

14658

No. _____

Supreme Court of Illinois

Hendel

vs.

Greenleaf

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. . 279

J. W. Middleton & Co., Stationers, 196 Lake St.

*Handled
by
Greenleaf*

1864

John Hendel } In the Supreme Court
vs } 3^d Grand Division.
David Gaencleaf } Appeal from Peoria Circuit Court,
Tried at April Term A.D. 1863.

The Appellee above named is notified,
that on the 1st day of the next ~~Term~~ of said Supreme
Court to be held at Ottawa, on Tuesday, the 19th
day of April instant, or as soon thereafter, as
counsel can be heard, the said Appellant, John
Hendel, will file his petition in said Court
for a rehearing on said Cause, when and
where you the said Appellee can appear and
assist said application if you deem proper
Peoria April 8th 1864

Cooper & Moss

To Johnasow & Hopkins } Atty's for Appellant,
Atty's for said Appellee }

Received Copy of the above notice
this 8th day of April A.D. 1864.
E. J. Huron

279
Hendel
W.D. =
Greenleaf
Notice
11

Filed Apr. 26. 1864.
L. Seland
Clk.

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1863,

DAVID GREENLEAF, *Appellee,*

ATS.

JOHN HENDEL, *Appellant.*

In May, 1857, the appellant, a dentist, bought out the shop fixtures and business of the appellee, a dentist at Peoria, for \$400, and in payment gave his four notes of \$100 each, on 3, 6, 9, and 12 months. The first, appellee paid, the second was by mutual consent, destroyed on settlement, the third is the note in suit, and the fourth still remains unsettled.

- 1 This is a case of conflicting testimony, of uncertainty as to facts, and involving more controversy than pecuniary interest. A jury have passed upon it in the light of all the evidence as fairly as they would ever be able to do, and have obviously done that substantial justice which we think this Court will not disturb.

Wheeler vs. Shields, 2 Scam., 351.
Lowery vs. Orr, et al 1 Gil. 84.
Daws vs. Robbins, 5 Gil. 72.
Johnson vs. Moulton, 1 Scam., 532.
Allen vs. Smith, et al 3 Scam. 97.
Evans vs. Fisher, 5 Gil. 569.
Blanchard et al vs. Morris, 15 Ill. 35.
Young vs. Silkund, 11 Ill. 36.
1 Bos. and Pul., 339.
2 T. R., 4.
8 Wen. 672.
7 Johns., 138.
2 Caines, 90.

- 2 There is great uncertainty what the contract was, if there was any, as to appellee remaining at Peoria to hunt up recommendations to the appellant. And it is wholly uncertain what damage, if any, appellant sustained by appellee's not so remaining. It is quite clear from the evidence that all such damage was mutually settled between the parties, appellant paying the first note, appellee cancelling the second, the third remaining in force, and the fourth not to be paid except in a certain event. So that appellee has never been asked to pay but \$200, inclusive of this note in suit, of the \$400 for which he gave his notes while the property and business he got were worth the full sum of four hundred dollars irrespective of any services of appellee. All these were proper and peculiar subjects for the jury to weigh and decide, and their facilities for doing so cannot be reproduced to this Court. Hence a finding upon complicated and doubtful questions of fact will rarely be disturbed, especially when the conclusion reached is substantial justice.

- 3 The note about which a subsequent agreement is claimed to have been made that it should not be collected unless, &c.—was not the note in suit but the 12 months note, the last in said series of four.

- 4 Appellant received the full value of his 4 notes in property and business irrespective of any services of appellee in recommending him.
- 5 There is no error in the Court refusing to permit witnesses Blakely and Bush to testify to their understanding of the consideration of said note and immediately thereafter reconsidering the matter and admitting the same.
- 6 It is claimed that there was no error in the instructions as passed upon by the Court.

182 279

Hendel

✓

Grumleaf

Dfts. Brief

Filed May 12. 1863.
L. Seland
Clerk.

1. Walker J. It appears from the evidence, in this record, that in May 1957, appellant, a dentist purchased the shop furniture and business of appellee, situated in the City of Peoria, for the sum of four hundred dollars. Appellant then executed his four several promissory notes, of equal amounts, due in three, six, nine and twelve months from date. It further appears that one was paid and taken up, and another was destroyed, leaving two still in existence. Hamaker testifies, that he was present, when an adjustment was made, and that one of the notes was paid, and ~~one~~ taken up, and one destroyed, because appellant had not remained in Peoria after the sale, and solicited custom for appellant in his business, according to the agreement when the purchase was made. He is unable to state which notes in the series were destroyed or paid; but he testifies, that it was then agreed, that if appellee still remained in Peoria, and accounted

2

appellant to Customs, that he should pay the last note. He is unable to state how long appellee was to remain for that purpose, or the time that note fell due.

But inasmuch as the parties designated it as the last note, we have a right, to conclude, nor can we infer any thing else, than that it was the ~~last~~ note due in twelve months. The witness gives it as his opinion that it was the last unpaid note. If the note maturing at twelve months was not destroyed he is undeniably correct in his inference as the parties certainly ^{replied} ~~stated~~ of that note as the last. The note sued upon in this case is the third in the series, or the note falling due in nine months. We are unable to perceive how it could be designated as the last note. The agreement testified to by this witness could not apply to this note, as it was not the last.

On the trial below appellant produced the note falling due at the expiration of six months, which was in all probability the note which was paid and taken up and when the next

ment was made. It is more than
 probable, that the first note in the
 series, was destroyed, an appellant
 would have also produced it on
 the trial. As the ~~note~~ last note was
 to be paid, the twelve months note
 could not have been destroyed.
 We must then conclude, that when
 the adjustment was made, the notes
 maturing at nine and twelve months
 were left outstanding. This seems
 to have been the conclusion at
 which the jury aimed in finding
 their verdict. And the evidence var-
 -rants their verdict. It devolved up-
 -on ~~the~~ appellant to show by evi-
 -dence that the consideration of this
 note had failed, and not that the
 note ~~was~~ ^{superseded} ~~up~~ and destroyed and
 the note last falling due had fail-
 -ed. The parties by their agreement fixed
 and as to the extent of the failure
 of the consideration, which was the
 -note destroyed and the last note if
 appellee failed to remain in Prison
 and recommend appellee, to customers.
 The parties having fixed the extent
 of the failure of consideration, the
 law will not disturb that agreement.

4

We are unable to perceive, that the instructions as given, were calculated to mislead the jury. Nor do we perceive discern, that the court erred in refusing a portion of appellants instructions, or in modifying his former instruction, before it was given. Considering all of the instructions as given we are of the opinion that they fairly presented the law of the case, and the court below committed no error, in overruling the motion for a new trial, and the judgment must be affirmed, judgment affirmed.

²⁷⁹
John Wendell

182 vs 137.

David Greenleaf

Opinion by
Walter J.

Recorded B. 12 P. 203

com^o.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863

JOHN HENDEL, Appellant,
vs.
DAVID GREENLEAF, Appellee, } *Appeal from Circuit Court of Peoria County.*

ABSTRACT OF RECORD.

- p. 1. Assumpsit on promissory note, brought by Greenleaf vs. Hendel, before a justice of the peace.
Nov. 18th, 1860, judgment for plaintiff for \$93.¹⁰/₁₀₀.
- p. 3. Appeal to said Circuit Court by defendant, to March term, 1861.
- p. 7. March 7th, 1861, appearance of Greenleaf entered.
- pp. 9, 10. Dec. 10th, 1861, trial by jury—judgment for plaintiff for \$1.
Feb. 5th, 1862, motion for new trial by plaintiff granted on his paying all costs.
- pp. 11, 12. April term, 1862, 2nd trial by jury, and verdict for plaintiff for \$100.⁸⁹/₁₀₀.
April 12, '62, motion for new trial by def't, for following reasons:—
- p. 13. 1st. Court excluded proper evidence offered by def't.
2d. Admitted improper evidence for plaintiff.
3d. Gave improper instructions for plaintiff.
4th. Refused proper instructions offered by def't.
5th. Verdict of jury is against the evidence.
6th. Verdict is against the law.
7th. Verdict is against the law, the evidence, and the instructions of the Court.
- pp. 14, 15. Motion for new trial overruled, at June term, 1862, and judgment rendered for pl'ff upon said verdict. Appeal thereupon prayed to the Supreme Court, and granted on filing bond in the sum of \$200, with Wm. H. Davis as security, in 20 days.
Bill of exceptions filed June 10, 1862, shows that plaintiff offered in evidence this note:—
- p. 15. “\$100. Nine months after date, for value received, I promise to pay David Greenleaf or order, one hundred dollars, with interest at six per cent. per annum. Peoria, May 4th, 1857. JNO. W. HENDEL.”
Endorsed “Due on within note eighty-seven dollars seventy-four cents.—\$87.74. Nov. 9th, 1859.”
“Received on within note one dollar and fifty cents.”
Plaintiff here rested.
- p. 16. Def't called George S. Blakeley, who said:—I know the parties to this suit—

- p. 16. know when Hendel bought Greenleaf out—He made out Bill of Sale to Hendel of certain articles, and Hendel gave his notes. Do not remember amount of notes, but think there were four, in equal amounts, payable in 3, 6, 9 and 12 months. I drew notes and Bill of Sale. The note sued on is one of the notes given by Hendel to Greenleaf at that time, and in part payment on purchase.

The following note, produced by defendant, viz :

"\$100. Six months after date, for value received, I promise to pay David Greenleaf or order, one hundred dollars, with interest at six per cent. per annum.

Peoria, May 4th, 1857."

JNO. W. HENDEL."

- p. 17. With payments of various dates endorsed on it, amounting to \$47, and this memorandum: "May 4th, 1859. Due on the within note eighteen dollars and ninety-four cents—\$18.⁹⁴/₁₀₀, was shown to witness, who said, this note is one drawn by me and executed at time referred to. Note and endorsements read to jury. Witness said, I do not know where bill of sale is.

Def't. being sworn said—Bill of sale was burnt up or lost, as I suppose. Some months after said purchase, the building in which I had my Dental shop was burnt. My papers were in my desk in the office,—the fire was in the night, in my absence. My desk was broken open and thrown out of the window, and pa-

- p. 18. pers scattered—this Bill of sale was among the missing. I have searched carefully for it, but could not find it, and have no doubt it was destroyed or lost at time of fire.

Blakely again called, said—I do not recollect what articles were enumerated in said Bill. It contained an enumeration of articles and furniture that were in said Dental shop; but do not know that it embraced any Dental tools, nor do I know the value of articles named, or what plaintiff had in his shop. It purported to be a schedule of articles in the shop, but had nothing to show that it contained the full consideration for the notes. It said nothing about good will, nor anything except enumerated articles. If any sum was named in bill it was \$400, and either ran:

- p. 19. "In consideration of \$400, I sell," &c., or "For value received, I sell," &c. If the latter, no sum was named in it. My impression is that this was drawn the way last mentioned, that being my usual way, unless I was otherwise directed, and I remember no directions in this case—I have no recollection on the subject.

Def't asked the witness if there was any other consideration for said notes besides the articles named in said schedule or Bill of sale, and if so, what it was?

Question objected to by plaintiff, and objection sustained. Plff's counsel then stated that they expected to prove by this witness, if permitted, that a material and much larger part of the consideration of said notes, was the agreement of pl'ff to remain in Peoria, and recommend def't, who was a stranger, as a competent Dentist, and to send him customers. And by other witnesses that pl'ff had wholly failed to comply with his agreement in this respect; and that def't had

- p. 20. already paid on said notes more than the value of the goods enumerated in said Bill of sale; for the purpose of showing failure of consideration of the note in suit. Def't again asked the same question. Pl'ff objected—objection sustained and def't excepted.

CR. EX. Hendel took possession of shop immediately after the sale, and went on with business in the same place.

John Bush testified—I reside in Peoria, know parties—knew Hendel before he came here. Had some conversation, by correspondence, with him, and interviews with Greenleaf respecting the sale. I know pl'ffs hand writing. Three
 p. 21. letters from Dr. Greenleaf to Dr. Hendel were shown witness. One dated September 11th, 1856, in which is the following: "I think of changing my business, and if I do I should like to dispose of my practice. "I have had three offers, but I would give you the preference. I think I can make it an object for you to take my practice, as I shall remain here and can use my influence for you, and know you can keep all my business." One dated Feb. 13, 1857, in which he says: "I intend to sell out my business, as I intend going into the wholesale grocery
 p. 22. business with my father-in-law. I was offered \$500 by Noble, but after visiting Memphis, he concluded to locate there. I am now offered \$400 for it, as it now stands, (excepting my case of instruments). My practice is worth 2500 to \$3000; mostly city, and with proper exertions could be made worth 3500 to 4000; easy.—I have more than \$400 worth of work to do? If you want it at \$400 I will give you the preference. I am going into business here, and can help whoever I sell to." One dated March 6th, 1857, in which he says: "You can have the rooms I
 p. 23. occupy—I have had them nine years. I have a good operating chair, (one of Jones & Whites,) a book case, 2 tables, 4 chairs, 1 looking glass, a lounge or settee, carpet, stove, &c.; but you can fit it up to suit yourself. I will let you have all, except my case of instruments, at that price." Witness says these are in the hand writing of pl'ff, and signed by him. These letters were not allowed by the Court to be read to the jury, but were afterwards, by consent of plaintiff read in evidence.

