INDEX.

SUMMONS.

Filed November 4, 1919.

THE STATE OF NEW JERSEY TO LOUIS PASTEELNICK:

YOU ARE SUMMONED to answer the annexed complaint of Samuel J. Pariser, in an action at law in the Essex County Circuit Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

(L. S.)

WITNESS, WORRALL F. MOUNTAIN, Judge of the Essex County Circuit Court at Newark, this 4th day of November, nineteen hundred and nineteen.

JOHN H. SCOTT,
Clerk.

WILLIAM HARRIS,
Attorney.

COMPLAINT.

ESSEX CIRCUIT COURT.

SAMUEL J. PARISER, *Plaintiff,*	*Action at Law.*
vs.	*Complaint.*
LOUIS PASTEELNICK, *Defendant.*	

The plaintiff, Samuel J. Pariser, of the City of Newark, County of Essex and State of New Jersey, says that:

1. The defendant made and delivered to Samuel Roessler a note, a true copy of which is hereunto annexed marked Schedule "A" and hereby made a part hereof, as though herein fully recited.

2. The payee afterwards endorsed said note to Samuel J. Pariser.

3. Said note is now the property of the plaintiff and is unpaid.

The plaintiff demands as damages one thousand dollars, with interest from November 1, 1919.

SECOND COUNT:

1. Plaintiff, at the times herein mentioned was a resident of the City of Newark, County of Essex and State of New Jersey.

2. That on or about the first day of November, nineteen hundred and nineteen, the plaintiff was the owner and holder of a promissory note, a copy of which is hereunto annexed and marked Schedule "A."

3. That prior to November 1, 1919, the plaintiff left said note with the Federal Trust Company of Newark, New Jersey, for collection with instructions to protest the said note if same was not paid in order to hold the endorser thereon, Samuel Roessler, liable.

Complaint.

4. That the said note was not paid by the maker, the defendant on the day when the same became due, but the payment of same was stopped.

5. That the Federal Trust Company of Newark, New Jersey, did not protest said note because on the due date of said note the said defendant, by fraudulent means, procured possession of the said note from the Federal Trust Company of Newark, New Jersey, and unlawfully and fraudulently retained same in his possession until on or about November 10, 1919, thus making it impossible under the Laws of the State of New Jersey for the said Federal Trust Company to properly protest said note, thus releasing from liability on said note the said Samuel Roessler.

6. That by reason of the fraud of the said defendant, the plaintiff has suffered damages in the sum of five thousand dollars.

Plaintiff demands five thousand dollars on this count.

WILLIAM HARRIS,
Plaintiff's Attorney.

SCHEDULE "A."

$1000.00. Newark, N. J., Aug. 1, 1919.

Three Months after date I promise to pay to the Order of Samuel Roessler

One thousand 00/100 .....Dollars

at the Broad & Market National Bank of Newark.

With interest. Value received.

No. Due 11-1-19 (signed) L. Posterlnick.
50 Commerce St.

Endorsed:

Samuel Roessler.
S. J. Pariser.

Answer and Defense.

Notice to the Within Named Defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of service hereof upon you and must file your answer within twenty days from the date of such service and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this notice.

WILLIAM HARRIS,
Plaintiff's Attorney.

ANSWER AND DEFENSE.

Filed January 23, 1920.

The defendant, Louis Pasteelnick, of the City of Newark, County of Essex and State of New Jersey, says, as to the first count, that

1. He admits the first paragraph.

2. As to the statement in the second paragraph defendant has not any knowledge or information thereof sufficient to form a belief.

3. As to the statements in the third paragraph defendant has not any knowledge or information thereof sufficient to form a belief, except as to the statement that the note therein referred to is unpaid, which he admits.

The defendant says as to the second count, that

1. As to the statements in the first paragraph defendant has not any knowledge or information thereof sufficient to form a belief.

2. As to the statements in the second paragraph defendant has not any knowledge or information thereof sufficient to form a belief.

3. As to the statements in the third paragraph defendant has not any knowledge or information thereof sufficient to form a belief.

Reply.

4. He admits the fourth paragraph.

5. He denies the fifth paragraph insofar as any fraudulent conduct charged by plaintiff therein is concerned; as to the remainder of said paragraph, he has not any knowledge or information thereof sufficient to form a belief.

6. He denies the sixth paragraph.

DEFENSE AS TO FIRST COUNT:

The said note of one thousand dollars on which this suit was instituted, was given by the defendant to the payee therein as the attorney for the plaintiff herein, Samuel J. Pariser, as a bonus for a real estate mortgage loan of ten thousand dollars made by the plaintiff to the defendant, and is therefore based on an illegal consideration and is void.

J. HANSBURY CALLAGHAN,
Attorney for Defendant.

REPLY.

Filed February 5, 1920.

Plaintiff, by way of reply to the defense, as to the first count, says that:

1. He denies the facts therein alleged.

At the trial, plaintiff will move to strike out the defense marked "defense as to the first count," on the ground that same does not set forth facts, constituting a defense in law.

WILLIAM HARRIS,
Plaintiff's Attorney.

Minutes.

MINUTES.

ESSEX CIRCUIT COURT.

No. 768-29687.

Thursday, March 11, 1920.

SAMUEL PARISER,
vs.
LOUIS PASTEELNICK.
At Law.

The Court ordered on the trial of this cause and the sheriff returned a panel, whereupon the following persons were returned and sworn as jurors:

1. Martin Hertlain.
2. Arthur F. Benson.
3. Walter L. Van Deizee.
4. John Jasten.
5. Frank L. Powers.
6. Alex M. Jerolamen.
7. Fred A. Sessing.
8. Harry G. Van Ness.
9. Frank L. Evans.
10. Joseph Merz.
11. Lucian R. Shattuck.
12. John F. Winchester.

Plaintiff's attorney, William Harris.

Defendant's attorney, J. Hansbury Callaghan.

Evidence: Max Biddleman, Louis Pasteelnick, Morris Morise, Samuel Kessler, Edward Moffat, Samuel P. Pariser.

The evidence being closed, the jury retired to consider their verdict, an officer being sworn to attend them, when having appeared in court say they have agreed upon their verdict, and by their foreman say they find in favor of the plaintiff and assess the damages against the defendant at the sum of one thousand thirty-six dollars and fifty cents ($1,036.50). Whereupon it is ordered that judgment final be entered in favor of the plaintiff, Samuel J. Pariser and against the defendant, Louis Pasteelnick, in the sum of one thousand thirty-six dollars and fifty cents ($1,036.50) and costs of suit to be taxed. Judgment actually entered March 19, 1920, on motion of Wm. Harris, plaintiff's attorney.

CHARGE OF COURT BELOW TO THE JURY.

CUTLER, *J.*

Gentlemen of the Jury: The plaintiff in this case brings suit to recover a thousand dollars with interest from August 1st, 1919, and there are two claims in his complaint, counts as they are called in law. One was for the money due on a note and the second is a count alleging fraud in obtaining possession of that note. So far as the second count—that is the count in regard to the obtaining of that note by fraud—is concerned there has been a voluntary non-suit allowed, that is, the plaintiff withdraws his complaint so far as obtaining that note by fraud is concerned, and so you gentlemen have nothing whatever to do in determining this case except it may throw some light on the credibility of some of the witnesses in reference to the obtaining of that note from the bank and it leaves you a very simple proposition, and that is, can the plaintiff recover on this note?

He has the note in his possession; he produces it in court and is entitled to a verdict at your hands for the amount of that note unless it appears that the note was given as a bonus for securing the ten-thousand-dollar loan. If it was, then the statute of our State in reference to usury applies. That statute reads: "That no person or corporation shall, upon contract, take directly or indirectly, for a loan of any moneys, wares, merchandise, goods and chattels, above the value of Six Dollars for the forbearance of One hundred dollars for a year, and after that rate for a greater or less sum for long or shorter time."

Usury, then, is a contract upon a loan of money or giving time for forbearing payment of money in excess of the legal rate of interest of six per cent. per annum. If you believe the evidence adduced in this case on behalf of the defendant that the note upon which the suit is brought was given as a bonus in addition to the legal rate of interest of six per cent. for the loan by the plaintiff of $10,000 on the giving of time for the payment of said sum of $10,000, then the note is usurious and illegal and your verdict would be a verdict for the defendant. The real transaction of a loan, no matter under what guise the loan is concealed, if the true nature of the transaction is a loan any charge in excess of the legal rate of interest of six per cent. per annum, is usurious and void. It is no valid objection to the

defense of usury that the note sued upon was part of a transaction involving the sale and purchase of real estate if it in fact was a bonus for the forbearance by the plaintiff of the payment to him in cash for part of the money which was then to be paid or secured him.

