INDEX.

New Jersey Supreme Court,

(Filed, January 16, 1930.)

CONSOLIDATED PLAN OF NEW JERSEY, INC.,
a corporation of New Jersey,
Plaintiff-Appellant,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and
ADOLF PALKOWITZ,
Defendants-Appellees.

Notice of Appeal and Grounds.

To JACOB I. POLKOWITZ, Attorney for Defendant-Appellee, Adolf Palkowitz.

Sir:

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

1. Because the Supreme Court erred in affirming the judgment of the Perth Amboy District Court instead of reversing said judgment and finding for the plaintiff-appellant, in that:

(a) The learned trial Court erred in finding that the demand of plaintiff-appellant for attorney's fees of Fifteen ($15.00) Dollars plus Fifteen (15%) per cent., was

contrary to Section 5 of Chapter 49 of the Laws of 1914.

(b) The learned trial Court erred in finding that said note was null and void.

(c) The learned Trial Court erred in disregarding the saving clause in said contract and found that plaintiff could not even recover the principal amount of said note and interest.

(d) The learned trial Court erred in rendering judgment in favor of the defendant and against the plaintiff.

Dated, January 8th, 1930.

Respectfully yours,

LEWIS S. JACOBSON,
Attorney of Plaintiff-Appellant.

Service of a copy of the within notice of appeal and grounds is hereby acknowledged this 15th day of January, 1930.

JACOB I. POLKOWITZ,
Attorney for Defendant-Appellee.

Rule on Affirmance.

(Filed, January 10, 1930.)

NEW JERSEY SUPREME COURT,

OCTOBER TERM, 1929.

On Appeal From District Court.

CONSOLIDATED PLAN OF NEW JERSEY, INC.,
a corporation of New Jersey,
Plaintiff-in-Error,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and
ADOLF PALKOWITZ,
Defendants-in-Error.

This cause having been duly argued at the present term of this Court by Lewis S. Jacobson, of counsel for the plaintiff-in-error, and Jacob I. Polkowitz, of counsel for the defendant-in-error, and the Court having considered the same, and finding no error in the record or proceedings in the City of Perth Amboy,

It is thereupon ordered and adjudged that the judgment of the District Court of the City of Perth Amboy, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the District Court of the City of Perth Amboy to be proceeded with in accordance with this judgment and the practice of said Court.

Entered, January 10, 1930.

On motion of

JACOB I. POLKOWITZ,
Attorney of Defendant-in-Error.

Substitution of Attorneys.

(Filed, September 27, 1930.)

I hereby consent to the substitution of Green & Green, in my place and stead, to prosecute the above-entitled action.

Dated, September 18, 1930.

LEWIS S. JACOBSON.

Specification of Determinations.

NEW JERSEY SUPREME COURT.

On Appeal from District Court.

CONSOLIDATED PLAN OF NEW JERSEY, INC.,
a corporation of New Jersey,
Plaintiff-Appellant,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and
ADOLF PALKOWITZ,
Defendants-Appellees.

The following is a specification of the determinations of the District Court with which appellant is dissatisfied in point of law:

1. Because the Court found that the demand of plaintiff-appellant for attorney's fees of Fifteen ($15.00) Dollars, plus Fifteen (15%) per cent., was contrary to Section 5 of Chapter 49 of the Laws of 1914.

2. Because the Court found that the note was null and void.

3. Because the Court disregarded the saving clause in said contract and found that plaintiff could not even recover the principal amount of said note and interest.

4. Because the Court rendered judgment for the defendants and against the plaintiff.

LEWIS S. JACOBSON,
Attorney for Plaintiff-Appellant.

Notice of Appeal.

DISTRICT COURT OF THE CITY OF PERTH AMBOY.

On Contract.

CONSOLIDATED PLAN OF NEW JERSEY, INC., a corporation of New Jersey,

Plaintiff,

vs.

ADOLF PALKOWITZ,

Defendant.

To: ADOLF PALKOWITZ or JACOB I. POLKOWITZ, his Attorney:

Sir:

TAKE NOTICE, that the plaintiff in the above cause, Consolidated Plan of New Jersey, Inc., hereby appeals to the New Jersey Supreme Court from the judgment of the Perth Amboy District Court of Perth Amboy, rendered in the above-stated action, on the 17th day of June, Nineteen Hundred and Twenty-nine.

CONSOLIDATED PLAN OF NEW JERSEY, INC.

(Signed) By LEWIS S. JACOBSON, Its Attorney of Counsel.

(Signed) DAVID MANDEL.

State of Demand.

DISTRICT COURT OF THE CITY OF PERTH AMBOY.

Action on Contract.

CONSOLIDATED PLAN OF NEW JERSEY, INC., a corporation of New Jersey,

Plaintiff,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and ADOLF PALKOWITZ,

Defendants.

The plaintiff, Consolidated Plan of New Jersey, Inc., a corporation organized under the laws of the State of New Jersey, demands of the defendant the sum of Three hundred fifty ($350) Dollars, for that:

FIRST COUNT:

1. On or about January 18, 1929, the defendant, Meyer Shanholtz, became the maker of a promissory note in the amount of one hundred fifty ($150) Dollars, a true copy of which is hereinafter annexed. Said note has not been paid.

2. There is due on said note interest in the amount of two dollars and seventy cents ($2.70).

3. The note contained a clause that in the event of default of payment, attorney's fees would be paid in the amount of Fifteen ($15) Dollars,

together with 15 per cent. of the amount of the principal and interest due on the note.

Plaintiff demands the sum of One hundred fifty ($150) Dollars, together with interest in the amount of Two dollars and seventy cents ($2.70), attorney's fees in the amount of Thirty-nine dollars and fifty-three cents ($39.53) and costs of suit.

SECOND COUNT.

1. On or about January 18, 1929, the defendant, Mollie Shanholtz, became the endorser of a promissory note in the amount of one hundred fifty ($150), a true copy of which is hereinafter annexed. Said note has not been paid.

2. There is due on said note interest in the amount of Two dollars and seventy cents ($2.70).

3. The note contained a clause that in the event of default of payment, attorney's fees would be paid in the amount of Fifteen ($15) Dollars, together with 15 per cent. of the amount of the principal and interest due on the note.

Plaintiff demands the sum of One hundred fifty ($150) Dollars, together with interest in the amount of Two dollars and seventy cents ($2.70), attorney's fees in the amount of Thirty-nine dollars and fifty-three cents ($39.53) and cost of suit.

THIRD COUNT:

1. On or about January 18, 1929, the defendant, Adolf Palkowitz, became the endorser of a promissory note in the amount of One hundred

fifty ($150) Dollars, a true copy of which is hereinafter annexed. Said note has not been paid.

2. There is due on said note interest in the amount of Two dollars and seventy cents ($2.70).

3. The note contained a clause that in the event of default of payment, attorney's fees would be paid in the amount of Fifteen ($15) Dollars, together with 15 per cent. of the amount of the principal and interest due on the note.

Plaintiff demands the sum of One hundred fifty ($150) Dollars, together with interest in the amount of Two dollars and seventy cents ($2.70), attorney's fees in the amount of Thirty-nine dollars and fifty-three cents ($39.53) and costs of suit.

Judgment will be claimed for the sum of One hundred fifty ($150) Dollars, together with interest in the amount of Two dollars and seventy cents ($2.70), attorney's fees in the amount of Thirty-nine dollars and fifty-three cents ($39.53) and costs of suit.

(Signed) LEWIS S. JACOBSON,
Attorney for the Plaintiff.

TRUE COPY OF NOTE MENTIONED IN STATE OF DEMAND.

NOTE

	License No. 550
CONSOLIDATED PLAN	Loan No. 211
OF NEW JERSEY, INC.	$150.00

New Brunswick, N. J., January 18, 1929

We, the undersigned, jointly and severally, for value received, promise to pay to the order of CONSOLIDATED PLAN OF NEW JERSEY, INC., at its office, 137 Albany Street, New Brunswick, N. J., the sum of One hundred fifty dollars ($150), in gold coin or its equivalent in lawful currency of the United States of America, in monthly installments of seven dollars and fifty cents ($7.50) on the 18th day of each month, commencing the 18th day of February, 1929, until September 18th, 1930, when the entire balance of one hundred fifty dollars ($150), then due shall be paid, together with interest on all unpaid balances of said principal, at the rate of three per cent. per month, payable simultaneously with each installment payment of principal.