Witness said—I knew pl'ffs Dental shop and office, and what he had in it, and
 p. 24. what he sold to def't. There was a lounge, a desk with book case on top, stove, carpet, Dentist chair, looking glass with mahogany frame, a few chairs, think 3 or 4, and in the back shop a turning lathe and some loose tools of small value, some saws and files. Def't got articles in front shop that I enumerated, but did not get case of Dental Instruments, or any of them, I think. The furniture was somewhat worn. I am a painter, and am acquainted with furniture business and
 p. 25. value of furniture—was in that business formerly. Not including Dental chair, the furniture in front room was worth about \$40. Desk and book case \$10, stove \$6, lounge \$5, carpet \$12. Dental chairs cost, when new, \$30 to \$75; do not know the value of the turning lathe. There was a bench in the back room, on which tools lay, which Hendel got. It was a board set against the wall, and supported by stays, worth \$1.50. There were four notes of \$100 each, given I think on 3, 6, 9 and 12 months. I do not know how many of them have been paid. I saw one in Hendel's possession, which he had taken up. This was before the fire, which was in fall after the purchase.

p. 26. The question by def't—How long did Greenleaf remain in Peoria after the sale? Objected to by pl'ff and objection sustained, and def't excepted.

The question—What was the consideration of said notes? Objected to, objection sustained, and def't excepted. This evidence afterwards admitted.

p. 27. John Batten being called said—I knew pl'ff's Dental office before he sold to def't, and what was in it. Am a cabinet maker, acquainted with the value of furniture. The furniture in the office was one desk, with book case on top, worth \$15, 4 or 5 chairs, worth 75 cents each, stove, 5 or \$6, a worn carpet, worth 40 or 50 cents a yard, probably 20 yards of it, a screen across the back part of room, (and part behind not carpeted,) a lounge, worth not over \$4, small table, worth \$2.50. The looking glass, not large, and worth about \$3. I do not know the value of a Dental chair, but should think one of this kind when new, would sell for 40 or \$45. This one was considerably worn, and was worth some \$15. In the back room, used for a work shop, was an old bench, being a board set against the wall, worth 75 cents, a turning lathe, worth \$10, and another bench of some kind, to put tools on. I don't remember what it was. It may have been a store box turned up, of little value. I have seen old plaster casts standing on it, when pl'ff was there. There was a furnace intended for use about the business; have not seen it since Hendel bought.

Cr. Ex. I do not pretend to state all the little articles that were in the shop.—I was in after the sale, perhaps one, or perhaps two months. Am furniture maker. Don't know the value of all the articles in the laboratory—do of some of them. Cannot say I was in the office one month before the sale.

p. 28. Abraham Hamaker testified—I know the parties—was present in fall of 1859, at an interview between them, relative to notes pl'ff had against def't. Don't know that I should know the notes if I saw them. Notes were spoken of, and one was destroyed in my presence. Some money was paid—don't know on what note. It was not on the one destroyed—that was a whole note. Hendel said to Greenleaf: "You know you have not complied with your agreement—you know you agreed to stay here and give your influence in my behalf, which you know you did not do;" which Greenleaf admitted was so.

p. 29. Hendel then said, he would pay the last note according to agreement, if Greenleaf would now stay and use his influence for him. Greenleaf said—I do not ask you to pay it, if I do not stay. The note was destroyed because of non-conformity with some agreement, relating to the notes. I know nothing of this agreement, but what I learned at this time. I think the note destroyed was for \$100. I don't know how much was paid—it was more than \$1.50. It was paid in bank bills, and there were several of them. It was the last note which was to be paid, if pl'ff remained, and pl'ff promised to remain and use his influence thereafter, if Hendel would pay it. Something was said to the effect that Hendel had already paid pl'ff more than he deserved. I, with John Zeigler, was called into Hendel's office, to witness this transaction. Zeigler is now in U. S. service—Cap'n in 11th Ills. Cavalry. I saw the notes but was not very near them. Something was said about a \$100 note being destroyed.

Cr. Ex. At this time I was employed in Bartlett's Grocery store. Hendel called

Zeigler and myself in as witnesses. Do not know that Greenleaf knew about our being called in. I stayed until I thought all was done. We did nothing but witness the transaction. Do not know where Greenleaf lived then—I heard, in Knoxville. One note was destroyed, a balance, I think, paid on another, which was given up to Hendel, and one was to be paid, if Greenleaf stayed in Peoria.—Hendel said—“Dave you know you did not comply with your agreement, and Greenleaf admitted it, and said—“I will destroy one note.” I have repeated conversation as near as I can recollect. Hendel said, it is pretty hard for me to pay these notes—the stand having been burned out, and your not staying and giving me your influence. I saw one note destroyed, and something endorsed on another at the time. I think Hendel took one up. I saw more than one note there. The note destroyed had no endorsement on it. I don’t know how long Greenleaf was to stay in Peoria. But Hendel said, if Greenleaf staid here he would pay the note, and if he did not remain he would not pay it, and Greenleaf said, “If I do not remain I will not expect you to pay it.” The note that was to be paid was the last. I am positive it was the next to the last that was destroyed, because the one that was kept was called the last. On condition that pl’ff would remain in Peoria and give his influence in favor of Hendel, and destroy one note, Hendel agreed to pay the other, or last note. As near as I can remember, this was in the fall of ’59. Hendel went over the conversation while Zeigler and I were there.

RE-EX. As I understand it, there were three notes present—one was destroyed, one taken up, and the remaining one to be paid, if pl’ff stayed and used his influence for the shop. The note that remained I understood to be the last.

CR. EX. Pl’ff did not say how long he would stay—don’t know as he made any positive assurance that he would stay; but said he was going to stay in Peoria from that time on. Don’t know how long he remained. This was after he had left Peoria and come back. Nothing was said about how long the note still to be paid had to run. Def’t made no objection to the note which he paid and took up.

p. 32. John Johnson testified—Pl’ff is my son-in-law. In spring of 1857, pl’ff left Peoria and went to Knoxville, and lived there till fall of ’59; then went to Memphis, Tenn.; from there, to St. Louis, and the next spring to Knoxville again, and has not been in Peoria since he left in 1857, except for a short visit. I think def’t paid me something on the street, on the six months note, don’t know how much.

CR. EX. I think I called on def’t a number of times for payment of one of the notes—the last time as much as two years ago, and while pl’ff was in Knoxville; never called on him for payment since pl’ff left Knoxville. Def’t never said anything to me about defence to the notes, always said he would pay, but complained of hard times. I knew in general way of sale by pl’ff to def’t, from pl’ff’s statements, but did not know particulars. Def’t. here rested.

Charles Greenleaf, called by pl’ff, testified—I have been in business some 14 years, as a dentist. Knew the property in office—owned it before pl’ff sold out.

p. 33. I paid for Dental chair \$60, in N. Y., and \$14 charges. It was, I think, worth \$60. It was not injured. I saw it three or four months before pl'ff sold out. I don't know how much the carpet was worth. The book case I paid \$50 for; don't know whether this is the same sold to Hendel or not. I allowed \$20 for the lounge; when pl'ff sold, I should think this worth \$12.50. When I left, the chairs were worth \$1.50 each—they cost me \$2.50 or \$3. The stove, when I sold, was worth \$8. The looking glass I brought from the East, and valued it highly. It was worth, when pl'ff sold, \$6; would give \$5 for it now. There was a screen across the front room worth \$3. The lathe and fittings was worth \$15, when I left them; have not seen it since. Furnace cost and was worth \$30. Articles in laboratory were worth from 75 to \$100; this includes all but furnace. I was out of the shop 18 months before sale to Hendel, and for six months or a year before said sale, I was not inside the shop. The last time I was in, I did not notice that anything was gone. When I sold out, pl'ff claimed to have paid me \$250 for my

p. 34. interest, which was one-half—I thought this was not enough.

Pl'ff asked—"What was the concern worth which pl'ff sold?" Question objected to by def't, objection overruled and exception taken.

Ans. I heard pl'ff was going to sell, and I offered him \$400—I was willing to give it, and thought it worth that or more.

Pl'ff asked—"What did pl'ff do to recommend Doctor Hendel as a dentist?" Question objected to, also testimony of Cunningham, Garrett, Johnson & Cox, to prove that pl'ff had recommended def't, unless def't was allowed to prove by other witnesses that pl'ff's agreement to stay in Peoria and recommend Hendel, as a dentist, was a part of the consideration of said notes. Evidence then admitted for both on that point, and objection before sustained to Blakely and Bush's evidence, on that point, overruled.

p. 35.

Ans. I know several instances where persons were by pl'ff induced to go to def't for work. Don't know how many, nor amount of work. Never heard pl'ff recommend any one to go to def't—only knew it from parties telling me, who have come to my office. Know he has done work for parties recommended by plaintiff, for I have seen the work.

CR. EX. Do not know that I ever heard pl'ff recommend def't. Know that the work was done by Hendel because parties told me so—knew it no other way.

p. 36.

The furnace was in the back room when I left. It cost me \$30. Know little of pl'ff's doings since I left the office. Was on R. R. a year and a half, and was in office off and on, after I sold out, five years ago. A few months after I quit the R. R. I went into drug business for a year and a half or two years. Pl'ff. was not in dental business much, if any of the time, I was in the store. I offered pl'ff. \$400 for his place in dental business. Think this was before I went into the drug business. I made the offer to be reinstated in the business—I had been in it some 9 years at this stand, and wanted the old place. When I went out pl'ff. said he would give me \$800 for the good will of the office. Paid me partly in work and repairs, and partly in cash. There was a case of dental tools that cost me \$100,

plff. got. Don't know the dental chair in deft's office, nor what he got when he bought from plff. I have given articles and value as I left them. Plaintiff came from East and was going South. I induced him to stay with me,—he was joint owner with me in the stock. Don't know what he paid me.

- p. 37. James Cunningham testified—I know parties. About time plff. sold out I had tooth-ache; went to plff. to get something done. He said they were not then in fit condition to fix. I went again, found deft. there, who pulled teeth and did some fixing for me. About this time my wife had a set of new teeth made. She had been to plff. who pulled some teeth for her, preparatory to putting in new set, and contracted for the job. Before new teeth were made, plff. sold out, and turned the job over to the deft., and recommended him to us, and said he was a good dentist—all right, &c., and, on this, we let him make and put in the teeth. I paid deft. for this and what he had done for me \$55. Before paying him I wrote to plaintiff. to know who I should pay. He replied to pay defendant. Witness here produced the letter, which is dated October 13, 1857, written from
- p. 38. Knoxville, and, in which, he says: I left all work engaged to Hendel, but, the first of next month, he will owe me \$80, and if you don't pay him before then I should like to give you an order on him. You need not mention this to him, but let me know if you do not pay him before then.

The work was well done—all done by defendant, except pulling the teeth, which was not much of a job. My wife still has these teeth, and they do first rate.

E. G. Johnson testified. The only case I know of where plff. recommended deft. was my own. I wanted some work done, and plff. took me and introduced me to deft. I got him to do what I wanted. It amounted to \$7.

Cr. Ex. I think it was in June after the sale that I was introduced to deft.

- p. 39. A. O. Garrett testified—The spring deft. bought, I was having a set of teeth made by plff. for my wife. When he sold out he introduced me to deft., and said he would do the work well for me. I gave him the job and paid him \$100 for it.

Cr. Ex. I think it was in May or June. I had before agreed with plff. to do the job. Deft. did the work very well—it was a most excellent job—one of the best I ever saw.

R. S. Cox testified—I know parties. I recollect plff. recommended deft. as the best dentist in town, and on that I went and got him to do a job, amounting to one dollar.

- I have a number of times heard plff. express his opinion that deft. was a good dentist. Have seen note in suit—presented it once for payment, about 18 months ago, in Nov. 1860. When presented, deft. offered to pay me \$50 for it, if would give it up. This was all he said about it—he mentioned no defence to it—merely said he would pay me \$50 for it. Plff. gave me the note, told me to present it, if not paid, to sue it. Plff. was here then and staid two or three days.
- p. 40.

Cr. Ex. I knew neither party when plff. first left town. When I first knew plff. he was living in Knoxville—this was in 1858. When he has been in Peoria since, he has never stayed but a few days at a time. My interview with deft. was

very brief, when I presented the note. My instructions were, to sue it if not paid on sight. When deft. offered me \$50 for it, I turned round immediately and left him, and sued the note. Plff. is my brother-in-law. The time plff. recommended deft. to me was just before I went to present the note for payment.

John Johnson testified—I think it was in the summer of 1857 that plff. left Peoria for Knoxville. Before that, for some months, we talked of going into business together, in Peoria—had canvassed a number of kinds of business, the grocery among others. Not making satisfactory arrangements plff. left for Knoxville, and has not resided in Peoria since. Plff. here rested.

Deft. re-called George Blakely, who said—I remember deft. said the notes ought not to be made negotiable. That, if they were, plaintiff would have all the advantage. Plff. replied—you know I am going to remain here and use my influence for you, and it will make no difference. Deft. said, you have all the advantage over me in this way, and I have nothing to hold you. I then understood plff. to say he was going into business in Peoria—did not say how long he would stay. I told deft. it would not do very well to make the notes not negotiable. That as plaintiff was going to remain in Peoria, he need have no fears. Deft. finally consented and the trade was made.

