INDEX

STATE OF THE CASE.

DISTRICT COURT OF THE CITY OF EAST ORANGE, NEW JERSEY.

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff-Appellee,* *vs.* MICHAEL A. LISENA, *et als., Defendants.*	*On Contract.* *On Appeal.* *State of the Case.*

Before Hon. William V. Rafferty, Judge, and a jury.

East Orange, New Jersey, March 12, 1929.

Appearances:

Haines & Chanalis, Esqs., by Patrick J. Maloney, Esq., attorneys for the plaintiff.

George A. Henderson, Esq., attorney for the defendant, Michael Lisena.

Summons in the above case was originally issued on July 13, 1927, and made returnable on July 20, 1927; it was then re-issued and the copy of the summons served upon the defendant Lisena, bore date of December 12, 1927, and was returnable December 20, 1927. A jury demand was duly filed by defendant, Lisena, on December 17, 1927; a copy of the summons and state of demand served upon defendant, Lisena, is attached hereto.

A jury was empaneled, examined and sworn.

The plaintiff's only witness was the manager of the plaintiff company who testified that he has

charge of the records of the company, and that according to the company's records the amount of the note was three hundred ($300.00) dollars and that there was paid on account of said note the sum of seventy-six dollars and thirty-six cents ($76.36) leaving a balance of two hundred and twenty-three dollars and sixty-four cents ($223.64) principal. He also claimed interest at the rate of three per cent. per month from the date of default on the note up to July 13, 1927, the date summons was originally issued, amounting to fifty-two dollars and eleven cents ($52.11) making a total due on principal and interest on the date of the issuance of summons of two hundred and seventy-five dollars and seventy-five cents ($275.75); he further claimed interest from July 13, 1927, to the date of trial at six per cent. per annum, amounting to twenty-two dollars and thirty-six cents ($22.36) making a total of two hundred and ninety-eight dollars and eleven cents ($298.11).

On cross examination he admitted that he did not have charge of the records during the time this note was executed and the alleged payments were made.

He further testified that his predecessor, the man who had charge of the records during this period, had been convicted of embezzlement of similar funds. All testimony in reference to this matter was objected to by plaintiff's attorney, but the objection was overruled.

Under cross examination he further stated that the plaintiff was entitled to and claimed an attorney's fees of fifteen (15) per cent. plus fifteen ($15.00) dollars. The original note was admitted in evidence over defendant's objection that the note had not been proved. Plaintiff's

counsel at this point stated that plaintiff waived the attorney's fees of fifteen per cent. plus $15.00.

The plaintiff and defendant thereupon rested their case and made motions respectively for a judgment in favor of their respective clients. The defendant did not offer any evidence on his own behalf as to the amount alleged to have been paid in reduction of the note.

Whereupon after the arguments of counsel, the Court ordered the jury to bring in a judgment in favor of the plaintiff and against the defendant, Lisena, in the sum of two hundred and ninety-eight dollars and eleven cents ($298.-11). The defendant took an exception to the Court's refusal to grant his motion on the ground that under the evidence the amount claimed was more than three hundred ($300.00) dollars and that this was in violation of sections five and six of the statute covering the licensing of such loan companies, such as was the plaintiff, referring to the Pamphlet Laws of 1914, page 78; page 44 of 1911 to 1915 Compiled Statutes of New Jersey. The Court overruled this motion and allowed an exception. The defendant further made the same objection to the entry of judgment in favor of the plaintiff for the same reasons. The Court also overruled this objection and allowed an exception.

The defendant further objected to the proof of the amount due contending it was a jury question, particularly in view of the fact that the only witness for the plaintiff had no personal knowledge of the situation but only the knowledge that was disclosed by his records; contending in view of the fact that the records had been mismanaged by the man who had charge of same,

that a jury question was involved whether or not these were the true amounts. The Court overruled this objection and allowed an exception.

Notice of appeal was duly served and filed and an appeal bond approved and duly filed.

"We hereby agree upon the above State of the Case."

HAINES & CHANALIS,
Attorneys of the Plaintiff.

GEORGE A. HENDERSON,
Attorney of Defendant, Michael Lisena.

SUMMONS.

ESSEX COUNTY, *ss.*

The State of New Jersey to any Constable of said County, or to the (L. S.) Sergeant-at-Arms of the East Orange District Court.