The aforesaid payments made at any time on account of this note or any part thereof shall be applied first to the payment of the said interest then due and the remainder to said principal. In the event that the installment payments aforesaid plus interest to date of payment on account of this note are not made as and when due, or if any of the undersigned shall abscond or move from the jurisdiction of the Courts of New Jersey, or shall assign, secrete or dispose of his or her property with intent to hinder, delay or defraud cred-

itors then the entire balance plus interest at the rate of 3 per cent. per month shall become at once without further notice, and suit to recover the same may be commenced immediately thereafter.

The holder of this note, upon default of any payment, may, at its or his election, require said obligation to be paid by any maker or makers, or endorser or endorsers, surety or sureties thereon; and to this agreement said makers, endorsers and sureties hereby specifically give their assent.

Upon the payment of this obligation by the said makers or sureties thereon or any of them, this note shall be transferred (without recourse against the payee and subsequent holders) to the party or parties so paying the amount due thereon.

Each of the undersigned, whether principal, surety, guarantor or other party hereto, hereby severally and jointly agrees that additional makers, guarantors or sureties may become parties hereto either with or without notice to them or any of them, without effecting the liability of the undersigned on the within instrument. Each of the undersigned hereby severally waives any or all benefit or relief from homestead exemption and all other exemptions to which they or any of them may be entitled to under the laws of this State or any other State, now in force or hereafter to be passed, as against this debt; and each severally further waives presentment for payment protest and notice of protest and non-payment of this note and all defenses by reasons of any extension of time of any payments that may be given by the holder of this note to any or all of the undersigned. Extension of time for payments of principal and or interest, may be granted by the

holder of this note without notice and failure on the part of the holder of this note to insist upon strict compliance of the payments herein required, shall not be construed as a waiver thereof and shall in no way be interpreted as a release of any of the undersigned from the within obligations, or any of them.

Upon default in the payment of the whole or any part of this note, the undersigned jointly and severally further agree to pay interest at the rate of 3 per cent per month from and after the date of such default until the date of payment; and upon the entry of judgment for the whole or any part of this note, the undersigned jointly and severally agree to pay all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note, said attorney's fees to be fixed at Fifteen ($15.00) Dollars plus fifteen (15%) per cent of the amount of such sum of principal and interest then due, provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by chapter 49 of the laws of 1914 of the State of New Jersey and the amendments thereof.

The undersigned hereby certify that they have no joint or several defense to any action either in law or equity which may be brought at any time for the collection of the whole or any part of this note, and further certify that each of them is of lawful age; that at the time of the making of this loan, the full amount of this note has been received in cash together with a statement in the English language as required by section 5 of

said chapter 49 of 1914 of the State of New Jersey and the amendments thereof. Each of the undersigned clearly understands how payments of installments on the principal and the interest are to be made.

SIGNATURES		ADDRESSES
1. Borrower	MEYER SHANHOLTZ	TEL.
Full name		
2. Wife or Husband	MOLLIE SHANHOLTZ	
Full name		
3. Co-Maker	ADOLF PALKOWITZ	
Full name		214 Dennison St.
		Highland Park

District Court Summons.

State of New Jersey,
Middlesex County,
City of Perth Amboy—ss.:

THE STATE OF NEW JERSEY

To the Sergeant-at-Arms of the District Court of the City of Perth Amboy or any Constable of the
(L. S.) County of Middlesex

SUMMON Meyer Shanholtz, Mollie Shanholtz and Adolf Palkowitz to appear before the District Court of the City of Perth Amboy, to be held in the City Hall in said City, on the 2nd day of May, One Thousand Nine Hundred and Twenty-nine at ten o'clock in the forenoon, to answer unto Consolidated Plan of New Jersey, Inc., a corporation of N. J. in action Upon Con-

tract, Demand Three hundred fifty ($350) Dollars Hereof fail not.

WITNESS Charles C. Hommann, Esq., Judge of said District Court, at Perth Amboy, aforesaid, the 19th day of April in the year One Thousand Nine Hundred and Twenty-nine.

LEWIS S. JACOBSON,
Plaintiff's Attorney.

HARRY J. HARDIMAN,
Clerk.

The defendants Meyer Shanholtz and Mollie Shanholtz could not be found and I served the within summons on them the 26th day of April, 1929, by leaving a copy thereof at their usual place of abode in the presence of a person of their family over the age of fourteen years whom I informed the contents thereof.

LOUIS DAITZ,
Constable.

Summons Upon Contract.

DISTRICT COURT
OF THE CITY OF PERTH AMBOY, N. J.

No. 26535.

CONSOLIDATED PLAN OF NEW JERSEY, INC., a corporation of New Jersey,

Plaintiff,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and ADOLF PALKOWITZ,

Defendant.

Demand	$350.00
True Amount	
Interest	
Court Costs	4.40
Mileage	1.92

Returnable May 2, A. D., 1929, 10 o'clock A. M.

I served the within summons April 19, 1929, on Adolf Palkowitz, the defendant by reading the same to him and delivering to him a copy thereof.

LOUIS DAITZ,
Constable.

Proof of Account.

DISTRICT COURT
OF THE CITY OF PERTH AMBOY

On Contract.

CONSOLIDATED PLAN OF NEW JERSEY, INC., a corporation of New Jersey,
Plaintiff,

vs.

MEYER SHANHOLTZ and MOLLIE SHANHOLTZ,
Defendants.

State of New Jersey,
County of Middlesex—ss.:

MARK BEAGLE, being duly sworn according to law upon his oath, deposes and says: that he is the manager of the Consolidated Plan of New Jersey, Inc., the plaintiff corporation; that the attached note is the real note due and owing the plaintiff from the defendants; that there is now due and owing the sum of One hundred fifty ($150.00) Dollars, together with interest in the amount of Two dollars and seventy Cents ($2.70) attorney's fees in the amount of Thirty-nine dollars and fifty-three Cents ($39.53) and costs of suit, is justly due and owing to the plaintiff from the said defendants.

(Signed) MARK BEAGLE.

Subscribed and sworn to before me
this 18th day of July, A. D. 1929.

(Signed) LEWIS S. JACOBSON,
An Attorney-at-Law of New Jersey.

Docket.

IN THE DISTRICT COURT OF THE
CITY OF PERTH AMBOY.

No. 26535.

On Contract.

State of New Jersey,
County of Middlesex—ss.:

CONSOLIDATED PLAN OF NEW JERSEY, INC., a corporation of New Jersey,

Plaintiff,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and ADOLF PALKOWITZ,

Defendants.

Demand
$350.00.

Lewis S. Jacobson, Plaintiff's Attorney.
Jacob I. Polkowitz (Palkowitz), Defendants' Attorney.

COSTS

Summons	1.70	City Al.
Service	1.20	
Mileage	1.92	
Trial Fee	1.50	
Venire		
Jury Fee		
Constable		

Filed A. D., 192 .
Summons was issued tested April 19, A. D. 1929.
Returnable May 2, A. D. 1929.
The summons returned was as follows, viz.:
I served the within summons April 19, 1929, on Adolph Palkowitz, the defendant, by reading the same to him and delivering to him a copy thereof.

LOUIS DAITZ,
Constable.

Docket.

Subpoenas
Service
Witness

The defendants, Mollie Shanholtz and Meyer Shanholtz, could not be found and I served the within summons on them the 26th day of April, 1929, by leaving a copy thereof at their usual place of abode in the presence of a person of their family over the age of fourteen years, whom I informed of the contents thereof.

Order
Order
Bond 1.00

LOUIS DAITZ,
Constable.

Plaintiff's demand was filed April 19, A. D. 1929.

Notice of appeal and appeal bond filed July 9, 1929.