John Bush testified—The furnace which the Greenleafs had in their back room never came into deft.'s possession. It was put into room back of office, by Dr. Charles Greenleaf, before he sold out to plff., as useless lumber, and was not used by him or plff. afterwards. I was in furniture business from early boyhood until I was 18. The price I put on these articles that deft. got, is the fair value.—Deft., when he bought plff. out, was an entire stranger in Peoria, from Penn.

CR. EX. I know the furnace was not included in the trade. I have often priced dental chairs. The price varies from 30 to 75 dollars.

Abraham Hamaker recalled, said—I know time Charles Greenleaf went into Coralite business—have heard plff., since then, recommend Coralite as preferable to the old system—that it was an advance upon it.

CR. EX. First I heard about Coralite, was from plff.,—he said it was preferable to Gold. This was in Bartlett's Grocery Store. Some others were there expressing their opinion about it, and plff. gave his in favor of Coralite.

RE-EX. Deft. did not set teeth in Coralite, but did in Gold.

Deft. here again offered the letters from plff. to him, above set out, which, by consent of plff., were read to the jury, and deft. again rested. This was all the evidence.

PLAINTIFF'S INSTRUCTIONS.

1st. If the jury find from the evidence that when sale was made to deft. a sale bill was executed in writing, as the sole consideration of the notes, and that no other writings were made, the jury will consider no proof of any contract of the parties, other than what appears in the notes and sale bill.

2d. The note is evidence of itself, and plff. is entitled to recover balance due on it, unless deft. has affirmatively proved a legal defence thereto.

3d. Any mere understanding that plff. would remain in Peoria after the sale, does not amount to a contract to that effect. There must be an affirmative contract proven, to entitle it to your consideration in this suit.

4th. If the jury find such contract made by plff., to remain in Peoria, and no definite limit fixed, and such departure by plff. before a reasonable time, and that it caused damage to deft.; yet, if they find that the parties have settled and adjusted said damages, the deft. is not entitled to renew in this defence, a claim for damages so adjusted.

5th. If the jury find, from the evidence, that such contract to remain was made by plff. and broken, deft. is not entitled to recover unless he has proven that he
p. 45. sustained damages thereby, or unless the said agreement was part of the consideration of said notes.

6th. A payment on a note, or legal obligation already existing and due, is no consideration for a promise of the payee to do or perform any independent act. An assurance or promise by plff. to deft., that he would remain here, or do any other independent act, made without consideration, is not legally binding on plff., and not a foundation for suit or ground of defence.

7th. The jury are instructed that the note given in evidence entitles plff. to recover the amount due thereon, unless deft. has shown facts to defeat such right of recovery.

8th. If the jury believe, from the evidence, that plff. agreed to remain in Peoria, and recommend customers to deft., and that he did not so remain, still, deft.
p. 46. is not entitled to be allowed in defence, only such damages as he proves he actually sustained on account thereof.

9th. Proof that plff. agreed to remain and did not, does not authorize the jury to find that deft. was damaged thereby, unless proof of actual damage is given, unless the jury believe from the evidence that this agreement materially entered into and constituted the consideration of the note in suit, or a part of it, in which case they may allow deft. so much as is shown to have actually entered into the consideration of said note, and has failed; but the burden of proof is on deft. to show how much of the consideration was based upon the agreement to remain and use his influence for deft., and whether said consideration has in whole or in part failed; and it is immaterial in those issues, whether the prices allowed in said notes for the furniture, good will, &c. are large or small, unless they believe from the evidence that such part failure of consideration had been subsequently
p. 47. adjusted by the parties, or that a sufficient amount to cover the same had been applied.

10th. If the jury believe from the evidence that deft. gave plff. 4 notes, due in 3, 6, 9 and 12 months, and that the parties afterwards agreed that the last one should not be paid unless plff. remained in Peoria and recommended deft. in business, said agreement is no defence to any but said last note, and plff.'s right to recover on the 1st, 2d or 3d notes, cannot be affected by such agreement in regard to the last one, although it has not been kept; but deft. may set up such defence, if he has it, whenever an attempt is made to collect said last note. This suit is on said nine months note, and not on said twelve months note.

To the giving of the above instructions deft. objected and excepted.

Deft. asked the following instructions;

1st. If the jury believe, from the evidence, that the note sued on was, with other notes, given by plff. to deft. upon sale of certain furniture in dental shop of plaintiff, and that a material part of the consideration of said notes, was the good will of the shop, and the agreement of plff. to remain in Peoria and use his influence for deft's business; and that plff. did not remain and exert his influence for deft. as he agreed to do, and that payments have already been made upon said purchase to more than the value of the part of such consideration actually received by deft., the jury should find for deft.

2d. If the jury believe from the evidence, that the consideration of the note sued on has failed, they should find for defendant.

3d. An offer to pay part of a disputed claim by way of compromise, and to avoid trouble and litigation, is not binding on the party making it, unless accepted by the party to whom made; and if the jury believe, from the evidence, that the offer of deft. to pay \$50, testified to by Cox, was made by way of compromise, and to avoid further trouble, and that this offer was not accepted, it is not binding on deft., nor any evidence that the claim on which it was made is just, or that it ought to be paid.

4th. If the jury believe, from the evidence, that a material part of the consideration of the note sued on, was the engagement of plff. to remain in Peoria and exert his influence in favor of the business of deft., and that plff. did not remain in Peoria after making said note, and exert his influence as agreed on, the law presumes damage to deft. from such failure on the part of plff., and it devolves on plff. to prove deft. has not been damaged thereby.

5th. If the jury believe, from the evidence, that plff. sold to deft. certain office furniture and the good will of the dental shop of plff., in the city of Peoria, and that, in consideration thereof, and his express engagement to remain in Peoria and use his influence to send business to said shop, under charge of deft., four notes of \$100 each were given by deft. to plff., and that plff. did not remain in Peoria and do as he agreed; and that upon payment of two of said notes, and complaint made by deft. that plff. had not complied with his agreement, and that deft. ought not to pay the remaining notes, it was agreed between the parties that one of said remaining notes should be destroyed, and that the other should be paid *only on condition* that the plff. should thereafter remain in Peoria and use his influence for the benefit of deft., and that plff. did not so remain a reasonable time and exert his influence in favor of deft., and that, pursuant to said agreement, one of said two remaining notes was destroyed, and that the other one, about which such conditional agreement was made, is the one now in suit, plff. is not entitled to recover.

6th. The introduction of proof by plff. tending to show that plff. had complied with his contract to remain in Peoria and recommend deft. as a dentist, admits that this was a part of the consideration of the note sued on, and opens the whole case *upon the proof*, to the consideration of the jury, as to whether plff. did so comply with his contract.

Said instructions Nos. 2 and 3, were given, and said instructions Nos. 1, 4 and

Refused

given n. 47.

p. 48.

given

Refused

Refused

p. 49.

given

given
Refused

p. 50.

In settlement of said matter and on consideration of the fact that the plaintiff has not complied with his contract to remain in Peoria and use his influence for the benefit of the defendant, the jury should find for the defendant.

6, were refused ; and instruction No. 5, Court refused to give, as asked, but modified it by inserting therein after the words, " It was agreed between the parties," the words " In settlement of said matter, and in consideration of the failure of plaintiff to perform his part of this contract."

To the ruling of the Court in refusing to give instructions 1, 4 and 6, and modifying instruction 5, deft. then and there excepted.

Verdict of jury for plff. for \$100.⁸³/₁₀₀.

p. 51. Motion for new trial, as above given. Motion overruled and judgment rendered upon said verdict, and deft. excepts.

pp. 53, 55. Appeal Bond, as per order of Court, filed.

ASSIGNMENT OF ERRORS.

1. Exclusion of evidence offered by deft. below.
2. Admission of improper evidence for plaintiff.
3. Improper instructions given for said plaintiff.
4. In refusing the 1st, 4th and 6th, and in modifying the 5th instruction, asked by defendant.
5. Overruling defendant's motion for new trial.
6. In rendering judgment for plaintiff.
7. In not rendering judgment for deft.

COOPER & MOSS,
For Appellant.

182 279
JOHN HENDEL

VS.

DAVID GREENLEAF.

ABSTRACT.

Filed Apr 22, 1862,

L. L. Greenleaf

Pleas before the Circuit Court, within and for
the county of Peoria, and state of Illinois, on the
third day of June, in the year of our Lord, one
thousand eight hundred and sixty-two.

Be it Remembered that, heretofore, to wit,
on the fifth day of January AD 1861, there was
filed in the office of the clerk of the circuit
court in and for said county and state, a
Transcript and accompanying papers, which
said Transcript and papers are in words
and figures following, to-wit:-

David Greenleaf }

Damages \$93.10

Taking bond 25 John Hendee }

Issuing Cens 19

Docketing suit 12 of November 1860, returnable on the 19th at 10 o'clock

Continuance 12 A. M. and returned by Saml. Crouse, Const, served

Returning writ 06 by reading to the defendant on the 12th. On the re-

Transcript 25 turn day the parties appeared and by consent

Bond 25 the cause was continued the 18th day of December

Writ 25 next at 10 o'clock A. M. on said return day the

and Crown acts 30 defendant appeared and after hearing the proofs

Transcript bond and allegations of the parties it is ordered and ad-

certificate paid judged that the plaintiff recover from the de-

by defendant pendaut ninety-three dollars and ten cents
damages and the costs of suit.

State of Illinois

Peoria County

J. Bernard Bailly one of the

2
acting justices of the peace in and for said county
do hereby certify that the above is a true and cor-
rect transcript of the docket kept by me in
the above entitled cause. Given under my
hand and seal this 31st day of December
1860.

Bernard Bailey, J.P. (seal)

David Greenleaf

¹⁴
John W. Hendle,

I enter myself security for all
costs that may accrue in the above en-
titled cause. Given under my hand
and seal this 3^d day of November 1860.

Richard F. Cox, (seal)

I enter myself security for all costs
that may accrue in the above entitled
cause. Dec. 11 1861. by permission of court
as substitute for the above and in
place thereof, assuming same liability
C. G. Johnson

State of Illinois,
Peoria County } ss.

The People of the State of Illinois, to any
Constable of said county, Greeting:

You are hereby commanded to
Summon John W. Hendle to appear before
me at my office in Peoria on the nineteenth
day of November inst at 10 o'clock A.M., to

3

answer the complaint of David Greenleaf for a failure to pay him a certain demand not exceeding \$300; and hereof make due return as the law directs. Given under my hand and seal, this twelfth day of November 1860.

Bernard Bailey, Justice of the Peace [J.S.]

Served on John W. Hendell by reading to him this writ, this November 12th 1860. Paul Crouse,
Fees 30 cts. Const.

Know all men by these Presents, That we, John Hendell and William N. Davis, are held and firmly bound unto David Greenleaf in the penal sum of one hundred and ninety dollars, lawful money of the United States; for the payment of which well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally, and firmly, by these presents. Witness our hands and seals, this thirty-first day of December AD 1860. The condition of the above obligation is such, That whereas, the said David Greenleaf did on the eighteenth day of December 1860 before Bernard Bailey, a justice of the Peace for the county of Peoria recover a judgment against the above bounden John Hendell for the sum of ninety-three ⁷/₁₀₀ dollars; for

4 which judgment the said John Hendle has taken an appeal to the circuit court of the county of Peoria aforesaid, and state of Illinois: Now if the said John Hendle shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Approved before me, at my
office, this 31st day of December
1860: Bernard Bailey, J.P.

Geo. W. Hendel (seal)
Mm & Davis (seal)

And afterwards to-wit:- But on the day and date of the filing of said Transcript and papers, there was issued from the office of the clerk of said circuit court a Summons, in words and figures following, to-wit:-

The People of the State of Illinois

To the Sheriff of Peoria county - Greeting:

We Command you to Summon David Greenleaf if he may be found in your county, to appear before our circuit court on the first day of the term thereof, to be held at Peoria, within and for the said county of Peoria, on the first Monday of March next then and there in our said court to prosecute his suit against John

5 Hendle, lately appealed to our circuit court from the Judgment of Bernard Baby, a justice of the peace in and for said county, by said Hendle and make return of this writ, with an indorsement of the time and manner of serving the same on or before the first day of the term of the said court to be held as aforesaid.

Witness, Enoch D. Sloan, clerk of our said court, and the seal thereof,
at Peoria, this 5th day of January
in the year of our Lord one thousand eight hundred and sixty one
Enoch D. Sloan, clerk
per J. Newton Jy.

Which said summons was afterwards returned endorsed as follows, to-wit:-

"David Greenleaf is not found in my county- 20. Feb. 1861. J. Stewart, Shff
 fees 10 cts.

And afterwards to-wit- on the 13th day of May AD 1861, there was filed in the office of the clerk aforesaid, an affidavit & account in words and figures following, to-wit:-

David Greenleaf } In the circuit court of
 } Peoria County, Illinois.
John Hendle } of the May term AD 1861.
John Hendle being first duly sworn

6 deposes and says that he has what he believes to be a true and just account and set off to the note sued on in the above entitled suit, (see account herewith filed) and that it was not interposed before the justice of the peace for the reason that, at the time set for the trial of said cause there was another occupying the attention of the justice, and this case was postponed; Your affiant called in afterwards to see about the case, but your affiant's main witness being in New York, said justice said he would postpone said case until your affiant's witness returned, after said witness returned, your affiant went with him to said justice, after consulting said justice, your affiant concluded to employ an attorney, and said justice said that if your affiant would call in next day he would attend to it, But when your affiant called in the next day said justice told him judgment had been rendered up against him, and thereby your affiant was prevented from bringing in his set-off and making defence. And further your affiant saith not - witness my hand this 13th day of May A.D. 1861

Subscribed and sworn to before } Jno. W. Hendel
me this 13th day of May A.D. 1861 }
Charles Sloan, clk. for J. Newton, D.P.