SUMMON Clarence E. Haggerty, Michael Lessena and Thomas Connelly to appear before the District Court of the City of East Orange, to be held at the City Hall, Main street, in the City, on the 20th day of December, 1927, at nine-thirty in the forenoon, to answer unto Trustees System Company, in an action in contract to the damage of the plaintiff, five hundred dollars, hereof fail not.

WITNESS, WILLIAM V. RAFFERTY, Esq., Judge of the said court, at East Orange, aforesaid the 12th day of December in the year one thousand nine hundred and twenty-seven.

DENIS L. CONROY,
Clerk.

STATE OF DEMAND.

EAST ORANGE DISTRICT COURT.

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff,* *vs.* CLARENCE E. HAGGERTY, MICHAEL LISENA and THOMAS CONNOLLY, *Defendants.*	*On Contract.* *State of Demand.*

The plaintiff, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

1. It sues for the amount of a promissory note for $300.00 made by the defendants to the plaintiff, a copy of which note is annexed hereto and made a part hereof.

2. That defendants have paid on account of the principal of said note the sum of $76.36, but have neglected to pay the balance of said note, and by reason of said neglect, the full amount of principal amounting to $233.64 became due and owing, together with interest at the rate of three per cent. per month and an attorney's fee of fifteen per cent. plus fifteen dollars, as more fully appears in the annexed note.

3. Plaintiff still owns said note.

Plaintiff demands as damages the sum of two hundred twenty-three dollars and sixty-four cents ($223.64) besides interest at the rate of

State of Demand.

three per cent. per month from November 20, 1926, together with an attorney's fees of fifteen per cent. plus fifteen dollars, and costs of suit.

HAINES & CHANALIS,
Attorneys of Plaintiff.

TRUSTEES SYSTEM SERVICE.

No. TSCH-659
$300.00 Newark, N. J., June 3rd, 1926

WE, JOINTLY AND SEVERALLY, FOR VALUE RECEIVED, promise to pay to the order of Trustees System Company of Newark, at its office in Newark, New Jersey, the sum of Three Hundred 00/000.....Dollars as principal, together with interest on said principal or on unpaid balances thereof for the time unpaid at the rate of 3% per month, payment to be made in gold coin of the United States of America of the present standard of weight and fineness, in monthly installments on the 3rd day of each month beginning on the 3rd day of July, 1926, until the full obligation of this note shall have been paid, each installment to be $30.00 except the last which may be a final balance of a smaller amount, said payments or any others, at any time made on this note or any renewal of the whole or any part of same to be applied first to said interest then due and the remainder to said principal, and if we shall fail to pay the whole or part of any of said installments of this note or any renewal of same on its due date, or if any of us shall abscond or move from the jurisdiction of the courts of New Jersey or shall assign, secret or dispose of his or her property

with intent to hinder, delay or defraud the creditors of any of us, said company or other legal holder of this note or any renewal of the whole or any part of same shall thereby become entitled to at any time declare at once due all unmatured installments of principal, without notice to any of us and then or thereafter suit may be brought for the entire obligation of this note or any renewal of the whole or any part of same that remains unpaid.

We, the undersigned, jointly and severally further agree that said company or other legal holder may apply to the payment of the whole or any part of this note, or any renewal thereof, when same has become due, all moneys or assets of any kind of ours or any of us in possession of the said company or other legal holder and may, without resorting to such security or other collateral whatever, compel any of us to pay the whole or any part of this note or any renewal of same, such as do satisfy this note or any renewal note being entitled to receive the same endorsed by the company without recourse.

And on default in the payment of the whole or any part of this note or any renewal of same, we the undersigned, jointly and severally further agree to pay interest at the rate of 3% per month from and after the date of such default; and upon the entry of judgment for the whole or any part of this note or any renewal of same, we, the undersigned, jointly and severally further agree to pay all reasonable costs, including attorneys' fees that may be incurred in collecting the whole or any part of this note or any renewal of same; said attorneys' fees to be fixed at $15.00 plus 15% of the amount of such judgment, provided this note or any renewal of the whole or part

of same shall not be construed to charge us or any of us with, or obligate us or any of us to pay, any interest, charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by Chapter 49 of the Laws of New Jersey 1914, or any amendment thereof, known as the Uniform Small Loan Law.