Defendant's offset was filed , A. D. 192 .

Affidavit filed July 19, A. D. 1929.

May 2, A. D. 1929, this cause adjourned until May 9, May 16, May 23.

May 23, A. D. 1929, this cause was called at 10 o'clock in the forenoon.

Plaintiff appeared by Lewis S. Jacobson.

Execution
Service
Mileage

Defendant appeared by Jacob I. Polkowitz (Adolf Palkowitz).

May 23, 1929, no appearance as to Mollie and Meyer Shanholtz.

Application being made to me, Clerk of said Court, in the above action of contract, after the return day of the summons therein, for judgment by default, and the defendant not having appeared at the time and place expressed in the summons, and no sufficient reason appearing for the defendant's non-appearance, and it appearing from the return to the process in said cause that said process was duly served, and the application being accompanied by the affidavit of Mark Beagle establishing the plaintiff's claim or

Transcript

demand to the extent as required by Sections 151, 152, 153, 154, of an act, approved March 31, 1913 (P. L. 1913, p. 280), entitled "An act to amend an act entitled 'An act concerning district courts' (Revision of 1898)," approved April fourteenth, eighteen hundred and ninety-eight, I do on this 19th day of July, 1929, in pursuance of Section 146 of said act, as above amended, enter judgment by default against the defendant in favor of the plaintiff for the sum of One hundred ninety-two and 23/100 Dollars, damages, and Fifteen and 93/100 Dollars, cost of suit.

HARRY J. HARDIMAN,
Clerk.

(Seal.)

Decision reserved.

Ex. P-1: Note of January 18, 1929, $150.00
Loan No. 211.

192.23
15.93

June 17, 1929.

Judgment
Court Costs
Execution
Alias
Interest
Mileage
Dollarage 5%
Adv. of Sale
Adj. of Sale
Total

Judgment was rendered for defendant for the sum of dollars and cents damages, and dollars and cents, costs of suit.

A. D. 192 , execution was issued. The execution was returned as follows, viz.:

I, HARRY J. HARDIMAN, do hereby certify that this is a true and correct copy of the docket entry in above case.

HARRY J. HARDIMAN,
Clerk District Court of the
City of Perth Amboy, N. J.

A. D. 192 , Transcript for docketing was issued.

(Seal.)

State of the Case.

PERTH AMBOY DISTRICT COURT

On Appeal.

CONSOLIDATED PLAN OF NEW JERSEY, INC., a corporation of New Jersey,

Plaintiff,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and ADOLF PALKOWITZ,

Defendants.

The plaintiff company was licensed to do business under an act entitled "An act to define, regulate and control the business of the making loans or advancement of money in the sum of Three hundred ($300.00) Dollars, or less in the amount, and to regulate the assignment of wages given as security for any such loan or advancement." P. L. 1914, page 75, Supplement Compiled Statutes, 1910-1915, page 42.

On January 18, 1929, the defendant, Meyer Shanholtz, became the maker of a promissory note and the defendants, Mollie Shanholtz and Adolf Palkowitz became the endorsers of said promissory note in the amount of One hundred and fifty ($150.00) Dollars, which note was made to the order of the plaintiff, a copy of said note is hereto annexed and marked Schedule "A." The note contained the following provision:

> Upon default in the payment of the whole or any part of this note, the undersigned

jointly and severally further agree to pay interest at the rate of three (3%) per cent. per month from and after date of such default until the date of payment; and upon the entry of judgment for the whole or any part of this note, the undersigned, jointly and severally, agree to pay all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note, said attorney's fees to be fixed at Fifteen ($15.00) Dollars plus fifteen (15%) per cent. of the amount of such sum of principal and interest then due, provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by chapter 49 of the Laws of 1914 of the State of New Jersey, and the amendments thereof.

Upon default in the payment of said note, plaintiff corporation instituted suit in the Perth Amboy District Court and demanded judgment against the defendants for the sum of One hundred and fifty ($150.00) Dollars, together with interest at the rate of three (3%) per cent. per month plus an attorney's fee of Fifteen ($15.00) Dollars plus fifteen (15%) per cent.

Defendants contended that the demand of plaintiff corporation was contrary to Section 5 of Chapter 49 of the Laws of 1914, and therefore the note was null and void.

Judgment was rendered for the defendants and against the plaintiff.

Schedule A.

The above state of the case is hereby acknowledged by

LEWIS S. JACOBSON,
Attorney for Plaintiff-Appellant.

JACOB I. POLKOWITZ,
Attorney for Defendant-Appellee,
Adolf Palkowitz.

SCHEDULE "A"

A TRUE COPY OF NOTE MENTIONED IN STATE OF DEMAND

NOTE

	License No. 550
CONSOLIDATED PLAN	Loan No. 211
OF NEW JERSEY, INC.	$150.00

New Brunswick, N. J., January 18, 1929

We, the undersigned, jointly and severally, for value received, promise to pay to the order of CONSOLIDATED PLAN OF NEW JERSEY, INC., at its office, 137 Albany Street, New Brunswick, N. J., the sum of One hundred fifty Dollars ($150), in gold coin or its equivalent in lawful currency of the United States of America, in monthly installments of Seven dollars and fifty Cents ($7.50) on the 18th day of each month, commencing the 18th day of February, 1929, until September 18th, 1930, when the entire balance of One hundred fifty Dollars ($150), then due shall be paid, together with interest on all unpaid balances of said principal, at the rate of three per cent. per month, payable simultaneously with each installment payment of principal.

Schedule A.

The aforesaid payments made at any time on account of this note or any part thereof shall be applied first to the payment of the said interest then due and the remainder to said principal. In the event that the installment payments aforesaid plus interest to date of payment on account of this note are not made as and when due, or if any of the undersigned shall abscond or move from the jurisdiction of the Courts of New Jersey, or shall assign, secrete or dispose of his or her property with intent to hinder, delay or defraud creditors then the entire balance plus interest at the rate of 3 per cent. per month shall become at once without further notice, and suit to recover the same may be commenced immediately thereafter.

The holder of this note, upon default of any payment, may, at its or his election, require said obligation to be paid by any maker or makers, or endorser or endorsers, surety or sureties thereon; and to this agreement said makers, endorsers and sureties hereby specifically give their assent.

Upon the payment of this obligation by the said makers or sureties thereon or any of them, this note shall be transferred (without recourse against the payee and subsequent holders) to the party or parties so paying the amount due thereon.

Each of the undersigned, whether principal, surety, guarantor or other party hereto, hereby severally and jointly agrees that additional makers, guarantors or sureties may become parties hereto either with or without notice to them or any of them, without effecting the liability of the undersigned on the within instrument. Each of the undersigned hereby severally waives any or all benefit or relief from homestead exemption and all

Schedule A.

other exemptions to which they or any of them may be entitled to under the laws of this State or any other State, now in force or hereafter to be passed, as against this debt; and each severally further waives presentment for payment protest and notice of protest and non-payment of this note and all defenses by reasons of any extension of time of any payments that may be given by the holder of this note to any or all of the undersigned. Extension of time for payments of principal and/or interest, may be granted by the holder of this note without notice and failure on the part of the holder of this note to insist upon strict compliance of the payments herein required, shall not be construed as a waiver thereof and shall in no way be interpreted as a release of any of the undersigned from the within obligations, or any of them.

Upon default in the payment of the whole or any part of this note, the undersigned jointly and severally further agree to pay interest at the rate of 3 per cent. per month from and after the date of such default until the date of payment; and upon the entry of judgment for the whole or any part of this note, the undersigned jointly and severally agree to pay all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note, said attorney's fees to be fixed at Fifteen ($15.00) Dollars plus fifteen (15%) per cent. of the amount of such sum of principal and interest then due, provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by Chapter 49 of the Laws of

1914 of the State of New Jersey and the amendments thereof.

The undersigned hereby certify that they have no joint or several defense to any action either in law or equity which may be brought at any time for the collection of the whole or any part of this note, and further certify that each of them is of lawful age; that at the time of the making of this loan, the full amount of this note has been received in cash together with a statement in the English language as required by Section 5 of said Chapter 49 of 1914 of the State of New Jersey and the amendments thereof. Each of the undersigned clearly understands how payments of installments on the principal and the interest are to be made.