Now, remember those principles of law in reference to usury; look at the facts, which are practically admitted, and which lead up to the giving of this note in question. The defendant owned a piece of property; he entered into an agreement with the plaintiff to convey the property to him; the sale was consummated and the deed was delivered. The deed was a deed of warrantee, free from encumbrances, except such encumbrances as were mentioned in the deed. Some time after the conveyance was made the present plaintiff and the purchaser of this property discovered that there was a right of way over part of the property. He then went to his lawyer in reference to it. His lawyer notified the present defendant and negotiations were entered into with reference to that situation. As a result of those negotiations the property was re-conveyed by the present plaintiff to the defendant and the defendant made good to the plaintiff for moneys that he had expended, that amounted to some ten thousand dollars, after the crediting, runs ten thousand, six hundred and some odd dollars—you have the statement before you. Defendant then gave a mortgage back for ten thousand dollars and a check for the six hundred and odd dollars.

Those facts, gentlemen, are practically admitted. Now comes the difficult part. One question you have to solve. The plaintiff says that he wanted profits for his bargain and he bought the property; he expected to make upon it and in order to bring a settlement without a suit, the defendant agreed to allow him a thousand dollars as profit that he would have made if the title had been what he expected it to be. Now, if that was the consideration of that note it was valid consideration and the note can be recovered. On the other hand, the defendant says that is not the transaction at all. The plaintiff says, "Unless you can pay me ten thousand dollars in cash you must give me a thousand dollars as a bonus for letting you have this ten thousand dollars for three years." The mortgage you will recollect is payable in three years but in installments. Now, if it was a bonus, gentlemen, if the story of the defendant is true that it was a bonus for the extension of that time, loaning of that ten thousand dol-

lars, then there cannot be a recovery because, under our statute if it is usury the amount cannot be recovered, and that, gentlemen, is all there is in this case.

This should be considered by you, because the stories differ, and you must determine which party is telling the truth, first what the witnesses have sworn to and then what credit and weight you will give to their testimony. If, after considering all this evidence, you believe the plaintiff's story that the thousand dollar note was a settlement of their difficulties and the amount that he was to receive for his profits and his trouble in the transaction, then he is entitled to a verdict of a thousand dollars and interest from the 1st of August, all of which you have to compute, and add to the note so the sum will be a thousand dollars and interest.

If, on the contrary, you believe the defendant's story, there is nothing said about the profits but that it was a bonus which the plaintiff admitted should be given him for allowing this ten thousand dollars to remain, then, of course, it would be usury and the plaintiff cannot recover. That, gentlemen, is the question that you have to determine.

Jury sworn.

In the matter of Samuel J. Pariser, plaintiff, vs. Louis Pasteelnick, defendant, heard at the Court House, Newark, New Jersey, on the 11th day of March, 1920, before Hon. Willard W. Cutler, Judge, after the Judge had charged the jury the following exceptions and additional charge took place:

Mr. Callaghan. I wish to take an exception; your Honor did not charge as I requested.

The Court. You may take the exception.

Mr. Siff. Your Honor, please, one exception I want to make that I think can readily be cured by recalling the jury.

There has nothing been said about the burden of proof in your Honor's charge. The rule is that the burden of proof is on the defendant in this case and he must establish usury beyond a reasonable doubt, not merely preponderance of evidence. If there is any doubt, that doubt should be resolved in favor of the plaintiff. Due to failure to include anything about the burden of proof in your Honor's charge I ask an exception.

Charge to Jury.

The Court. You think they ought to be charged as to the question where the doubt is?

Mr. Siff. No; I think they ought to be instructed on what the law is about the burden of proof.

The Court. Does your reasonable doubt apply to civil cases?

Mr. Siff. In defence of the case of usury; it is in the nature of a penalty. Parker's digest. I once had occasion to look it up very thoroughly.

Mr. Callaghan. Will you permit me to state what my thought was in the question of that charge on the yellow paper?

The Court. Yes, I will give you a chance to say what you think.

Mr. Callaghan. There has been talk in this testimony of pending suit for damages and the law is where the vendor does not refuse to convey but is unable to convey that all he is liable for is the return of the deposit, return of deposit received and the allowance of the expense and it is only when he refuses to convey that he is liable for the loss of the bargain.

The Court. That is all very true but how does that affect this case?

Mr. Callaghan. Then it would not be a true consideration.

The Court. They agreed on the profits and are entitled to the profits.

Mr. Callaghan. Not on a question of damages.

The Court. Not on a question of damages?

Mr. Siff. The doubt is resolved in favor of the plaintiff, Morris v. Taylor.

Mr. Callaghan. There are subsequent decisions, your Honor please.

Jury recalled.

CHARGE (Continued).

Counsel has desired me to call your attention to the fact that in considering questions of evidence the burden of establishing usury would be upon the defendant, the plaintiff having produced the note and it is necessary to have the fact of usury clearly established by a preponderance of the evidence. Now, it might be considered beyond a reasonable doubt a bargain. The

defense of usury is set up and must be proved by the evidence and cannot be left to the conjecture of the jury. That simply means, gentlemen, that you must be satisfied by the evidence beyond a reasonable doubt that the story told by the defendant about the bonus is true; otherwise the plaintiff will be entitled to have a verdict at your hands.

Mr. Callaghan. Your Honor, I ask an exception to that.

The Court. You may take an exception to that.

If you find this jury comes in against you, you may apply for a rule to show cause if you find that to be the law.

Mr. Siff. I thank your Honor.

The Court. I charged it on the strength of your statement that you had examined it. If you have misstated that I will set it aside. If the Court, acting on a misstatement, charges the jury and the verdict goes on that side, I will set it aside. Counsel has to be responsible for it.

Mr. Siff. I want to state to the Court that the question was looked up by me the year I was admitted, but I do state to the Court that at the time that was the law. It was looked up very thoroughly, too.

The Court. All right.

Rule to Show Cause.

RULE TO SHOW CAUSE.

Filed March 16, 1920.

On application, made within six days after the rendering of the verdict herein:

It is on this 15th day of March, 1920, on motion of J. Hansbury Callaghan, attorney for the defendant, Louis Pasteelnick, ORDERED that the plaintiff show cause before this Court at the Court House, Newark, N. J., at 10 o'clock in the forenoon, on the 27th day of March, 1920, why the verdict in this case should not be set aside and a new trial granted to said defendant, and that a copy of this order be served on the attorney of the plaintiff within five days after this date.

And it is further ORDERED that the said defendant be permitted to reserve all exceptions taken at the trial by him and that this rule shall not preclude the taking of an appeal by the said defendant.

WILLARD W. CUTLER,
Judge.

On motion of

J. HANSBURY CALLAGHAN,
Attorney for Defendant.

Let the above be entered on the minutes.
Rule entered March 16, 1920.

DEFENDANT'S GROUND FOR APPLICATION FOR A NEW TRIAL.

Defendant's grounds for application for a new trial are that:

1. The Court charged the jury at the trial of this case that the defendant had the burden of proving the defense of usury in the above-entitled cause beyond a reasonable doubt;

2. That the jury could have been misled by the charge of the Court relative to the burden on the defendant of proving the defense of usury, and

3. That the Judge's charge relative to the burden on the defendant to establish the defense of usury was erroneous in point of law.

J. HANSBURY CALLAGHAN,
Attorney for Defendant.

It is stipulated that the within ground is to be filed of record as within time.

J. HANSBURY CALLAGHAN,
Attorney of Defendant.

WILLIAM HARRIS,
Attorney of Plaintiff.

MEMORANDA.

Filed May 26, 1920.

CUTLER, *J.*

Vice-Chancellor Backes, in the case of *Norton* v. *Nathanson*, reported in 85 Eq. 409, held:

> "The burden of proving usury is upon the party setting it up, and the facts necessary to constitute it must be clearly established beyond reasonable doubt by the decided preponderance of evidence. It is not enough that the circumstances proved render it highly probable that there was a corrupt bargain; such a bargain must be proved, not left to conjecture."

This case was afterwards affirmed by the Court of Errors & Appeals, 86 Law, 433.

Usury must be established beyond a reasonable doubt by a decided preponderance of the evidence.

The jury could have been misled by the charge of the Court on this subject, and a new trial will be granted.

I will sign an order to that effect.

ORDER.

Filed June 2, 1920.

The rule to show cause why the verdict in this cause should not be set aside and a new trial granted, having been duly argued, and the Court being of the opinion that the jury could have been misled by the charge of the Court, and that a new trial should be granted;

It is on this second day of June, 1920, ordered, that the rule to show cause be made absolute, and that the said verdict be set aside and a new trial granted.

WILLARD W. CUTLER,
Judge, &c.

The attorney of the plaintiff objects to the making of this order granting a new trial.

WILLARD W. CUTLER,
Judge, &c.

Notice of Appeal.

NOTICE OF APPEAL.

Filed June 8, 1920.

ESSEX COUNTY CIRCUIT COURT.

SAMUEL J. PARISER, *Plaintiff-Appellant,* *vs.* LOUIS PASTEELNICK, *Defendant-Appellee.*	*Notice of Appeal.*

To J. Hansbury Callaghan, Esq., counsellor for the above-named defendant, 9 Clinton street, Newark, N. J.

