) The interest demanded by the terms of the note *sub judice* was in excess of that allowed by P. L. 1914, Chapter 49, Section 5. The note,

in respect to the payment of interest, reads as follows:

Loan No. 10-97

THE MORRIS PLAN CORPORATION
OF NEW JERSEY.

Principal	\$300.00
Interest	\$ 30.00
Total	\$330.00

Newark, N. J. Nov. 25, 1929.

For Value Received, we, jointly and severally, promise to pay to the order of The Morris Plan Corporation of New Jersey, at its office in the City of Newark, the sum of Three Hundred & Thirty Dollars, in amounts as follows: \$33.00 one month after date and the balance in nine equal successive monthly instalments of \$33.00 each on the same day of each month beginning two months after the date hereof, *with interest on each instalment after its maturity at the rate of 3% per month.*

If any installment of this note is not paid at the time specified herein, the entire amount unpaid shall become due and payable forthwith at the election of the holder of the note.

It is undisputed by the defendant-appellant that the principal of the loan was \$300. and that an interest charge of \$30. was made at the time the loan was made, and included in the note *sub judice*, making a total of \$330. to be paid by the plaintiff-respondent in ten equal monthly installments of \$33. each, *which installments in the aggregate included both the principal and interest charges.*

The note further provides, however, for an additional payment of interest of 3% per month

on any installment after its maturity. This additional charge of 3% per month after maturity on any unpaid installment is in direct violation of the express limitation put by the Legislature on the rate of interest to be charged, which under Section 5 was not to exceed 3% per month and was to be computed on the unpaid balances only. Here the note provides for a payment after maturity of 3% per month in installments which include both principal and interest already charged, so that in fact the plaintiff was by the terms of the note called upon to pay more than the amount fixed by law.

The enormous increase in the rate of interest in the note as exacted by the defendant-appellant can be readily seen by the following example:

If we assume that a default in the note occurred in the first installment due under the note, which would be in two months from the date thereof, then the defendant-appellant by exercising its option and declaring the entire note due, would then be entitled to repayment by the plaintiff-respondent as follows:

Principal \$300, interest charge in advance \$30, and 3% per month thereafter on the sum of \$330. until the amount was paid. If payments were delayed for a period of one month the plaintiff-respondent could have been compelled to pay 3% additional on the entire amount of \$330, or \$9.90 additional. The total amount that the plaintiff-respondent could have been called upon to pay, by the defendant-appellant, in this total period of three months in repayment of the loan of \$300. would have been \$339.90. Under Section 5 the total amount that the defendant-appellant should have been able to demand of the plaintiff-respondent after the loan had con-

tinued for three months, without any payment on account of the same, would have been \$327, being the principal sum and interest thereon for three months at 3%, i. e., \$27.

Notwithstanding the contentions of the defendant-appellant that it in fact charged less than the rate of interest allowed by law, and notwithstanding its computations in its brief tending to show that interest was not in fact charged in advance, it is clear from the above that the defendant-appellant by the very terms of the note which it exacted *was in a position if it so desired, to exact a considerable sum from the plaintiff-respondent in excess of the enormous rate of interest allowed by the law in question.*

The Legislature intended to safeguard strictly the rights of the small borrower when borrowing under the act under which the note *sub judice* was given (P. L. 1914, Chapter 49) and in no uncertain language prohibited "charges, bonus, fees, expenses or demands of any nature whatsoever other than interest" as provided in Section 5 of P. L. 1914, Chapter 49.

The defendant-appellant's method of charging interest as provided in the note *sub judice* violates this provision of the law, both in its letter and spirit and so the Supreme Court in its opinion below found.

(B) The note *sub judice* violates Section 5 in that it exacted in addition to the interest allowed by law "costs and reasonable attorney's fees" from the plaintiff-respondent.

The note in the case *sub judice*, provides that:

"The undersigned, endorsers and guarantors hereby authorize irrevocably any attorney-at-law to appear in any court of

record in the United States and waive the issue and service of process and confess a judgment against the undersigned, endorsers and guarantors in favor of the holder hereof, *for such amount as may appear to be unpaid hereon after maturity, together with costs and reasonable attorney's fees*, and release all errors and waive all right of appeal" (State of Case, p. 7, l. 19).

The exaction by the defendant corporation from the maker of the note, the plaintiff-respondent in this cause, of the promise to pay "the amount due on the note *together with costs and reasonable attorney's fees*" is an exaction in clear violation of Section 5, *supra*.

In the case of *Consolidated Plan of New Jersey v. Meyer Shanholtz, et al.*, 7 N. J. Misc. 876; 147 Atl. 401, the Supreme Court declared void a note which provided for a payment of "all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note," notwithstanding the fact that the note itself contained a provision that it should not be construed to be in violation of Chapter 49, P. L. 1914. The Court said:

"The legislature having forbidden the making of *charges, fees and demands other than interest* upon these small loans, *the lender has exacted that in the instrument which under the statute renders his note void.* * * *"

The Court also said:

"The note itself calls for that which is forbidden, and the lender having sought that which he was not entitled to, cannot be heard to say that that which he seeks he does not seek. Legislative enactments are not to be played fast and loose with, and corporations who violate the law cannot be heard to say that they did not intend that their violations of the law should be con-

strued as such. They, like all others, must stand or fall by their own acts."

This case was affirmed by the Court of Errors and Appeals on February 2, 1931, without further opinion, which affirmance is recorded in Volume 9 of Advance Reports, page 151.

It follows therefore that the note in the instant case, by calling "for that which is forbidden" (excessive interest and reasonable attorney's fees and costs), is in violation of Section 5, *supra*.

POINT II.

The Supreme Court did not err in ruling that Morris Plan Corporation of New Jersey v. Schwartz, 8 Misc. 417, 150 Atl. 390, and Consolidated Plan of New Jersey v. Meyer Shanholtz, et als., 7 N. J. Misc. 876, 147 Atl. 401, settled the law in this state governing the note in the case *sub judice*.

The Supreme Court in a *per curiam* opinion in the Morris Plan *vs.* Schwartz case, in construing a note identical in terms with the present note, and given to the defendant-appellant herein, which corporation was a party to the litigation in that case, held the note void and said:

"It (the note) violates both the spirit and letter of the statute.

"The case of *Consolidated Plan of New Jersey v. Shanholtz, et al.*, 7 N. J. Misc. 876; 147 Atl. 401, is somewhat like the present case. The reasons stated for holding the note void in that case are applicable to the facts of the present case."

The court below rightly stated that the law applied to the note in the said case would govern the note in the case *sub judice*, as the terms of the

note in respect to the exaction of "attorney's fees and costs" are the same, and consequently the note under consideration is void for the same reason.

The defendant-appellant makes much of the fact that the Supreme Court opinion in the case of *Morris Plan v. Schwartz, supra*, does not of itself disclose the terms of the note which was construed, and that therefore it cannot be said that the Schwartz case is in point and controlling upon the Supreme Court and in the case *sub judice*. This contention is absolutely without merit. The defendant-appellant was the holder of the note construed in the Schwartz case and has full and complete knowledge as to its terms. The State of the Case filed in the Clerk's Office of the New Jersey Supreme Court in the afore-said case contains a copy of the note construed. An examination of that note, which is found on pages 5 and 6 of the State of the Case, in that suit, shows it to be in its language and terms, exactly the same as the note *sub judice* in every particular with the exception of, the date, the names of the maker and endorsers, and the amount of the principal. In every other respect the note is similar in its terms and demands. Every reason for holding the note void in that case is applicable in the instant case. The defendant-appellant's attempt to plead ignorance of, and to throw into obscurity, the terms of the note in that case (upon which note the Supreme Court based its opinion), is not made in good faith and is made solely to hinder this court in its determination of the law governing the note in the case *sub judice*.

The Supreme Court did not err in ruling that the case at bar was controlled by the opinion in

the case of *Consolidated Plan of New Jersey v. Shanholtz, supra*. The note was held void in that case for containing, *inter alia*, the following clause, as the same is set forth in the opinion of the Supreme Court:

“Upon default in the payment of the whole or any part of this note, the undersigned jointly and severally further agree to pay * * * *all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note*, said attorney's fees to be fixed at \$15. plus 15% of the amount of such sum of principal or interest then due, provided the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expenses, or demands of any nature whatsoever in excess of that now allowed by Chapter 49 of the Laws of 1914 of the State of New Jersey and the amendments thereof.”

The note was held to be void because it demanded “reasonable costs and attorneys’ fees” contrary to the provisions of Section 5, *supra*. The fact that the reasonable attorneys’ fees were fixed in the note at 15% plus \$15. certainly was not held to be material by the Supreme Court and by the Court of Errors and Appeals in affirming the Supreme Court opinion that the note was void. The note was void because it demanded from the maker a payment in addition to the payment of interest as provided by law. It was not void because of the *percentage* of the amount fixed as a reasonable attorney’s fee, but because an attorney’s fee was in itself demanded. The demand for reasonable costs and fees was construed to be a demand such as was not allowed to be made by Section 5, Chapter 49 of the Laws of 1914. *Any such demand, irrespective of amount, would void the note.*

In the case at bar, the provisions of the note authorized the defendant-appellant to take a judgment against the plaintiff-respondent for "such amount as may appear to be unpaid hereon after maturity, *together with costs and reasonable attorney's fees * * **." The language of the demand is the same as in the *Shanholtz* case with the sole exception that in the *Shanholtz* case the reasonable fees are stipulated in a definite percentage of the amount due. This difference is immaterial as the Legislature in its enactment of Section 5, *supra*, has not concerned itself with the quantum of the demand in excess of interest, but has prohibited *any* demand so in excess. In the *Shanholtz* case demand for reasonable costs and attorney's fees was held to invalidate the note, so that in the case at bar, the note for the very same reasons is void.