And we, the undersigned, hereby authorize any attorney of any court of record outside the State of New Jersey to appear for us jointly and severally in any court, having competent jurisdiction, in term or vacation, at any time hereafter and confess a judgment against any one or more of us for the whole or any part of this note or any renewal of same, said attorneys' fees and costs which may be due and unpaid, in favor of said company or other legal holder and to waive and release all errors which may intervene in such proceedings and to consent to an immediate execution of said judgment hereby ratifying and confirming all that our said attorneys may do by virtue hereof.

Each of us waives the right of inquisition on any real estate that may be levied upon to collect the whole or any part of this note, or any renewal of same and does hereby voluntarily condemn the same and authorize the clerk of court or other proper officer to enter upon the fi. fa. our said voluntary condemnations, and agrees that said real estate may be sold upon a fi. fa. and also waives and releases all benefit and relief from any and all appraisement and stay of execution and exemption by virtue of laws now in force or hereafter adopted or enacted in the State of New Jersey, or in any of the other states.

State of Demand.

Each of us, whether subscribing hereto as maker, co-maker, endorser, surety or guarantor or in any other capacity, severally waives all demands, protest, presentments and notice thereof and of non-payment and further waives as to the whole or any part of this note or any renewal of same the benefit and relief under the Constitution of any Exemption Laws now in force or hereafter adopted or enacted in the State of New Jersey, or in any of the other states.

And we, the undersigned, hereby certify that we have no joint or several defense to any action, either in law or in equity which may be brought at any time for the collection of the whole or any part of this note or any renewal of same, and further certify that each of us is of lawful age; that at the time of making this loan, the full amount of the loan has been received in cash by us, together with a receipt in compliance with Section 5 of said Chapter 49 of said laws, and that we understand how installments and interest are to be paid, as set forth in said receipt.

Signatures	*Addresses*
Clarence E. Haggerty,	3 Yanticaw avenue, Glen Ridge
Michael Liseng	259 Waverly avenue, City
Thomas Connolly	28 North 6th St., City
Edward Blanche	327 Monroe St., Hoboken

SPECIFICATION OF OBJECTIONS.

NEW JERSEY SUPREME COURT.

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff-Appellee,* *vs.* CLARENCE E. HAGGERTY, *et al.*, *Defendant-Appellant.*	*On Contract.* *Specification of Objections.*

To Haines & Chanalis, Esqs., attorneys of plaintiff-appellee.

SIRS:

The following is a specification of the determinations of the District Court of the City of East Orange in the above-entitled cause, with respect to which the defendant-appellant is dissatisfied in point of law:

(1) At the close of the plaintiff's case the defendant-appellant's attorney made a motion for a direction of a verdict in favor of the defendant-appellant on the following grounds. That the amount claimed was more than $300.00 and that this violated sections five and six of the statute covering the licensing of small loan companies, such as was the plaintiff. The Court denied the motion and appellant asked for an exception and same was granted. The Court erred in this determination, and appellant was dissatisfied with same in point of law.

(2) The defendant-appellant further made objections to the entry of judgment in favor of the plaintiff on the ground that under the evidence

the amount claimed was more than $300.00 and that this violated sections 5 and 6 of the statute covering the licensing of small loan companies, such as was the plaintiff. The Court overruled this objection and defendant-appellant asked for an exception and the same was granted. The Court erred in this determination, and defendant-appellant was dissatisfied with same in point of law.

(3) The defendant objected to the proof of the amount due contending that it was a jury question that should have been left to the jury, as to whether the amount stated was or was not the true amount due. The Court overruled this objection and appellant asked for an exception and same was granted. The Court erred in this determination and defendant-appellant is dissatisfied with same in point of law.

GEORGE A. HENDERSON,
Attorney of Defendant-Appellant.

"Due and legal service of the within specification of objections is hereby acknowledged this 11th day of April, 1929."

HAINES & CHANALIS,
Attorneys of Plaintiff-Appellee.

OPINION OF SUPREME COURT.

Filed June 21, 1929.

NEW JERSEY SUPREME COURT.

No. 439 May Term, 1929.