7 David Greenleaf, To John Hendle Dr,
To damages for non-filfilment of contract \$250.00
of May 4/57
To cash paid on notes under said contract 300.00

Proceedings at a term of the circuit court
begun and held at the court house in the
city and county of Peoria, state of Illinois,
on the fourth day of March in the year of
our Lord one thousand eight hundred
and sixty one, it being the first Mon-
day of said month. Present - the Hon-
orable Elisha N. Powell, judge of the
16th Judicial circuit in said state,
James Stewart, Sheriff, and Enoch
Pfeifer, Clerk, to-wit: -

Thursday, March 7th 1861.
David Greenleaf

vs Appeal from J.P.
John Hendle

This day came plaintiff by
Johnson his attorney and entered
his appearance herein, and this
cause is continued.

Proceedings at a term of the circuit
court begun and held at the court
house in the city and county of

8 Peoria, state of Illinois, on the first Monday in the month of May, in the year of our Lord one thousand eight hundred and sixty one, it being the sixth day of said month. Present - the Honorable Elisha N. Powell, judge of the 16th judicial circuit in said state, James Stewart, Sheriff and Enos H. Sloan Clerk, to-wit: -

Monday, May 13th 1861
David Greenleaf

vs appeal from JP
John Hendle

This day came the defendant by Cooper his attorney and moved the court for leave to file an account & this cause is continued.

Proceedings at a term of the circuit court began and held at the court house in the city and county of Peoria, Illinois, on the first Monday in the month of December in the year of our Lord one thousand eight hundred and sixty one, it being the second day of said month - Present the Honorable Amos L. Merriam, Judge of the 16th judicial circuit in said state, Alexander McCoy, states attorney, James Stewart, Sheriff and Enos H. Sloan, clerk to-wit:

9

Tuesday, December 10th 1861.

David Greenleaf

vs

Appeal from J.P.

John Hendle

This day came the plaintiff by Johnson his attorney, and the defendant by Cooper his attorney, and it is ordered by the court that a jury be impannelled to try this cause whereupon came a jury of twelve good and lawful men to-wit:- Jacob Silzell, John Otto, Hugh Morrow, Andrew Lindsey, A. J. Wiley, Cyrus Aiken, Owen Doulevy, A. M. Wiley, Isaac Walker, J. C. Schnabel, Robert McCulloch & G. L. McMacken, who being duly chosen, tried and sworn to well and truly try the issues in this cause, and a true verdict give according to the evidence, do say, "We the jury find for the plaintiff and assess his damages at the sum of one dollar." The plaintiff by his attorney entered a motion for a new trial.

Proceedings at a term of the circuit court begun and held at the court house in and for the county of Peoria and state of Illinois, on the first Monday in the month of February in the year of our Lord one thousand eight hundred and sixty-two, it being the third day of said month. Present, James Stearns.

10 est, Sheriff, and Enock D. Plow, clerk; the Honorable Amos L. Merriman, Judge of the 16th Judicial Circuit in said state, not being present court stands adjourned to 9 o'clock to-morrow morning by force of the statute in such case made and provided.

Tuesday Morning, February 4th AD 1862, court met pursuant to adjournment, and the said judge having arrived before four o'clock in the afternoon of said day, court was opened in due form, after which it was ordered that court adjourn to 10 o'clock to-morrow morning:

Wednesday, February 5th AD 1862.
David Greenleaf

14 Appeal from J P
John Hendel

This day this cause came on to be heard on the motion of plaintiff for a new trial, and the court now being fully advised in the premises do sustain said motion on condition that said plaintiff pays all the costs which have now accrued herein.

Proceedings at a term of the circuit court begun and held at the court

11 house in the city and county of Peoria, Illinois, on the first Monday in the month of April, in the year of our Lord one thousand eight hundred and sixty-two, it being the seventh day of said month. Present, the Honorable Amos L. Merriman, Judge of the 16th Judicial circuit in said state, Alexander McCay, states attorney, James Stewart, Sheriff and Enoch P. Sloan, Clerk, to wit:—

Thursday, April 10th A.D. 1862.

David Greenleaf

vs

Appeal from J.P.

John Hendle

This day came the plaintiff by John S. and Hopkins his attorney, and the defendant by Cooper & Moss his attorney, and it is ordered that a jury be impaneled to try this cause, whereupon came a jury of twelve good and lawful men, to wit: Geo. Edwards, Geo. Paul, Waldo Holmes, Albanus Jenkins, Wm. Owens, M. M. Sloan, John Murray, Saml Groom, Horner Tucker, C. C. Pyneason, Geo. Dobord, & Bolen F. Hare, who were duly chosen tried and sworn, to well and truly try the issues joined in this cause and a true verdict give according to the evidence. And the said

12 jury not having heard all the case, were adjourned to meet the court at 9 o'clock to-morrow morning.

Friday, April 11th A.D. 1862.

David Greenleaf

vs Appeal from J. P.

John Hendle

This day came the parties to this suit by their attorneys, and also came the jury sworn to try this cause &c., and the said jury upon their oath, aforesaid do say, "We the jury find for the plaintiff and assess his damages at the sum of one hundred dollars and eighty nine cents. Thereupon come the defendant by Cooper his attorney, and moved the court for a new trial.

And afterwards to wit: on the 12th day of April A.D. 1862, there was filed in the office of the clerk aforesaid, a motion for a new trial, in words and figures following to wit:-

David Greenleaf	{	Circuit Court
"		Peoria County Ills.
John Hendle		April Term 1862.

And now comes said defendant and moves the court for a new trial

13 herein; and for cause shows =

- 1st The court excluded proper evidence offered by the defendant.
- 2^d The court admitted improper evidence on the part of the plaintiff.
- 3^d The court gave improper instructions to the jury for the plaintiff.
- 4th The court refused proper instructions asked by defendant.
- 5th The verdict of the jury is against the evidence.
- 6th The verdict of the jury is against the law.
- 7th Said verdict is against the law, evidence & the instructions of the court.

Cooper & Moss, for Deft.

Proceedings at a term of the circuit court of Peoria County, began and held at the court house, in the city and county of Peoria, Illinois, on the first Monday in the month of June, in the year of our Lord one thousand eight hundred and sixty-two, it being the second day of said month. Present - the Honorable A. L. Merriman, Judge of the 16th judicial circuit in said state, James Stewart Sheriff, and Enoch S. Sloan, clerk. To wit: -

Tuesday, June 3^d 1862.

David Greenleaf

v

appeal from J.P.

John Hendle

This day this cause came on to be heard on the motion of defendant for a new trial, and the court being fully advised in the premises overruled said motion. Therefore it is considered by the court that the said David Greenleaf have and recover of the said John Hendle the said sum of one hundred dollars and eighty nine cents his damages aforesaid, and also his costs and charges by him about his suit in this behalf expended, and that he have execution therefor.

Monday, June 9th 1862.

David Greenleaf

v

appeal from J.P.

John Hendle

This day came defendant by Cooper his attorney, and prayed an appeal to the Supreme Court of this state, which is allowed on his giving bond in the penal sum of two hundred dollars payable to said plaintiff, and conditioned

15- as the law directs, with William A. Davis
as security - said bond to be filed with
in twenty days.

And afterwards to wit - on the 10th day of June
A.D. 1862, there was filed in the office of the
clerk of said court a bill of exceptions
in words and figures following to wit:-
David Greenleaf } In the circuit court,
" } Peoria county, Ills =
John W. Hendel } June Term A.D. 1862.

Be it remembered that on the
coming on of this cause for trial at the
April Term A.D. 1862, before said court & a
jury, the plaintiff to maintain the issues
on his part, offered & read in evidence to the
jury, a note in words & figures, as follows
"\$100 = Nine months after date for value
received, I promise to pay David Greenleaf
or order one hundred dollars with interest
at six per cent per annum.

Peoria, May 4th 1857 "John W. Hendel"

The following endorsements are on the back of said note.
"Due on within note Eighty-seven dollars seventy four
cents. \$87.74."

Nov. 9th 1859.

"Read on within note one dollar & fifty cents"
and then rested his case - And thereupon the

16 defendant to maintain the issues on his part,
called George S. Blakesley, who being duly sworn,
testified as follows - I know the parties
to this suit, & know when Hendel bought
Greenleaf out - Greenleaf made a bill of
sale of certain articles to Hendel and Hen-
del gave his notes to Greenleaf - I do not
remember the amounts of the notes; but think
they were drawn in equal amounts, and
there were four of them, and think they were
payable in three, six, nine & twelve months.
I drew both the bill of sale & the notes - The
note sued on is here shown to witness, who
states, this note is in my hand writing and
is one of the notes given by Hendel to
Greenleaf at the time & in part payment
on the purchase referred to. Defendants
counsel also produced and exhibited to
said witness another note purporting to be
given by defendant to said plaintiff, of
same date & payable in six months which
said note, and endorsements thereon, are in
words & figures as follows viz:-

\$100 Six months after date for value
received I promise to pay David Greenleaf
or order, one hundred dollars with interest
at six per cent. per annum.

Peoria, May 4th 1857

Jno. W. Hendel.

17

The following are the endorsements on said note.

"24th Sept. 1857 - Rec'd on within note twenty-two
dollars - \$22.00"

"26th March 1859 - Rec'd on within note twenty
dollars - \$20.00"

"May 4th 1859 - Due on within note eighteen ad-
dars & ninety four cents - \$18.24."

"July 4th 1859 - Rec'd on within note five dollars"

And said witness stated, the body of this
note is also in my hand writing, and said
note is one of the notes drawn by
me and executed by deft to plff on the
occasion referred to - And thereupon
deft read said note & endorsements in evi-
dence to the jury - Witness then further
stated, I don't know what has become
of the Bill of Sale referred to - whereupon
said dependant Hendel was sworn, and
stated to the court that said bill of Sale
was burnt up or lost as he supposed -
That some months after his purchase
from plff, the building in which he
dependant, had his dental shop, was
destroyed by fire - That this paper with
others was in a desk in his office at
the time - That the fire occurred in the
night and in his absence - that his
desk was broken open and thrown
out of a window, and the papers scat-

18 tened = That he got some of them, and that others he had never seen or heard of since, and that this bill of sale was among the missing papers = That he had searched carefully for it, but could not find it, and that he had no doubt it was either destroyed or lost at the time of said fire. Defendant then again called said witness Blakeley, who further said = I do not recollect certainly what articles were enumerated in said bill of sale; but it contained an enumeration of certain articles & furniture which were in plaintiff's dental shop, but do not know that it embraced any of the dental tools = I do not know the value of the articles mentioned in this bill of sale or what things plaintiff had in his shop = said bill purported to be a schedule of articles which plaintiff had in his shop, but did not contain anything to show that it embraced the full enumeration for the notes = It said nothing about the good will of the shop or of anything except the list of articles of furniture & fixtures enumerated. If any sum was specially named in the bill of sale, it was \$400 - and as to its form it either ran thus - "In consideration of \$400, I sell" &c., or thus "For value received, I sell" &c. = If in the latter form no sum

19

was named as consideration for the articles embraced in the Bill of sale = My impression is, this bill of sale ran in the way last mentioned = This was my usual habit in drawing bills of sale of personal property, unless I was otherwise directed by the parties and I remember no directions given to me on this subject - I don't remember whether there were directions given or not - I have no recollection on the subject. Defendants counsel then asked witness if there was any other consideration for said notes beside the articles named in said schedule or bill of sale, and if so, what it was? - which question was objected to by plff's counsel, and the objection sustained by the court - Defendants counsel then stated to the court that they expected to prove by this witness, if permitted, that a material & much the larger part of the consideration of said notes was the agreement of said plaintiff to remain in Peoria, and recommended defendant who was a stranger, as a competent & skilful dentist, and to send customers to his shop, and by other witnesses, that he said plff. had wholly failed to comply with his contract & undertaking in this respect.

20 and that defendant had already paid upon said notes much more than the value of the goods enumerated in said bill of sale, for the purpose of showing failure of the consideration of the note now in suit, and thereupon defendant by his counsel, renewed said question to said witness - to which Jeff again objected, and the court sustained the objection, and defendant, by his counsel, then & there excepted - but the same was subsequently by ~~the court~~ admitted by the court to the jury.

On cross-examination witness said Doctor Hendel took possession immediately after the sale of Doctor Greenleaf's office, and went on with the business in the same place.

John Bush, next called by Deft. said - I reside in Peoria and know the parties - knew Hendel before he came to Peoria, and had some conversation by correspondence, with Hendel & interviews with Greenleaf respecting the sale by the latter to the former spoken by Mr. Blakely - knew Jeff's hand-writing - have often practised writing with him & seen him

21 write - the following letters viz:-

Peoria, Sept. 11/56.