It is to be noted further that in the *Shanholtz* case, notwithstanding an express provision of the note that it should not be construed in such a way as to violate Chapter 49 of the Laws of 1914, the note was nevertheless, in the face of this provision, held to be void.

The defendant-appellant in the case at bar again insists that the note might be construed and should be construed by the court in such a way as to render its language within the terms of Section 5, *supra*. It asks this court to assume that the court of the first instance in fixing reasonable costs and attorney's fees as demanded by the note is required to do so, in such a way that the total amount to be paid by the defendant for interest and attorney's fees would not exceed 3% per month.

This construction of the plain language of the note is forced and untenable. By the terms of the note the court in the first instance would be required to fix the attorney's fees according to a standard of reasonableness and without regard to the interest charges on the note. The defendant-appellant would now have the court fix the attorney's fees irrespective of a standard of reasonableness and in such a way that the said attorney's fees would not conflict with the language of Section 5.

In the Shanholtz case the court refused to do this notwithstanding an express direction in the note itself that the note should not be construed in such a way as to be in violation of Section 5.

In the case at bar there is no such request and if the ordinary meaning of the language of the note is such that the note becomes void, the court is under no duty to strain the construction to aid the defendant-appellant. The note was drawn by the defendant-appellant with full knowledge of the penalties imposed by the act for its violation. Notwithstanding the high rate of interest allowed by the act, and notwithstanding the express limitations of the act, it made the terms of the obligation signed by the plaintiff-respondent even more oppressive. It now seeks relief in this court from what it terms the oppressive rigors of the usury law as the result of a situation which was solely of its own making and caused by its own greed.

If there is any ambiguity, as the defendant-appellant contends, in the language of its own note (and it is susceptible of two constructions, it should be construed against the defendant-

appellant), as it employed and prepared the words concerning which the doubt arises.

See 13 Corpus Juris 544.

In this case, however, there is no ambiguity, neither in the statute which governs the making of the note, nor in the note itself.

The defendant-appellant further contends and cites cases from other jurisdictions to sustain it, that a demand for reasonable attorney's fees in a note is valid and enforceable. It is not questioned, and the plaintiff-respondent admits that in such jurisdictions as are cited by the defendant-appellant, and in the absence of express statutory prohibition, that such provision may be valid, but in this state, in view of the express prohibition of the Legislature under the very law which allows the defendant-appellant to operate, such a provision in a note is in the case at bar is absolutely invalid and renders the note void.

The defendant-appellant's contention that no actual *demand* was made for the fees contracted for in the note is immaterial. It is sufficient as the court ruled in the *Shanholtz* case, that "the note itself calls for that which is forbidden, and the lender having sought that which he was not entitled to, he cannot be heard to say that that which he seeks he does not seek."

It is the reservation in the lender of more than the statute allows which renders the note void. It is not material whether the excess amount is actually demanded or received. The lender's waiver of the illegal exaction subsequent to the making of the note cannot cure the defect in the note itself.

POINT III.

The plaintiff-respondent relies upon the statutory right to recover the amount paid in on account of the void note, granted in Section 6, P. L. 1914, Chapter 49.

Section 6, P. L. 1914, Chapter 49, provides:

“The violation of any provision of this act shall be a misdemeanor, and if such violation be by a corporation, then such violation shall be a misdemeanor on the part of any person participating therein as a representative or agent of said corporation. *Every loan in connection with which such violation shall have occurred shall be absolutely null and void, and the borrower shall be entitled to recover from the lender any or all sums paid or returned on account of or in connection with such loan.*”

The plaintiff-respondent's right to recover the sum paid in under the void note finds express authority in this section. The note being void, in violation of Section 5, the right of the plaintiff to sue as in the case *sub judice*, and to recover, becomes fixed and determined. In giving judgment in favor of the plaintiff the court below followed the express language of the Legislature, and prevented the defendant corporation from “playing fast and loose” with the enactment of the Legislature, to quote the language of this court in the *Shanholtz* case, *supra*.

POINT IV.

The state of demand was adequate to support the finding of the court below.

The defendant-appellant lays great stress upon the fact that the State of Demand was not sufficient to sustain the judgment of the court below

in that it does not set forth with sufficient particularity the plaintiff's cause of action as required by those cases which deal with pleadings involving a usury defense.

It is settled law in this State that no formal pleadings are required in a suit in the District Court. The State of Demand need only state a cause of action in such form as will make it to appear what the plaintiff's cause of action is.

O'Donnell v. Weiler, 72 N. J. L. 142; 59 Atl. 1055;

Dejane v. Citizens Protective Association, 79 N. J. L. 107; 74 Atl. 443.

The State of Demand in the case *sub judice* alleges the loan to the plaintiff; that the note given under said loan was void, being in violation of Section 5, P. L. 1914, Chapter 49; payment of one hundred sixty-five dollars (\$165.00) on account of the void transaction, and the right to recover the same under Section 6 of said P. L. 1914, Chapter 49. Attached to the State of Demand is a copy of the note, which, in the words of the State of Demand, called upon the plaintiff to pay a sum in excess of that allowed by law. A reading of the note attached to the State of Demand shows the demand for attorney's fees and costs which is interdicted by law and the excessive interest rate. It fully apprises the defendant of the cause of action against it, so as to satisfy not only the requirements of the District Court, but also the stricter requirements of formal pleading (State of Case, p. 6).

POINT V.

The defendant-appellant cannot urge lack of particularity in the state of demand on appeal, no objection to the same having been taken at the trial in the District Court.

The State of Case is entirely bare of any exception taken at the trial or any request on the part of counsel for the defendant for a finding of law or fact, or law and fact whatever from the court below, and no exceptions of any kind were taken at the trial. Hence there is no point presented which can be reviewed on appeal with the exception of any error made by the court below in giving final judgment.

Before the amendment of the Practice Act, approved March 15, 1916, P. L. 1916, page 109, no appeal could be taken where no objections were made at the trial.

Blanchard v. Beverage, 86 N. J. L. 561; 92 Atl. 384;

Webster v. Freeholders of Hudson, 86 N. J. L. 256; 90 Atl. 1110;

Pannonia Building & Loan Association v. West Side Trust Company of Newark (Court of Errors and Appeals), 93 N. J. L. 377; 108 Atl. 240.

The pertinent part of the amendment of the Practice Act, *supra*, provides that

“when cases are submitted to the court to be heard without a jury, any error made by the court *in giving a final judgment* in the case shall be subject to change, modification or reversal without the grounds of the objection having been specifically submitted to the court.”

While this amendment has been held constitutional (*Pannonia Building & Loan Association v.*

West Side Trust Company, supra), and while it has been held to apply to a District Court case (*Lambert v. Cahill*, 2 N. J. Misc. 826; 128 Atl. 434), it limits the right to appeal, without objection taken below, to *any error made by the Court in giving final judgment*, and does not allow an appellant to raise, for the first time upon appeal.

POINT VI.

Inadequacy in the state of demand as to particulars could have been cured by the defendant-appellant before trial, and presents no ground for reversal on appeal.

It is settled law in this State that when a State of Demand alleges a cause of action which is not set forth with sufficient particularity to enable the defendant to prepare a defense, that the defendant may obtain a bill of particulars before trial calling upon the plaintiff to set forth in greater detail the allegations of the State of Demand.

Dixon v. Swenson, 101 N. J. L. 22; 127 Atl. 591.

The defendant by not having demanded a bill of particulars must be deemed to have waived his right to obtain greater particularity in the State of Demand. He should not be entitled to raise such a question for the first time upon appeal, and seek it as a cause for reversal.

CONCLUSION.

It is respectfully urged for the foregoing reasons that the judgment of the Supreme Court, affirming the judgment of the First District Court of the City of Newark, should be affirmed, and

that the appeal of the defendant-appellant be
dismissed and for nothing holden.

Respectfully submitted,

MORRIS ISSERMAN,
Attorney for and of Counsel
with Plaintiff-Respondent.

ABRAHAM J. ISSERMAN,
On the Brief.

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY

CHICAGO, ILL., U.S.A.

VOLUME 12

NUMBER 1

JANUARY 1, 1919

Published by the

AMERICAN MEDICAL ASSOCIATION

New Jersey Court of Errors and Appeals

MORRIS LANGER,
Plaintiff-Respondent,

against

MORRIS PLAN CORPORATION OF
NEW JERSEY,
Defendant-Appellant.

On Appeal
from
Supreme Court.

BRIEF FOR DEFENDANT-APPELLANT.

Facts.