Dear Sir:

PLEASE TAKE NOTICE that the plaintiff in the above-entitled cause hereby appeals to the New Jersey Court of Errors and Appeals from the order and rule of the Essex County Circuit Court, granting the defendant a new trial of the above-entitled cause of action, which order and rule was granted, made and entered in the above-stated action on June 2, 1920.

The grounds of the said appeal are:

1. The Court below made absolute a rule to show cause why a new trial should not be granted and ordered a new trial of the above-entitled cause when said rule to show cause should have been discharged.

2. The charge of the Court below to the jury with respect to the defendant's burden of proof of the defense of usury was entirely correct in point of law.

3. The Court below charged the jury that the defendant had the burden of proving the defense of usury beyond a reasonable doubt by the decided preponderance of the evidence. The defendant took an exception to this portion of the charge. After a verdict and judgment was entered in favor of the plaintiff, the Court below granted a rule to show cause why a new trial should not be granted to the defendant; that the ground for a new trial stated by the defendant was that the said portion of the charge of the Court below was erroneous in the point of law;

that the Court below held that the said portion of the charge correctly stated the law but granted a new trial on the ground that other portions of the charge on that point could have misled the jury; that, in fact, said portion of the charge on that point correctly stated the law to the jury and there was nothing in any other portion of the charge on that point, which could have misled the jury with respect thereto; the rule to show cause should, therefore, have been discharged and the Court committed error in granting a new trial.

4. The Court below granted the defendant a rule to show cause why a new trial should not be granted. The ground stated by defendant as ground for a new trial was that the Judge charged the jury that the defendant had the burden of establishing the defense of usury beyond a reasonable doubt and that his charge in that respect was erroneous in law; the Court below made absolute the said rule and entered an order granting the defendant a new trial on the ground that the burden of proof on the defendant in the above-entitled cause was to establish the defense of usury beyond a reasonable doubt by the decided preponderance of evidence and that the jury in the trial of the above-entitled cause could have been misled by the charge of the Trial Judge with respect to the burden of proof upon the defendant to establish the defense of usury; that, in fact, the Judge charged the jury in the above-entitled cause with respect to the law of the burden of proof on the defendant in establishing the defense of usury in accordance with what he held the law to be on that point in granting a new trial; that even if his charge can be construed as charging that the burden was upon the defendant to establish the defense of usury in the above-entitled cause beyond a reasonable doubt, nevertheless, that was a correct statement of the law on that point and the new trial should not have been ordered on the ground of any alleged misdirection of the jury on that point and the order of the Court below granting a new trial was erroneous in law and without any justification in point of law.

5. So much of the charge of the Court below to the jury as was duly excepted to, was correct in point of law and no new trial should have been granted on the ground of alleged misdirection to the jury.

Respectfully yours,

WILLIAM HARRIS,

Plaintiff's Counsellor.

Stipulation.

Due, legal and timely service of the within notice is hereby acknowledged this 7th day of June, 1920, as of time; but the truth of the facts as to the Judge's charge are denied.

J. HANSBURY CALLAGHAN.

10

STIPULATION.

Filed June 8, 1920.

New Jersey Court of Errors and Appeals

SAMUEL J. PARISER, *Plaintiff-Appellant,* *vs.* LOUIS PASTEELNICK, *Defendant-Appellee.*	*Stipulation.*

20

It is hereby stipulated and agreed by and between the undersigned, attorneys and counsellors for the above parties that the above-entitled cause be submitted on briefs; and it is further stipulated and agreed by and between them that the state of the case in the above-entitled matter is to be considered in the same manner and with the same effect as if the objection on the record to the order granting a new trial were printed and read as follows:

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"The attorney of the plaintiff objects to the making of this order granting a new trial on the ground that there was no error of law in the charge to the jury in the above-entitled cause in respect to the burden of proof on the defendant relative to establishing the defense of usury."

It is further mutually stipulated and agreed by and between the parties hereto that plaintiff-appellant's attorney and counsellor does hereby consent that the time within which defendant-appellee may file his brief in the above-entitled cause be extended to August 5, 1920.

40

WILLIAM HARRIS,
Attorney and Counsellor for Plaintiff-Appellant.

J. HANSBURY CALLAGHAN,
Attorney and Counsellor for Defendant-Appellee.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SAMUEL J. PARISER,
Plaintiff-Appellant,

vs.

LOUIS PASTEELNICK,
Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT.

A.

Statement of the Case.

This suit was brought by the plaintiff on a note for one thousand dollars made by the defendant to the order of Samuel Roessler and by Samuel Roessler endorsed to the plaintiff. The note was made August 1, 1919, and was due on November 1, 1919.

The circumstances leading up to giving the note were as follows:

On March 31, 1919, the defendant gave the plaintiff a warranty deed for certain property. Subsequently it was discovered by the plaintiff that an adjoining property owner had a right of way. The plaintiff went to his attorney, Samuel Roessler, and acquainted him with this discovery. Samuel Roessler, in behalf of plaintiff, threatened to bring suit against the defendant in the Court of Chancery for the rescission of the contract and at law for damages. Negotiations were commenced to settle the difficulty out of court, with the result that the defendant agreed to accept a deed for the property from the plaintiff and the defendant agreed to give the plaintiff a mortgage on the property for ten thousand dollars, representing part of the consideration which had been paid by the plaintiff to the defendant for the first mentioned deed, and the defendant further agreed to give the plaintiff cash (about $1,600) for the balance of the consideration that he had paid and the expense that he had been put to during the four months that plaintiff had held the property after crediting against the expense the income of said property during the said four months, the cash to be paid also to include one thousand dollars for the trouble plaintiff had been put to and for the loss

of profit he had expected to make on a resale of the property. At the time of settlement, the plaintiff gave the defendant a deed and the defendant gave back the plaintiff a mortgage for ten thousand dollars and a check for a small amount, the amount of which I do not recall, but believe it was about six hundred dollars, and a note for a thousand dollars, the defendant claiming at the time of settlement that he was a thousand dollars short in cash in order to close the settlement and that plaintiff would have to take the note of the defendant for that amount. The plaintiff did take the note for a thousand dollars, the note being payable to Samuel Roessler, the attorney of the plaintiff, and by Samuel Roessler endorsed to the plaintiff; it is the note sued on in this case. In a nutshell, the plaintiff's position is that the note was given as part payment of settlement of threatened litigation and in part payment for plaintiff's trouble and of loss of profits which plaintiff had expected to make on the real estate transaction. Defendant contended that the note wholly represented usury and was given to the plaintiff as a bonus for plaintiff's agreement to take the ten-thousand-dollar mortgage on the property. These facts appear in the charge of the Court below to the jury. (See state of the case, pages 7 to 11.)

Witnesses were produced on each side in support of the story of each side and the Judge charged the jury. After the jury had retired, the attention of the Court below was called to the fact that it had failed to charge the jury on the law with respect to the burden of proof, the plaintiff's attorney contending that the law was that the defendant had the burden of establishing the defense of usury beyond a reasonable doubt and the defendant's attorney contending that defendant had the burden of establishing the defense of usury only by the preponderance of evidence as in other civil cases. The attention of the Court below was called to the case of *Taylor* v. *Morris,* as set forth in Parker's Digest, and the jury was thereupon recalled. With respect to the law of the burden of proof on the defendant to establish the defense of usury, the Court below charged the jury as follows (see state of case, pages 10 to 11):

> "Jury recalled.
>
> "Counsel has desired me to call your attention to the fact that in considering questions of evidence the burden of establishing usury would be upon the defendant, the plaintiff having produced the note, and it is necessary to have the fact of usury clearly established by a preponder-

ance of the evidence. Now, it might be considered beyond a reasonable doubt a bargain. The defense of usury is set up and must be proved by the evidence and cannot be left to the conjecture of the jury. That simply means, gentlemen, that you must be satisfied by the evidence beyond a reasonable doubt that the story told by the defendant about the bonus is true; otherwise the plaintiff will be entitled to have a verdict at your hands.

"*Mr. Callaghan.* Your Honor, I ask an exception to that.

"*The Court.* You may take an exception to that."

~~It will be noticed that no ground for defendant's exception to the charge is stated.~~

The jury returned with a verdict in favor of the plaintiff and against the defendant for the full amount of the note. The defendant applied for a new trial and a rule to show cause why a new trial should not be granted was entered (see state of the case, page 12).

The grounds for a new trial are stated as follows (see state of the case, page 13):

"1. The Court charged the jury at the trial of this case that the defendant had the burden of proving the defense of usury in the above-entitled cause beyond a reasonable doubt.

"2. That the jury could have been misled by the charge of the Court relative to the burden on the defendant of proving the defense of usury.

"3. That the Judge's charge relative to the burden on the defendant to establish the defense of usury was erroneous in point of law."