SIGNATURES	ADDRESSES
1. Borrower MEYER SHANHOLTZ Full name	TEL.
2. Wife or Husband MOLLIE SHANHOLTZ Full name	
3. Co-Maker ADOLF PALKOWITZ Full name	214 Dennison St. Highland Park

Opinion.

Filed October 14, 1929.

CONSOLIDATED PLAN OF NEW JERSEY, INCORPORATED, a corporation of New Jersey,
Plaintiff-Appellant,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and ADOLF PALKOWITZ,
Defendants-Appellees.

7 N. J. Msc. Rep. 876.

Decided October 14, 1929.

On appeal from the Perth Amboy District Court.

Before Justices Parker, Black and Bodine.

For the plaintiff-appellant, Lewis S. Jacobson.

For the defendants-appellees, Jacob I. Polkowitz.

Per Curiam:

The plaintiff below, a loan company organized under the Act of 1914, brought suit upon a promissory note. The District Court entered a judgment in favor of the defendant and the plain-

tiff appeals. The note, so far as pertinent, provides as follows:

"New Brunswick, N. J.,
January 18, 1929.

"We, the undersigned jointly and severally, for value received, promise to pay to the order of Consolidated Plan of New Jersey, Inc., at its office, 137 Albany Street, New Brunswick, N. J., the sum of One hundred fifty Dollars * * * in monthly installments * * * until * * * the * * * unpaid balances of said principal, at the rate of three per cent. per month. * * *

"Upon default in the payment of the whole or any part of this note, the undersigned jointly and severally further agree to pay * * * all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note, said attorney's fees to be fixed at Fifteen ($15.00) Dollars plus fifteen (15%) per cent. of the amount of such sum of principal and interest then due, provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by Chapter 49 of the Laws of 1914 of the State of New Jersey and the amendments thereof."

The plaintiff's state of demand seeks the recovery of the principal due upon the note, with

interest at the rate of three per cent. a month and the attorney's fees called for in the note.

The District Court held the note void as a violation of Pamph. L. 1914, ch. 49, sec. 5. The act in question is entitled: "An act to define, regulate and control the business of the making of loans or advancements of money in sums of Three hundred ($300) Dollars or less in amount, and to regulate the assignment of wages when given as security for any such loan or advancement."

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

Section 6 is as follows: "The violation of any provision of this act shall be a misdemeanor, and if such violation be by a corporation, then such violation shall be a misdemeanor on the part of any person participating therein as a representative or agent of said corporation. Every loan in connection with such violation shall have occurred shall be absolutely null and void, and the borrower shall be entitled to recover from the lender any or all sums paid or returned on account of or in connection with such loan."

Obviously, if it were not for the provision in the note that it is not to be construed to violate

the statute in question, the exaction of the forbidden fee would render the instrument void.

"Commercial paper cannot be based on any consideration which is a violation of an express statutory provision." 8 Corp. Jur. 243.

The Legislature having forbidden the making of charges, fees and demands other than interest upon these small loans, the lender has exacted that in the instrument which, under the statute, renders his note void. By saying in the note that the exaction is not to be construed as a violation of the legislative prohibition does not save the situation. We are not construing the note as an exaction of that which is forbidden. The note itself calls for that which is forbidden, and the lender having sought that which he was not entitled to cannot be heard to say that that which he seeks he does not seek. Legislative enactments are not to be played fast and loose with, and corporations who violate the law cannot be heard to say that they did not intend that their violations of the law should be construed as such. They, like all others, must stand or fall by their own acts.

The judgment below is affirmed, with costs.

New Jersey Court of Errors and Appeals.

Action at Law.

(On Appeal from Supreme Court.)

CONSOLIDATED PLAN OF NEW JERSEY, a corporation of New Jersey,

Plaintiff-Appellant,

vs.

MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and ADOLF POLKOWITZ (Appellee),

Defendants.

BRIEF OF CONSOLIDATED PLAN OF NEW JERSEY, INC., PLAINTIFF-APPELLANT.

Statement.

This is an appeal by the plaintiff from a judgment of the Supreme Court affirming a judgment of the District Court of the City of Perth Amboy. The suit in the District Court was for the recovery by the plaintiff on a promissory note made to its order by the defendant, Meyer Shanholtz, endorsed by the defendants, Mollie Shanholtz and Adolf Polkowitz. Judgment by default was entered against the defendants, Meyer Shanholtz and Mollie Shanholtz, but judgment for defendant, Adolf Polkowitz, was entered against the plaintiff, by the Court sitting without a jury.

Facts.

The plaintiff company was licensed to do business under an act entitled "An Act to define, regulate and control the business of the making of loans or advancements of money in sums of Three hundred ($300) Dollars or less in amount, and to regulate the assignment of wages when given as security for any such loan or advancement," P. L. 1914, page 75, and amendments thereof.

On January 18th, 1929, the defendant, Meyer Shanholtz, became the maker of promissory note in suit and the defendants, Mollie Shanholtz and Adolf Polkowitz, became the endorsers thereof, which note was made to the order of plaintiff.

The note contained the following provision:

> "Upon default in the payment of the whole or any part of this note, the undersigned jointly and severally further agree to pay interest at the rate of three (3%) per cent. per month from and after date of such default until the date of payment; and upon the entry of judgment for the whole or any part of this note, the undersigned, jointly and severally, agree to pay all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note, said attorney's fees to be fixed at Fifteen ($15) Dollars plus fifteen (15%) per cent. of the amount of such sum of principal and interest then due, provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that

now allowed by chapter 49 of the Laws of 1914 of the State of New Jersey, and the amendments thereof" (Case, p. 12, ll. 12-31).

Payment of said note was defaulted, and plaintiff commenced this suit (Case, pp. 20-21).

In the state of demand filed in the District Court (Case, pp. 7-9) plaintiff claimed amount of note, together with interest at statutory rate, attorney's fees as set forth in said provision, and costs of suit.

The defendant, Adolf Polkowitz, appellee herein, interposed defense that the demand of plaintiff contained in aforesaid provision of note was contrary to Section 5 of the Act above mentioned, commonly known as the Small Loan Act, and therefore the note was null and void. The District Court sustained this contention and rendered judgment in favor of the defendant, Adolf Polkowitz, and against the plaintiff.

On appeal, Supreme Court affirmed judgment in a *per curiam* opinion (Case, pp. 26-29).

Grounds of Appeal.

SPECIFICATIONS.

On said appeal, appellant filed specifications that it is dissatisfied in point of law with the following determinations of the District Court, which specifications are embraced within usual grounds of appeal taken from Supreme Court (Case, p. 1, ll. 31-34):

1. Because the Court found that the demands of plaintiff-appellant for attorney's fees of Fifteen ($15) Dollars, plus fifteen (15%) per cent., was

contrary to Section 5 of Chapter 49 of the Laws of 1914.

2. Because the Court found that the note was null and void.

3. Because the Court disregarded the saving clause in said contract and found that plaintiff could not even recover the principal amount of said note and interest.

4. Because the Court rendered judgment for the defendant and against the plaintiff.

POINTS.

We propose to show that:

1. Provision in note for payment of reasonable costs including attorney's fees upon entry of judgment is not contrary to statute, but squarely within same.

2. The note contains a saving clause providing that the borrower shall pay the reasonable costs including attorney's fees upon the entry of judgment provided the same shall not be construed to charge or obligate the borrower to pay any charges, &c., in excess of that allowed by the law.

3. It is not against the policy of law or within the mischief intended to be remedied to save a defaulter from paying the expenses caused by his default.

POINT I.

Provision in note for payment of reasonable costs including attorney's fees *upon entry of judgment* is not contrary to statute, but squarely within same.

Through inadvertence or oversight, *the most pertinent part of the note is omitted* from the copy of note "so far as pertinent", contained in the opinion of the Supreme Court (Case, p. 27, l. 3).