This case comes up on an appeal taken by the defendant from a judgment of the Supreme Court affirming a judgment of the First District Court of the City of Newark, in favor of the plaintiff, for \$165, and in favor of the plaintiff on the counterclaim filed by the defendant.

The action is based upon a state of demand which alleges that on November 25, 1929, the defendant, a New Jersey corporation, authorized to make loans in accordance with P. L. 1914, Ch. 49, loaned plaintiff and certain other persons the sum of \$330, to secure which sum plaintiff executed a note, a copy of which is annexed to the state of demand. It is alleged that said note was in violation of Sec. 5 of said Act, in that the note itself called upon plaintiff and said other persons to pay a sum in excess of that allowed by Sec. 5 of P. L. 1914, Ch. 49 (Case, p. 6), and that therefore said loan and note were null and void. The plaintiff having repaid on account of said loan the sum of \$165, seeks to recover said sum under Sec.

6 of said Act (Case, p. 6). Defendant filed a counterclaim in said action for the balance of \$165 due on said note, which admittedly was not paid (Case, p. 11, 13-14).

The District Court found a judgment in favor of the plaintiff for \$165 and a judgment for the plaintiff on the counterclaim. The Court based its decision on the case of *Morris Plan v. Schwartz*, 8 N. J. Misc. 417, 150 Atl. 390 (Case, p. 15).

The defendant appealed to the Supreme Court and the judgment of the District Court was affirmed. From this ruling of the Supreme Court the present appeal is taken upon the ground that the Supreme Court erred in affirming said judgment.

In support of its contention, the defendant will urge all grounds relied upon before the Supreme Court, namely:

1. The trial court erred in finding that the state of demand properly alleged a violation of P. L. 1914, Ch. 49, and the amendments thereof and supplements thereto.

2. The trial court erred in finding that the case was governed by *Morris Plan v. Schwartz*, 8 N. J. Misc. 417.

3. The trial court erred in finding that the state of demand was sufficient to support a judgment for the plaintiff.

4. The trial court erred as a matter of law, in finding in favor of the plaintiff and against the defendant on the state of demand.

5. The trial court erred as a matter of law, in finding in favor of the plaintiff and against the defendant on the counterclaim.

POINT I.

The note itself does not call upon the plaintiff and the co-makers to pay a sum in excess of that allowed by Sec. 5 of P. L. 1914, Ch. 49.

Plaintiff's action, as set forth in his state of demand, is based upon an alleged violation of Sec. 5 of P. L. 1914, Ch. 49, in that the note itself called upon plaintiff and the co-makers to pay a sum in excess of that allowed by the above section of said Act. According to the state of demand, the amount of the loan was \$330. However, plaintiff did not urge this point in presenting the case to the Supreme Court and the Court itself in its opinion affirming the judgment of the District Court, accords no validity whatsoever to this position (Case, p. 15). In the agreed statement of facts it is stipulated that plaintiff borrowed from defendant the sum of \$300, at which time he signed the promissory note in question (Case, p. 11). The note itself makes it clear that the amount borrowed was \$300. In the upper left-hand corner it bears the word "Principal" and the figure "\$300," "interest," and the figure "\$30," making a total of \$330. Obviously the note was not for a principal sum in excess of \$300.

Assuming for the purpose of argument that the facts stated in the state of demand are true, it may be noted that in such case the loan would not be governed by P. L. 1914, Ch. 49, for Sec. 8 of this Act as amended by P. L. 1928, Ch. 498, provides:

"This Act shall not be held * * * to apply to any loan greater in principal sum than three hundred dollars (\$300)."

POINT II.

The Supreme Court erred in holding that interest was payable in advance and on other than unpaid balances.

The Supreme Court, in affirming the judgment of the District Court, relied solely upon its finding that defendant did not comply with the provisions of Sec. 5 of the Act, as amended, P. L. 1928, Ch. 251, providing in part as follows:

“No such licensee shall charge or receive of the borrower * * * a greater rate of interest than three per centum per month. Such interest shall not be payable in advance and shall be computed on unpaid balances.”

In finding that defendant violated this provision of said Act, we submit that the learned Court fell into error.

The question is whether under the terms of the note the total amount of interest charged was more than three per cent. per month as permitted by the Statute. If it was not greater than three per cent. per month, computed on unpaid principal balances, then it cannot be urged that defendant has violated the above quoted provision of the Act.

In the first place, no sum whatsoever was deducted by defendant in advance. The note itself provides for a loan in the principal amount of \$300. This the Supreme Court found and the finding cannot be disputed. Furthermore, it cannot be disputed that the plaintiff received the full sum of \$300 from the defendant at the time of the execution of said note. This is stipulated in the agreed statement of facts (Case, p. 11).

The note provides that the principal and interest, totaling \$330, shall be repaid in ten succes-

sive monthly instalments of \$33 each, beginning one month after the date of said note. It is difficult to see where there is any basis for holding that this arrangement calls for payment of interest in advance or payment of interest other than on unpaid principal balances. This is easily seen in the following table setting forth the amount actually charged in the case at bar:

A.

Rate and Amount of Interest Actually Charged.

	<i>Unpaid Balance of Principal</i>	<i>Amount of Payment</i>	<i>Interest Rate on Unpaid Balance of Principal</i>	<i>Amount of Interest</i>	<i>Amount Allocated to Principal Payment</i>
No. 1	\$300.00	\$ 33.00	3%	\$ 9.00	\$ 24.00
2	276.00	33.00	3%	8.28	24.72
3	251.28	33.00	3%	7.54	25.46
4	225.82	33.00	2.24%	5.18	27.82
5	198.00	33.00	0	0	33.00
6	165.00	33.00	0	0	33.00
7	132.00	33.00	0	0	33.00
8	99.00	33.00	0	0	33.00
9	66.00	33.00	0	0	33.00
10	33.00	33.00	0	0	33.00
		\$330.00		\$30.00	\$300.00

The above table shows that for the first three months the defendant charged the legal rate of interest on unpaid balances and on the fourth payment it collected less interest than it was entitled to under the Statute, and that for the six months thereafter it collected no interest at all. The *bona fides* of the lender and the legality of this phase of the transaction cannot be more clearly demonstrated.

Under the Statute defendant could have collected more interest than it actually did. The following table shows the amount which could have been collected by the defendant had the full three per cent. interest per month been charged on unpaid principal balances:

B.

**Rate of Interest Which Might Have Been
Charged.**

No.	<i>Unpaid Balance of Principal</i>	<i>Amount of Payment</i>	<i>Interest Rate on Unpaid Balance of Principal</i>	<i>Amount of Interest</i>	<i>Amount Allocated to Principal Payment</i>
1	\$300.00	\$ 33.00	3%	\$ 9.00	\$ 24.00
2	276.00	33.00	3%	8.28	24.72
3	251.28	33.00	3%	7.54	25.46
4	225.82	33.00	3%	6.77	26.23
5	199.59	33.00	3%	5.99	27.01
6	172.58	33.00	3%	5.18	27.82
7	144.76	33.00	3%	4.34	28.66
8	116.10	33.00	3%	3.48	29.52
9	86.58	33.00	3%	2.60	30.40
10	56.18	33.00	3%	1.69	31.31
11	24.87	25.62	3%	.75	24.87
		\$355.62		\$55.62	\$300.00

The Supreme Court recognized that defendant actually charged a lower interest than three per cent. per month in the following excerpt from its opinion:

“Although the amount of interest exacted was less than three per cent, the Act provides that interest shall not be payable in advance, and shall be computed on unpaid balances” (Case, pp. 16, 31-34).

But the Court holds that interest was collected in advance. However, in view of the above Table A, and in view of the undisputed fact that plaintiff received the full principal sum loaned without any deduction in advance, we submit it is impossible to sustain this view. There is not only nothing in the agreed stipulation of facts or in the note to indicate that interest was charged in advance, but the facts positively negative any such view. Certainly the mere provision in the note for interest does not support the Court's conclusion when we realize that the note is merely a promise to pay and is not payment. In Table A, *supra*, it is clearly demonstrated that interest was

computed and collected on *unpaid balances* at the statutory rate for three months, at a lower than the statutory rate for one month, and that no interest was charged at all thereafter.

It is fundamental that in determining whether or not a given contract for payment of money is usurious "it is clearly the rule that where the contract is susceptible of two constructions, the one lawful and the other unlawful, the former will be adopted."

Seattle Trust Co. v. Morgan, 9 Pac. (2d) 1079 (Supreme Ct., Washington, 1932).

It is our contention that the transaction in question is susceptible of only one construction, namely, the one which we have set forth in Table A, *supra*, but even if it were susceptible of the interpretation adopted by the Supreme Court, it is submitted that the above rule should be applied and the lawful construction adopted.

Furthermore, it will be recalled that in the state of demand there is no allegation which would sustain the alleged violation relied upon by the Supreme Court. All that is alleged in the state of demand is that the note itself called upon the plaintiff and the co-makers to pay a sum in excess of that allowed by Sec. 5 of the Small Loan Act.

