INDEX

	Page
Complaint	1
Copies of the Four Promissory Notes mentioned in the above complaint	4
Affidavit of Merits, filed Dec. 19, 1914	6
Consent Extending time to File Affidavit and Answer	7
Affidavit of Merits, filed Jan. 12, 1915	8
Answer	8
Reply	12
Reasons	13
Order to Show Cause	14
Conclusions	15
Judgment Record	15
Notice of Appeal	16
Testimony	18
Defendant's Motion to Direct Verdict	81
Plaintiff's Motion for Direction of Verdict	82
Court's Charge to Jury	82

WITNESSES

Plaintiff's:

Robert Johanson,	
Direct	18
Cross	20
Re-direct	27
Re-cross	30

Page

Defendant's:

Charles Ihle,
Direct 31
Cross 37
Re-direct 53
Re-cross 54
Edward W. Martin,
Direct 55
Cross 57
William Hackett,
Direct 63
Cross 64

Rebuttal:

Robert Johanson,
Direct 67
Cross 72
Re-direct 74
Re-cross 74
Re-called:
Direct 77
Cross 77
Charles Ihle,
Direct 81

EXHIBITS

Offered Page

Plaintiff's:

Exhibits P-1, P-2, P-3 and P-4—Notes 20
Exhibit P-5—Paper 37
Exhibits P-6 and P-7—Checks 77
Exhibit P-8—Pleadings 81

New Jersey Court of Errors and Appeals

Complaint

(Filed Dec. 17, 1914)

HUDSON COUNTY CIRCUIT COURT

ROBERT JOHANSON, Plaintiff, vs. CHARLES IHLE, Defendant.	Action at Law.

Plaintiff, Robert Johanson, residing at 23 Coenties Slip, in the City of New York, in the County of New York and State of New York says that:

FOR A FIRST COUNT

I. That heretofore, on February 18th 1914, the defendant, Charles Ihle, made and delivered to Edward W. Martin, his promissory note in writing, whereby he promised to pay the said Edward W. Martin or order, Seven hundred and fifty dol-

lars ($750) with interest, four months from date at the City Trust Company, Newark, N. J., a copy of which note is hereto annexed.

II. The payee, Edward W. Martin endorsed the said note and afterward and before maturity delivered it so duly endorsed to the plaintiff.

III. That thereafter, the said note was duly presented for payment at the said bank when it fell due, on the 18th day of June, 1914 and payment thereof was demanded and refused, whereupon said note was duly protested for non-payment, and notice of such demand and refusal was given to the said maker, the defendant.

IV. That no part of the said note has been paid and the plaintiff is now the lawfu lowner and holder thereof.

For a Second Count

V. That heretofore, on February 18th 1914, the defendant, Charles Ihle, made and delivered to Edward W. Martin, his promissory note in writing, whereby he promised to pay the said Edward W. Martin or order, the sum of Seven hundred and fifty dollars ($750) with interest, four months from date at the City Trust Company, Newark, N. J., a copy of which note is hereto annexed.

VI. The payee, Edward W. Martin, endorsed the said note and afterward and before maturity delivered it so duly endorsed to the plaintiff.

VII. That thereafter, the said note was duly presented for payment at the said Bank, when it

fell due, on the 18th day of June, 1914 and payment thereof was demanded and refused, whereupon said note was duly protested for non-payment, and notice of such demand, and refusal, was given to the said maker, the defendant.

VIII. That no part of the said note has been paid and the plaintiff is now the lawful owner and holder thereof.

For a Third Count

XI. That heretofore, on March 2nd, 1914, the defendant, Charles Ihle, made and delivered to Edward W. Martin, his promissory note in writing, whereby he promised to pay the said Edward W. Martin, or order, the sum of Seven hundred and fifty Dollars ($750) with interest four months from date at the City Trust Company, Newark, N. J., a copy of which note is hereto annexed.

X. The payee, Edward W. Martin, endorsed the said note and afterward and before maturity delivered it so duly endorsed to the plaintiff.

XI. That no part of the said note has been paid, and the plaintiff is now the lawful owner and holder thereof.

For a Fourth Count

XII. That heretofore, on March 2nd, 1914, the defendant, Charles Ihle, made and delivered to Edward W. Martin, his promissory note in writing, whereby he promised to pay the said Edward

W. Martin, or order, the sum of Seven Hundred and Fifty Dollars ($750) with interest, four months from date at the City Trust Company, Newark, N. J., a copy of which note is hereto annexed.