The full provision, with omitted portion from Supreme Court's opinion (Case, p. 27, l. 23) underscored, is as follows:

> "Upon default in the payment of the whole or any part of this note, the undersigned jointly and severally further agree to pay *interest at the rate of 3 per cent. per month from and after the date of such default until the date of payment; and upon the entry of judgment for the whole or any part of this note, the undersigned jointly and severally agree to pay* all reasonable costs including attorney's fees that may be incurred in collecting the whole or any part of this note, said attorney's fees to be fixed at Fifteen ($15) Dollars plus fifteen (15%) per cent. of the amount of such sum of principal and interest then due, provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by Chapter 49 of the

> Laws of 1914 of the State of New Jersey and the amendments thereof" (Case, p. 12; Omitted portion, ll. 14-19).

It clearly appears therefrom that "all reasonable costs including attorney's fees" are payable "upon the entry of judgment for the whole or any part of this note" (Case, p. 12, l. 17).

What is the statute regarding same?

The statute is "An Act to define, regulate and control the business of making of loans or advancements of money in sums of Three hundred ($300) Dollars or less in amount, and to regulate the assignment of wages when given as security for any such loan or advancement," P. L. 1914, page 75, approved March 23, 1914.

The sections of the statute which apply to the note in suit are Sections 5 (as amended, *post*) and 6.

At the time the note in suit was made (January 18, 1929, Case, p. 10), Section 5, as the same was amended by P. L. 1928, Chapter 251, page 497, approved April 3, 1928, was applicable, and pertinent provision thereof read as follows:

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

The italicized words "upon the entry of judgment" are identical with the words in the note fixing the condition and contingency upon the happening of which the maker of the note agrees to pay the reasonable costs including attorney's fees.

The legislative meaning seems to be clear that nothing but interest can be charged, "except upon actual foreclosure or upon the entry of judgment."

No attempt was made here to charge any fees *except* in connection with judgment. (Case, State of Demand, pp. 7-9.)

The said provision in the note in suit was condemned in the District Court and in the Supreme Court solely because it provides that the maker shall pay all costs including attorney's fees, "upon the entry of judgment."

This is not contrary to the statute—it is within it. Plaintiff did not insert this provision to gain something, but merely sought to be indemnified and saved harmless against payment of legal expenses from the principal sum in case borrower defaulted, and plaintiff had to enter judgment against said borrower. In such case it would have to engage an attorney and pay the court costs and an attorney's fees and collection commissions. It should be borne in mind that the sums involved under this Act (commonly known as the Small Loan Act) are comparatively small sums and within $300. The amount of the note in this case is $150. If the note did not contain this provision the plaintiff could only recover the amount of the note, with interest, and the small fees allowed in the District Court. The Court will undoubtedly take judicial notice that the attorney's fees of five per cent. (5%) allowed by the District Court Act (in

the case at bar $7.50) is not sufficient to pay attorney handling matter, and that the ordinary commercial collection rates are $15 suit fee and 15% collection commission. These minimum fees are the ones set forth in the note against the payment of which plaintiff sought to protect itself in case the borrower defaulted and plaintiff had to institute and prosecute suit to judgment. No contention was made in the Courts below that the said fees were unreasonable. They are the standard collection rates fixed by the Commercial Law League of America, a national body consisting of lawyers from all parts of this country who handle matters of a commercial character such as notes, book accounts, &c. They may be regarded in the nature of liquidated damages.

In appellee's brief to Supreme Court, he did not contend that the prohibition of the statute prevented any charge for costs including attorney's fee upon entry of judgment, but on the contrary he stated that costs including attorney's fee could be charged providing the same were the costs and attorney's fee fixed by Section 216 of the District Court Act, which includes an attorney's fee of 5%. Here is what the attorney stated on this proposition:

> "It is not the contention that the provision for the payment of an attorney's fee in a negotiable instrument or other contract for the payment of money, is usurious or illegal, but where the statute provides that no charge, bonus, fees, etc., shall be made except upon the actual foreclosure of the security or upon the entry of judgment, then the licensee is permitted to charge only the actual expenses of liti-

> gation, that is, court costs which includes an attorney's fee of five (5%) per cent. fixed by Section 216 of the District Court Act. The provision in a contract, under this act, for the payment of an attorney's fee, is a charge in addition to court costs and is prohibited by Section 5 of the Act."

Reference to Section 5 of the Small Loan Act, *supra,* indicates that nothing is said about the amount of costs and attorney's fees.

It is entirely proper and not legally objectionable for an agreement to provide for the payment of attorney's fees. In *Metropolitan Lumber Co.* v. *Fordham National Bank,* 7 N. J. A. R. 421, at 426, 144 Atl. 879, complainant-assignor in an assignment of rents, agreed to pay an attorney's fee. This Court, speaking by Mr. Justice Parker, said:

> "We know of no legal objection to a defendant agreeing to pay a reasonable fee to plaintiff's lawyer as one of the terms of a compromise. If the Court of Chancery may award such a fee in litigation; if five per cent. of a District Court judgment is taxed as an attorney's fee; and if in many jurisdictions an attorney's fee may be stipulated on a confession of judgment (34 C. J. 112; *Smith* v. *Swart,* 103 N. J. L. 150) it would seem that an agreement to pay an attorney's fee as part of the consideration of forebearance in enforcement of a judgment is not legally objectionable, and if so, will not in this case amount to duress."

It, therefore, must have been the legislative intent to leave the same to be determined by the Court "upon the entry of judgment," the Legislature knowing that the Courts could control same. Reasonable costs and fees within indemnity, are in the nature of liquidated damages, and are favored, and the Courts will allow same. (*Monmouth Park Assn.* v. *Wallis Iron Works,* 55 N. J. L. 132; *Globe Automatic Sprinkler Co.* v. *Small,* 49 N. J. L. J. 182). There is no express provision in the statute in question to support contention and distinction made by appellee, and the same would have to be extended by implication or construction, which we contend cannot be done in the case of a penal statute.

Had the Legislature desired to say that in any case no charges whatever should be added in the note under any circumstances, it would have been easy to say so by simply leaving out the portion of Section 5 which refers to the foreclosure of the security and the entry of judgment. Had it been the Legislature's intent to provide that in the case of the entry of judgment only standard court costs should be allowed, that would have been equally as easy to say.

We submit that if the prohibition against charges and fees in addition to interest does not apply "upon the entry of judgment", with which the appellee apparently agrees, then the fact that plaintiff claimed more than the costs and fees allowed by the District Court Act is immaterial and does not vitiate the note and loan *ipso facto.*

The costs including attorney's fee are linked up and coupled with the phrase "upon the entry of judgment," and nowhere in the note does it appear that plaintiff can exact said costs upon any other condition or contingency.

If there is any doubt about same, it should be resolved in favor of the plaintiff, because (13 C. J. 541, paragraph 512):

> "Where a contract is susceptible of two constructions, one of which will work a forfeiture and the other will not, that construction should be adopted which will prevent the forfeiture and preserve the right of the parties, and the ordinary meaning of words employed in a contract will not be extended for the purpose of supporting a forfeiture."

Furthermore, every instrument in the law is presumed to be legal and the presumption of legality must continue until such time as the contrary is proven. *U. S. Industrial Alcohol Co.* v. *Distilling Co.,* 104 Atl. 216; *O'Gormen & Young Inc.* v. *Phoenix Assurance Co.,* 7 N. J. Adv. Rep. 980, 146 Atl. 370. In 10 Ruling Case Law it is said:

> "In cases where a statute, in derogation of the common law, requires certain contracts to be executed in a prescribed manner in order to be binding on the parties, the law will not presume, it has been held, that either party has violated the statute" (p. 882).

and:

> "A court will not presume a state of facts injurious to fair dealing and common honesty. *Odiosa et inhonesta non sunt in lege praesumenda,* is a legal maxim; and Lord Cole says, that in an act which partaketh both of good and bad, the presump-

> tion is in favor of what is good, because odious and dishonest things are not to be presumed" (Section 31, p. 883).