Furthermore, as the Court in the above case of *Seattle Trust Co. v. Morgan* stated, in determining whether or not a contract is usurious, *the entire period of the contract must be considered.*

The position of the Supreme Court is all the more untenable in view of the well settled law that penal statutes are to be construed strictly and should not be applied except in situations falling within the clear and literal purport of the statute. The act constituting the offense must be within both the letter and the spirit of the statute.

Lair v. Millmer, 25 N. J. L. 522;
Buck v. Danzenbacher, 37 N. J. L. 359.

If there be any doubt about the matter the Court should resolve it in favor of the accused. This rule would seem applicable even if the statute were not strictly penal, for it is well settled that usury statutes are at least quasi-penal and are therefore to be strictly construed.

27 *R. C. L.* 207, Sec. 8;
 29 *Cyc.* 910.

It is stated in *R. C. L.*, *supra*:

“ * * * the law of usury is penal in its nature and therefore should be strictly construed. Thus, while courts, under a statute avoiding the entire contract for usury, will uphold the defense according to the letter of the statute, they will grant affirmative relief, not expressly given by such a statute only on payment of the money actually loaned and legal interest. *And this is because while it is the duty of courts to give effect to the letter of a statute against oppression of the borrower, they will not extend the letter of the statute to relief oppressive of the lender.*” (Italics ours.)

That the Small Loan Act is a penal statute is clear from §6 of the Act, which provides:

“The violation of any provision of this act shall be a misdemeanor, and if such violation be by a corporation, then such violation shall be a misdemeanor on the part of any person participating therein as a representative or agent of said corporation. Every loan in connection with which such violation shall have occurred shall be absolutely null and void, and the borrower shall be entitled to recover from the lender any or all sums paid or returned on account or in connection with such loan” (P. L. 1914, p. 79).

Thus, a violation of the Statute is not only a crime and nullifies and forfeits the loan, but the borrower may also recover money paid back to the lender in connection with the loan. The results are so drastic and severe that the Statute should be construed strictly and not extended by the construction.

As was said in *Bates Refrigerating Co. v. Sulzberger*, 157 U. S. 1-37, 15 Sup. Ct. 508, 516, 39 L. Ed. 601:

“Undoubtedly the court, when endeavoring to ascertain the intention of the Legislature, may be justified in some circumstances in giving weight to considerations of injustice or inconvenience that may arise from a particular construction of the statute.”

And in *Knowlton v. Moore*, 178 U. S. 41-77, 20 Sup. Ct. 747, 761, 44 L. Ed. 969, the Supreme Court said:

“We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute.”

POINT III.

Even if defendant had collected interest in advance, inasmuch as the maximum amount permitted under the statute was not charged, there is no violation of said statute.

Although we have clearly demonstrated that interest was not collected in advance by the defendant, but was merely collected on unpaid principal balances at actually less than the statutory rate, let us assume for the purpose of argument that interest was collected in advance. Even then,

we submit, there is no violation of the spirit or of the letter of the statute.

The Supreme Court specifically found that less than three per cent. per month was charged by defendant. This is clearly demonstrated in Table A, *supra*. Assume, then, that this interest or part thereof, was collected in advance.

Section 5 of the Act, as amended, P. L. 1928, Ch. 251, provides in part as follows:

“No such licensee shall charge or receive of the borrower * * * a greater rate of interest than three per centum per month. *Such* interest shall not be payable in advance and shall be computed on unpaid balances.” (Italics ours.)

It is submitted that a reasonable construction of the Act justifies the position that the word “such” refers to the *maximum* rate of interest permitted, namely, three per cent. per month, and has no applicability where the rate of interest charged is less than the maximum and deduction of such interest in advance will not cause the rate to exceed the maximum. There can be no doubt that even if defendant in this case had deducted the interest in advance, the amount of interest charged would not have exceeded three per cent. per month. That defendant did not deduct any interest in advance, however, cannot be disputed.

It is the general rule under ordinary usury laws that deduction of the maximum amount of interest in advance does not render the loan usurious.

Fowler v. Equitable Trust Co., 141 U. S. 384, 399;

International Bank v. Bradley, 19 N. Y. 245, 254;

National Life Insurance Co. v. Donovan, 238 Ill. 283, 288.

This rule of construction has been adopted in New Jersey.

Hoyt v. Bridgewater Copper Mining Co.,
6 N. J. Eq. 253, 274.

In view of the above ruling it was obvious to the Legislature that unless the Small Loan Act specifically prohibited the maximum interest from being collected in advance, loan companies could get around the statute and therefore in effect collect more than three per cent. per month. It was to prevent this that the prohibition was inserted. Manifestly, it could be no violation of the Act if a lesser rate than three per cent. per month is collected in advance if the effect thereof is not to charge more than three per cent. per month, considering the whole contract. Any other construction would be an over-refined technicality and would sacrifice substance to mere form.

POINT IV.

The case at bar is distinguishable from *Morris Plan v. Schwartz*, 8 N. J. Misc. 417, 150 Atl. 390, and *Consolidated Plan of New Jersey v. Shanholtz*, 147 Atl. 401 (aff'd 153 *id.* 906), and is not governed thereby.

The plaintiff in presenting the case at bar to the Supreme Court relied chiefly upon *Morris Plan Co. v. Schwartz*, *supra*, and *Consolidated Plan v. Shanholtz*, *supra*. The Supreme Court in its opinion merely mentioned these two cases, but did not specifically rest its decision upon them. It is submitted that neither of the cases is applicable.

In the first place, in the *Schwartz* case, we do not know from the findings of the Supreme Court

just what the defect was upon which the transaction was held void. It is quite obvious from the report of the case that it cannot possibly have been the defect on which the plaintiff in the case at bar rests his action, for the action in the *Schwartz* case was to recover the sum of \$130 alleged to be due on a promissory note for \$500. We do not know how much interest was charged and the opinion does not indicate what the terms of the note were. Moreover, the *Schwartz* case has never been passed upon by this Court and is now pending on appeal.

It must be clear that a case in which the facts appear to be different from those in the case at bar cannot govern it except as the reasoning is applicable. And where neither the reasoning of the Court nor the facts upon which it bases its reasoning are set out, it becomes quite inconceivable to argue that the case at bar can be bound thereby, especially in view of the fact that the case has never been passed upon by this Court.

The case of *Consolidated Plan of New Jersey v. Shanholtz*, *supra*, is easily distinguishable from the case at bar. In the *Shanholtz* case there was a provision in the note for a fixed minimum attorney's fee of \$15 together with 15 per cent. of the principal due. A demand was made in the state of demand filed for the fees provided in the note. Furthermore, the condition upon which the attorney's fee became payable was upon default in the payment of the note. This Court in affirming the judgment of the Supreme Court, 153 Atl. 906, very properly held that this was a violation of both the spirit and the letter of the Small Loan Act.

In the case at bar, the question raised in the *Shanholtz* case is not presented by the pleadings, inasmuch as plaintiff relies solely upon the allegation that the note itself demands payment of a greater sum than that permitted by the Act. It is

a fundamental rule of pleading that the facts upon which a plaintiff bases his cause of action and upon which a defendant rests his defense must be set forth in the respective pleadings. The Courts are even stricter where the question of usury is concerned, where it is necessary that the nature of the transaction alleged to be usurious be fully and specifically set forth so that the Court may see for itself whether there is any usury and so that the party charged with the usury may clearly know what he must disprove.

Haldeman v. Tansey, 8 N. J. Misc. 73;
Taylor v. Morris, 22 N. J. Eq. 606;
Crane v. Homeopathic, etc. Ins. Co., 27
 N. J. Eq. 484 (E. & A.);
Watson v. Conkling, 24 N. J. Eq. 230;
Beatty v. Van Brenner, 24 N. J. Eq. 312;
Turrel v. Byard, 24 N. J. Eq. 135, aff'd
 24 *Id.* 589;
Hannas v. Hawks, 24 N. J. Eq. 12; 39
 Cyc. 1049.

Thus, in *Haldeman v. Tansey*, *supra*, the Supreme Court said:

"It is entirely settled that in setting up usury as a defense in an action at law the defendant must set out the particular facts and circumstances of the supposed usurious agreement so that the court may see that the agreement was in violation of the statute. (Cases cited.) The allegations of the present answer do not, in the remotest way, suggest the facts or the circumstances intended to be proved, and the plaintiff is in no way apprised by the answer of the facts necessary to be met by him in resisting the defense" (p. 74).

However, it is really immaterial whether the point decided by the *Shanholtz* case can be urged

by the plaintiff on this appeal. The provisions in the note sued upon in the *Shanholtz* case are entirely different from those in the note in the case at bar. In the *Shanholtz* case, the attorney's fees and commissions were fixed, while in the note now in question the "costs and reasonable attorney's fees" are provided for, and are obviously to be fixed by the Court upon entry of judgment. In the instant note there is no promise whatsoever running from the promissor to the promisee other than the promise to pay the principal and the permitted rate of interest. The attorney's fee must be fixed by the Court. In the *Shanholtz* case it was pointed out by the Court that the condition upon which the attorney's fee becomes payable is upon default in the payment of the note. Such is not the case in the note in suit.