The question was argued on briefs in the court below and the sole question argued on briefs was whether or not the law in this State is that a defendant who pleads usury has the burden of establishing that defense beyond a reasonable doubt, or merely by a preponderance of the evidence, the plaintiff contending the former, and the defendant contending the latter.

The Court below on this question found as follows (see state of the case, page 14):

"Memoranda.

"CUTLER, *J.*

"Vice-Chancellor Backes, in the case of *Norton* v. *Nathanson,* reported in 85 Eq. 409, held:

> 'The burden of proving usury is upon the party setting it up, and the facts necessary to constitute it must be clearly established beyond reasonable doubt by the decided preponderance of evidence. It is not enough that the circumstances proved render it highly probable that there was a corrupt bargain; such a bargain must be proved, not left to conjecture.'

"This case was afterwards affirmed by the Court of Errors and Appeals, 86 Law, 433.

"Usury must be established beyond a reasonable doubt by a decided preponderance of the evidence.

"The jury could have been misled by the charge of the Court on this subject, and a new trial will be granted.

"I will sign an order to that effect."

An order for a new trial was entered and plaintiff's objection thereto was duly noted on the record. (See state of the case, pages 14 and 17, lines 34 to 38.)

Plaintiff promptly appealed from the order of the Court below granting a new trial on the following grounds (see state of the case, pages 15 to 16):

"1. The Court below made absolute a rule to show cause why new trial should not be granted and ordered a new trial of the above-entitled cause when said rule to show cause should have been discharged.

"2. The charge of the Court below to the jury with respect to the defendant's burden of proof of the defense of usury was entirely correct in point of law.

"3. The Court below charged the jury that the defendant had the burden of proving the defense of usury beyond a reasonable doubt by the decided preponderance of the evidence. The defendant took an exception to this portion of the charge. After a verdict and judgment was entered in favor of the plaintiff, the Court below granted a rule to show cause why a new trial should not be granted to the defendant; that the ground for a new trial stated by the defendant was that the said portion of the charge of the Court below was erroneous in the point of law; that the

Court below held that the said portion of the charge correctly stated the law but granted a new trial on the ground that other portions of the charge on that point could have misled the jury; that, in fact, said portion of the charge on that point correctly stated the law to the jury and there was nothing in any other portion of the charge on that point, which could have misled the jury with respect thereto; the rule to show cause should, therefore, have been discharged and the Court committed error in granting a new trial.

"4. The Court below granted the defendant a rule to show cause why a new trial should not be granted. The ground stated by defendant as ground for a new trial was that the judge charged the jury that the defendant had the burden of establishing the defense of usury beyond a reasonable doubt and that his charge in that respect was erroneous in law; the Court below made absolute the said rule and entered an order granting the defendant a new trial on the ground that the burden of proof on the defendant in the above-entitled cause was to establish the defense of usury beyond a reasonable doubt by the decided preponderance of evidence and that the jury in the trial of the above-entitled cause could have been misled by the charge of the Trial Judge with respect to the burden of proof upon the defendant to establish the defense of usury; that, in fact, the Judge charged the jury in the above-entitled cause with respect to the law of the burden of proof on the defendant in establishing the defense of usury in accordance with what he held the law to be on that point on granting a new trial; that, even if his charge can be construed as charging that the burden was upon the defendant to establish the defense of usury in the above-entitled cause beyond a reasonable doubt, nevertheless, that was a correct statement of the law on that point, and the new trial should not have been ordered on the ground of any alleged misdirection of the jury on that point of law.

"5. So much of the charge of the Court below to the jury as was duly excepted to, was correct in point of law, and no new trial should have been granted on the ground of alleged misdirection to the jury."

Broadly speaking, there are two questions to be decided on this appeal:

(1) Did the Court below err in point of law in granting the defendant a new trial, which in turn involves the question of whether or not the Court below correctly charged the jury on

the law with reference to the burden of proof on the defendant to establish the defense of usury, and (2) is the order granting a new trial reviewable by or ~~applicable~~ appealable to this Court. The second question is really a preliminary question, and the reason I state that that seems to be one of the questions raised is that my adversary at one time questioned whether or not such an order was appealable; my adversary has since changed his views on that question, but I want to cite some cases on the point in case there should be any question in the mind of the Court on that point.

B.

GROUNDS OF APPEAL.

The following grounds of appeal are asserted and intended to be argued:

1. The Court below made absolute a rule to show cause why a new trial should not be granted and ordered a new trial of the above-entitled cause when said rule to show cause should have been discharged.

2. The charge of the Court below to the jury with respect to the defendant's burden of proof of the defense of usury was entirely correct in point of law.

3. The Court below charged the jury that the defendant had the burden of proving the defense of usury beyond a reasonable doubt by the decided preponderance of the evidence. The defendant took an exception to this portion of the charge. After a verdict and judgment was entered in favor of the plaintiff, the Court below granted a rule to show cause why a new trial should not be granted to the defendant; that the ground for a new trial stated by the defendant was that the said portion of the charge of the Court below was erroneous in point of law; that the Court below held that the said portion of the charge correctly stated the law, but granted the new trial on the ground that other portions of the charge on that point could have misled the jury; that, in fact, said portion of the charge on that point correctly stated the law to the jury, and there was nothing in any other portion of the charge on that point which could have misled the jury with respect thereto; the rule to show cause should, therefore, have been discharged, and the Court committed error in granting a new trial.

4. The Court below granted the defendant a rule to show cause why a new trial should not be granted. The ground stated by defendant as ground for ~~trial~~ new trial was that the Judge charged the jury that the defendant had the burden of establishing the defense of usury beyond a reasonable doubt and that his charge in that respect was erroneous in law; the Court below made absolute the said rule and entered an order granting the defendant a new trial on the ground that the burden of proof on the defendant in the above-entitled cause was to establish the defense of usury beyond a reasonable doubt by the decided preponderance of evidence and that the jury in the trial of the above-entitled cause could have been misled by the charge of the Trial Judge with respect to the burden of proof on the defendant to establish the defense of usury; that, in fact, the Judge charged the jury in the above-entitled cause with respect to the law of the burden of proof on the defendant in establishing the defense of usury in accordance with what he held the law to be on that point in granting a new trial; that even if his charge can be construed as charging that the burden was upon the defendant to establish the defense of usury in the above-entitled cause beyond a reasonable doubt, nevertheless, that was a correct statement of the law on that point, and the new trial should not have been ordered on the ground of any alleged misdirection of the jury on that point, and the order of the Court below granting a new trial was erroneous in law and without any justification in point of law.

5. So much of the charge of the Court below to the jury as was duly excepted to was correct in point of law, and no new trial should have been granted on the ground of alleged misdirection to the jury.

C.

BRIEF OF ARGUMENT.

(a) The Court below charged the jury that the defendant had the burden of proving the defense of usury beyond a reasonable doubt by the evidence; this was a correct statement of the law of this state on that point; the ground for a new trial was that this was an incorrect statement of the law on that point; after argument by briefs, the Court below found the law of this state to be that the defendant has the burden of proving the defense of usury beyond a reasonable doubt by the decided preponderance of the evidence; that this finding of the law of this state was in accord with the law as charged to the jury; the Court below nevertheless granted the defendant a new trial on the ground that the jury could have been misled by the charge of the Court below on this point, whereas in view of the fact that the Court subsequently found the law to be exactly as he had charged the jury, the jury could not have been misled as to the law, and it was, therefore, error in law for the Court below to grant a new trial; the order of the Court below granting a new trial is, therefore, erroneous in point of law, as there was no legal reason for the granting of the said order. Taylor v. Morris, 22 N. J. Equity 606, 612 and 613. Berden v. Trustees, 47 N. J. Equity, page 8, page 10, affirmed in 48 N. J. Equity, page 309. Norton v. Nathanson, 85 N. J. E. 409, 86 N. J. L. 433. (See state of the case, pages 10 to 17.)

In the court below the plaintiff-appellant relied upon the cases of *Taylor* v. *Morris* and *Berden* v. *Trustees, supra,* as establishing the proposition that the defendant has the burden of proving usury beyond a reasonable doubt. The cases cited by Mr. Callahan for the proposition that the defense of usury need be proved only by the preponderance of evidence were *Kane* v. *Hibernia Insurance Company,* 39 New Jersey Law, 697; *Chew* v. *Ferrari,* 29 New Jersey Equity, 380; *Blackmore* v. *Ellis,* 70 New Jersey Law, page 264.

I am not capable of a better or clearer exposition and differentiation of those cases than are contained in my brief in the court below, and I, therefore, take the liberty of copying my brief in the court below at this point, as a discussion in this brief with reference to such cases would be a mere repetition of that brief:

"I.

"Upon careful examination of the cases in this State, there can be no doubt that the law in this State is that the burden of proof is upon the party setting up usury and the facts necessary to constitute it must be clearly established beyond a reasonable doubt, and that, therefore, the charge of the Court to the jury at the trial of the above case was correct.