It will be noted that this phrase in the statute is preceded by the preposition "except," which makes it an exception from the forepart of the section. The exception or excepting clause takes cases where fees are to be charged upon entry of judgment out of the prohibition contained in the statute that no charges, &c., other than interest shall be made.

"Except" is defined in Webster's New International Dictionary, 1925 Edition, as follows:

> (Prep.) With exclusion of, leaving or left out, excepting.

The word is derived from *ex,* meaning "out", plus *capio,* meaning "take", and literally means "take out".

In Black's Law Dictionary, 2 ed., page 962, it is stated "an exception exempts, *absolutely,* from the operation of an engagement or an enactment; * * *. An exception takes out of an engagement or an enactment something which would be otherwise part of the subject matter of it * * *.

We contend that the exception set forth in the statute and in the note in suit exempt, absolutely, the prohibition of making charges upon the entry of judgment.

As stated in *Lanning* v. *Lanning,* 17 N. J. Eq. 228, at 234, with regard to a proviso, it is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify

the enacting clause. It is a limitation of, or exception to, the authority conferred.

We submit that the exception "upon the entry of judgment" means exactly what it says, that the commandment not to make charges, other than interest, modifies same and is a limitation thereof.

This is all the more so when it is realized and considered that the Act is a penal law, because by Section 6:

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

It has been held that a penal statute is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited. *Marter* v. *Repp,* 80 N. J. L. 530, affirmed 82 N. J. L. 531.

Penal statutes are to be construed strictly and cannot be extended by construction. The act constituting the offense must be within both the letter and spirit of the statute. *Lair* v. *Killmer,* 25 N. J. L. 522; *Buck* v. *Danzenbacker,* 37 N. J. L. 359. *If there is any doubt* about the matter the Court should resolve it in favor of the accused. This

rule would seem applicable even if the statute were not strictly penal, for it is well settled that usury statutes are at least quasi-penal and are therefore to be strictly construed.

27 R. C. L. 207, §8;
39 Cyc. 910.

It is stated in R. C. L.:

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

What is the offense interdicted in the statute?

The offense is that he who violates the provision in Section 5, that no charges, &c., other than interest, shall be made *except* upon the actual foreclosure of the security or *upon the entry of judgment,* shall under Section 6 be guilty of a misdemeanor. Not only that, but the loan shall be "absolutely null and void" and in addition, "the borrower shall be entitled to recover from the lender any or all sums paid or returned on account of or in connection with such loan".

The violation is not only a crime and nullifies

and forfeits loan, but the borrower may also recover moneys paid back to the lender in connection with the loan.

The results of the violation are so drastic and severe that the statute should be construed strictly and not extended by construction.

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

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

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

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

It is manifest that great hardship and injustice will result to plaintiff if the statute is construed without the benefit of the exception which is in the statute and upon which the note in suit is based. The statute is susceptible of a more reasonable interpretation, namely, that there is no violation if the charges are made upon the fore-

closure of the security or *upon the entry of judgment* as in the case at bar, and it is urged and submitted that this is the proper interpretation and the one which should be given. It seems to us the other construction twists and tears the *excepting phrase* out of the statute and stamps the plaintiff as a criminal and forfeits its property.

The provision of Section 5, upon which the defendant bases his contention, excepts demands, etc., upon actual foreclosure of the security or upon the entry of judgment. By so providing the Legislature clearly says that a certain type of demand is valid. This type may be a demand made upon entry of judgment without previous arrangement therefor, or by virtue of such previous arrangement. If it means the former type the provision is practically meaningless. After a debtor has defaulted and judgment is entered it is difficult to see how any demand would benefit the lender. He may immediately proceed to get his claim paid by the issuance of execution and it seems nugatory to give him the right by statute to make other demands in return for this right. On the other hand, if the act is construed to mean that the lender may contract for the right to demand an additional benefit upon the entry of judgment the act becomes a logical piece of legislation. The lender cannot make a demand if the borrower pays in accordance with the terms of the contract, but if he doesn't, the lender, by virtue of a previous contract, may demand an additional sum of money equivalent in amount to that which it cost the lender to make himself whole. Of what benefit is it to the lender to give him the right to make any kind of demand without giving him the right to contract therefor? When the law provides him with the right to make a demand it must of necessity provide him with the right to make an ef-

fectual demand, *i. e.,* a demand based upon a pre-existing contract.

But even if this be not so, it appears as one of the facts in this case that no demand was actually made. The lender may have contracted for the right to make such demands but he did not avail himself of the right. The act condemns a demand. None was here made. The lender neither sought nor asked for anything more than the law allowed it. It did not demand attorney's fees, nor did it attempt to confess judgment. It is therefore impossible to see how a demand forbidden by the statute was ever made in the present case.

For these reasons, the established principles of statutory construction would require an interpretation be placed on any alleged violation of the statute most favorable to the lender and unless required to do so by the express language of the statute, the Court should not construe an act of the lender to constitute a violation of the terms of the statute and so to result in the commission of a misdemeanor and in the forfeiture of the entire principal amount loaned.

It is submitted that not only does the language of the statute not require such a construction but that, on the other hand, the statute expressly exempts the provision for additional fees or charges from being a violation, provided they are made only "upon the entry of judgment".

A study of the provision reveals that every one of the provisions is dependent upon the entry of a judgment for its life. Thus court costs, attorney's fee—these are meaningless unless there be a judgment entered. A court must breathe life into these empty words by means of a judgment. The statute expressly permits demands upon entry of judgment. The note merely provides that upon entry of judgment demand may be made. The

note not only seems not to violate the statute but to be expressly sanctioned thereby.

We therefore respectfully submit that the provision in the note does not violate the statute, but is squarely within it and the note is therefore valid and enforceable.

POINT II.

The note contains a saving clause providing that the borrower shall pay the reasonable costs including attorney's fees upon the entry of judgment *provided* the same shall not be construed to charge or obligate the borrower to pay any charges, etc., in excess of that allowed by the law.

This is not a case where the plaintiff is playing fast and loose with the statute (Case, p. 29, l. 23). On the contrary, by the inclusion of the provision hereinafter set forth, it was doing everything within its power to bring itself within the statute, and at the same time protect itself against loss against a defaulting debtor.

The note further

> "Provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by chapter 49 of the Laws of 1914 of the State of New Jersey and the amendments thereof" (Case, p. 12, ll. 25-31).

This clearly indicates that plaintiff did not unconditionally and unequivocally obligate the bor-

rower to pay the reasonable costs including attorney's fees even upon the entry of judgment if said cost should be construed in excess of that allowed by the statute. Who would construe it? Naturally the Court in which suit was instituted, because the payment of the costs is predicated upon the entry of judgment, which presupposes first the institution of a suit. Assuming that the claim for costs contained in said provision of the note is contrary to the statute (which we deny), we submit that the same is not absolute, but is based upon a condition, namely, that the same shall not be construed to charge or obligate the borrower to pay the same if a court shall construe the note in that respect to demand something in excess of that allowed by the statute.

A proviso is defined in Black's Law Dictionary, second edition, page 962, as "a condition or provision which is inserted in a deed, lease, mortgage or contract, and on the performance or non-performance of which the validity of the deed, etc., frequently depends." It usually begins with the word "provided".

> "A proviso in deeds or laws is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. *Voorhees* v. *Bank of United States,* 10 Pet. 449, 9 L. Ed. 490."

In the case of *Gifford* v. *Thorn,* 9 N. J. Eq. Rep. 702, the Court stated:

> "It has been repeatedly held, and seems at this day to be the settled law, that where a bequest made to a legatee is in these, or

words of similar meaning, without being controlled by the context of the will, they imply a condition precedent, to wit, that the legatee live to that age, and consequently the legatee does not take a vested interest in the legacy until twenty-one. I give and bequeath to A. B. *'at* the age of twenty-one'—or *'if* he arrives at twenty-one' —or *'provided* he lives to be twenty-one'— or *'in case* of his arriving at twenty-one'— or *'when* he arrives at the age of twenty-one'—have all been held to be contingent legacies * * *

So also where the bequest was to the legatee *provided* he should attain the age of twenty-one it has been held that until twenty-one the legacy does not vest. *Atkinson* v. *Turner,* 2 Atkyns 41, is a case of this class. There the bequest was of a certain part of a joint stock in trade to the legatee *provided* he should attain the full age of twenty-one, with remainder over if he did not live to that period; and the legatee having died under twenty-one, the question was whether his administrator was entitled to the profits which accrued between the death of the testator and his own, and which depended on the circumstance whether or not he took a *'vested interest'* in the legacy during his minority, and the court held that he did not."