J. W. Hendel, Dear Sir:-

I was informed by your friend Bush that you called when I was absent, to see me, I should liked to have seen you, as he tells me you intend to locate here. I have thought of changing my business, and if I conclude to do so, I should like to dispose of my practice to some one that is able to do my friend Angle justice. I have had three offers, but I would give you the preference, I think, I can make it an object for you to take my practice as I shall remain here, and can use my influence for you, and know you can keep all of my business which is to day as good (to say the least) as my opponents - write and let me know what you think about it, as I shall dispose of it soon - Yours Respectfully

D. Greenleaf "

Peoria, Feb. 13/57

Dr. Hendel - Dear Sir:-

I intend to sell out my business as I am again into the Wholesale Grocerie business this spring with my father-in-law, I wrote you last fall by request.

22 of your friend Bush, but have received no answer - I have since received propositions from four others, I was offered \$500 by Noble when he left Angle, but after visiting Memphis, Tenn., he concluded to locate there. I am now offered \$200 for my office as it now stands (except my case of instruments,) my practice is worth from 2500 to 3000 and mostly city, and with proper exertions could be made worth from 3500 to 4000 say - I have more than \$400 worth of work to do. Your friends Bush & Thrush are anxious that I should hear from you before I close the bargain - now if you want it at the same \$400, I will give you the preference as Bush spoke to me last fall for you. Write and let me know soon as the others are awaiting for answer. I am again into business here and can help whoever I sell to. Yours &c D. Greenleaf
Peoria, March 6, 1857

Dr. Hendel - Dear Sir:-

Yours of the 20, came duly at hand - You wished to know if you can get the rooms I now occupy - When I rented them it was with the understanding

23

that I should have them as long as I wished (and I have had them 9 years, altho he has been offered almost double what I pay him) I saw him (the Landlord) to day and he is willing that you should take them on the same terms. The rooms are, the front one 17ft wide by 19 long. I occupy but half of the back room which is 17 by 10. I have a good operating chair (one of Jones & Whites) a Book case 2 tables 4 chairs, a looking glass, a lounge or Settee, Carpet, stove &c, which answers very well - but you can fit it up to suit yourself. I will let you have all, except my case of instruments at that price - I will wait until you come out, if you come soon after the first of April - I send you one of my engagement cards, you can see what my prices are

Respectfully Yours

D. Greenleaf

A. B. Your friend Angle hopes I will sell to any one but you"

are here shown to witness, who states these letters are all in the hand writing of the plaintiff, and signed by him - dect. then offered to read said letters in evidence.

24 to the jury to which plaintiff objected, and the court sustained the objection, and refused to permit said letters to go in evidence - to which rulings of the court in sustaining said objection, and refusing to allow said letters to be read to the jury defendant by his counsel, then & there excepted - but said letters were all afterwards allowed to be read to the jury. Said witness then further testified - I knew plaintiffs dental shop & office, and what he had in it, and what articles sold to Dept. in the office - There was one lounge, one desk with book case on top - one stove - a carpet - a dentists chair - a looking glass with Mahogany frame - a few chairs - dont remember how many, but think 3 or 4, and in the back shop there was a turning lathe, and some loose tools of small value - some saws & files - Defendant got the articles in the front shop which I have named. He did not get plaintiffs case of dental instruments or any of them, I think - The furniture was somewhat worn - I am a painter by trade and am acquainted with the furniture business and the value of furniture - Was in that

25-

business formerly, and more or less conversant with it ever since - Not including the dental chair - the furniture in the front office which ~~plff~~ sold ~~deft~~ was worth about \$40 - The desk & Book case at \$10 - the stove at \$6 - the lounge at \$5 - The carpet at \$12. As to the Dental chair, such articles cost when new from \$30 up to \$75. I don't know the value of the turning lathe. There was also a bench in the back shop on which the tools lay, which ~~Hen Del~~ got - This consisted of a board or plank set against the wall & supported by stays and was worth about one ⁵⁰/₁₀₀ dollars. There were four notes given of \$100 each payable, I think in 3, 6, 9 & 12 months. I do not know how many of these notes have been paid. I saw one of these notes in ~~Hen Del's~~ possession, which he had taken up - This was before the fire, and the fire happened the fall next after he purchased. Defendant's counsel then asked witness how long ~~plff.~~ remained in Peoria after said sale to defendant, which question was objected to by ~~plff's~~ counsel, and the objection sustained by the court, and defendant by his counsel, then & there excepted. Defendant then next asked said witness

26 what was the consideration of said notes - To which question also plff by his counsel objected, and the court sustained the objection, and defendant by his counsel then & there excepted, but which evidence was afterwards permitted by the court to go to the jury.

Defendant then called John Batten who testified - I knew plffs Dental office or shop before he sold out to Deft, and know what furniture was in it - Am a cabinet maker & acquainted with the prices & value of furniture - said office contained a desk with a book case on it, worth altogether \$15 - There were 4 or 5 chairs worth 75 cts each - a stove worth five to six dollars - a carpet pretty well worn and worth 40 or 50 cents per yard - The room was 20 feet one way by 15 feet the other, and there was probably twenty yards of carpet. There was a screen across the back part of the room, and the part behind was not carpeted. There was a lounge worth. I should say not over \$4. a small table worth some \$2.50. The looking glass was not very large - and was worth probably about \$3 - As to the Dental chair, I don't know the value of the Dental chair, I never dealt in that article, but should say that

27 one of the same kind as this, would sell when new for \$40 or \$45 - This chair was considerably worn, and was worth some \$15. In the back room which was used for a work shop, there was an old bench which was only a board set against the wall and was worth some 75 cents - The turning lathe in said back room was worth about \$10 - There was another bench of some kind in this room to put tools on - Don't remember what it was - May have been a store box turned up side down - of little value. Have seen some old plaster castes standing on it. There was also in this room when Greenleaf was there, a furnace intended for use in some way about the business - never saw this since Hendel bought the shop. on cross-examination witness stated - I do not pretend to state all the little articles that were in the shop - I was in the shop after the sale took place, perhaps one month or perhaps two months - am a furniture maker - Don't know the value of all the articles in the laboratory - I do of some of them. I cannot say whether I was in the office within one month before the sale to Hendel

Abraham Hamaker next called by defendant said - I know the parties to this suit. I was present in the fall of 1859, at an interview between plff & deft relative to certain notes which plff held against deft - I do not know that I should know ^{said} those notes if I now saw them - notes were spoken of between the parties, and one of those notes was destroyed in my presence. There was some money paid, but I don't know on what note, except that it was not on the note destroyed - That was a whole note. Hendel said to Greenleaf, you know you have not complied with your agreement - you know you agreed to stay here & give your influence in my behalf, which you know you did not do - which Greenleaf admitted was so. Hendel then said he would pay the last note according to a agreement, if Greenleaf would now stay & use his influence for the shop - Greenleaf said I don't ask you to pay if I don't stay. The note was destroyed because of non-compliance with some agreement relating to the notes between the parties. I know nothing of this

29

agreement save what I learned at this time - I think the note destroyed was for \$100 - but don't know - I don't know what the amount of money was that was paid, but it was more than one $\frac{50}{100}$ dollars - It was paid in Bank Bills & there were several of them - It was the last note which was to be paid if Greenleaf remained, and Greenleaf promised to remain & use his influence thereafter, if Hendel would pay it - Something was said to the effect that Hendel had already paid Greenleaf more than Greenleaf deserved. I was called into Hendel's office to witness the transaction between the parties. John Zeigler was called in at the same time with me - Zeigler is now absent in the service of the United States - He is a Captain in the 11th Illinois Cavalry - I saw the notes but was not very near them. Something was said about a hundred dollar note being destroyed.

Cr. G. At the time of this interview between Jeff & Dept, I was employed in the grocery store of P. C. Bartlett - Hendel called Zeigler & myself into witness the transaction ^{between him & Greenleaf.} I don't know that Greenleaf knew about our being called in. I staid there until I thought it was all done - Zeigler and myself did nothing but witness the trans-

action - Don't know where Greenleaf lived at that time. I heard he was living in Knoxville. Hendel's office was, at this time where it is now. One note was destroyed a balance, I think, was paid on another, which was given up to Hendel; and one note was to be paid if Greenleaf staid in Peoria. Hendel said - Have you know you did not comply with your agreement, and Greenleaf admitted it & said I will destroy one note. I have stated the conversation as near as I can recollect it. Hendel said it is pretty hard for me to pay these notes - the stand having been burned out, and your not staying and giving me your influence - I saw one note destroyed, and something endorsed on another, at the time and I think Hendel took one up - I saw more than one note there. The note destroyed had no endorsement on it - I don't know how long Greenleaf was to stay in Peoria - But Hendel said if Greenleaf remained here he (Hendel) would pay the note, and if he did not remain here he would not pay it. And Greenleaf said, if I don't remain I will not expect you to pay it - The note that was to be paid was the last note - I am positive it was the next to the last note

31

that was destroyed because the one that was kept was called the last note. On condition that Greenleaf would remain in Peoria & give his influence in favor of Hendel & destroy one note, Hendel agreed to pay the other or lost note. As near as I remember this conversation occurred in the fall of 1859. Doctor Hendel went over the conversation while Jisgen & I were there. On re-examination by deft. witness said: As I understood it there were three notes present. One was taken up by Hendel. one was destroyed, and the remaining one Hendel was to pay if Greenleaf staid & used his influence for the shop. The note that remained I understood to be the last one.

Cr. Ex. by self = Greenleaf did not say how long he would stay. Don't know as Greenleaf made any positive assurances that he would stay but said he was going to stay in Peoria from that time on - I don't know how long he remained after that. This was after he had left Peoria & had come back. There was nothing said about how long the note still to be paid had to run. Deft made no objection to the note which he paid & took up.

John Johnson next called said plain =

Peff is my son-in-law. In the spring of 1857 Peff left Peoria & went to Knoxville, where he lived till fall of 1859, when he went to Memphis, Tennessee and was there a short time. From there he went to St. Louis, and the next spring went to Knoxville again and has never been in Peoria, except for a ~~brief~~ short visit, since he left in 1857 = I think Peff paid me something once, in the street, on the six months note - I don't know how much.

On Cross Examination - witness said I think I called on Peff for payment of one of the notes a number of times - the last time as much as two years ago - It was while Peff was at Knoxville - never called on Peff for payment since Peff left Knoxville - Peff never said anything to me about any defence to the notes - always said he would pay, but complained of hard times - I knew in general way of the sale by Peff to Peff from Peff's statements, but did not know the particulars.

Peff here rested.

Peff then called Charles Greenleaf - who said I have been in business some 14 years as a dentist, knew the property in the office and owned it myself

33

before David sold out - For the Dental Chair I paid \$60, in New York and \$4 charges - It was I think worth \$60 - The chair was not injured, I saw it 3 or 4 months before David sold out - I don't know how much the Carpet was worth. The book case I bought of Underhill & paid \$30 for it. Don't know whether this is the same sold to Hendel or not - I allowed Schimpferman \$20 for the lounge - when Jeff sold I should think this worth \$12⁵⁰/₁₀₀ - When I left the chairs were worth, I guess, \$1.50 each - they cost me \$2⁵⁰/₁₀₀ or \$3 - The stove when I sold to Jeff was worth some \$8 - The looking glass I bought from the east & valued highly - It was worth when Jeff sold some \$6 - would give \$5 for it now - There was a screen across the front room - This was worth \$3 - The lathe & fittings was worth \$15 - when I left there - Have not seen same lathe since - The furnace cost us & was worth here \$30 - The articles in the laboratory were worth from \$75 to \$100 - This includes all but the furnace - I was out of the shop 18 months before sale to Aft And for six months or a year before said sale I was not inside the shop. The last time I was in I did not notice that any thing was gone. When I sold

out to David he claimed to have paid me \$250.
 for my interest, which was one half interest.
 I was not satisfied with this - That it was
 not enough - Plff counsel then asked wit-
 ness what the concern was worth which plff
 sold to deft - To the putting of which in-
 terrogatory to the witness, dependant by his
 counsel objected, but the court overruled
 the objection and allowed the question
 to be asked, and dependant then & there
 excepted - witness then said - When I heard
 that David was going to sell to Hendel
 I offered him \$400, which I was willing to give.
 That it was worth said sum or more. Plffs coun-
 sel next asked witness this question viz -
 What did plaintiff do if any thing to re-
 commend Doctor Hendel as a dentist? To
 the putting of which question to the
 witness and also to the ~~witness~~ testimony
 of witnesses Cunningham, E. G. Johnson,
 Garrett & Cox, offered by plaintiff for the
 purpose of proving that plaintiff had
 recommended dependant as a dentist
 & procured business for him, the de-
 pendant by his counsel objected at
 the time the same was offered unless
 dependant was permitted to prove
 by witnesses outside of the (witnesses)
 writing

made at the time that it was a part of the original consideration of said notes given on said purchase, that plaintiff should remain in Peoria & recommend defendant as a dentist & use his influence to send business to him, and the court ruled that both plaintiff and defendant might give the evidence aforesaid on their respective parts & the objections before sustained to witnesses Blakely & Bush being examined on said points were overruled by the court.