XIII. The payee, Edward W. Martin, endorsed the said note and afterward and before maturity delivered it so duly endorsed to the plaintiff.

XIV. That no part of the said note has been paid, and the plaintiff is now the lawful owner and holder thereof.

Plaintiff demands as damages fifteen hundred dollars ($1500) with interest at six (6) per cent per annum from the 18th day of February, 1914, and fifteen hundred dollars ($1500) with interest from the 2nd day of March, 1914, together with protest fees amounting to three and 20/100 dollars ($3.20), amounting in all to the sum of three thousand one hundred and thirty-five and 39/100 dollars ($3,135.39), together with the costs of this action.

HENRY W. TRIMBLE,
Attorney for Plaintiff.

Copies of the Four Promissory Notes Mentioned in the Above Complaint

Annexed to complaint

The following are copies of the four promissory notes mentioned in the above complaint:

$750.00 Newark, N. J. February 18, 1914.

Four months after date I promise to pay to the order of Edward W. Martin
Seven Hundred Fifty & 00/100.....Dollars
at the City Trust Company, Newark, N. J.
Value received. With interest
No..... Due (sd) CHARLES IHLE

Endorsements.

(sd) Edward W. Martin
(sd) Robert Johanson
Stamped :Pay to the order of:
:National Park Bank:
:Waterbury & Co.:

$750.00 Newark, N. J. February 18 1914

Four months after date I promise to pay to the order of Edward W. Martin
Seven Hundred Fifty & 00/100.....Dollars
at the City Trust Company, Newark, N. J.
Value received. With interest
No..... Due (sd) CHARLES IHLE

Endorsements.

(sd) Edward W. Martin
(sd) Robert Johanson
Stamped :Pay to the order of:
:National Park Bank:
:Waterbury & Co.:

$750.00 March 2" 1914

Four months after date I promise to pay to the order of Edward W. Martin

Seven Hundred Fifty & 00/100.....Dollars
at the City Trust Company, Newark, N. J.
Value received. With Interest.
No. ..... Due (Sd) CHARLES IHLE
Endorsement.
(sd) Edward W. Martin

$750.00 March 2" 1914
Four months after date I promise to pay to the order of Edward W. Martin
Seven Hundred Fifty & 00/100.....Dollars
at the City Trust Company, Newark, N. J.
Value received. With Interest.
No. ..... Due (sd) CHARLES IHLE
Endorsement.
(sd) Edward W. Martin
Filed Clerk's Office
Dec. 17 1914
Hudson County, N. J.
John F. Crosby, Clerk.

Affidavit of Merits

(Filed December 19, 1914)

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

Charles Ihle of full age, being duly sworn on his oath saith, that he is the defendant in the above stated cause, residing at No. 942 Summit

Avenue in the City of Jersey City in the County and State aforesaid, and he believes that he has a just and legal defense to the said action on the merits of the case.

CHARLES IHLE.

Sworn and subscribed this
19th day of December, A. D. 1914, before me,
(Seal) Edward Meister,
Notary Public of
New Jersey.

Filed Clerk's Office
December 19, 1914
Hudson County, N. J.
John F. Crosby,
Clerk.

Consent Extending Time to File Affidavit and Answer

(Filed Jan. 4, 1914)

Consent is hereby given that the time within which to file an affidavit of merits and answer, be extended from the fourth day of January, to the thirteenth day of January, nineteen hundred and fifteen.

HENRY W. TRIMBLE,
Attorney of Plaintiff.

Filed Clerk's Office
Jan. 4th, 1915
Hudson County, N. J.
John F. Crosby,
Clerk.

Affidavit of Merits

(Filed, Jan. 12, 1915)

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

Charles Ihle, of full age, being duly sworn according to law on his oath saith, that he is the defendant in the above stated cause, residing at No. 942 Summit Avenue in the City of Jersey City in the County of Hudson and State of New Jersey, and he believes that he has a just and legal defense to the said action on the merits of the case.

CHARLES IHLE.

Sworn to and subscribed this
12th day of January, A. D., 1915, before me,
(Seal) Edward W. Insley,
Notary Public,
New Jersey.

Filed Celrk's Office
Jan. 12th 1915
Hudson County, N. J.
John F. Crosby, Clerk.