"A decision of the Court of Errors and Appeals upon a specific point is binding as a precedent that must be followed by every court lower than the Court of Errors and Appeals. A decision of the Court of Errors and Appeals cannot be overruled by a subsequent decision of a lower court or *obiter dicta.* The only court that can reverse a decision or rule of law laid down by the Court of Errors and Appeals is the Court of Errors and Appeals in a *decision* on the very point in issue. I shall demonstrate that the law as laid down by the Court of Errors and Appeals of this State is that the party alleging usury has the burden of proving it beyond a reasonable doubt, and I shall then further demonstrate that there is no Court of Errors and Appeals *decision* on that point that holds that it is sufficient to establish usury by a mere preponderance of the evidence.

"II.

"The two Court of Errors and Appeals decisions which hold that the defendant has the burden of proving usury beyond a reasonable doubt are: *Taylor* v. *Morris,* 22 Eq. 606, see pages 612 and 613, and the case of *Berden* v. *Trustees,* 47 Eq. 8, page 10, affirmed in 48 Eq. 309. These two cases have considered the question and the cases in this State very thoroughly and are decisions on the very point in issue at bar. These two cases have collected and analyzed all the decisions on this point in this State. The former case was decided by the Court of Errors and Appeals in 1871; the latter case was decided by the Court of Errors and Appeals in 1890. In both of these cases Justice Depue rendered a decision in conformance with the majority of the Justices who decided those cases. The following is a very important extract from *Taylor* v. *Morris,* 22 Eq. 606, 612 and 613, and is important because it not only lays down the rule of law, but also gives the reason that is at the foundation of that rule of law and the excerpt is as follows:

> " 'The burden of the proof is on the defendant, and the defense cannot be supported by probabilities or suspicions,

however strong. If allowed to prevail, it must be sustained by such preponderance of evidence as establishes the truth of the allegations on which it depends, *beyond a reasonable doubt.* Brolasky *v.* Miller, 4 Halst. Ch. 789; N. J. Pat. Tanning Co. *v.* Turner, 1 McCarter 326; Conover *v.* Van Mater, 3 C. E. Green. 481.

"'This rule as to the degree of proof required, in a measure depends upon the character of the defense. The usury law now in force has mitigated the penalty which was prescribed by the former law, but has not abolished it. The plaintiff, on a successful defense, loses the interest on the sum lent and the costs of the suit, both of which he would be entitled to recover on a demand not obnoxious to the provisions of the statute. To this extent the defense involves a forfeiture as a penalty, and the rules of evidence touching the enforcement of a penalty still apply. (Conover *v.* Van Mater.) In addition thereto the defendant, in the securities he executed, has put in writing an acknowledgment that he received the full amount of the securities in question. In the most ordinary case, where the parties have put their contract in writing, public policy and established rules of evidence exact clear and cogent proof when parol testimony is relied on to show a different contract. The statute which makes parties competent witnesses in their own behalf, provides facilities for defenses of this kind. If the defense should ever be sustained upon the uncorroborated testimony of the party by whom the security was made, the testimony should be, in all respects, unexceptionable.'

"The following is the important extract from *Berden* v. *Trustees,* 47 Eq. 8, page 10, subsequently affirmed by the Court of Errors and Appeals *for the same reasons* given by the Court below in 48 Eq. 309:

"'The burden of proof is upon the parties setting up usury. The facts necessary to constitute it must be clearly established, *beyond reasonable doubt,* by the decided preponderance of evidence. It is not enough that the circumstances proved render it highly probable that there was a corrupt bargain; such a bargain must be proved, and not left to conjecture. Brolasky *v.* Miller, 4 Hal. Ch. 789; New Jersey Patent Tanning Co. *v.* Turner, 1 McCart. 326; Barcalow *v.* Sanderson, 2 C. E. Gr. 460; Conover *v.* Van Mater, 3 C. E. Gr. 481; Morris *v.* Taylor, 7 C. E. Gr. 438; *S. C.* on appeal *sub. nom.* Taylor *v.* Morris, 7 C. E. Gr. 609; Rowland *v.* Rowland, 13 Stew. Eq. 281. Usury will not be inferred when the opposite conclusion can, reasonably and fairly, be arrived at. Gillette *v.* Ballard, 10 C. E. Gr. 491; Homoeopathic Mutual Life Ins. Co. *v.* Crane, 10 C. E. Gr. 418, 422.'

"III.

"Not a single case cited in the brief of Mr. Callahan is a decision of the Court of Errors and Appeals reversing the rule as laid down in Taylor *v.* Morris, and upon close examination of those cases, the statements therein contained on the point of usury will be found to be either *obiter dicta* or else statements not in conflict with the rule laid down in Taylor *v.* Morris, or else a decision on some point other than usury. In fact, even the *obiter dicta* is impliedly disapproved in view of the *subsequent* decision of Berden *v.* Trustees, above cited.

"The first case cited by Mr. Callahan is *Kane* v. *Hibernia Insurance Company,* 39 Law 697, which was decided in 1877. Upon a close examination of that case it will be found that that case was an action on an insurance policy and that the defense was that the plaintiff had willfully and knowingly set fire to a building. The question was whether the defense had to be established by a preponderance of evidence or beyond a reasonable doubt, in view of the fact that the defense involved a charge of *crime.* In view of the fact that the issue there presented was not on a question of usury and that the law of usury was not argued by counsel, it is very plain that anything said by the Court in that case on the question of usury was only *obiter dicta* and was not a *decision* on a question of *usury.* The said case which presented an issue as above set forth could not overrule the law as laid down by Taylor *v.* Morris.

"In order to thoroughly understand the Court's comment with respect to usury, the whole case must be read carefully and upon a careful reading of the case it is plain that even the *obiter dicta* did not attempt to state that on a question of usury the defendant has the burden of establishing usury by only a preponderance of evidence. The Court is discussing the question of whether the law in this State should be that in *all* defenses involving a charge of *crime,* the rule should be that the crime pleaded in the civil case must be proved beyond a reasonable doubt. In discussing this point, the Court alludes to various illustrations involving various forms of crimes. Amongst other illustrations, the Justice rendering the opinion alludes to the defense of usury, as laid down in Taylor *v.* Morris and says that while the Court of Errors and Appeals has established the law in usury cases in Taylor *v.* Morris, that the defendant must prove usury beyond a reasonable doubt, nevertheless the Court of Errors and Appeals in that case did not mean to lay down a

general rule that in *all* civil cases in which the defense involves some *criminal* charge, the general rule is that the crime must be established beyond a reasonable doubt. In other words, the Court said that in libel and slander cases, where the defense involved a charge of crime and in usury cases the defense must be established beyond a reasonable doubt and limited that rule to those two classes of cases, but at the same time said that it should not be understood that that would be the rule in *all* civil cases with respect to *all* crimes charged in *all* civil cases.

> "The exact *obiter dicta* is as follows:
>
> 'In actions where usury was pleaded, it has been said that the defense must be established beyond a reasonable doubt, Conover *v.* Van Mater, 3 C. E. Green 481; Taylor *v.* Morris, 7 *Id.* 606. This language was used, perhaps inconsiderately, to express the quantity of evidence that, under the circumstances, should be required to defeat the plaintiff's security, without intending to assert that, as a *rule* of law, the same measure of proof should be required in civil as in *criminal cases.*'

"The careful reading of this language will show that what the Court intended to say was that while the rule in usury cases as settled by cases cited is that the defenses of usury must be proved beyond a reasonable doubt, nevertheless it must not be understood that this rule is to be extended as a *general rule* to cover all *criminal charges* of other descriptions involved in civil cases. The Court in the Kane case does not say that the rule in usury cases is that the defense of usury need be established only by the preponderance of evidence and uses no language to that effect.

"As the question of usury was not in issue and was, therefore, not argued in the Kane case, it is clear that the Kane case is not a decision overruling Taylor *v.* Morris.

"The Kane case was decided in 1877 and a *subsequent* decision by the Court of Errors and Appeals (the Berden case above cited) on an issue of usury reiterated the rule as laid down by Taylor *v.* Morris and, in fact, cites the case of Taylor *v.* Morris with entire approval. The Berden case was decided in 1890 by the Court of Errors and Appeals.