Section 5, P. L. 1928, Ch. 251, page 497, provides as follows:

"5. No such licensee shall charge or receive of the borrower or borrowers, or any other person in his, her or their behalf, a greater rate of interest than three per centum per month. Such interest shall not be payable in advance and shall be computed on unpaid balances. No charges, bonus, fees, expenses, or demands of any nature whatsoever, other than interest as above provided, shall be made upon such loan or advancements, *except upon actual foreclosure of the security or upon the entry of judgment * * *.*" (Italics ours.)

The Act undoubtedly contemplates that both costs and attorney's fees are to be assessed by the Court. It is inconceivable that the Court would enter any judgment which would render the note null and void. We have already quoted the well recognized rule, particularly applicable to usury cases, to the effect that where a contract is susceptible to two constructions, the one lawful and

the other unlawful, the former will be adopted. It would therefore be the Court's plain duty to give the note in suit no construction which would render it usurious and null and void. Furthermore, the attention of the Court is again called to the fact that the Small Loan Act is a highly penal statute and is most harsh in its terms upon lenders who violate the Act. This is also a conclusive reason why no court would enter any judgment on the note which would render it null and void. Still a third point is that under the terms of the note it would be entirely possible for a court entering judgment to permit attorney's fees in the amount of \$25, and still not exceed the maximum rate of interest permissible under the statute. We pointed out clearly in Table B, *supra*, the amount of interest which could have been charged under the maximum rate, viz., \$55.62. Only \$30 interest was actually charged, leaving a difference of \$25.62. There could therefore be no objection to any court, after maturity and upon the entry of judgment, assessing attorney's fees in that amount, provided they appeared to the court to be reasonable. There could certainly be nothing usurious about the transaction.

The section above quoted inhibits the licensee from charging or receiving of the borrower a greater rate of interest than that prescribed and further provides that no charges, fees, expenses or demands of any nature whatsoever other than interest, as provided, shall be made upon such loans or advancements, *except* upon actual foreclosure of the security or upon the *entry of judgment*. The note in suit neither in fact nor in spirit violates the Act since the licensee makes no charges, receives no fees and makes no demands other than the interest provided by law. Furthermore, the costs and attorney's fees are not fixed in this note by any promise on the part

of the borrower as in the *Shanholtz* case, but are to be fixed by the Court entering the judgment in strict accordance with the statute.

The precise distinction between the *Shanholtz* case and the case at bar is forcibly demonstrated by courts of other states. For instance, in the state of Oregon, in the case of *Peyser v. Cole*, 11 Ore. 39 (1883), the Supreme Court of Oregon held that a provision in a note whereby the maker agrees to pay a reasonable sum as attorney's fees in case suit or action is instituted to collect said note or any portion thereof, is valid. The Court said (p. 44):

"Upon the point of the sufficiency of consideration for such a stipulation, we think there can be no doubt. Making the loan itself, although at the highest rate of interest allowed by law, would constitute a valuable and sufficient consideration. And the only question involving any serious difficulty, it seems to us, is whether such engagements are opposed to the policy of the statute against usury. If the effect of enforcing them would be to give the lender a larger compensation for the loan and use of his money than such statute allows, then they should be held usurious and void. But while the lender has no lawful right to contract with the borrower for a rate of interest exceeding the limit imposed by the statute, he is not debarred from requiring as a condition of making the loan that he shall be secured in such a way as will enabled him to receive the principal of the loan and the amount of lawful interest stipulated for, without further loss or expense occasioned by the default of the borrower."

The above case and holding, it is submitted, are precisely applicable to the case at bar. Only "reasonable" attorney's fees are stipulated in the note in suit and it is contemplated that the Court fix the fees.

However, the Supreme Court of Oregon has recognized the distinction between such a case as ours together with the one which we have just quoted from and a case in which the note stipulates a *fixed* percentage of fees to be paid by the maker. In *Levens v. Briggs, et al.*, 21 Or. 333 (1891), the note provided for the allowance of a specified percentage thereof as attorney fees. The Court said (p. 338):

“The remaining question is whether any attorney fee is collectible under this note. In *Balfour v. Davis*, 14 Or. 47, the parties contracted for a specified percentage in case of suit and we refused to enforce it or to allow any attorney fee. *Had the note provided for a reasonable attorney fee, to be ascertained by the court, as was done in Peyser v. Cole, 11 Or. 39, there could have been no legal objection; but where the parties stipulated for an oppressive and unconscionable amount, no court ought to enforce it; and because that method had grown into an oppressive abuse and the courts were being used to make it effectual, we thought best to announce the rule that no attorney fee would be allowed by the courts if the amount thereof be specified in the contract.*” (Italics ours.)

It is submitted that the above decision contains the precise distinction between our case and the *Shanholtz* case. In the *Shanholtz* case, as we have already pointed out, the fee was fixed. In our case only reasonable fees are stipulated and they would necessarily be assessed by the Court.

There are numerous cases sustaining the stipulation in a note for reasonable attorney's fees. In *Hulnig v. Drexel*, 5 Watts 126, the Court, in passing upon such a provision, said:

“The contract here has nothing in it oppressive to the borrower; it is advantageous to the borrower and lender when merely in-

tended to enforce a punctual performance of the contract, nor is there the slightest pretense to say that it is intended as a cover to usury. A failure on the part of the borrower puts nothing in the pocket of the lender; on the contrary, the probability is he will not be reimbursed the expense which he may incur."

Again, in *Imler v. Imler*, 94 Pa. St. 372, the Pennsylvania Court passed upon a note containing a similar provision to the one now before the Court. There it was said:

"The contract is one of indemnity, and if the defendant, by his neglect or refusal to pay, has subjected his creditor to the necessity of employing counsel, why should he not pay?"

We believe that the above cases clearly illustrate the distinction between the case at bar and the *Shanholtz* case, and the validity and *bona fides* of the note in the case at bar.

The force of our above argument is greatly strengthened by a comparison of the notes in the two cases in another particular, which also shows clearly the general intent of the lender in the *Shanholtz* case to take advantage of the exigencies of the borrower, in contrast to the honest desire of the lender in the case at bar to deal fairly with the borrower. Thus, the note in the *Shanholtz* case provides:

"Upon default in the payment of the whole or any part of this note, the undersigned * * * further agrees to pay * * * all reasonable costs, including attorney's fees that may be incurred in collecting the whole or any part of this note, said attorney's fees to be fixed at fifteen dollars plus fifteen per cent. of the amount of such principal and interest then due * * *."

This provision clearly extends to any default of the borrower in any instalment of the note no matter how slight that default may be and regardless of the fact of whether the note is thereby accelerated or matured, or whether the lender is put to any expense as a result thereof. In other words, there may be ten different defaults if the loan is to be paid in ten instalments. It needs little argument to show that under such circumstances the lender is in a position to reap a very substantial pecuniary benefit by virtue of the provision. This is especially so in view of the minimum attorney's fees. In the case at bar, however, the provision for reasonable attorney's fee is applicable only after default "after maturity." And the amount of the fee which the lender can recover is not fixed by any promise of the borrower but is determined by the Court.

The cases may further be distinguished by virtue of the fact that in the *Shanholtz* case there was an actual demand made in the state of demand filed by the lender for the fees provided and contracted for in the note. In the case at bar no such demand has been made in the counterclaim (Case, p. 10). Plaintiff has made no attempt to even raise the question, and it is in no way presented by the facts of the case.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court be reversed and for nothing holden and that a judgment be entered herein in favor of the defendant on the state of demand and in favor of the defendant on the counterclaim in the sum of \$165 together with costs.

Respectfully submitted,

GREEN & GREEN,
Attorneys for Defendant-Appellant.

HARRY GREEN,
Of Counsel.

R. RANDOLPH HICKS,
WILLIAM C. SCOTT,
Of the New York Bar.

*Filed after the Oral Argument
by leave of Court.*

New Jersey Court of Errors and Appeals

MORRIS LANGER,
Plaintiff-Respondent,

vs.

MORRIS PLAN CORPORATION OF
NEW JERSEY,
Defendant-Appellant.

Action at Law.

(On Appeal from
Supreme Court.)

REPLY BRIEF.

Facts.

This case was argued before this Honorable Court on Thursday, October 20th, shortly before which appellant was served with a copy of respondent's brief. At the close of the argument, appellant was given permission by the Court to file this reply brief.

ARGUMENT.

Reply to Respondent's Point I (A).

An inspection of respondent's brief discloses that he apparently abandons the theory on which the Supreme Court affirmed the decision of the District Court, as well as the theory on which the District Court rendered its original judgment.

It will be recalled that the judgment of the District Court was affirmed on the ground that the transaction between the borrower and the lender involved the payment of interest in advance, notwithstanding that the Court specifically

found that the maximum charge was not made. In our main brief filed in this case we demonstrated by figures appearing under our Point II that such was not the case and that the Supreme Court fell into error by assuming that a promise in the note to pay \$30 interest over the normal period of the note was a payment of interest in advance. We called attention to the fact that the vice against which Section 5 of the Small Loan Act was directed was the payment of interest in advance and that the record showed indisputably that the loan was for \$300 and that \$300 was paid to the borrower at the time of the consummation of the transaction.