Answer

(Filed, Jan. 12, 1915)

Defendant, Charles Ihle, residing at No. 942 Summit Avenue in the City of Jersey City in the County of Hudson and State of New Jersey, says that:

Answer

1. He admits the truth of the matters contained in paragraph one.

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

3. He admits the truth of the matters contained in paragraph three.

4. He denies the truth of the matters contained in the fourth paragraph.

First Defense to First Count

1. On or about February 18, 1914, defendant made the certain promissory note for $750.00 referred to in the first count, and set out in the complaint, together with three certain other promissory notes each in the sum of $750.00, one of which said notes was dated February 18, 1914, and two of which were dated March 2, 1914 referred to in the second, third and fourth counts and set out in the complaint; and also on said February 18, 1914, endorsed certain other promissory notes made by the said Edward W. Martin to the order of the plaintiff, aggregating the sum of $9,950.00; that subsequent thereto, and on or about September 12, 1914, it was agreed by and between the plaintiff and defendant, that if the defendant would pay to the plaintiff the sum of $5,000.00, as follows: $500.00 in cash, and $4,500.-00 in four new certain promissory notes, four in the sum of $1,000.00 each, and one in the sum of $500.00 he, the said plaintiff would release and discharge defendant of his liability on said four notes in the sum of $750.00 each, would surrender up to the defendant said four notes, and would

further release and discharge him of his alleged liability as endorser on the said certain other promissory notes aggregating $9,950.00 and accept said $500.00 and new notes in full satisfaction and payment of any and all claims which he had against defendant; that in accordance with said agreement said defendant, on or about said September 12, 1914, paid to said plaintiff the sum of $500.00 and made and delivered to him his four certain promissory notes, dated July 1, 1914, four of which were in the sum of $1,000.00 each, and one of which was in the sum of $500.00, and due respectively on January 15, 1915; April 15, 1915; July 15, 1915; October 15, 1915 and January 15, 1916, which said defendant accepted as a full satisfaction and payment of the demand set up in the first count of complaint, and of defendant's alleged liability as endorser as aforesaid.

DEFENSE TO SECOND COUNT

1. He admits the truth of the matters contained in paragraph five.

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

3. He admits the truth of the matters contained in Paragraph seven.

4. He denies the truth of the matters contained in paragraph eight, and defendant refers to the same defence, raised upon the facts pleaded in first defense to first count and therein recited, and which said plaintiff accepted as a full satisfaction of the demand set up in the second count.

Answer

Defense to Third Count

1. He admits the truth of the matters contained in Paragraph nine.

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

3. He denies the truth of the matters contained in paragraph eleven, and defendant refers to the same defense raised upon the facts pleaded in first defense to first count and therein recited, and which plaintiff accepted as a full satisfaction of the demand set up in the third count.

Defense to Fourth Count

1. He admits to the truth of the matters contained in paragraph twelve.

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

3. He denies the truth of the matters contained in paragraph fourteen, and defendant refers to the same defense raised upon the facts pleaded in first defense to first count and therein recited, and which said plaintiff accpted as a full satisfaction of the demand set up in the fourth count.

WM. HACKETT,
Attorney for Defendant.

Filed Clerk's Office
Jan. 25, 1915
Hudson County, N. J.
John F. Crosby, Clerk.

Reply

(Filed Mar. 1, 1915)

Plaintiff makes the following reply to the first defense to the first count, the defense to the second count the defense to the third count, and the defense to the fourth count.

I. Plaintiff denies the agreement set up in the several alleged defenses.

II. Plaintiff admits that he received from defendant the sum of $500.00 in cash, and promissory notes of defendant aggregating $4,500.00, but denies that said sum of $500 and said notes aggregating said $4,500.00 or either of them, were accepted in full or part satisfaction of the notes on which plaintiff is suing herein and denies that said sum of $500.00 and said notes aggregating $4,500.00 were to be applied in any way on the said notes on which plaintiff is suing herein.

III. Plaintiff alleges said sum of $500.00 was applied to obligations other than those involved in this suit, and said notes aggregating $4,500.00 were renewal notes of long standing obligations not involved in this suit.

IV. Plaintiff denies that he at any time released or discharged said defendant from any of the obligations herein sued upon.

V. Plaintiff will object that the answer discloses no defense. It fails to show that the alleged contract as made was made for good and valuable consideration.

HENRY W. TRIMBLE,
Attorney of Plaintiff.

Filed Clerk's Office
Mar. 1, 1915
Hudson County, N. J.
John F. Crosby,
Clerk.

Reasons

(Filed Oct. 24, 1916)

To the above named plaintiff and his attorenys:

The defendant hereby assigns as reasons why a new trial of the above-entitled action should be granted the following:

1. Because the verdict of the jury is against the weight of the evidence.

2. Because the evidence for the plaintiff does not show any proper standard for the measurement of damage.

3. Because the verdict of the jury was contrary to the direction and instructions of the Court.

4. Because the verdict of the jury was excessive.

5. Because the Court excluded lawful evidence offered by the defendant.

6. Because the Court refused to direct a verdict for the defendant.

Respectfully yours
CHAS. E. S. SIMPSON,
Of Counsel of Defendant.