"With reference to the case of *Chew* v. *Ferrari,* 29 N. J. Eq. 380 (1878) it is true that the Court says:

"'It is sufficient to sustain the defense of usury if the weight of evidence be in its favor.' In the first place, the said case of *Chew* v. *Ferrari* is not a decision of the Court of Errors and Appeals and, therefore, could not overrule the law as laid down by

the Court of Errors and Appeals in the case of Taylor *v.* Morris and anything therein stated which conflicts with the law as laid down by the Court of Errors and Appeals would have to be disregarded as being contrary to the law of the highest court in the State. In the second place, the case of Berden *v.* Trustees, above cited, is a Court of Errors and Appeals decision, which was decided in 1890 and was decided subsequent to the case of Chew *v.* Ferrari and the Court of Errors and Appeals' decision rather than the decision in Chew *v.* Ferrari would be the one to control this court. In the third place, there is nothing in that statement of the law as it appear in Chew *v.* Ferrari which conflicts with the law as laid down by the Court of Errors and Appeals; the Chancellor merely stated that it was sufficient if the weight of evidence be in favor of the defense of usury, but he does not state the *degree* of weight which must be present. The Chancellor does not state that it is sufficient if the weight should be by a preponderance of the evidence or if the weight must be beyond a reasonable doubt. That statement is, therefore, not an authority either way, as it does not express clearly the *quantum* of evidence that is necessary to sustain the burden and, as above shown, even if it could be construed as being contrary to the decision of the Court of Errors and Appeals, the statement of the Chancellor would have to be disregarded as being in conflict with the settled law as laid down by the Court of Errors and Appeals. It might further be pointed out that the Chancellor cites in that case, the Kane case, but as what was said in the Kane case was merely *obiter dicta,* the authority relied upon was rather an ill chosen one and the authority relied upon was a case which, as above shown, was not law in this State, on the question of usury.

"With respect to the case of Blackmore *v.* Ellis, cited in the brief of Mr. Callahan, said case is not a usury case and anything therein said is, therefore, *obiter dicta* on that point. The case of *Blackmore* v. *Ellis,* was a suit for assault and battery. It cites the Kane case merely to show that the general rule is that proof of a crime in a civil case need not be beyond a reasonable doubt, which rule, as we have seen upon an examination of the Kane case, is subject to exceptions with respect to usury and crimes charged in defense in libel and slander actions. There is not the slightest allusion in the case of Blackmore *v.* Ellis, to the question of usury. The most that it holds is that the *general rule* is that where a *plaintiff* sues for an injury, resulting from a

criminal act, he need not prove his case beyond a reasonable doubt. This is very much beside the point at issue on the application for a new trial in this case.

"IV.

"To recapitulate I might state that the cases under discussion establish that the general rule in civil cases is that the burden of proving an affirmative defense is on the defendant; that as a general rule an affirmative defense need only be proven in a civil case by a preponderance of the evidence, that as a general rule even though the affirmative defense involves a charge of crime in a civil case it need be established only by a preponderance of the evidence, but that this latter rule is subject, under the decision of the Court of Errors and Appeals in this State where the question was in point, to an exception that in usury cases the defense of usury must be established by the defendant beyond a reasonable doubt. The Court of Errors and Appeals' decision of Taylor *v.* Morris and Berden *v.* Trustees and the cases therein cited are *decisions* in point which are decisive on this application and control this court in the conclusion to be drawn on the point of law now in issue. None of the cases cited by the defendant's counsel is a decision in point contrary to the law as demonstrated by plaintiff in this behalf."

After considering the briefs, both of paintiff and defendant, the Court filed a memorandum finding the law to be as set forth in plaintiff's brief citing the later case of *Norton* v. *Nathanson,* 85 N. J. E. 409. The lower Court then goes on to state that it finds that the jury *could* have been misled by the charge of the Court below on this point, and for that reason granted a new trial.

The charge of the Court below on that point is before this Court and it is impossible to see wherein the jury could have been misled by the charge of the Court below, as the charge was exactly in accordance with the law.

The charge of the Court below with reference to the burden of proof is contained in four sentences. And if we consider these four sentences separately, or if we consider them all together, it is clear that the charge on that point to the jury was exactly in accordance with law and there is nothing misleading or harmful in any one sentence or in the whole charge on that point.

The first sentence is as follows (see state of case, page 10):

> "Counsel has desired me to call your attention to the fact that in considering questions of evidence the burden of establishing usury would be upon the defendant, the plaintiff having produced the note, and it is necessary to have the fact of usury *clearly established by a preponderance of the evidence.*"

Certainly there is nothing harmful to the defendant in this statement of the law. If anything, it was favorable to the defendant and did not go far enough to protect the plaintiff's rights. This sentence placed the burden on the defendant to establish usury only by a preponderance of the evidence. Certainly there is nothing harmful to the defendant in stating such to be the rule for the error if any was one that was harmful to the plaintiff, and the charge in that respect was very much in favor of the defendant and not harmful to him.

The second sentence of the charge is as follows (see state of the case, page 10):

> "Now, it *might* be considered beyond a reasonable doubt a bargain."

There is nothing harmful to the defendant in this sentence. The sentence simply means that the jury would be *justified in drawing* or *might draw the inference* that a bargain was established beyond a reasonable doubt under the evidence. This sentence was no more than a comment on the evidence and by the word *"might"* the Judge left it *optional* with the *jury* to determine whether or not, under the evidence, the bargain contended for by the plaintiff or the defendant was established beyond a reasonable doubt. Here, again, the charge was not harmful to the defendant, but, if harmful at all, was harmful to the plaintiff, for the plaintiff was under no duty to establish the bargain as contended for by the plaintiff beyond a reasonable doubt; there was no harm in this sentence as it is stated to jury that the jury had the right to draw the inference that the bargain as contended for by the defendant was established beyond a reasonable doubt under the evidence. This sentence was a mere comment on the evidence by the Court below, and did not state any rule of law and did not state the rule of law with respect to the burden of proof upon the defendant; all that the Court told the jury was that it might consider, or would be justified in drawing the inference that under the evidence a bargain was established beyond a reasonable doubt; this was a comment on the evidence and not a charge with reference to the law

and was not a direction as to what finding the jury should draw. There is, therefore, nothing harmful in this sentence to the defendant and above all it does not state any rule of law and, therefore, does not misstate any rule of law. It is, therefore, clear that the jury could not have been misled by this sentence of the charge with respect to the burden of proof upon the defendant, as a matter of law.

The next sentence is as follows (see state of the case, pages 10 and 11):

> "The defense of usury is set up and must be proved *by the evidence* and cannot be left to the conjecture of the jury."

Certainly there is nothing harmful in this sentence, and this sentence is exactly in accordance with the law as laid down by Taylor *v.* Morris, Berdan *v.* Trustees and Norton *v.* Nathanson. There was certainly nothing harmful in law in this sentence of the charge and nothing therein, as a matter of law, to mislead the jury.

The last sentence of the charge on this point is as follows (see state of the case, page 11):

> "That simply means, gentlemen, that you must be satisfied *by the evidence beyond a reasonable doubt;* that the story told by the defendant about the bonus is true; otherwise the plaintiff will be entitled to have a verdict at your hands."

As a matter of law, there was nothing harmful or misleading in this statement of the rule of law. The rule of law is usually stated that usury must be established beyond a reasonable doubt by the decided preponderance of the evidence. Instead of stating that the defendant must establish the defense of usury "beyond a reasonable doubt by the evidence," the Court below simply transposed the two phrases and told the jury that the defendant must establish the defense of usury "by the evidence beyond a reasonable doubt." This transposition of the two phrases "by the evidence" and "beyond a reasonable doubt" can make absolutely no difference; it is immaterial which of these two prepositional phrases is used first.

It is true that the rule is generally stated, that the defense of usury must be proved "beyond a reasonable doubt by the decided preponderance of the evidence"; in the case at bar the Court below did not use those exact words, but told the jury that the defendant had the burden of proving the defense of usury beyond a reasonable doubt by the evidence. While the

exact formula is different in exact verbiage, there was no misstatement of the rule of law and there was certainly nothing harmful or misleading in the statement of law as it was presented to the jury by the Court below. If, anything at all, the exact verbiage as usually used is much stronger and might tend to lead a jury to believe that the quantum of evidence and the strength of evidence must be a good deal stronger than under the formula of law which the Court below used, so that if there is any difference of strength in the exact verbiage between the rule as it is usually stated and the rule as it was stated to the jury below, it was not stated in a way that was harmful to the defendant or misleading to the jury. My own personal view is that there is no difference between the rule as is usually stated by the Court of Errors and Appeals and the rule as stated by the Court below.

By the first part of the rule, to wit, that usury must be established beyond a reasonable doubt, it is clear that the rule of law contemplates that the *goal* which must be attained by the defendant is that he must establish his defense of usury *beyond a reasonable doubt;* the *goal*—the ultimate fact of the defense—must be established *beyond a reasonable doubt;* the balance of the rule is concerned with *the manner in which* that goal or ultimate fact must be attained or accomplished; and the rule as laid down by the Court of Errors and Appeals (although it is stated differently in Taylor *v.* Morris) is that the manner in which it must be proved beyond a reasonable doubt is that it must be so proved *by evidence,* by the decided preponderance of the evidence. There is nothing novel in this statement nor does it qualify the rule that the defense must be established beyond a reasonable doubt. Every defense must be established by the evidence and nothing but the evidence. The rule is that the defense must be established beyond a reasonable doubt and the Court goes on to say by the preponderance of the evidence in order to indicate that the evidence must be of very great strength, a great deal stronger than in the ordinary civil case.