And thereupon witness said I have known several instances where persons were induced by David to go to Doctor Hendel - Don't know how many, nor how much the work amounted to - Never heard David recommend any body to go to Hendel - only know the fact from parties who have come to my office telling me. I know he has done work for parties recommended by David because I have seen the work - Cr. G. - I don't recollect that I was present or ever heard David recommend Hendel as a Dentist - I know the work was done by Hendel because the parties told me so - Don't know it any other way. The furnace was in the back room when

36 I left. It cost me \$30. Know very little of David's doings since I left the office. I was on the Rail road one year & a half and was in the office off & on after. I sold out to David 5 years ago I think. A few months after I quit the Rail Road I went into the Drug business. and kept the drug store some year & a half or two years. David was not in the Dental business, I think much, if any of the time I was in the store. I offered Dave the \$400. for his place in the dental business. I think this was before I went into the Drug store. I made the offer to be reinstated in the business. I had been in the Dental business some 9 years at this stand, and I wanted the old place. When I went out my brother said he would give me \$800 for the good will of the office. He paid me partly in work & repairs & partly in cash. There was a case of dental tools which cost me \$100. which David got. Dont know the dental chair in Hendel's office. nor what Hendel got when he bought. I have given articles and values as I left them. David came from the east & was going south & I induced him to stay & go into business with me. He was joint owner with me in the stock. Dont know what he paid me.

37 James Cunningham next called by Jeff-
said, I know David Greenleaf, and also the
deft. About the time Jeff sold out to deft
I had tooth ache, and went to Jeff to get some-
thing done with my teeth - He said they were
not then in fit condition to fix - Afterwards
I went again & found Hendel there, who pulled
teeth & did some fixing for me - About the
same time my wife had a new set made.
She had been to Jeff, who pulled some teeth
for her - preparatory to putting in the new
set, & contracted for the job. Before the
new teeth were made Jeff sold out to
Hendel and turned over the job to Hendel
and recommended him to us - said he was
a good dentist, all right &c - and on this
we let Hendel make & put in the teeth -
I afterwards paid Hendel for this & what
he had done for me \$55. Before paying Hen-
del I wrote to Jeff to know who I should
pay, and he replied to pay Hendel. Witness
here produced said letter from Jeff to witness
which is as follows:

Knoxville, Oct 13th 1857

Friend Jim.

I received your letter
in due time - you wish to know
who to pay for the teeth - I left all

work engaged to Hendle, but the first of next month he will owe me eighty dollars and if you dont pay him before then, I should like to give you an order on him, you need not mention this to him, but let me know if you do not pay him before then,

Yours truly
D. Greenleaf

The work was well done - a very good job - It was all done by Hendel except pulling the teeth which was not much of a job as they pulled easy - my wife still has this set of teeth and they do first rate.

Pepp then next called E. J. Johnson, who said, the only case I know of where Pepp recommended deft as a dentist is my own, I wanted some work of the kind done - Pepp took me to Hendel & introduced me to him - and I got him to do what I wanted - It amounted to seven dollars.

Cor. Ex - I think it was in June next after

39 the sale that I was introduced by Peff to Deft.

A. O. Garnett next called by Peff, said - The spring in which Hendel bought out, I was having plaintiff make a set of teeth for my wife, and when he sold to defendant, he Peff, introduced me to Deft, and said he was a good workman, and would do the work well for me, and I thereupon gave the job - which he did and I paid him \$400 for it -

Cr. 4 - It was, I think in May or June I had before agreed with Peff for the job. Deft did the work very well indeed. It was a most excellent job - one of the best I ever saw. Peff next called R. J. Cox who said, I know the parties and recollect distinctly of Peff recommending Deft as the best Dentist in town, and on that recommendation I went & got a job done amounting to one dollar. I have also heard Peff express his opinion that Hendel was a good Dentist a number of times myself, have seen the note in suit, and presented it once to Deft for payment about 18 months ago - in November 1860. When I presented the note to Deft, he said he would pay me \$50 - If I would give up the note - This was all he said about the note, he mentioned no

40 defence to the note he merely said he would pay \$50 if I would give up the note. Dave gave me the note, told me to present it, and if not paid to sue it. David was here at the time & staid two or three days.

Cr. Ex. I knew neither of the parties when plff first left the town. When I first knew David he was living in Knoxville. This was in 1858 - when he has been in Peoria since then he has never staid but a few days at a time. My interview with Hensel, when I presented the note, was very brief. I had instructions to sue it if not paid on sight - And when dept said he would pay the \$50 if I would give up the note, I turned round immediately & left him and ended the matter. plff is my brother in law. The time plff recommended Hensel, and I got the latter to do the \$1 job was just before I went to present the note to him.

John Johnson called by plff said I think it was in the summer or early summer of 1857 that plff left Peoria for Knoxville. Before that, for some months, we had talked of going into business together in Peoria and had canvassed a number of different plans & kinds of business among others the grocery business - but could

not make satisfactory arrangements and David finally left and has not resided in Peoria since.

Peff then again rested.

Deft then recalled George Beakely who said I remember Hendel remarking that the notes ought not to be made negotiable, and said, if they were negotiable it would give Greenleaf all the advantage - Greenleaf replied you know I am going to remain here and will use my influence for you, and it will make no difference - Hendel said, you have all the advantage over me in this way, and I have nothing to hold you - I then understood Greenleaf to say he was going into business in Peoria - Greenleaf did not say how long he was going to stay. I told Hendel it would not do very well to make the notes not negotiable, and that as Greenleaf was going to ~~stay~~ remain in Peoria, he need have no fears - and he at length consented, and the notes were drawn & signed and the trade closed.

John Bush recalled by Deft. said the furnace which the Greenleafs had in their back room never came into the possession of Hendel - It was put

42 out into a room behind either of the two rooms spoken of, as used for office & laboratory, by Doctor Charles Greenloop before he sold out to the plff as useless lumber, and was not used by the Greenloops afterwards = I was in the furniture business from early boy hood till I was 18 years old = The price I put on the furniture & articles Heudel got of plff is the fair value = When Heudel bought plff out he was an entire stranger in Peria = He resided before then in Pennsylvania and came from there to Peria.

Cr. Ex. I know the furnace was not included in the trade - I have often priced dental chairs = The prices varies from \$30 to \$75 =

Abraham Hamaker, recalled - said, I know the time Doctor Charles Greenloop went into the Coralite business = Have heard plaintiff since then recommend the Coralite method of setting teeth as preferable to the old system of setting teeth = He said it was an advance upon the old system =

Cr. Ex. The first I heard about the Coralite system was from the plff. He said it was preferable to gold for setting teeth.

43

This conversation was in Bartlett's grocery store - some persons there were expressing their opinion of the new method of setting teeth in Coralite & Peff was among them & gave it as his opinion that the Coralite was an improvement on the old method of setting on gold plate. And to a question by defendant's counsel - witness - Hendel did not set teeth on Coralite, but worked on gold plates.

Defendant then again offered said letters from Peff to him, above set out, and by consent of Peff, by his counsel, the same were read to the jury in evidence - and defendant again rested.

This was all the evidence in the case. Peff then asked the following instructions which were given by the court:

- 1 If the jury find from the evidence that at the time of the sale from plaintiff to defendant a written sale bill of conveyance was executed from plaintiff to defendant contemporaneous with the execution of and as the sole consideration of the notes and that no other writings were made between the parties, the jury will consider no proof of any contract of the parties, other than

44 what appears in the note and sale bill.

2 The note is evidence of itself and the plaintiff is entitled to recover the balance due upon it unless the defendant has affirmatively proved a legal defence thereto.

3 Any mere understanding that plaintiff would remain in Peoria after his sale to defendant does not amount to a contract to that effect. There must be an affirmative contract proven, to entitle it to your consideration in this suit.

4 If the jury find such contract made by the plaintiff to remain in Peoria and that no definite limit for such remaining was fixed and that plaintiff had departed before a reasonable time, and such departure have caused damages to the defendant, yet if the jury still find the parties had themselves settled and adjusted said damages the defendant is not entitled to renew in this defence a claim for damages so adjusted.

5 If the jury should find from the evidence that such contract to remain was made by plaintiff and broken by him, then defendant is not entitled to recover unless he has proven that he suffered

45 damages by such violation, or unless
5 the said agreement constituted a part
of the consideration of said note.

6 A payment upon a note or legal
obligation already existing and due
is no consideration for a promise
of the payee to do or perform any
independent act. An assurance or
promise by the plaintiff to defend-
ant that he would remain here or
do any other independent act made
without consideration is not legally
binding upon the plaintiff and
does not constitute a foundation
for suit on ground of defence.

7. The jury are instructed that the note given
in evidence entitles the plaintiff to recover
the amount due thereon unless the de-
pendant has shown facts to defeat such
right of recovery.

8 The jury are instructed that if they be-
lieve from the evidence that plaintiff
agreed with dependant to remain in Pe-
oria and recommend customers to Hen-
del, and that plaintiff did not so remain
still dependant is not entitled to be allow-
ed in defence of said note only such dam-
ages as he proves he actually sustained
by reason of plaintiff not so remaining.

46 Q. Proof that plaintiff agreed to remain in Peoria & did not do so, does not authorize the jury to find that defendant sustained any damage thereby unless evidence has been given of actual damage so sustained.

Unless the jury believe from the evidence that this agreement materially entered into and constituted the consideration of the note in suit or a part thereof, in which case the jury may allow to the defendant so much as is shown by the evidence to have actually entered into the consideration of said note & has failed but the burden of proof is on the defendant to show how much of the consideration of said notes was based upon the agreement of said plaintiff to remain in Peoria & use his influence in favor of defendant & whether such consideration has in whole or in part failed, and it is immaterial in those issues whether the prices allowed in the said notes as the considerations thereof for furniture good will &c., are large or small, unless also the jury shall believe from the evidence that such part failure of consideration had been subsequently adjusted by the parties or that

47 a sufficient amount to cover the same had been applied.

10. If the jury believe from the evidence that defendant gave plaintiff four notes due in 3, 6, 9 & 12 months, and that afterwards plaintiff & defendant agreed that said last note should not be paid unless Greenleaf remained at Peoria & recommended defendant in business, said agreement is no defence to any but said last note, and plaintiff's right to recover on either the 1st, 2nd or 3^d of said notes cannot be affected by such agreement in regard to said last note, although said agreement has not been kept, but defendant may set up such defence, if he has it, whenever an attempt is made to collect said last note.

This suit is on said nine months note & not on said twelve months note.

And to the giving of which said instructions deft. by his counsel, then & there, at the time objected & excepted - And thereupon defendant asked the court to instruct the jury as follows viz:

2. If the jury believe from the evidence that the consideration of the note sued on has failed, they should find for defendant.

David Greenleaf ~ April Term 1862 = The court
is asked to instruct the jury
John Hendel ~ on the part of the defendant,

1. That if they believe from the evidence that the note sued on was given, in connection with other notes, upon a sale by plaintiff to defendant of certain furniture in the Dental Shop of plaintiff, and that a material part of the consideration of said notes was the good will of the shop and the agreement of plaintiff to remain in Pemba & use his influence to advance the business of defendant, in said shop = and if they further believe from the evidence that plaintiff did not remain & exert his influence for defendant as he agreed to do, and that payments have already been made upon said purchase to more than the value of the part of such consideration actually received by the defendant, the jury should find for the defendant =

Refused

48 3 An offer to pay a part of a disputed claim by way of compromise, and to avoid trouble & litigation is not binding on the party making it unless accepted by the party to whom made; And if the jury believe from the evidence that the offer of debt to pay \$50 testified to by Mr. Cox, was made in the way of compromise & to avoid further trouble, and that this offer was not accepted, it is not binding on the defendant, nor any evidence that the claim on which it was made is just or that the same ought to be paid.

If the jury believe from the evidence that plaintiff sold to defendant certain office furniture & the good will of the Dental Shop of plaintiff in the city of Peoria, and that in consideration thereof, and of the express engagement of plaintiff to remain in Peoria after said sale, and use his influence to send business to said shop, under the charge of defendant, four notes, in the sum of \$100. each, were given by debt to plaintiff. And if the jury further find from the evidence that plaintiff did not remain in Peoria, and exert his influence for defendant as he agreed to do, and that upon payment by defendant of two

48 3 An offer to pay a part of a disputed claim by way of compromise, and to avoid trouble & litigation is not binding on the party making it unless accepted by the party to whom made; and if the jury believe from the evidence that the offer of debt to pay \$50 testified to by Mr. Cox, was made in the way of compromise & to avoid further trouble, and that this offer was not accepted, it is not binding on the defendant, nor any evidence that the claim on which it was made is just or that the same ought to be paid.

4. If the jury believe from the evidence that a material part of the consideration of the note and on was the engagement of plff to remain in Peoria and exert his influence in favor of the business of debt, and that plff did not remain in Peoria after the making of ~~said~~ said note, & exert his influence as agreed on, the law presumes damage to defendant from such failure on the part of plff and it devolves on the plff to prove that the defendant has not been damaged thereby.

The evidence that plaintiff did not remain in Peoria, and exert his influence for defendant as he agreed to do, and that upon payment by defendant of two

Refused

49

of said notes, and complaint made by defendant that plff had not complied with his agreement, and that defendant ought not to pay the remaining notes, it was a ^{between the parties} ~~agreed~~ ^{in settlement} of said matter, and in consideration in the furtherance of plaintiff to perform his part of the contract, that one of said remaining notes should be destroyed, and that the other should be paid by defendant only on condition that the plaintiff should thereafter remain in Peoria and use his influence for the benefit of defendant, and that plaintiff did not so remain a reasonable time and exert such influence in favor of the defendant. And if the jury shall further believe from the evidence that pursuant to said agreement one of said two remaining notes was destroyed, and that the other about which such conditional agreement was made is the note now in suit, the plaintiff is not entitled to recover.