In the case of *Appeal of Smith,* 103 Penn. 559, 562, the Court stated:

"A bequest of money in bank 'provided' the said amount is collected from the assets of the stockholders of said bank means

> upon condition or with the understanding the amount shall be collected out of that debt, and if not, then the bequest is not to be paid."

In the case of *Attorney General* v. *Methuen,* 236 Mass. 564, 573, the Court stated:

> "The word 'provided' in common speech naturally expresses a qualification, a limitation, a condition, or an exception respecting the scope and operation of words previously used. Although a proviso in statutes, contracts or wills not infrequently introduces new or independent matter, its true office and its general purpose is to restrict the sense or make clear the meaning of that which has gone before. (*Am. Exp.* v. *U. S.,* 212 U. S. 522, 534; *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181.)"

In the case of *Coykendall* v. *Blackman,* 161 App. Div. (N. Y.) 11, 146 N. Y. S. 631, the Court discussed at length the mortgage clause in an insurance policy containing the following provision: "Provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy the mortgagee shall on demand pay the same." In discussing that provision the Court elaborated in part as follows: "We are of the opinion that the word 'provided' was used in the sense of 'if' or 'on condition', and hence that the clause referred to should be construed as a condition and not as a covenant. The word 'provided' is defined by several authorities as follows: By Webster: 'On condition, by stipulation, with the understanding, if.' By Encyclopedia of Law and Procedure: 'On condition, by stipulation, the appropriate

term for creating a condition precedent, sometimes used in the sense of unless'." In *Robertson* v. *Caw,* 3 Barb. 410, 418: "The appropriate term for creating a condition precedent." In *Locke* v. *Farmers' Loan & Trust Co.,* 140 N. Y. 135, 148, 35 N. E. 578, 582: "The word 'provided' usually indicates a condition." And, to the same effect, *Brennan* v. *Brennan,* 185 Mass. 560, 71 N. E. 80, 102 Am. St. Rep. 363. In *Rich* v. *Atwater,* 16 Conn. 409, 418: "The proviso, it is said, requires such a construction. There has been much nice discussion upon the word 'provided'. 2 Co. 72; Cro. Eliz. 242, 385, 486, 560; Cro. Car. 128. It is certain, as is said by Judge Swift, that there is no word more proper to express a condition than this word 'provided'; and it shall always be so taken, unless it appears from the context to be the intent of the parties that it shall constitute a covenant. (*Wright* v. *Tuttle,* 4 Day 326.)" Many authorities in other states might be cited to the same effect.

Plaintiff in drafting the note endeavored to meet not only the letter but also the spirit of the law by adding said proviso. If a court in which suit was instituted on the note so construed the provision in the note as attempting to recover something in excess of the statute, then the condition imposed in said proviso was effective and plaintiff could not exact the same. Therefore, how can it be said that it violates the statute? If this were a matter solely within the control and discretion of plaintiff and did not depend upon a court of law to recognize and enforce the provision, it might be another matter and might be a mischief against which the act was intended.

However, we respectfully urge and submit that the proviso, which is in the nature of a saving

clause, took the provision for costs out of the ban of the statute, assuming that the same violated the statute.

As previously argued plaintiff by provision for costs was seeking indemnity against a delinquent borrower or defaulter and not seeking to penalize or get something else from the punctual and prompt borrower, and this brings us to the next point in the argument.

POINT III.

It is not against the policy of law or within the mischief intended to be remedied to save a defaulter from paying the expenses caused by his default.

Ramsey v. *Morrison,* 39 N. J. L. 591;
Globe Automatic Sprinkler Co. v. *Small,* 49 N. J. L. J. 182 (1926);
Bowie v. *Hall,* 1 L. R. A. 547 (Md.);
Dorsey v. *Wolf,* 18 L. R. A. 428 (Ill.);
39 Cyc. 953;
27 R. C. L. 232.

No protracted argument is necessary to point out that the Small Loan Act is of the same genus as ordinary usury statutes, albeit of a different species. The policy underlying the both statutes are alike. The policy of the Small Loan Act is obviously to prevent the plundering of small borrowers who, because of the extremities of their financial plight, provide an easy prey for "money sharks." The statute is designed to protect *bona fide* borrowers, and cannot be called upon by a borrower who at the maturity of a just claim

fails to pay it. The rule and reasons underlying it may well be seen from a few of the cases cited above.

In *Ramsey* v. *Morrison* (*supra*), a borrower pledged stock with a lender to secure a loan and signed an agreement reading:

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

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

> "The provision of forfeiture was by way of penalty for the non-performance of the contract. The contract itself called for no more than the payment of the sum loaned, with legal interest upon it, and the borrower had the right to pay to the plaintiff the principal and interest, according to the terms of his contract, and thereby avoid the penalty. It is essential to the nature of usury that a certain gain, exceeding the legal rate of interest, is to accrue to the lender as a consideration for the loan. If the gain to the lender, beyond the legal rate of interest, is, by the contract, made dependent upon the will of the borrower, as where he may discharge himself from it

> by the punctual payment of the principal, the contract is not usurious (authorities cited)." 39 N. J. L. 591, 593.

This case seems clear authority for the provisions in the present case. Here too, the operation of the provisions is dependent upon the will of the borrower, and he may discharge himself from it by the payment of his obligation at any time, even after suit, prior to entry of judgment.

Another case stating the rule very well is *Bowie* v. *Hall* (*supra*), wherein the Court held that a stipulation in a promissory note for the payment, in addition to the legal rate of interest, of costs of collection, including attorney's fees, on failure to pay at maturity was valid, saying:

> "In our judgment such contracts violate no principle of law or public policy. It seems to us simply a stipulation intended to secure punctuality in the performance of the contract, and as such contains no element of oppression to the borrower. Its tendency, in fact, is to help him to borrow at a less rate of interest, as punctuality of payment is usually taken into consideration in fixing the terms of a law. Nor can it be regarded as a cover to usury, for its effect is clearly not to put any money above the legal rate of interest, into the pocket of the lender, but merely to enable him to get back his money with legal interest and nothing more."

These cases are indicative of a policy universally recognized by the courts. The provisions in the present case are of the same general character, and by the same token are not within the

evil which the statute was designed to destroy. The *bona fide* debtor is not affected by the provision in any but a beneficial way, for the effect of the provision is merely to make it a little less likely that he will have to suffer by reason of the default of a *mala fide* borrower.

In other words, the Small Loan Act does not forbid a demand or charge for fees and expenses providing same are to be chargeable only "upon the entry of judgment." It is obvious that this constitutes full protection to the borrower, since by paying the note according to its terms he has it entirely within his own power to prevent the entry of judgment, and hence, so long as he lives up to his obligations, is protected against any other or further charges. The Legislature by this provision clearly indicated that in the event the borrower did not live up to the terms of his obligation and judgment was actually entered against him, there was no reason or policy to preclude the lender, in the event of entry of judgment, from collecting costs and fees.

CONCLUSION.

The plaintiff-appellant, therefore, respectfully submits that the Supreme Court erred as pointed out in the foregoing brief, and that for said reasons the judgment should be reversed and for nothing holden.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant.

HARRY GREEN,
Of Counsel.

New Jersey Court of Errors and Appeals

CONSOLIDATED PLAN OF NEW JERSEY, INC., a corporation of New Jersey, *Plaintiff-Appellant,* vs. MEYER SHANHOLTZ, MOLLIE SHANHOLTZ and ADOLF PALKOWITZ, *Defendants-Appellees.*	On Appeal from Supreme Court

BRIEF OF DEFENDANT-APPELLEE.