In the rule of law as stated by the Court below, the Court stated that the defense of usury had to be established by the defendant beyond a reasonable doubt; that the goal or ultimate fact to be proved by the defendant had to be established beyond a reasonable doubt; the Court then went on to state in what manner that goal had to be established and stated that the goal had to be established by the evidence; this was a statement of the law as laid down by the Court of Errors and Appeals, for

the Court of Errors and Appeals contemplates that the manner in which the defendant shall prove the defense of usury beyond a reasonable doubt is by the evidence; the Court below fails to state except in its first sentence of the charge above quoted that the evidence proving the defense of usury beyond a reasonable doubt had to be evidence of very great strength, but the failure to make this statement was not harmful to the defendant and could not have misled the jury; the statement of the rule by the Court below was not a statement that placed a greater burden on the defendant than is stated by the exact rule of law involved and, therefore, was not harmful to the defendant or misleading to the jury; if anything, the statement of the Court below, stated the rule in a weaker form than the rule is actually stated by the Court of Errors and Appeals and, therefore, there was nothing harmful to the defendant as the rule was laid down to the jury and nothing misleading in the rule as laid down to the jury.

So that by examining each sentence separately it is apparent there was nothing in the charge of the Court below on the point involved that could have misled the jury, and it is impossible to perceive anything in the charge which accounts for the statement of the Court below that the jury could have been misled by his charge on the point involved.

If we consider the charge of the Court below on this point as a whole, and its effect as a whole upon the jury in the trial of the case below, it can fairly be stated that there was nothing therein which was harmful to the defendant or could have misled the jury on a proposition of law. The difference sought to be established is so fine that it is like trying to split hairs without causing a severance of the hairs sought to be severed. Does this Court believe that if the jury below were charged in the exact verbiage of the law as laid down by the Court of Errors and Appeals that this would be likely to cause a different result from a result produced by a charge such as was given in the Court below? Personally I do not believe it would make any difference to the jury whether it were charged in the exact language of the rule as it is stated in some of the cases in the Court of Errors and Appeals and if it were charged as it was charged in this particular case. The distinction sought to be drawn is so fine that it would make no impression as being different in the minds even of lawyers, and the effect produced by the language would certainly not make any difference of impression upon the minds of laymen. I cannot conceive of a situation where I would say to a lawyer or a layman:

"You have convinced me of a certain proposition beyond a reasonable doubt by the decided preponderance of the evidence," and in the same breath say to him:

"You have not convinced me beyond a reasonable doubt of a certain proposition by the evidence." If evidence were produced to me in proof of a certain proposition beyond a reasonable doubt by the decided preponderance of the evidence, if the evidence attains that goal, I would say:

"I am convinced of this proposition beyond a reasonable doubt, by a decided preponderance of the evidence"; I would also say, expressing it a different way:

"I am convinced of this proposition beyond a reasonable doubt, by the evidence"; the effect of my statement in both instances would be the same, except that possibly in the former instance, I might desire to convey the impression that not only was I convinced beyond a reasonable doubt, by the evidence, but that the evidence was of very great strength. And so with a layman, the difference in verbiage would not make any difference.

There are only two rules of law respecting burden of proof. In a civil case, the rule respecting the burden of proof is usually that a defendant pleading an affirmative defense has the burden of establishing that defense by a preponderance of the evidence; to this rule there are exceptions, as, for instance, where the affirmative defense pleaded is usury. In criminal cases the burden is on the State to establish its case beyond a reasonable doubt, by reason of the fact that the State seeks to impose punishment or a penalty. In laying down the rule with reference to the burden on the defendant to establish the defense of usury in a civil case, the Court of Errors and Appeals did not intend to lay down a third rule which differed from the two rules above mentioned. The Court of Errors and Appeals intended merely to lay down the law that the rule applicable as against the State in criminal cases was the rule applicable as against the defendant in a civil case pleading the defense of usury. That this was the intention of the Court of Errors and Appeals is clear from the reason when we consider the reason given by the Court of Errors and Appeals for placing the burden of proof on the defendant to prove usury beyond a reasonable doubt; the reason stated by the Court of Errors and Appeals is that the defense of usury, if established, imposed a penalty on the plaintiff and he lost the principal and interest; as the effect of a successful defense was to inflict a *penalty* on the plaintiff, the Court held that before

the penalty would be imposed the facts that would call for meting out the penalty would have to be established beyond a reasonable doubt in analogy to criminal cases where before a penalty will be imposed the case must be made out beyond a reasonable doubt. Although the penalty is no longer so severe and although the plaintiff is penalized only to the amount of interest, nevertheless a penalty is still imposed and the reason for the rule still exists and the same rule continues in existence down to date. Upon consideration of the reason which lies at the foundation of the rule that requires usury to be established beyond a reasonable doubt, it is clear that the burden intended to be imposed upon the defendant to establish usury is the same that is intended to be imposed upon the State to establish proof of a crime; in both instances before penalty is inflicted the crime must be established beyond a reasonable doubt. It is, therefore, apparent that the Court of Errors and Appeals did not intend to create a third distinct rule regarding the burden of proof and that the same burden rests upon the defense to prove usury as rests upon the state to prove crime. See *Taylor* v. *Morris* as the rule is therein set forth and as the reason for the rule is therein set forth.

The charge in this case did not place a stronger burden on the defendant than is imposed on the State in a criminal case. There is nothing to indicate that the defendant has been injuriously affected by any alleged misdirection; there is nothing to indicate that the jury could have been misled by the charge of the Court below on the point in question, and, consequently, it was the duty of the Court below to deny a new trial, as matter of law. It is the policy of the law as expressed by Section 27 of the Practice Act of 1913 to terminate and not to prolong litigation. The charge of the Court below having been very fair to the defendant and being strictly in accordance with law and not harmful to him and not misleading to the jury, the order for a new trial should have been denied on the ground that there was no error of law in the charge of the Court below on the point involved.

The charge of the Court to the jury having been in accordance with law on the point of the burden of proof resting on the defendant to establish the defense of usury, the grounds stated for a new trial were insufficient as a matter of law to warrant the granting of a new trial and the rule to show cause for a new trial should have been discharged instead of an order made granting a new trial, and the order granting a new trial was, therefore, erroneous as a matter of law.

~~It will be noted that the exception to the charge of the Court on the point in question is just a general exception and does not state any ground for the objection to that portion of the charge and the Court below should, therefore, not have considered the objection.~~

(b) An order of the Trial Court granting a new trial is appealable where ground for granting a new trial is an alleged error of law when, as a matter of fact, no error of law exists or where the order granting a new trial amounts in a legal sense to an abuse of the legal discretion placed in the Court below to grant a new trial.

Let us assume for the moment for the sake of argument that the Court below had charged the jury on the point of law involved exactly in the language of the Court of Errors and Appeals, and then let us further assume that the defendant excepted to the same under the impression that the statement of law was erroneous, when, in fact, it was correct; and let us further assume that the defendant applied to the Court for a new trial on the ground of said alleged error of law in charging the jury; and let us assume that the Court below after argument on the application for a new trial finds the law to be exactly as he charged the jury, but in spite of that fact grants a new trial. Can there be any question but that the Court below must, as a matter of law, under such a set of circumstances deny the order for a new trial in view of the fact that no error of law was made in the charge to the jury and no error of law exists and, therefore, there is no reason for a new trial? Can there be any question that such an order upsetting the final determination of the cause in the court below is appealable to this court and that this court can correct the error of the Court below in granting the new trial under such circumstances on the ground that the order granting a new trial was made without a legal justification in law and was, therefore, entered under an error in law? The mere statement of this hypothesis would seem to answer itself.

The hypothetical case is exactly the situation in the case at bar under the theory on which this appeal is brought, and the order is, therefore, appealable.

The error under such circumstances is a clear error of law on the part of the Court below, for to enter his findings logically in accordance with the law as charged and as the Court below finds the law to be, the Court below should enter an order denying a

new trial, and by granting a new trial makes an order directly contrary to and in the face of what he finds the law to be; the order granting a new trial under those circumstances is clearly and beyond any question entered by error and without any legal justification whatsoever.