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff-Respondent.* *vs.* MICHAEL A. LISENA, *et als.*, *Defendants-Appellants.*	*On Appeal.* *Opinion of Supreme Court.*

Submitted May Term, 1929; decided June 21, 1929.

Before Justices Parker, Black & Bodine.

For the plaintiff-respondent, Messrs. Haines & Chanalis.

For the defendants-appellants, Mr. George A. Henderson.

PER CURIAM:

This suit was brought in the East Orange District Court to recover the sum of $223.64 the balance due on a promissory note. The case was tried by the Court with a jury resulting in a directed verdict for the plaintiff for the sum of $297.30.

The plaintiff's only witness was the manager of the plaintiff company, who testified, that he has charge of the records of the company and that there was paid on account of the promissory note of the sum of $76.36. The credibility of the witness and the existence of the facts testified to

by him, not being admitted, are questions of fact, under our cases, of which, the case of Second Nat. Bank *v.* Smith, 91 N. J. L. 531, is illustrative. It was error to direct a verdict for the plaintiff, a jury question was involved. The judgment of the East Orange District Court is therefore, reversed.

RULE FOR JUDGMENT.

Entered September 13, 1929.

NEW JERSEY SUPREME COURT.

No. 439 May Term, 1929.

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff-Respondent.* *vs.* MICHAEL A. LISENA, *et als.*, *Defendants-Appellants.*	*On Appeal.* *Rule for Judgment.*

The Court having considered the appeal of the defendants-appellants to reverse the judgment of the East Orange District Court, entered in favor of the plaintiff-respondent and against the defendants-appellants, and having heard argument of counsel for the respective parties thereon, it is ORDERED that the judgment of the East Orange District Court be and is hereby reversed.

On motion of

GEORGE A. HENDERSON,
Attorney for the Defendants-Appellants.

A true copy

FRED L. BLOODGOOD,
Clerk.

NOTICE OF APPEAL AND GROUNDS OF APPEAL.

Filed September 13, 1929.

NEW JERSEY SUPREME COURT.

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff-Appellant,* *vs.* MICHAEL A. LISENA, *et als.,* *Defendant-Respondent.*	*On Contract.* *Notice of Appeal and Grounds of Appeal.*

To George A. Henderson, Esq., attorney for defendant-respondent, or to whom it may concern:

SIR:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit:

(1) Because the Supreme Court erred in rendering judgment for the defendant-respondent and not for the plaintiff-appellant.

HAINES & CHANALIS,
Attorneys for and of Counsel
with Plaintiff-Appellant.

Notice of Appeal and Grounds of Appeal.

Service of within notice and grounds of appeal is hereby acknowledged this 13th day of September, 1929.

GEORGE A. HENDERSON,
Attorney for and of Counsel
with Defendant-Respondent.

NOTICE OF ARGUMENT.

Filed September 13, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff-Appellant,* *vs.* MICHAEL A. LISENA, *et als.*, *Defendant-Respondent.*	*On Contract.* *On Appeal from New Jersey Supreme Court.* *Notice of Argument.*

To George A. Henderson, Esq., attorney of defendant-respondent:

SIR:

PLEASE TAKE NOTICE that the argument of the appeal in this cause from the New Jersey Supreme Court will be moved before the Court of Errors and Appeals on the 15th day of October, 1929, at the State House in Trenton in and for the County of Mercer, at 10 o'clock in the forenoon or as soon thereafter as said Court can attend to the same.

Dated, September 7, 1929.

Respectfully yours,

HAINES & CHANALIS,
Attorneys for Plaintiff-Appellant.

Service of within notice of argument is hereby acknowledged this 13th day of September, 1929.

GEORGE A. HENDERSON,
Attorney for Defendant-Respondent.

New Jersey Court of Errors and Appeals

TRUSTEES SYSTEM COMPANY OF NEWARK,
Plaintiff-Appellant,

AGAINST

MICHAEL A. LISENA, *et als*,
Defendant-Respondent.

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

The Plaintiff offered in evidence the original note and also its records showing the amount paid thereon. The witness for the plaintiff admitted on cross-examination, over objection, that the Manager of the plaintiff company at the time the loan was made, and who had charge of the records at the times the several payments were made thereon, had been convicted of the crime of embezzlement for misappropriation of similar funds coming into his custody.