FACTS.

The plaintiff, herein, the Consolidated Plan of New Jersey, Inc., a corporation of New Jersey, brought suit upon a written contract for the payment of money which contained the following provision:

> Upon default in the payment of the whole or any part of this note, the undersigned, jointly and severally further agree to pay interest at the rate of three (3%) per cent per month from and after the date of such default until the date of payment, and upon the entry of judgment for the whole or any part of this note, the undersigned jointly and severally agree to pay all reasonable costs, including attorney's fees that may be incurred in collecting the whole or a part of this note, said attorney's fees to be fixed at fifteen ($15.00) dollars plus fifteen (15%) per cent of the amount of such sum of principal

and interest then due, provided, the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by chapter 49 of the laws of 1914 of the State of New Jersey and the amendments thereof.

The contention of the defendant is that such a provision is contrary to Chapter 49 of the Laws of 1914, as amended, and therefore the contract is null and void and uncollectable.

ARGUMENT

POINT ONE.

PROVISION IN NOTE FOR PAYMENT OF REASONABLE COSTS, INCLUDING ATTORNEY'S FEES OF FIFTEEN ($15.00) DOLLARS PLUS FIFTEEN (15%) PER CENT, UPON ENTRY OF JUDGMENT IS CONTRARY TO STATUTE.

The plaintiff Company was licensed to do business under an Act entitled, "An Act to define, regulate and control the business of the making of loans or advancements of money in the sum of Three hundred ($300.00) dollars or less in amount, and to regulate the assignment of wages given as security for any such loan or advancement." P. L. 1914, page 75, Supplement Compiled Statutes, 1910-1915, page 42, as amended by P. L. 1928, pg. 497.

Section 5 of the Act provides, that no such licensee shall charge or receive of the borrower or borrowers, or any other person, on his, her, or their behalf, a greater rate of interest than three (3%) per centum per month. Such interest shall not be payable in advance and shall be computed on unpaid balances. No charges, bonus, fees, expense

or demands of any nature whatsoever, other than interest as above provided, shall be made upon such loans or advancements except upon the actual foreclosure of the security or upon the entry of judgment.

Section 6 provides, inter alia, that the violation of any of the provisions of the Act shall be a misdemeanor, and that any loan in connection with which such violation shall have occurred, shall be absolutely null and void, and the borrower shall be entitled to recover from the lender any or all sums of money paid or returned on account of or in connection with such a loan.

The Appellant claims the right to charge and collect an attorney's fee of fifteen (15%) per cent plus fifteen ($15.00) dollars, and bases its claim upon that part of Section 5 of the Statute, which reads:

"Except upon the actual foreclosure of the security or upon the entry of judgment." Appellant argues in its brief, that the charge for attorney's fee was in the nature of liquidated damages and proper and permissible.

That this was not the intent of the legislature is clear from the language employed, and the situation the enactment of the Statute was intended to meet.

In the construction of a statute, it is proper to consider the previous state of the law, the circumstances which lead to the enactment and especially the evil which it was designed to correct. Blackstone's Interpretation of Laws, section 91, Stephenson v. Stephenson, 139 Atl. 722, 6 N. J. Advance Reports 32.

The purpose of the Act is to enable persons who have no bank credit to receive small loans up to Three hundred ($300.00) dollars, and is similar

except so far as interest is concerned to the existing statutes on Provident Loans. In order to attract capital to the small loan and industrial loan field, the legislature has granted to loan companies, licensed by the Commissioner of Banking and Insurance, the right to charge a special rate of interest greater than the ordinary legal rate, and fixed the charge at three (3%) per centum per month. Such an act is one which grants special privileges to licensees under the Act and should therefore be strictly construed against such licensees.

In fixing the rate of interest in the Statute in question, the legislature must have intended to provide a sufficient and fair return to the licensee upon its investment. The fixing of such rate could only have been made after a consideration of the type of loans and borrowers, the cost of doing business which would include the cost of collection, and the risk entailed.

Evidently the legislature had conceived, that to attract lenders to make loans of the nature contemplated by the Act, it would be necessary to permit this unusual interest yet endeavored to protect the borrower from any other charges whatsoever. And consequently provided that in connection with such loans, no charge, bonus, fees, or demands, of any nature, whatsoever, except interest was to be received, or contracted for by the lender.

The Appellee did not contend in the lower courts, nor does he contend here that the provision for the payment of and attorney's fee in a negotiable instrument or other contract for the payment of money is usurious or illegal. However, in the case at bar, the Statute specifically provides that no charge, bonus, fees, expense or demands of any nature whatsoever, other than interest, shall be

made upon such loans or advancements, except upon the actual foreclosure of the security or upon the entry of judgment.

What did the legislature intend by the words, — "except upon the actual foreclosure of the security or upon the entry of judgment?" It being clear that only interest and no other charges could be made, the exception did contemplate something else. The exception of a particular thing from the operation of the general words of a statute shows that, in the opinion of the law-maker, the thing excepted would be within the general words, had not the exception been made. 25 R. C. L. 983.

Could the legislature have intended an arbitrary charge upon the entry of jodgment? It is the contention of the Appellee that the legislature anticipated there might be a default on the part of borrowers unable to meet payments, and that suit would be instituted and judgment entered, in that case, the injury to the lender would be the deprivation of the use of the money and the compensation for that is fixed and limited by the statute, allowing only interest, and the legal costs, prescribed by law upon the entry of judgment. The legislature could only have meant by the clause, upon the entry of judgment, the actual court costs. It will be noted that in the District Court, costs include an attorney's fee of five (5%) per cent. P. L. 1898 pg. 635 — 2 Compiled Statute 2019.

The provision in a contract, under this Act, for the payment of an attorney's fee is a charge in addition to interest and court costs, and therefore is prohibited by Section 5 of the Act.

As has been said, Appellant contends that the obligation to pay attorney's fee is in the nature of liquidated damages for the default or breach of

contract. If the borrower may be compelled to pay fifteen (15%) per cent plus Fifteen ($15.00) dollars, collection fees in addition to interest, in case suit is brought, could not a contract to pay 20, 25, or a greater per cent as liquidated damages, in case of failure to pay promptly on the day the debt became dus, be enforced, and thus the law regulating the rate of interest be virtually repealed.

The Appellee submits that this was not the legislature's intent, and that the exaction of the attorney's fee was a charge or fee prohibited by the Statute and the note was therefore null and void.

POINT TWO.

THE CLAUSE WHICH READS, "PROVIDED THE SAME SHALL NOT BE CONSTRUED TO CHARGE OR OBLIGATE THE BORROWER TO PAY ANY CHARGES, ETC., IN EXCESS OF THAT ALLOWED BY LAW" DOES NOT SAVE THE NOTE FROM BEING NULL AND VOID.

The provision in the contract which states, "Provided the same shall not be construed to charge any or all of the undersigned to obligate them to pay any interest charges, bonus, fees, expense or demands of any nature whatsoever in excess of that now allowed by Chapter 49 of the Laws of 1914 of the State of New Jersey and the amendments thereof," is an attempt to circumvent the express mandate of the statute, that no charges, bonus, fees, expense or demands of any nature whatsoever other than interest shall be made upon such loans or advancement except upon the actual foreclosure of the security or upon the entry of judgment, and hence is a violation thereof, especially, since the plaintiff in its State of Demand expressly demanded the payment of the attorney's

fee of Fifteen ($15.00) dollars plus fifteen (15%) per cent (Case pg. 9, LL 10-29), and that therefore the said note is according to Section 6, null and void and uncollectable. The Supreme Court properly said, (Case pg. 29 LL 18-22) "The note itself calls for that which is forbidden, and the lender having sought that which he was not entitled to connot be heard to say that that which he seeks, he does not seek."

CONCLUSION.

Appellee respectfully requests that the judgment of the Perth Amboy District Court entered in favor of the Appellees and against the plaintiff, and affirmed by the Supreme Court be affirmed here.

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