6 The jury are further instructed on the part of the defendant that the introduction of proof by the plaintiff tending to show that the plaintiff had complied with his contract to remain in Peoria and recommend the defendant as a dentist, admits that

Given

Refused

50 This was a part of the consideration of the note sued on, and opens the whole case, upon the proof, to the consideration of the jury, as to whether the plaintiff did so comply with his said contract.

which said instructions numbered 2 & 3 were given, and said instructions numbered 1, 4 & 6 were refused by the court, and said instruction numbered 5, the court also refused to give as asked, but gave the same in a modified form as follows:

5. If the jury believe from the evidence that plaintiff sold to defendant certain office furniture & the good will of the Dental Shop of plaintiff in the city of Peoria, and that in consideration thereof and of the express engagement of plaintiff to remain in Peoria after said sale, and use his influence to send business to said shop, under the charge of defendant, four notes, in the sum of \$100 each, were given by debt to plaintiff, and if the jury further find from the evidence that plaintiff did not remain in Peoria, and exert his influence for defendant as he agreed to do, and that upon payment by defendants of two of said notes, and complaint made by defendant that plaintiff had not complied with his agreement, and

that defendant ought not to pay the remaining notes, it was agreed between the parties in settlement of said matter, and in consideration of the failure of plaintiff to perform his part of this contract, that one of said remaining notes should be destroyed, and that the other should be paid by defendant only on condition that the plaintiff should thereafter remain in Peoria, and use his influence for the benefit of defendant, and that plaintiff did not so remain a reasonable time and exert such influence in favor of the defendant, and if the jury shall further believe from the evidence that pursuant to said agreement, one of said two remaining notes was destroyed, and that the other about which such conditional agreement was made is the note now in suit, the plaintiff is not entitled to recover.

To which decision of said court in refusing said instructions 1, 4, & 6, and modifying said instruction numbered 5, deft. by his counsel, then & there excepted - And thereupon the jury ~~retired~~ retired & returned a verdict for said peff, as follows, "We the jurors find for the plaintiff and assess damages to the amount of one hundred dollars and eighty nine cents - M. M. Leary, foreman"

52 Whereupon said defendant then & there entered his motion for a new trial in words & figures as follows:-

David Greenleaf } circuit court
" } Peoria county, Ills.
John Hendel } April Term 1862.

And now comes said defendant and moves the court for a new trial herein; and for cause shows =

- 1st The court excluded proper evidence offered by the defendant.
- 2^d The court admitted improper evidence on the part of plaintiff.
- 3^d The court gave improper instructions to the jury for the plaintiff.
- 4th The court refused proper instructions asked by Defendant =
- 5th The verdict of the jury is against the evidence.
- 6th The verdict of the jury is against the law.
- 7th Said verdict is against the law, evidence & the instructions of the court.

Cooper & Moss, for Deft.,
which said motion was then & there by order of the court continued for hearing till the next June term 1862 of said court = And now at said June

Term this cause coming on again for hearing before said court upon said motion of deft, for a new trial there in the same is overruled by the court & judgment thereupon at said June term entered in favor of said plff upon said verdict. To which decision of said court in overruling said motion for new trial and rendering judgment for said plff upon said verdict, defendant by his counsel, then & there excepted & prays that his Bill of exceptions be now signed & sealed by the court, which is done.

A. L. Messiman *Clk*

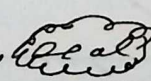
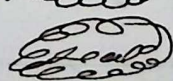
June 15, 1862

And afterwards to wit: on the day and date of the filing of said Bill of exceptions, there was filed in the office of the clerk of said court an appeal bond in words and figures following to wit:

Know all men by these presents that we, John W. Hendel and William N. Davis are held & firmly bound unto David Greenleaf in the sum of Two Hundred dollars, for the payment of which well & truly to be

made to the said Greenleaf, his personal representative & assigns, we bind ourselves, and our legal representatives, jointly & severally firmly by these presents, - But on this condition that whereas the said David Greenleaf has recovered judgment against the said John W. Hendel in the circuit court of Peoria county, Illinois, at the June Term thereof A.D. 1862. for the sum of one hundred and $89\frac{1}{100}$ dollars and costs from which said judgment the said Hendel has prayed an appeal to the Supreme court, now therefore, if the said Hendel shall prosecute his said appeal with effect, or in default thereof, shall pay whatever judgment, costs interest & damages shall be awarded in case of affirmance of said judgment or dismissal of said appeal, then this obligation to be void, otherwise to remain of force & virtue in the law.

In witness whereof we have hereunto set our hands & seals, at Peoria, this 12th day of May A.D. 1862.

John W. Hendel, 
 Wm. A. Davis 

State of Illinois,
Peoria county, ss

I, Enock D. Sloan, clerk of the circuit court in and for said county and state do hereby certify that the foregoing is a full true and complete transcript of the papers filed in the cause wherein David Greenleaf is plaintiff and John W. Hendel is defendant, and also of the record of proceedings of said court appertaining to said cause, as the same appear on file and of record in my office.

Given under my hand
and seal of said court at
Peoria this 29th day of August
AD 1862. Enock D. Sloan, clerk

Recd of J. R. Cooper for making this record
for making this record
J. R. Cooper, etc.

John Hendel } In the Supreme Court,
 vs. } Third Grand Division
 David Greenleaf } April Term A.D. 1863
 Appeal from ^{the circuit court of} Leonia County.

~~Anderson~~ Assignment of Errors =

And now comes the said John Hendel, the appellant above named, and says that manifest error in the record, proceeding & judgment of said circuit court, in this cause, hath intervened to his prejudice, in this,

- viz:
- 1st Said court erred in the exclusion of proper evidence offered by said Appellant, the defendant below =
 - 2nd Said court erred in admitting improper evidence for the plaintiff below, the appellee in this court =
 - 3^d Said court erred in the instructions given to the jury for the plaintiff below, on said trial =
 - 4th Said court in refusing said 1st, 4th & 6th instructions asked by said deft below, and in modifying said defendant's 5th instruction =
 - 5th Said court erred in overruling the motion of said deft below for a new trial =
 - 6th Said court erred in rendering judgment for said plff below upon said verdict =

Wherefore & for other good & sufficient reasons appearing in said Record, Appellant prays that the judgment of said circuit court herein, may be set aside & reversed & wholly for naught esteemed =

Cooper & Mayo
 for appellant =

#82-279

John Howard

As

D. Greenleaf

Record

Filed Apr 22, 1863

J. S. Greenleaf
Clerk

And now comes the said ~~Defendant~~
Appellee ~~attorney~~ by Johnson & Hopkins his atty.
And for finding in error says that
there is no error or illegality in the
finding record or any of the pro-
ceeding & matters therein set forth
in any of the ~~Defendant's~~ assignments
of error in any ^{part of the said record} Johnson & Hopkins
for Appellee

John Hendel } Supreme Court of Illinois =
vs. } 3^d Grand Division
David Greenleaf } April Term 1864 =

Petition for rehearing =
The Appellant, John Hendel, by his Counsel
Cooper & Hoff, respectfully asks the Court for a
rehearing in this case, believing that the order
of affirmance herein, pronounced at the last
term of this Court, proceeded on a mistake of fact
but for which the judgment below would have
been reversed = The opinion filed rests, as we read it,
solely on the ground that the note sued on is
not the note to which the agreement of par-
ties in the fall of 1859, testified to by Hamaker,
applies = We think, on the contrary, that the note in
suit is the only one of the several notes mentioned
in the record to which that agreement can apply =
To sustain this view we submit the following =

As stated in the opinion, Hendel gave four
notes to Greenleaf, all dated May 4/57, drawn on
3, 6, 9 & 12 Mo. respectively, and in \$100. Each
Hendel claimed he ought not to pay them all,
because Greenleaf had not fully complied with
his part of the contract = Accordingly, in the
fall of 1859 the parties met, and by arrangement
between them, one of these notes was destroyed, to settle
past delinquencies on the part of Greenleaf, another
was to be paid by Hendel, provided Greenleaf would

Thereafter remain in Peoria & recommend
Hendel as a dentist - a failure to do which ~~before~~
was the thing complained of - Greenleaf failed
to fulfil this engagement entirely, as is abundantly
clear from the proof - He told Hendel he was going to stay
in Peoria from that time on (see test. Hamaker, on Cr. Ex.,
p. 5 of Abstr.) whereas Johnson testifies (same page) that
he never was in Peoria, except on an short visit, from
the time he left in the Spring of 1857 - But it is deemed
unnecessary to dwell on this point - The Court, assuming,
as we understand it, this contract in 1859 to be valid & bind-
ing on the parties, and that it was not complied with by
Greenleaf, yet affirm the case on the ground that the
note which was thus to be paid, was the 12 Mos. note,
whereas this suit is on the note falling due in 9 Mos.
In arriving at this conclusion, the Court, after remark-
ing in substance (see opinion p. 2) that the agreement tes-
tified to by Hamaker could not relate to the note in suit,
"as it was not the last note", go on to say - "On the
" trial below appellant produced the note falling
" due at the expiration of six months, which was
" in all probability the note which was paid & taken
" up when the adjustment was made. It is
" more than probable that the first note
" in the series was destroyed, or appellant would
" also have produced it on the trial. As the last
" note was to be paid, the twelve months note could
" not have been destroyed." (opinion p. p. 243) - The Court
had before said (p. 1) that when one note was paid

1 1 1 1
+ another destroyed, at this time, two were still left
in existence = Now, while we think the Court clearly
right in affirming that the 6 Mos. note was the one
paid off & taken up at the time of this adjustment, we
think it is certainly mistaken in supposing the 3 Mos. note
~~to have been~~ the one then destroyed = And we note this
more especially here, because we suppose error on
this point has concurred to misapprehension
on the other, namely, that "the last note" which was
to be paid, necessarily meant the 12 & not the 9
Mos. Note - as also that when the one note was
destroyed & the other taken up, there still remained
two of the series outstanding & unpaid =

It will be remembered that in the fall of 1857 (the fall
next succeeding the date of the notes), Hendel's shop
was destroyed by fire, and that most of his papers
were then, either burnt or scattered & lost = This fire
& loss are referred to by Hendel in his statement (p. 2 of Abstr.)
and again at the meeting in 1859, to which Hamaker
testifies - And Bush says (p. 3 of Abstr.), it happened
"the fall after the purchase" = Now, prior to the
time of this fire Hendel had paid off & taken up one
of these 4 notes - (see test. Bush, p. 3 of Abstr. at
foot) = And that it was the three months note which
Hendel had then paid & taken up, & Bush saw
in his possession, we suppose does not admit
of serious doubt = In the first place, no other
note had probably fallen due at that time, cer-
tainly no other unless it was the 6 Mos. Note; and

that it was not the 6 M^{rs}. Note, is evident from the fact that it was long after in the possession of Johnson, Jeff's father in law, for collection, and that as late as May 4/59, (see Johnson's test. p. 5 of Abstract). And from the endorsements on this note, read in evidence, (see p. p. 16 & 17 of Record) it will be seen that it was not yet fully paid, as late as July 4/59 = It was not the 9 M^{rs}. Note, which Hendel had then paid, for that is now ^{quit} ~~in suit~~. And as the 12 M^{rs} Note did not fall due for several months afterwards, the presumption ^{against} its payment so long before maturity, would seem rather violent, in this case = But if it can be supposed that, for some unexplained reason, Hendel had taken up & paid this 12 M^{rs} Note, out of its order, it ~~don't~~ make the matter any worse for Hendel; for then, in every sense, the 9 M^{rs}. Note would be the last Note which was to be paid =

As strongly corroborative, if not conclusive of the view, that at the time testified to by Bush, Hendel had already paid & taken up said 3 M^{rs} Note, we refer the Court to the testimony of Cunningham given on page 7 of Abstract, taken together with the endorsements on the 6 M^{rs} Note, as shown at the top of page 17 of the Record - from which it will be seen that on the 13th of October 1857, Greenleaf does not claim that there is anything then due to him from Hendel, but says, "the first of next month he will owe me eighty dollars,

1 1 1 1

"And if you don't pay him before then I should
"like to give you an order on him. You need not
"mention this to him, but let me know if you
"do not pay him before then" = And by the endorsements
referred to, it is seen that as early as the 24th September
1857, Hendel had already paid \$22, on this six mos.
note, tho' that note would not mature till the be-
ginning of November following. Showing clearly
enough, two things = 1st That on the 13th October
1857, Hendel was not in arrear with Greenleaf, but
had actually anticipated his payments. And 2nd
that the \$80, which Greenleaf said would be due
~~on~~ "the first of next month", referred to balance
of the 6 mos note, as that would be within a mere
fraction of such balance after deducting the \$22. payment,
the note drawing 6 p. ct. interest = It may be fairly asked
we think, would Greenleaf have so written if the 3 mos
note remained unpaid? And why his reserve about
naming the matter to Hendel, if Hendel was actually
in arrear on that note? = To the suggestion of the
court, on page 3 of the opinion, at top, that if the first
note of the series was not the one destroyed at the
time of the adjustment in 1859, "Appellant would
"have also produced it on the trial," the destruction
of his shop and loss of papers, in the fall of 1857,
after he had paid & taken it up, indicates, as we
suppose, a satisfactory answer =

If we are right then in our conclusion that this 3
mos note, or for that matter indeed, any of the notes in the

Series, was paid off by Hendel in the Summer
or fall of 1857. the case is of easy solution - as the
3 remaining notes, ~~whichever~~ they were, are amply
accounted for - the statement of Hamaker as to what
occurred at the interview between the parties he was
called to witness in the fall of 1859, is unmistak-
able, and to this purport - That three notes & no
more, were exhibited - one, & perhaps two of them,
whole notes, on which nothing was paid - the other,
a note on which a balance only remained due
That one of these notes, a whole note on which
there was no endorsement, was destroyed to settle
for the past - that something, a balance, was
paid on another, which was then taken up by
Hendel, and that a payment of some amount was,
at the same time, made & endorsed upon the
remaining note; and that this third, or remain-
ing note, on which a partial payment was then
made, was the note ~~about~~ which it was con-
ditionally stipulated Hendel should pay - (for all
which see test. of Hamaker, p. p. 4 & 5 of abstract) =
Just how much Hendel paid Greenleaf at this time,
don't appear = Hamaker says it was more than \$1,000,
"that it was paid in Bank Bills, and there
"were several of them". But whatever the amount,
it was enough to enable Hendel to discharge balance
due on the 6 Mos. note, & take it up, and also to
obtain an endorsement of some amount, which
the witness saw made, on another of these notes.