The defendant took the stand but offered no evidence as to the amount alleged to have been paid in reduction of the note (State of Case, p. 3, l. 10-12).

ARGUMENT.

POINT ONE.

The only question involved in this appeal is whether the East Orange District Court erred in directing a verdict for the plaintiff for the amount claimed to be due.

The Supreme Court, on the rationale of *Second National Bank* v. *Smith,* 91 N. J. Law (Err. & App.) 531, 103 Atl. 862 (which will be treated hereafter) and cases following the principle therein enunciated, reversed the directed verdict above recited.

In 8 *L. R. A. Digest,* pages 9461, *et seq.,* the following statements appear:

> "A case should be taken from the jury when the evidence is so distinctly all one way that a verdict to the contrary would shock the judicial mind, and would be set aside as having no evidence to support it" (*Citing O'Connor* v. *Armour Packing Company,* 158 Fed. 241).
>
> "When the evidence adduced by one of the parties to a civil action at law is sufficient to warrant a finding in his favor, and no evidence appreciably tending to overthrow the case so made has been adduced by the opposite party, it is the duty of the Court to direct a verdict in favor of the former, if requested to do so" (P. 9470). (Citing *Kuykendall* v. *Fisher,* 8 L. R. A. (N. S.) 94, 61 W. Va. 87, 56 S. E. 48; *LaRue* v. *Lee,* 14 L. R. A. 968, 63 W. Va. 388, 60 S. E. 388).
>
> "If the Court can see that, if a verdict for the plaintiff should be rendered, it ought to

be set aside as being warranted by the testimony, an instruction to that effect should be given in advance of the verdict" (P. 9471). (Citing *Seabury & Johnson* v. *Crowell,* 11 L. R. A. 132, 51 Law (N. J. Sup.) 103, 16 Atl. 54).

"In an action upon a promissory note, where the execution of the instrument is not questioned, and the amount due and the rate of interest, which was not usurious, are shown, the Court may properly direct a verdict for the plaintiff" (P. 9472). (Citing 125 Ga. 72, 54 S. E. 77).

In the case of *Crosby* v. *Wells,* 73 N. J. Law (Err. & App.) 790, 67 At. 295, at page 299, the law on directed verdicts is tersely stated in the following language:

"* * * And the question to be propounded is whether there be any reason why the verdict should not be so directed. The principles with which the answer must accord have been stated in our reports in both positive and negative form. Firstly, the trial court should direct a verdict, when any number of verdicts, if found otherwise than as ordered, would be set aside without sufficient evidence to support them (citing cases), or when the testimony in the case will not support any other verdict."

The propriety of directing a verdict is discussed in the case of *Polhemus* v. *Prudential Realty Corp.,* 74 N. J. Law (Err. & App.) 570, 67 At. 303, at page 307, and we are taking the liberty of quoting therefrom at some length:

"We now come to the second inquiry: Whether, when the defendant below abstained from offering any evidence in support of his plea, the plaintiff had already

proved such facts as warranted the directing of a verdict in his favor. In considering this question, we are not to ask what would have been proper had the defendant done anything in the way of rebutting the plaintiff's case, or setting up an affirmative defense, either under general principles of law, or under any provision of the negotiable instrument act of 1902. We are merely to inquire whether a direction was proper and lawful under the existing circumstances. The defendant below put in his plea denying the truth of the declaration, and thus, so far as pleading goes, made his defense. He wholly failed, however, to support his plea by evidence going to the point in issue. He virtually rested his case on the evidence of the plaintiff. We have already determined that the plaintiff on his *prima facie* evidence was entitled to go to the jury; that is to say, we agreed with Lord Chelmsford in *Giblin* v. *McMullin* (1869), L. R. 2 P. C. App. 331, 335, that, when evidence is left to the jury, it is after this preliminary question is answered affirmatively by the presiding judge: 'Is there any evidence upon which a jury may properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed?'