Counsel for plaintiff-respondent, being apparently apprehensive of the theory on which the case was presented to the Supreme Court, in the brief filed as above set out, takes a new position, which we believe is as demonstrably fallacious as the one just alluded to.

The new brief, in Point I, seeks to uphold the decision of the Supreme Court on two grounds:

(A) At the bottom of page 4 of his brief he says "The interest demanded by the terms of the note *sub judice* was in excess of that allowed. * * * It is undisputed by defendant-appellant that the principal of the loan was \$300 and that an interest charge of \$30 was made at time the loan was made and included in the note *sub judice*, making a total of \$330 to be paid by plaintiff in ten equal monthly instalments of \$33 each, which instalments in the aggregate included both the principal and interest charges. * * * so that in fact the plaintiff was by the terms of the note called upon to pay more than the amount fixed by law."

(B) "The note *sub judice* violates Section 5 in that it exacted in addition to the interest allowed by law 'costs and reasonable attorneys' fees.'"

For the convenience of the Court we recall to it the exact wording of the note in suit:

“Loan No. 10-97

THE MORRIS PLAN CORPORATION
OF NEW JERSEY.

Principal	\$300.00
Interest	\$ 30.00
Total	\$330.00

Newark, N. J. Nov. 25, 1929.

For Value Received, we, jointly and severally promise to pay to the order of The Morris Plan Corporation of New Jersey, at its office in the City of Newark, the sum of Three Hundred & Thirty Dollars, in amounts as follows: \$33.00 one month after date and the balance in nine equal successive monthly instalments of \$33.00 each on the same day of each month beginning two months after the date hereof, with interest on each instalment after its maturity at the rate of 3% per month.

If any instalment of this note is not paid at the time specified herein, the entire amount unpaid shall become due and payable forthwith at the election of the holder of the note.

Each of the undersigned and each of the endorsers on the back hereof hereby waives presentment, demand, protest and notice of demand, protest and non-payment and each of the undersigned hereby assents to the subsequent addition of any signature above or below his signature.

Any payments on principal and interest made after default, shall not be deemed a waiver of the rights which the holder may have against the maker, co-makers, endorsers and guarantors by reason of such default, and the co-makers, endorsers and guarantors hereby authorize the Corporation to accept payments on principal and interest after default. The co-makers, endorsers and guarantors hereby agree to the extension or renewal of this note, and agree that their lia-

bility shall continue until this note and all interest is paid in full and satisfied.

The undersigned, endorsers and guarantors hereby authorize irrevocably any attorney-at-law to appear in any court of record in the United States and waive the issue and service of process and confess a judgment against the undersigned, endorsers and guarantors in favor of the holder hereof, for such amount as may appear to be unpaid hereon after maturity, together with costs and reasonable attorney's fees, and release all errors and waive all right of appeal.

Signatures:

Addresses:

Morris Langer

Nathan Mack

168 Ferry St., Newark, N. J.

Michael Brounstein 164 Gruman Ave., Newark, N. J.

Samuel Verger 313 Fabyan Pl., Newark, N. J.

THE MORRIS PLAN CORP. OF N. J.

E. W. ADAMS,
Asst. Cashier.

S. S. METZGER,
Asst. V. P.

For the same reason we set out Section 5 of the Small Loan Act:

"5. No such licensee shall *charge or receive* of the borrower or borrowers, or any other person on his, her or their behalf, a greater rate of interest than three per centum per month. Such interest shall not be payable in advance and shall be computed on unpaid balances. No charges, bonus, fees, expense or demands of any nature whatsoever other than interest as above provided shall be made upon such loans or advancements *except* upon actual foreclosure of the security or *upon the entry of judgment.* * * *"
(Italics ours.)

It will be observed that the vice contemplated in Point A of plaintiff-respondent's brief lies in the provision of the note which reads as follows:

“* * * with interest on each instalment after its maturity at the rate of 3% per month.

“If any instalment of this note is not paid at the time specified herein, the entire amount unpaid shall become due and payable forthwith at the election of the holder of the note.”

And it is argued that this provision is vicious in two particulars:

First: It contemplates interest on interest in that the words “with interest on each instalment” means interest on the instalments of \$33 each, of which amount \$3 is interest and \$30 principal.

Secondly: That the defendant-appellant by exercising the power of accelerating the payment of the note would bring about a usurious and illegal result in that by electing to declare the note due and payable upon the first default or a subsequent default it would charge the debtor with a rate of interest greater than that allowed by the statute.

The inhibitory language of Section 5 is

“No such licensee shall *charge or receive* of the borrower or borrowers, or any other person on his, her or their behalf, a greater rate of interest than three per centum per month.”

To violate this section the lender must either *charge or receive* the excessive amount, and until the lender exercises its election to accelerate the payment of the note it cannot be said that it has charged the prohibited rate of interest, and since it has never collected as much as 3% per month it cannot be stated that it has ever received any excessive amount of interest. An examination of the statement of facts appearing on page 10 of the Record and of the counterclaim appearing on page 9 of the Record shows that in fact less than

3% interest was received and that in the counterclaim the defendant-appellant is charged only with unpaid instalments.

It must be borne in mind that Section 5 of the Act provides, *inter alia*:

“Each such licensee shall furnish the borrower at the time the loan is made, a statement in the English language showing in clear and distinct terms, the amount of the loan * * * and the amount * * * of the interest charged.”

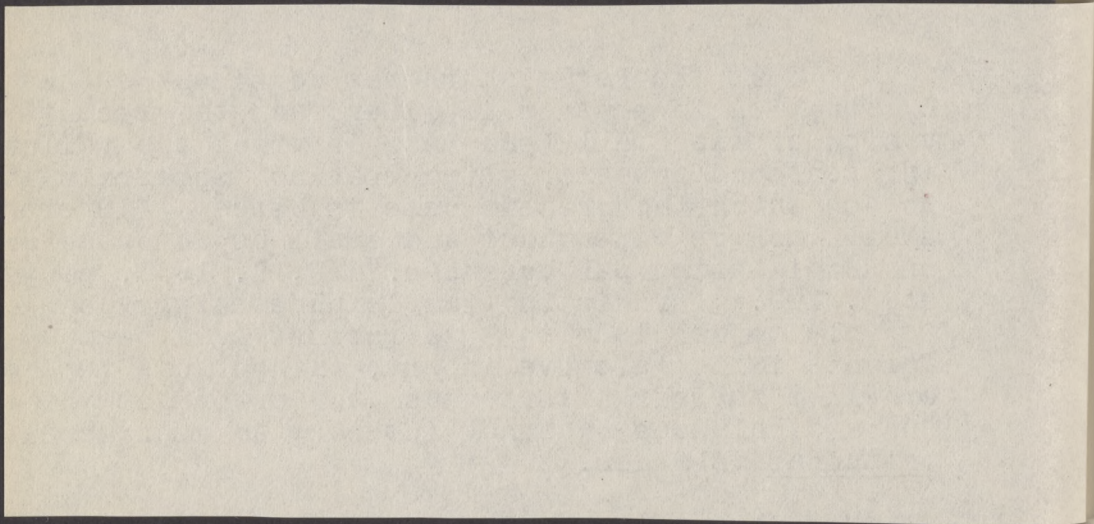
This is exactly what the note does; it states the amount of the loan and the amount of interest charged. Of course, the borrower agrees to repay this amount, but surely this was contemplated by the Act. It is inconceivable that merely because the borrower promised to pay the amount of interest which the Act required the lender to fix and state, that this Court should say it had thereby committed a violation of the very Act containing the requirements, the fulfilling of which is now the basis for the present attack.

With respect to the argument that interest is being charged under the terms of the note on installments which already include interest, we submit that a proper construction of the note is that the interest is to be charged upon the unpaid balance only in accordance with the terms of the statute, and in computing the balance such portion of the installment as includes interest would be disregarded. This construction is not only logical, but would certainly lead to a result far more equitable than that contended for by respondent.

Furthermore, the statute provides specifically that “such interest shall not be payable in advance, and *shall be computed on unpaid balances*” (Italics ours).

It is perfectly obvious that the interest due at the end of each monthly period becomes a part of the unpaid balance then due by the borrower. It is ordinary accounting practice that at the end of a month, if interest on a loan is not paid, the unpaid balance then due by the borrower would include such unpaid and past due interest. It is all very well for respondent to say that the installment already includes an interest charge, but if the installment is unpaid on the due date, then it is clear that the unpaid balance then due consists of the principal and the interest up until the due date, and on such unpaid balance the lender is clearly entitled by the terms of the statute itself to receive interest at the rate of 3% per month from such due date. That this was the intention of the Legislature appears in the language used in the statute. It would have been very simple for the Act to have provided that interest be computed on unpaid *principal* balances, but this was not done, and by ordinary rules of statutory construction we must therefore assume that the Legislature in not having used language to limit the items which could be computed in determining the "unpaid balances," did not mean to limit them, but, on the other hand, used the words in their ordinary meaning. x x x

That the Legislature was cognizant of the distinction in phrases is clear from the recent revision of the Small Loan Law, in which the following sentence appears, which does not appear in the Act on which the present case is based: "Interest shall not be compounded and shall be computed on unpaid principal balances." P. L. 1932, p. 94 at p. 103. The distinction in phraseology can lead us only to conclude that there must have been a difference in legislative intent, and we must further conclude therefrom that under the prior Act the "unpaid balances" was not intended to mean unpaid principal balances.