There is little room for doubt as to which of the notes then
present this endorsement was made upon. It was not
the one destroyed. As to that the witness says - "The payment
"was not on the one destroyed - that was a whole note."
(Abstr. p. 4) - again, on Cr. Ex. p. 5 - "The note destroyed
"had no endorsement on it." It was not the 6 mos.
note; for that is produced & shows no endorsement
at all corresponding in date with the time of this
interview. It was therefore ^{our} that note of the three then
present, on which still remained to be paid, & to which
the agreement referred, that this endorsement was made.
Now the note sued on, the 9 mos note, has this en-
dorsement written upon it - "Due on within note
"Eighty seven dollars & seventy four cents, \$87.74, Nov.
"9th 1859" (p. 1 of Abstr.) - This date we think corresponds
sufficiently with the time at ~~which~~ which the proof fixes
this interview, to render it reasonably certain that the
payment it indicates is the one which Hamaker
did make & endorse when the agreement was made,
and if so, that would seem to determine the case. True,
the witness does not fix the exact date of the interview
but he says twice - once on direct, & once on Cr. Examina-
tion - it was "in the fall of 1859" (p. p. 4 & 5 of Abstr.) -
We might add that, under the circumstances, the endorse-
ment is such, in form, as the parties would probably make
on concluding this adjustment. They had not to settle, and
it is evident from all that passed, had calculated matters
somewhat closely, and knew just what would remain
due after a certain amount was paid; and hence,

to save future trouble, instead of entering on the note
a given sum as paid, they endorse ^{or declare} what remains
due = There is one other view which seems proper
in this connexion - It is this - If ~~the whole~~ ^{all} four of the
notes were still outstanding, and in whole or in part un-
paid, when the parties met in the fall of 1859 to make
this adjustment. (And this is the view taken by the court, and
indeed, the necessary alternative, if the 9th Nov Note be not the
one to which the agreement then made, referred) how happen-
ed it that only 3 notes were either present, or alluded
to, at that interview? And how is the conduct of the par-
ties to be explained? That they designed to settle every
thing in dispute touching the whole of these notes then
in existence, and the subject matter out of which they
arose, seems most apparent = Hendel claimed he
had already paid Greenleaf "more than he deserved" under
the original contract; ~~Hendel~~ Greenleaf, the May ab-
surre, was insisting on further payments = A Com-
promise is effected; and it is settled between them,
how much of his entire claim Greenleaf shall
knock off, and how much Hendel shall still pay,
and on what conditions he shall pay it = They call in
two witnesses to attest the transaction, Hamaker & Zeigler
(the latter absent in the army at the time of trial) - Three notes
are produced - The attention of the ~~jury~~ ^{witnesses} is called to them -
and the terms of settlement stated carefully over - One
of the notes is then destroyed; a balance is paid on
~~another~~, & that note lifted by Hendel; and it is stipu-
lated that the third, and only remaining one present,

shall be paid on certain conditions = No allusion
whatever is made to any fourth note during the entire
transaction. A reticence consistent enough with the
idea that one of the notes of this series had long before
been paid, but unaccountable on the hypothesis
that all four of the notes were still in existence & in whole or
in part unpaid = Had this been so, that fourth note would
just as certainly have entered into this adjustment
then talked of before these witnesses, as the three which
were actually present = Besides, the assumption neces-
sarily is, that this 9 Mos note was not one of the three
produced at this meeting, otherwise it is the note to which
the agreement related, as one of the three was paid off & one
destroyed = But if not, where was it? Why was nothing
said about ^{it}? And how does Hendel, at or about this
very time, happen to be paying a part of it, as shown
by the endorsement, if it was not one of the three,
and the one he then & there engaged to pay, when we
find him so unwilling to pay anything more on any of
the notes, alleging that he had already paid Green
leaf "more than he deserved to have"? But not
wishing to push these inquiries, we conclude
that, by every reasonable intendment, the agree-
ment in question relates to this 9 Mos note the
note in suit = But assuming there is room for
doubt, enough certainly appears to show that the
point should have been left to the jury, at the least;
and in this view, we submit, the 10th instruction for
self help is sufficient of itself to reverse the judgment

It was not for the Court to settle ~~that~~ this question of fact by instruction, against the deft, as is done here, if we know what language means. As the interpret, the Court here tells the jury that the agreement in question concerns the last note only; That "the last note" means the twelve months note. And that as the suit is on the 9th not the 12 mos note, that agreement is out of the present case, and the jury cannot now consider it; but that when, in some other suit, the plff attempts to collect said last or 12 mos note, then this defence may be set up, but not before. The instruction in our judgment means this or it means nothing. And that the jury might well consider it as taking the question entirely away from them is, we think, apparent. The instruction was moreover specially improper under the proof. It was fair matter of argument to the jury what the parties really meant in calling the note still to be paid, the last note. And while we suppose they meant, and, consistently with well established facts in the case, could mean only this, that the note which they agreed was to be paid on the conditions named, was the last of the entire lot of notes originally given, that remained, or would remain outstanding & unpaid, after destruction of one & payment of one or another of the three then present, and not at all, that it was intended to designate the 4th, or last note numerically of the series:

Yet we admit the point required explanation, and indeed a somewhat careful statement & analysis to disincumber it of the Mists & complications which ingenious Counsel were able to throw over it - presenting, in fact, the very state of case where such an instruction was calculated to be more than ordinarily damaging to the Defendant - For while it is quite practicable, with time & opportunity for proper apprehension & comparison of facts, to see clearly what the parties meant when they spoke of "the last note," and "the last note to be paid," the jury in the haste & excitement of trial might well be confused & led to false conclusions by such an instruction - The witness Hamaker, himself, while knowing well the actual facts, that is, what he heard said & saw done, was apparently not free from confusion in his inferences; and not unnaturally, as he read none of the notes, and knew nothing of the business except simply what was said & done in his presence, when called in to witness the settlement - That he may have been misled from the language used, that the note to be paid was the last of a series numerically, may be true, and yet entitled to weigh little under the circumstances, especially when it is known that he also tho't, from what he heard, that the note destroyed was the next to the last - a matter in itself suggestive; for if the parties called the note destroyed the next to the last, they necessarily meant the next after the last that remained, (which makes the note destroyed the twelve months note) as the next

before the last, in this sense, (the six months' note still exists, tho' paid, was produced on the trial, and is set out in this Record:-

Having now, as we trust, said enough to satisfy the Court of the correctness of our position on this question of fact, and of the impropriety of ~~the~~ said 10th instruction, we leave the case with the Court, simply remarking, that since the presentation of the petition in this case to two of your Honours in vacation, we have had access to the Record, which we had not then, and this has given occasion to redraft the petition, modifying it in some respects, and as we hope strengthening the application =
All which is most respectfully submitted =

Cooper & Mads
Attys for app^{nt}
John Hubbel =

279

John Hendel
vs.
David Greenleaf

petition for rehearing

Filed April 26. 1824
L. Leland
Clerk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN HENDEL,

vs.

DAVID GREENLEAF.

} APPEAL FROM PEORIA CIRCUIT COURT.

BRIEF OF APPELLANT.

1ST. This suit is bro't on one of four notes of \$100 each, given by Hendel to Greenleaf, for certain furniture in a dental shop belonging to Greenleaf; the good will of said shop, and the engagement of Greenleaf to remain in Peoria and recommend customers to Hendel. The value of the furniture, all told, was less than \$100. The most material part of the entire contract, was the undertaking of Greenleaf to remain in Peoria and send customers to Hendel, which he failed to do. Hendel paid two of the notes, and much more than he ever received value for. The consideration of the note sued on, wholly failed, and plaintiff was not entitled to recover.

2D. The transaction between these parties constituted *one entire contract*, and pl'ff was not at liberty to disregard or refuse to perform any part of it.

Bedgley vs. Heald, 4 Gilm., 66.
Taylor vs. Beck. 13 Ill., 386

3D. But however this be, the subsequent agreement between these parties in reference to these transactions, and in settlement of their disputes growing out of the same, was a valid contract, supported by sufficient consideration on both sides, reciprocally binding on both parties. By the express terms of this contract, the remaining note was only to be paid in case Greenleaf thenceforward remained in Peoria, and exerted his influence in favor of the business of Hendel. This contract Greenleaf wholly failed to comply with, and he was therefore not entitled to recover.

4TH. The refusal of the Court to permit def't, in the first instance, to prove the true consideration of the notes, was erroneous, and tended to prejudice the def't before the jury.

5TH. As the case went to the jury, the first instruction given for pl'ff was wholly inapplicable and erroneous. The pl'ff had himself opened up the whole case, and thereupon the Court let in the proof originally offered by the def't as to the true consideration of the notes; whereas, this instruction takes entirely from the jury the very proof which the pl'ff, by his own act, had let in.

Pl'ff's 3d instruction was also inapplicable, and tended to mislead the jury; the proof was clear and uncontradicted, of a specific contract on the part of pl'ff, to remain in Peoria and use his influence for the benefit of def't. Besides, what is meant by a mere understanding? If connected with the transaction, it is, or may be, the contract itself or an essential part of it. For, what is a contract but the understanding of the parties to the transaction, in relation to it? The instruction could only confuse and mislead the jury, and should not have been given.

Upon pl'ff's 4th instruction we remark, that there was no proof of any adjustment of damage, as affecting this particular note. One note, it is true, was destroyed, because of failure on the part of pl'ff, to perform his contract up to that time. But the proof is not that this was in full of all damages sustained; on the contrary, it is, that all claim to any further payment, on any note, was then forfeited; and it was only in consideration of future services to be rendered by pl'ff, that the remaining note was to be paid.

Pl'ff's 6th instruction is equally objectionable on the score of impertinence.

The 8th instruction given for pl'ff, is not law, in the terms stated. When it was proved that pl'ff had not performed his part of the contract, it did not lie in the mouth of the pl'ff to say, the def't was not damaged. The law presumes damage in such case, and the burden was on the pl'ff to disprove it. The instruction was further improper, because it was a case of total failure of consideration—in which case there could be no recovery on the note, without reference to any question of damage.

Pl'ff's 10th instruction, in effect, takes the case, as to a material question of fact, from the jury and settles it against the def't. It was for the jury, upon the proof, to say what note the agreement referred to. But the Court, deliberately and in terms, determines this for them. This, it was not the province of the Court to do.

5TH. The 1st instruction asked by def't, is clearly law, and should have been given. If the consideration had failed to more than the amount of all that remained unpaid under the contract, the def't was certainly at liberty to show it. *Wears vs. Parish*, 26 Ill., 240; *Cook vs. Mix*, 11 Conn., 432. So, it is conceived, def't's 4th instruction is law, and should have been given.

A contract being proved, binding the plaintiff to do a certain thing, it is for him to prove performance before he can recover. In arg., *Eldridge vs. Rowe*, 2 Gilm., 96. So, where undertakings are mutual and dependent, the last cannot be enforced till performance of first is proved. *Capps vs. Smith et al.*, 3d Scam, 178.

6TH. Upon the proof in this case the verdict should have been for the defendant, and this, so palpably, as to require that the verdict should have been set aside. For this and other reasons stated, the new trial asked for should have been given.

COOPER & MOSS,
For Appellants.

Filed May 7, 1843
S. L. Leland
MR.

ings. For this and other reasons, I think the new kind of the spiritual movement and this so tragically as to reduce that the spiritual life has been not gone. Upon the hand, it has come the spirit and soul have been for the de-

not be entered till performance of it is perfect. Growth of health and life is slow. It is white and pinkish and mixed and gradual. The patient has to have performance before he can recover. In age. In disease or wound.

If coming point proved, making the growth to be a certain thing it is the

[illegible]

ration—in which case there could be no recovery on the note without a confession of judgment was further improved, because it was a case of total failure of consideration in such case, and the burden was on the bill to disprove it. The fact in the mouth of the bill itself, the fact was undisputed. The law presumes it was proved that bill had not performed his part of the contract, it did not follow that the note was not paid.

to the true celebration of the festival, whereas the celebration of the festival
 exact and therefore the Church in the present originally intended for the festival
 which is the most important of the festival. The festival is the festival
 as the one went to the festival, the festival is the festival
 1863
 W. M.