When, however, the defendant failed to meet the plaintiff's case, a further determination was and is proper, to the effect that the *prima facie* evidence became decisive of the issue. In *Kelly* v. *Jackson* (1832) 31 U. S. 622, 632, 8 L. Ed. 523, the Supreme Court of the United States, speaking by Mr. Justice Story, dealt with *prima facie* evidence, not rebutted, in these words: 'Is it not plain, then * * * that the plaintiff is entitled to recover? What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient

for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject.' And we may be permitted to add to the queries of Justice Story, that, if *prima facie* proofs, unrebutted, should operate upon the minds of the jurors as decisive, why should not the judge at a trial so instruct them. In *Starkie on Evid.* (9th Am. Ed.; 4th Eng. Ed.) *819, the rule is thus stated: '*Prima facie* evidence is that which, not being inconsistent with the falsity of the hypothesis (that is, it might be proved to be untrue by the opponent), nevertheless raises such a degree of probability in its favor that it must prevail, if it be accredited by the jury, unless it be rebutted or the contrary be proved.' In our own state, it may be gathered from *D. L. & W. R. R. Co.* v. *Toffey* (1875) 38 N. J. Law, 525, 529, *Fifth Ward Savings Bank* v. *First Nat. Bank* (1886) 48 N. J. Law, 513, 518, 7 Atl. 318, and *Baumann* v. *Hamb. Amer. Packet Co.* (1901) 67 N. J. Law, 250, 252-3, 51 Atl. 461, that, when a plaintiff has fulfilled the burden of proof laid upon him, and no facts in evidence show that the plaintiff's testimony cannot be true, the court is warranted in di-

> recting a verdict in his favor. This may be simply putting in another form the rule that, when no other verdict would be supported by the evidence, a direction is not erroneous. See *Anderson* v. *Cent. R. R. Co.* (1902) 68 N. J. Law, 269, 272, 53 Atl. 391. The foregoing view might be strengthened by invoking the principle of natural presumptions in evidence, but it seems unnecessary to do this."

We respectfully submit that the principles of law embodied in the foregoing cases have such universal sanction that the citation of further authorities is unnecessary.

The case of *Fein* v. *Meier,* 71 N. J. Law (Sup. Ct.) 12, 58 Atl. 114, holds in substance, that where payment is alleged it is an affirmative defense and must be proved by the party asserting it. This proposition, likewise, is so fundamental that we respectfully submit the mere statement thereof is sufficient.

The case of *Rosinoff* v. *Altshul,* 99 N. J. Law (Err. & App.) 519, 123 Atl. 376 is somewhat similar to the instant case. There the defendant attempted to go to the jury on the question of payment by her brother in his lifetime of a note in the sum of $10,000 on the strength of statements made by the original payee of the note (who was brought in as a party plaintiff, the note having been transferred after maturity) which were supposed to indicate that the maker owed him $5,000.00 instead of $10,000.00 and also proof that the maker had turned over to him seven notes in the aggregate amount of $13,000.00. The Supreme Court in its *Per Curiam* opinion said the only question was whether there was proof of such connection between the seven

notes and the $10,000.00 note, that the case ought to go to the jury and held that there was not and that a directed verdict was proper, saying that it was an attempt to make conjecture do the work of facts.

There is far more to justify this latter remark in the case *sub judice* than in the one just cited.

The rule requiring a controverted question of fact to be submitted to the jury has perhaps found its strongest expression in the cases of *Schmidt* v. *Marconi Wireless Co.*, 86 N. J. Law (Err. & App.) 183, 90 Atl. 1017 and *Second National Bank* v. *Smith, supra.;* but both of these cases are clearly distinguishable from the case at bar.

In the *Marconi* case, *supra,* the fact sought to be proved by Mr. Griggs' testimony (the non-ownership of the stock by Miss Parsons at the time she made an alleged assignment thereof) came as a complete surprise to the plaintiff during the trial, the Court remarking that there was nothing in the pleadings or the proofs to indicate that the plaintiff (assignee) had any knowledge that his assignors had made the admission to Mr. Griggs; and furthermore the testimony of Mr. Griggs related to a conversation between persons not substantiated in any respect by documentary proof or record and depending for its verity on Mr. Griggs' recollection of what was said at that time.

In the *Second National Bank* case, *supra,* the factual question presented was whether or not the estate of a deceased endorser had been properly notified of protest. There was proof that it had been mailed to the executor named in the will. A caviat was filed and the Fidelity Trust Company appointed administrator *pendente lite.*

Smith, the executor named in the will, testified that he did not receive the notice, that if he had he would have sent it to the Fidelity. The trust officer of the Fidelity testified that one week after the notice was alleged to have been sent to Smith his company received it. It was not shown that the notice was sent by any other person, and the Court held that the jury was justified in inferring therefrom that Smith was mistaken in his assertion that the same was not sent by him.