It is perfectly obvious that the interest due at the end of each monthly period becomes a part of the unpaid balance then due by the borrower. It is ordinary accounting practice that at the end of a month, if interest on a loan is not paid, the unpaid balance then due by the borrower would include such unpaid and past due interest. It is all very well for respondent to say that the installment already includes an interest charge, but if the installment is unpaid on the due date, then it is clear that the unpaid balance then due consists of the principal and the interest up until the due date, and on such unpaid balance the lender is clearly entitled by the terms of the statute itself to receive interest at the rate of 3% per month from such due date. That this was the intention of the Legislature appears in the language used in the statute. It would have been very simple for the Act to have provided that interest be computed on unpaid *principal* balances, but this was not done, and by ordinary rules of statutory construction we must therefore assume that the Legislature in not having used language to limit the items which could be computed in determining the "unpaid balances," did not mean to limit them, but, on the other hand, used the words in their ordinary meaning. x x x

In Point II of our main brief we have shown that the rate of interest charged the borrower was slightly more than one-half of that permitted by the statute.

Granting for the purpose of argument that the use of the word "instalment" in the sentence "with interest on each instalment after maturity at the rate of 3% per month" refers to the monthly payment of \$33 and not to the monthly payment of \$30 principal, it is a mathematical impossibility for the interest on the \$3 interest charge to equal within the period of the note the

statutory amount allowed, because even then the note would be less than 3% per month on unpaid balances; for example: assuming that the debtor never paid one dollar on account of principal or interest during the period of the note and that a charge of 3% per month is made on each instalment of \$33 after maturity of each instalment of \$33 the total interest charge would be as follows:

Table A.

<i>Instalment Number</i>	<i>Amount of Instalment</i>	<i>Months to Maturity</i>	<i>Interest on Instal- ment to Maturity at 3% per Month</i>
1	\$ 33	9	\$ 8.91
2	33	8	7.92
3	33	7	6.93
4	33	6	5.94
5	33	5	4.95
6	33	4	3.96
7	33	3	2.97
8	33	2	1.98
9	33	1	.99
10	33	0	0
\$330			\$44.55

By adding to the above \$44.55 the interest charge of \$30 appearing on the note and embraced in the monthly payments of \$33 each, we get a total interest charge of \$74.55, whereas the statute gives the right to charge 3% per month on the principal of \$300 loaned, which interest charges at maturity of the note would be \$90.

In what we have said above we have admitted, for the purpose of argument, that the word "instalment" in the sentence just above quoted referred to the monthly payments of interest as well as principal and that the words "entire amount unpaid" in the paragraph reading as follows:

"If any instalment of this note is not paid at the time specified herein, the entire amount unpaid shall become due and payable forthwith at the election of the holder."

referred to the entire amount of the note and not to the entire amount of the instalment nor the entire amount of the loan nor to the entire amount of principal. The word "instalment" above quoted and the words "entire amount unpaid" above quoted are ambiguous.

In our original brief at page 7 *et sequitur* we cited the fundamental rule that in determining whether or not a given contract for payment of money is usurious "it is clearly the rule that where the contract is susceptible of two constructions, the one lawful and the other unlawful, the former will be adopted."

Seattle Trust Co. v. Morgan, 9 Pac. (2d) 1079 (Supreme Court, Washington 1932).

And on pages 8 and 9 we cited the well-known authorities both from the State of New Jersey and from the United States Supreme Court to the effect that it is the well settled law that penal statutes are to be construed strictly and should not be applied except in situations falling within the clear and literal purport of the statute. We, therefore, believe that this court under the principles just enunciated should find that the word "instalment" as above quoted means instalments of principal and the interest due thereon, and the word "amount" means amount of the loan. A similar question arose in a case decided by the Supreme Court of Arkansas.

In *Matthews v. Georgia State Savings Association*, 132 Ark. 219, 200 S. W. 130 (1918), the Supreme Court of Arkansas had before it a bond which contained a stipulation that non-payment of three instalments of principal or interest after the same shall fall due shall authorize the association to proceed to enforce the payment of the loan, together with the interest due thereon. The

defendant pleaded that this provision amounted to usury. The Court said:

“The bond contained a stipulation that the non-payment of three instalments of principal or interest after the same shall fall due shall authorize the association to proceed to enforce the payment of the loan, together with the interest due thereon. This provision has reference to the amount of the principal and the interest due thereon at the time the option is acted on, and does not refer to the interest that would accrue subsequent to such time if no action were taken on the option. Therefore, the note is not in this respect usurious. *Eldred v. Hart*, 87 Ark. 534, 113 S. W. 213; *Graham v. Fitts*, 53 Fla. 1046, 43 So. 512, 13 Ann. Cas. 149; and *Goodale v. Wallace*, 19 S. D. 405, 117 Am. St. Rep. 962, 103 N. W. 651, 9 Ann. Cas. 545.”

But apart from the construction of the language under review it is most respectfully submitted that the law of the State of New Jersey, as well as that of other states, and as enunciated by the Supreme Court of the United States, is to the effect that, if the debtor by complying with his duties as set out in the instrument under review can avoid the payment of interest in excess of that allowed by law, the instrument is not usurious. The excess of payment in event of non-compliance is treated as a penalty, and does not void the instrument.

In *Ramsey v. Morris*, 39 N. J. L. 591, a borrower pledged stock with a lender to secure a loan and signed an agreement reading:

“* * * and in case I do not pay said note, by this agreement I forfeit said 25 shares of stock and said note shall stand against me as a just and legal claim, with no power on my part to dispute the payment of said note. I further agree that if by the non-payment of

said note, I forfeit said stock, said forfeiture shall in no way liquidate the whole or any portion of said note."

The sole point raised was whether the above transaction was usurious. The Court held it was not, saying:

"The provision of forfeiture was by way of penalty for the non-performance of the contract. The contract itself called for no more than the payment of the sum loaned, with legal interest upon it, and the borrower had the right to pay to the plaintiff the principal and interest, according to the terms of his contract, and thereby avoid the penalty. It is essential to the nature of usury that a certain gain, exceeding the legal rate of interest, is to accrue to the lender as a consideration for the loan. If the gain to the lender, beyond the legal rate of interest, is, by the contract, made dependent upon the will of the borrower, as where he may discharge himself from it by the punctual payment of the principal, the contract is not usurious, 39 N. J. L. 591, 593" (authorities cited).

A similar rule was enunciated and applied in *National Can Co. v. Fellows*, 290 Fed. 201 (C. C. A. 6th, 1923). In that case the contract provision was that the royalty for each month should be computed and paid on or before the 10th day of the next month, and that if not paid at the time specified "the amount due as rent or royalty shall be increased 10% each month until paid." Defendant contended that this was a contract for usurious interest and that under the statute therefore all interest was forfeited, but the Court said:

"Where a contract does not call for compensation for the use of money, but only exacts a payment, which the promissor may wholly avoid by keeping his contract, such

stipulated payment is not interest but is in the nature of a penalty, valid if within the proper limits of liquidated damages, or invalid if a mere penalty * * *. Of course, if it is not interest, it is not usurious."

In *Lloyd v. Scott*, 29 U. S. (4 Pet.) 205, 224, the Supreme Court of the United States said:

"If a party agree to pay a specific sum, exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty."

A similar rule is followed by the Courts of New York in *Sumner v. The People*, 29 N. Y. 337. The New York Court of Appeals said (p. 340):

"If the payment is conditional, and that condition is within the power of the debtor to perform, so that the creditor may by the debtor's act be deprived of any extra payment it would not be usurious."

Again in *Pomeroy v. Ainsworth*, 22 Barb. 124, it was said:

"If the gain to the lender beyond the legal rate of interest is made dependent on the will of the borrower, as where he may discharge himself from it by payment of the principal, it is not usury."

See also *Deal v. Becker*, 227 N. Y. 318; and *Florida Land Holding Corporation v. Burke*, 135 N. Y. Misc. 341.

Reply to Respondent's Points I (B) and II.

In "(B)" under Point I plaintiff-respondent contends that the provision in the note in suit authorizing an attorney to confess judgment in

a sum which would include reasonable attorney's fees is violative of Section 5 of the Small Loan Act. He cites in support of this contention *Consolidated Plan of New Jersey v. Shanholtz*, 7 N. J. Misc. 876; 147 Atl. 401 (aff'd 153 Atl. 906).

In Point II of his brief plaintiff-respondent points out what he contends to be the similarity of the *Shanholtz* case and *Morris Plan Corporation of New Jersey v. Schwartz*, 8 N. J. Misc. 417, 150 Atl. 390.

In Point IV of our main brief we thoroughly discussed these two cases and showed their inapplicability to the case at bar. Plaintiff-respondent states on page 10 of his brief that we pleaded ignorance of the facts in *Morris Plan v. Schwartz*, *supra*, when we were familiar with the facts of that case. This is, of course, mere sophistry. The *Schwartz* case has never been decided by this Court and is now pending on appeal. The facts of the case do not appear in the reported decision of the Supreme Court which decided the case on the authority of *Consolidated Plan v. Shanholtz*, *supra*. This Court can certainly not be asked to decide the case at bar upon the authority of the *Schwartz* case when that very case is now before the Court.