There are some cases in this State which hold that an order *refusing* to grant a new trial is not appealable; in those cases it is stated that the refusal of a new trial is a matter resting solely in the discretion of the Court below; on examination of said cases, however, it will be found that the ground of the application was not one which involves a question of the correctness or incorrectness of a proposition *of law,* but was one that really involved a discretionary matter, which by its very nature had to be left to the discretion of the Court, and consequently the refusal of a new trial in those cases rested in a sound discretion of the Court below. For instance, a refusal to grant a new trial on the ground that the verdict is against the weight of the evidence is a matter that must usually be left to the discretion of the Court below. The Court below had an opportunity of seeing the witnesses and hearing their testimony and gathering the impression that they make upon the Court and the jury; the upper Court is not in a position to get the effect of this very important phase of the matter and the upper Court is forced to rely upon the discretion of the Court below on such questions; the very nature of the question is one that must be left to the sound discretion of the Court. While the point is not involved in this case, it would seem to me that the *refusal* to grant a new trial because of some error in law would nevertheless be appealable where the matter is one purely of law and not a discretionary matter, unless such appeal is precluded by the fact that the party aggrieved by the error of law has recourse by appeal on an objection duly noted during the trial and, therefore, is not obliged to appeal from the order refusing a new trial, for he can appeal directly on the errors of law on objection duly noted, during the trial, and, therefore, does not have to appeal from the refusal of the order as he has another direct remedy of appeal; but in the case of the *granting* of a new trial, a different proposition is presented, for, as in this instance, the plaintiff has made no exceptions on the record below and is not complaining of an error of law committed during the course of the trial and has no objection on the record during the course of the trial, consequently he is not in a position, nor is there any reason for him to appeal by

reason of anything that took place during the course of the trial. The only exception that he has entered, having been the successful party, would be to the order granting the new trial, for that is the first time that any error of law is committed against the plaintiff. Consequently the plaintiff's only avenue of appeal is from the very order granting the new trial.

Aside from this, the discretion vested in the Court below to grant or refuse a new trial is not an arbitrary discretion, but is a legal, judicial discretion limited by well-defined legal principles and if the Court below should manifestly abuse that legal, judicial discretion in such a way that there can be no question that the Court below has gone beyond that judicial legal discretion vested in it, this Court should and will review and correct any such abuse of discretion. Bowes Administratrix vs Public Service, New Jersey Supreme Court decided June term, 1920

In the case of *Evans* v. *Adams,* 15 N. J. Law, page 373, it was held that an appeal lies from a *decision setting aside* a judgment rendered on confession without a sufficient affidavit, on the application of judgment and execution creditors of the defendant; *such decision* being final. In other words, a judgment had been rendered. A motion was made to open that judgment and set it aside and the Court below granted the motion and after argument opened and set aside the judgment on the strength of a certain rule of law. An appeal was taken from the order opening the judgment and the Upper Court held that *the order opening the judgment* was appealable on the ground that the reason which prompted the Lower Court to open the judgment was a legal question pure and simple, a question of *right;* that it was not a discretionary consideration which prompted the Lower Court to open the judgment. The order being to open up a final judgment, which is a final determination, the order opening that judgment was held to partake of finality in its character and being a final order, was appealable, and the Upper Court had the power to review the order of the Court below. The theory of the decision is that the order of the Lower Court is appealable and that the Upper Court in all cases has the *power* to review the order of the Court below and that the Upper Court will reverse the order of the Court below if it can see that as a matter of legal principle and a matter of *right,* the Court below has erred, but if the matter is a *discretionary* one, the Upper Court will not reverse the order of the Court below, because the Upper Court is not in a position to determine whether or not the Court below has erred and must,

therefore, depend upon the good judgment of the Court below in discretionary matters and will leave the order of the Court below undisturbed in a case where discretion is involved unless that discretion has been palpably abused. In the case of *Lee* v. *Heath,* decided by the Court of Errors and Appeals of this State, February 28, 1898, 61 N. J. Law, p. 250, 39 Atlantic Reporter 729, it was held that a judgment of the Supreme Court reversing and, therefore, opening a judgment of the Circuit Court and remitting the record for further proceedings according to law, is final so far as to render it subject to review by a writ of error in the Court of Errors and Appeals. The Court, in that case, said:

> "This practice is justified by the fact that the *substantial* matter for consideration is the legality of the original judgment, which unquestionably was a final judgment, and, if legal, ought to be restored. The writ of error, therefore, should not be dismissed and consequently we must examine the merits of the case."

The situation in *Evans* v. *Adams,* and in *Lee* v. *Heath* is analogous to the situation in the case at bar. In all such cases the *substantial* question is whether the original judgment which unquestionably is a final judgment is legal and ought to be restored.

In the case of *Brady* v. *Carteret Realty Company,* 70 New Jersey Equity, page 748, 64 Atlantic Reporter 1078, the Court of Errors and Appeals of this State on November 20th, 1906, held that the refusal of the Chancellor to grant a new trial of an issue at law directed by him under section 65 of the act to quiet title is an appealable order.

On the point stated at the head of this division of this brief, I desire to call the attention of the Court to the decisions of the State of Pennsylvania, because the decisions there rest on sound policy and on sound legal reasoning. In the case of the *First National Bank of Birmingham* v. *Fidelity Title and Trust Company,* 97 Atlantic Reporter, page 77, on page 79 the Court had the following to say:

> "We have no doubt of our power to entertain an appeal from an order granting a new trial. Allen *v.* Sawyer, 2 Pen. & W. 325; Stauffer *v.* Reading, 206 Pa. 479, 55 Atl. 1072; Commonwealth *v.* Gabor, 209 Pa. 201, 58 Atl. 278. Of course, this power is to be exercised only in clear cases of an abuse of discretion on the part of the trial court. 'The granting or refusing of a motion for a new trial,' says our Brother Potter in the recent case of

Mifflintown Bank *v.* New Kensington Bank, 247 Pa. 40, 43, 92 Atl. 1076, 1078, 'is so largely a matter of discretion in the court below, that we will not attempt to review its exercise, except in a clear case of abuse of that discretion. In the present case the questions raised by a new trial were questions of law, and in disposing of them there was no abuse of discretion whatever.' This is the doctrine of all our cases. The court can abuse its discretionary power as to the law as well as to the facts in passing upon an application for a new trial, and when a new trial is based on a plain and palpable error of law applicable to the facts of the case, it is such an abuse of discretion as well as will warrant a reversal. A party has the right to have his case heard and determined only once on the facts and the law applicable thereto, but when it has been decided by the court of first instance that he has not had such a trial, the granting of a retrial will not be reversed, unless reversible error in fact or law clearly appears to the appellate court."

In the case of *President of Danboro* v. *Bucks County,* decided June 30, 1917, 102 Atlantic Reporter, page 171, the Court in its opinion on page 172 has the following to say (I have underscored a statement which shows the opinion of that Court on the exact identical question before this Court):

"A preliminary question of practice, not at all affecting the merits of the controversy, has been suggested which may as well be disposed of before proceeding to consider the main question. We have been reminded of the general rule that the granting or refusal of a new trial rests in the discretion of the trial judge, and it is only where that discretion has been abused that an appeal can be entertained. This court has been constant in the observance of this rule, however liberal it may have been in its construction. What is sometimes thought to be a departure from it is only another illustration of strict adherence, by giving it more general application than its strictly literal interpretation would seem to allow. Strictly speaking, the law is never a subject resting in the discretion of the trial judge; and when he errs in regard to it in his instructions to the jury, it is by no means exact to say that he has abused his discretion, but this court has repeatedly held, the most recent case being First National Bank of Birmingham *v.* Fidelity Title Trust Company, 251 Pa. 536, 97 Atl. 77, that a court can abuse its discretionary power as to the law as well as to the facts in passing upon an application for a new trial, and that when the trial is based on a plain and palpable error of law applicable to the facts of the case, it is such an abuse of discretion as will warrant a reversal. If, in the

present case, the trial judge in his binding direction to the jury to find for the defendant reflected a clear misconception of the law governing the case, the proper practice was observed when he directed a new trial; *if otherwise, and the new trial was ordered to correct something that needed no correction, but was in entire accord with the law, such error would be palpable and this court on review could set aside the order.* We need no other warrant for entertaining the present appeal than is furnished by these authorities."

To the same effect as the law in Pennsylvania is the decision of *Nichols* v. *Lane* by the Supreme Court of Vermont, decided January, 1919, and found in 106 Atlantic Reporter, page 592. On page 593 the Court in its opinion has the following to say:

"The action of the court in setting aside the first special verdict was without error. The ordinary motion to set aside a verdict is based on the claim that it is against the evidence, and is addressed to the discretion of the trial court. Howton *v.* Strout Farm Agency, 90 Vt. 50, 96 Atl. 330; McDonald *v.* McNeil, 92 Vt. , 104 Atl. 337. But this was not the ordinary motion; it was specifically based upon the *legal insufficiency* of the representation to support an action. So the action of the court in granting the motion necessarily involved a ruling that the representation that 'there was no better land in Vermont' was insufficient to support this action. *This ruling is reviewable,* and the exception saved is sufficient to raise the question."

From the foregoing decisions it would seem to be manifest that the order granting a new trial on the grounds claimed by the defendant and for the reasons stated by the Court below, is an order final in its nature and which is appealable, and its propriety will be reviewed by this Court.

Respectfully submitted, William Harris

~~WILLIAM HARRIS~~,

Attorney and Counsellor for Plaintiff-Appellant.