In the case at bar the defendant knew when he was served with the summons and state of demand that the plaintiff company claimed there was a certain amount due on the note with interest from the last payment. As stated previously he offered no evidence of payment by himself or his co-makers. We contend that the evidence of the embezzlements of the predecessor manager, not coupled with any evidence supporting payment, was inadmissible for any purpose, and if this circumstance be eliminated from the trial, then of course there is absolutely no evidence upon which a contrary verdict could be predicated.

For the above reasons it is respectfully urged that a jury could not properly return a verdict for the defendant. Such a verdict would necessarily presuppose payment and there being no evidence to support it would be set aside on well recognized principles of law. If the jury returned a verdict for a lesser amount than that claimed to be due, and proved as above, such a verdict would likewise be set aside.

For the reasons hereinbefore set forth, we respectfully urge that in the case at bar if the jury returned a verdict other than the one di-

rected by the Court, the same would necessarily have to be set aside as having no evidence to support it; and therefore the judgment of the Supreme Court should be set aside and the judgment rendered in the East Orange District Court reinstated.

Respectfully submitted,

HAINES & CHANALIS,
Attorneys for Plaintiff-Appellant.

PATRICK J. MALONEY,
Of Counsel.

New Jersey Court of Errors and Appeals

TRUSTEES SYSTEM COMPANY OF NEWARK, *Plaintiff-Appellant,* *vs.* MICHAEL A. LISENA, *et als.*, *Defendant-Respondent.*	*On Appeal from the New Jersey Supreme Court.*

BRIEF OF DEFENDANT-RESPONDENT.

Facts.

The defendant-respondent was one of the three endorsers on a promissory note for $300 made by one Clarence Haggerty to the plaintiff-appellant, and was called a "co-maker" of same. The note was signed on June 3, 1926, and in December, 1927 (eighteen months later), summons was issued against defendant-respondent. Defendant Haggerty was not served with any process nor does the record show any judgment entered against anyone other than Lisena.

The plaintiff placed in evidence, over objection, the note on which the suit was instituted.

~~The records showing the amount paid thereon were not placed in evidence (p. 2, ll. 38, 40).~~

The plaintiff's only witness was the manager of the plaintiff company who testified that he has charge of the records of the company (p. 1, ll. 38, 40).

On cross examination he admitted that he did not have charge of the records during the time this note was executed and the alleged payments were made.

He further testified that his predecessor, the man who had charge of the records during this period, had been convicted of embezzlement of similar funds (p. 2, ll. 24, 34).

The Court ordered the jury to bring in a verdict in favor of the plaintiff and against the defendant. To this trial counsel for defendant interposed an objection that there was a jury question involved. On an appeal the action of the trial court was reversed by the Supreme Court.

ARGUMENT.

The action of the Supreme Court in reversing the East Orange District Court Judgment should be affirmed.

The credibility of the witness and the existence of the facts testified to by him were not admitted and accordingly a jury question was involved.

There was a jury question not only as to the veracity of the witness, but also as to the authenticity and weight of the records from which he testified.

The Court usurped the function of the jury and thereby said in effect that the records, kept by a man convicted of embezzlement of similar funds, was so trustworthy that the jury should not be allowed to pass upon their weight. It was a jury question and should have been left to the jury.

Defendant-respondent was placed in a position where the Court refused to let the jury infer that the records might be untrustworthy, or the witness not to be believed. The jury would be justified, in their discretion, in disregarding all evidence based on the records, from which the

only witness testified, he having no personal knowledge concerning the facts contained in these records, and the records not having been placed in evidence.

There are many cases in point, among them is *Second National Bank* v. *Smith,* 103 Atlantic 862; 91 Law, 531, holding

"Credibility of a witness is a question for the jury and where an issue depends upon facts, the existence of which is not admitted, even though testified to by a credible witness, who is unchallenged, a question is for the jury."

This is very much in point. Here defendant never admitted the existence of any of the facts testified to by plaintiff. The following cases and many others all are in accord with the principle we contend was violated.