As to the *Shanholtz* case, we respectfully refer the Court to our discussion under Point IV of our main brief. It is submitted that plaintiff-respondent has in no way met our arguments with reference to the inapplicability of that case to the case at bar. He does not attempt in any way to explain the provision in Section 5 of the Small Loan Act, which prohibits the charging of any bonus, fees or demands "except upon actual foreclosure of the security or upon the entry of judgment." In fact, plaintiff-respondent does not refer at all to this provision of the Act and apparently he seems to think that it is absolutely meaningless.

It would be mere repetition at this point again to go over the well recognized distinction between the *Shanholtz* case and the case at bar inasmuch as we have already thoroughly discussed the matter in Point IV of our main brief.

And it is also our view and we submit to this Court that the cases relied upon in the Supreme Court—*Morris Plan v. Schwartz*, 8 N. J. Misc. 417, and *Consolidated Plan v. Schanholtz*, 147 Atl. 401—are not in point and not controlling in the case at bar for the reason that there the borrower was the defendant in a District Court action not required to file any pleadings, not required to allege any defect in the instrument, but able to rely on any conceivable defect at the trial. In other words, in the cases cited the defendant borrower had a much broader basis for defense than the plaintiff borrower in the case at bar, who is restricted to the particular allegation of illegality which he has set up in his state of demand. It is for this reason that we submit that the argument made by respondent on pages 7 to 9 of his brief are not only unsound in fact, as we have shown on pages 14 to 19 of our original brief, but even if sound, can not be relied upon by him in the present action.

Reply to Respondent's Points IV, V and VI.

The balance of respondent's brief deals with alleged defects in the note which can not be said to be comprehended within the alleged illegality as stated in the state of demand, which must limit the plaintiff's right to recover. As we have sufficiently pointed out heretofore, the state of demand rests solely upon the alleged violation that the note calls for the payment of a sum in excess of that allowed by the statute. Respondent misinterprets our contention and argues that the

state of demand was adequate to support the finding of the court below and that we can not urge lack of particularity in the state of demand on appeal, and also rests upon the provision in the note calling for reasonable attorney's fees upon default. We do not say that the state of demand was too vague and indefinite, but that it was particular, and since it was particular, and alleged a particular violation of the statute, that it is only on the basis of the particular violation alleged that the respondent can recover, if at all. In other words, even if it would have been sufficient at the outset for the state of demand merely to have alleged in general terms the illegality of the note, and even if under such general allegation of illegality respondent would have been able to avail himself of any possible infirmity in the instrument, none the less, since he has stated a particular defect, and since there is no general allegation of illegality, he can not now rely upon any possible infirmity except that which he has specifically alleged. While this is an ordinary rule of pleading, it is even more applicable in a case such as the present where respondent is seeking to invoke the penalty of an extremely harsh usury statute. Here the law is very well settled that the particular item wherein usury is claimed must be very specifically pleaded, and that the party relying thereon will be strictly held to his particular allegations. We believe we have sufficiently discussed this point in our principal brief heretofore filed, on pages 12 and 13.

Only two further points, both of which were raised by members of this Court at the argument, require attention. It was first suggested that the note fails to state the rate of interest charged. In view of the above discussion, it seems clear that this defect, even if it exists, can not be considered in the present case for the reason that it

is not pleaded and is not comprehended within the issues made by the pleadings. Furthermore, an examination of the note indicates that the amount of interest was stated, to wit: \$30.00, and the times of repaying the interest and principal were stated, and it was further stated that interest would be charged at 3% per month on installments after maturity. It would be going far out of our way to hold that in spite of these provisions adequately advising any borrower of the exact terms of the contract to say that the lender violated either the spirit or the letter of the statute. In fact, we can think of no other method whereby the lender can so completely fulfil every requirement of the statute than by that which he utilized in the present transaction.

The other suggestion made by this Court at the time of the argument was that the note provided for a waiver of the right of appeal by the borrower. Here, too, we say that this issue is not comprehended within an allegation that the note called upon the borrower to pay "a sum in excess of that allowed by the statute." And here, too, we submit that the question can not be raised in the present case. But even if it were properly pleaded, such a provision is in conformity with the public policy of this state as enunciated by the recent decisions of this Court. *Harmina v. Shay*, 101 N. J. Eq. 273 (E. & A.); *Tierney v. Tierney*, 143 Atl. 821 (E. & A.).

As this Court said, in *Harmina v. Shay*, *supra*:

"* * * In some jurisdictions such agreements will not prevent appeal upon the theory that the jurisdiction of the Appellate Court depends upon the law and not upon the agreement of the parties. The general rule, however, is that a party may, by express agreement or stipulation before trial, or judgment, waive his right to appeal, and such agreements or stipulations will be enforced by dis-

missal of the appeal taken out in violation thereof, or by refusing to pass upon questions covered by the waiver. The intention and agreement to waive the right of appeal must be clear and there must be a sufficient consideration. *Such agreements are upheld upon the ground of public policy in encouraging litigants to accept as final decisions of courts of original jurisdiction. 3 Corp. Jur. 661, sec. 533*" (101 N. J. Eq. 273, 274).

Whether this provision be valid or not, it would seem there can be no penalty attached to the mere insertion thereof in a note.

The attitude of the Court with reference to waivers such as the one in the case at bar is perhaps most clearly seen in the recent opinion of the Supreme Court in *New Jersey Mortgage & Loan Co. v. Popick*, 9 N. J. Misc. 1314, 157 Atl. 671 (1931). In this case, which involved a transaction under the Small Loan Act, the note contained a clause providing for the waiver of protest and notice of dishonor by the endorsers, and the Trial Court found that this was a demand in violation of the Act, and that the note was therefore void. The Supreme Court, in reversing the judgment below, said:

"The note contains the following clause: 'Present, demand, notice and protest are hereby waived, and the total sum with interest shall become due and payable at the option of the New Jersey Mortgage and Loan Company in case of default of any payment of principal or interest or both.'

"The statute provides in part as follows: 'No charges, bonus, fees, expense or demands of any nature whatsoever other than interest as above provided shall be made upon such loans or advancements except upon the actual foreclosure of the security or upon the entry of judgment.' And the trial judge held that the provision in the note respecting waiver

of protest and notice of dishonor was an exaction of more than was permitted under the statute and that, therefore, the note was void under section 6, P. L. 1914, p. 75. In this we think there was error. Whether the waiver of notice of presentment and protest bound the endorsers the same appearing upon the face of the notes, we do not decide. *Confidential Finance Co. v. Monostersky*, 148 Atl. Rep. 183. But we do hold that the waiver clause cannot be construed either as a charge, bonus, fee, expense or demand of any nature whatever, and hence, it did not void the instrument."

This case clearly holds that there are some provisions, which, despite the interdiction of the statute, are proper, and we submit that the provision in the note in the case at bar with regard to waiver of right to appeal is of a class with those considered by the Court in the case cited, and therefore does not invalidate the note.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court be reversed and for nothing holden and that a judgment be entered herein in favor of the defendant on the state of demand and in favor of the defendant on the counterclaim in the sum of \$165.00, together with costs.

Respectfully submitted,

GREEN & GREEN,

Attorneys for Defendant-Appellant.

HARRY GREEN,

Of Counsel.

R. RANDOLPH HICKS,

WILLIAM C. SCOTT,

Of the New York Bar.

INDEX.

	PAGE
Notice of Appeal	1
Affidavit of Service	2, 4
Grounds for Appeal	3
Notice of Argument	5
Summons	6
Complaint	7
Schedule A. Annexed to Complaint	11
Answer	13
Notice of Motion to Strike Out Answer and for Summary Judgment	16
Affidavit Supporting Motion	18
Schedule A	21
Affidavit of Service	22
Affidavit Opposing Motion	23
Memorandum of Court Below	27
Rule for Judgment Final	32

of protest and notice of dishonor was an extension of more than was permitted under the statute and that, therefore, the note was void under section 8, V. L. 1914, p. 75. In this we think there was error. Whether the waiver of notice of protest and protest bound the endorsers the same appearing upon the face of the note, we do not decide. *Confidential Finance Co. v. Monastarsky*, 245 App. Div. 291. Nor do we hold that the waiver clause cannot be construed either as a charge, bonus, fee, expense or demand of any nature whatever, and hence, it did not void the instrument.

This case clearly holds that there are some provisions, which, despite the interdiction of the statute, are proper, and we submit that the provision in the note in the case at bar with regard to waiver of right to appeal is of a class with those considered by the Court in the case cited, and therefore does not invalidate the note.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court be reversed and for nothing be done and that a judgment be entered herein in favor of the defendant on the state of demand and in favor of the defendant on the counter-claim in the sum of \$165.00, together with costs.

Respectfully submitted,

CHAS. E. GUNN,

Attorney for Defendant Appellant.

CHAS. GUNN,

Of Counsel.

R. ROBERTSON PRINCE,

WILLIAM C. SCOTT,

Of the New York Bar.