Jones v. *Harper,* 1 Misc. R. 662, "Credibility of a witness is a question for the jury; therefore, it was proper to refuse to direct the verdict for defendant."

Also *Montecalvo* v. *Wahl,* 97 Law, 554, holds; "Where fair-minded men might honestly appear to differ as to the conclusions to be drawn from the facts, *whether controverted or uncontroverted,* the question at issue should go to the jury."

This same principle is enunciated in *Nolan* v. *Bridgetown Co.,* 65 At. 992 and in many other cases.

"Credibility of witnesses and the weight of their testimony are for the jury alone." *Kearns* v. *Waldron,* 76 Law, 370.

"The credibility of witnesses is the peculium of the jury." *Den* v. *Van Cleve,* 5 Law 589, *Newcomb* v. *Downan,* 13 Law, 135.

"The credibility of witnesses and the force and weight of evidence are matters which by our system of jurisprudence, are committed, in litigations which are the proper subject of common law cognizance, to the exclusive determination of a jury." *Chase* v. *Chase,* 50 Equity 143.

"The credibility of witnesses is for the jury." *Acolia* v. *Elizabeth R. Co.,* 57 At. 75.

"Inference of fact from transactions of ambiguous character must be drawn by the jury, not by the Court," is the holding in *Conover* v. *Middletown Township,* 42 Law, 382.

"It is undoubtedly true that a trial judge may not assume as a fact that which is disputed, and by his charge or otherwise withdraw any such matter from the consideration of the jurors," *Crosby* v. *Wells,* 73 Law, 190.

Jones on Evidence, pg. 1163, sec. 903 reads, "Obviously the testimony of a witness may be contradicted or discredited by circumstances as well as by the statement of other witnesses." In our case we contend that the circumstances under which these records were made and kept would discredit them.

Here, in the instant case we have a Court ordering a trial jury to say that a sum of money was owed by defendant, basing his order only on the testimony of a man reading from the records kept by a convicted embezzler, after defendant had denied any liability and left the plaintiff to his proof before a jury.

It is obvious that the defendant-respondent could not take the stand in contradiction of the plaintiff as he had no personal knowledge of the facts in dispute and denied generally the allegations of the plaintiff, leaving plaintiff to his proof, to be passed upon by a jury.

"Statements need not be accepted because not denied." *Dobbin* v. *Plager,* 111 At. 404, 92 Equity 231.

"The Court is not bound to accept everything as true a witness may say, and evidence to be believed, must not only proceed from a credible witness, but it must be credible in itself." *Harris* v. *Barrett*, 72 At. 956, 73 Eq. 386.

Accordingly the Court erred in withdrawing the case from the jury's consideration.

Plaintiff-appellant in its brief cites the case of *Polhemus* v. *Prudential Realty Corp.*, 74 N. J. Law 570. This case in plaintiff-appellant's brief refers approvingly on page 4 of the brief to *Kelly* v. *Jackson* which in part said (p. 5) "such prima facie evidence in the absence of all-controlling evidence, or discrediting circumstances, becomes conclusive of the fact."

Certainly circumstances are discrediting when the records from which testimony is offered were not made by the man testifying or under his supervision, but by his predecessor in office, who was convicted of embezzlement of similar funds at or about the time payments were made on this note.

From the State of the Case it is seen that these records were not even offered in evidence.

Polhemus v. *Prudential Realty Corp.* also spoke approvingly of paragraph 818 of *Starkie on Evidence* as cited on page five of brief of complainant-appellant, which, referring to prima facie evidence, says that, it is "That which must prevail if it be accredited by the jury." Could there be a statement more favorable to the defendant-respondent than this? The defendant-

respondent's objection was that the jury was not afforded an opportunity to accredit or discredit.

It is therefore in view of the above, most respectfully contended that the District Court usurped the function of the jury to pass on questions of fact, as to the credibility of the witness and the credibility of the records of payments from which the witness testified. The jury certainly had a right to pass upon these questions. Even had the records been made by a more reliable individual, they should be passed upon by the jury, and their weight and credibility and his, and that of the witness testifying should have been left to the jury.

The judgment of the Supreme Court reversing the District Court of the City of East Orange should be affirmed.

Respectfully submitted,

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