To
Messrs. Runyon & Autenrieth
Attorneys of Plaintiff.

Filed Clerk's Office,
Oct. 24th 1916,
Hudson County, N. J.
John J. McGovern,
Clerk.

Order to Show Cause

(Filed Oct. 24, 1916)

Application being made to me within the time prescribed by law for a Rule to Show Cause Why a New Trial should not be granted in the above-stated cause, upon the grounds stated in the reasons filed herewith, said application being made by the above-named defendant, it is thereupon on this 23d day of October 1916, on motion of Charles E. S. Simpson, of Counsel with the defendant,

ORDERED, that the above-named plaintiff or his Attorney show cause before me at the Circuit Court, at the County Court House, at Jersey City, in the County of Hudson, on Friday, the tenth day of November A. D. 1916, at ten o'clock in the forenoon of that day or as soon thereafter as Counsel can be heard, why the verdict rendered in the above-stated cause on the 11th day of October, 1916, should not be set aside and a new trial of the above stated cause granted to the defendant; and it is further

ORDERED, that the exceptions and objections, taken by the said defendant in the course of the trial of the said cause, upon the Court's refusal to direct a verdict be reserved to him; and it is further ORDERED, that execution on the judgment entered on the said verdict be stayed until further order of this Court, and that all proceedings on the part of the said plaintiff herein, with the exceptions of the foregoing rule and the proceedings thereon be, and the same are hereby stayed until the further order of this Court.

LUTHER A. CAMPBELL,

J.

Judgment Record

Filed Clerk's office,
Oct. 24th 1916,
Hudson County, N. J.
John J. McGovern,
Clerk.
MESSRS. RUNYON AND AUTENRIETH,
Attorneys for plaintiff.
MR. CHARLES E. S. SIMPSON,
Atty. for Defendant.

Conclusions

(Filed Jan. 3, 1917)

CAMPBELL, J.

I am unable to find any legal reason permitting me to disturb this verdict and the rule is therefore dismissed with costs.

Dated, Dec. 27, 1916.

LUTHER A. CAMPBELL,
Judge.

Filed Clerk's Office,
Jan. 3, 1917,
Hudson County, N. Y.
John J. McGovern,
Clerk.

Judgment Record

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit October 11th 1916. The cause having been heard and submitted to the jury they returned their verdict as follows:

Notice of Appeal

They say they find for the plaintiff, and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of Three Thousand Four Hundred seventy two Dollars ($3,472).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Three Thousaid Four Hundred seventy-two Dollars ($3,472) damages and his costs which are taxed at Fifty-three Dollars and sixty-four cents ($53.64) making in the whole the sum of Three thousand five hundred and twenty-five Dollars and sixty-four cents ($3,525.64).

Judgement entered this 11th day of October 1916.

LUTHER A. CAMPBELL,
Judge.

Attest:
John J. McGovern,
Clerk.

Notice of Appeal

HUDSON COUNTY CIRCUIT COURT

(Filed Jan. 9, 1917)

ROBERT JOHANSON, Plaintiff, vs. CHARLES IHLE, Defendant.	Action at Law.

To Messrs. Runyon & Autenreith
Attorneys of Plaintiff,
15 Exchange Place,
Jersey City.

Notice of Appeal

Sirs:

You Will Please Take Notice, that the defendant appeals from the judgment entered in the above stated cause in the Hudson County Circuit Court, on or about the Eleventh day of October, 1916, and from the whole thereof, to the Court of Errors and Appeals in the last Resort in all cases in New Jersey, and the said defendant hereby states the grounds of such appeal to be as follows:

1. Because the evidence does not support the verdict found by the jury.

2. Because the verdict is against the weight of the evidence.

3. Because the jury found in favor of the plaintiff whereas they should have found a verdict for the defendant.

4. Because legal evidence was excluded by the Court upon the trial of the action.

5. Because illegal evidence was admitted by the trial Judge upon the trial

6. Because the trial Judge refused to direct a verdict for the defendant at the close of the whole case.

7. Because the verdict and judgment was in other respects irregular and void and tended to prejudice the rights of the said defendant.

Dated, January 6th A. D. 1917.

WILLIAM HACKETT,
Attorney of Defendant.

Filed Clerk's Office,
Jan. 9th, 1917,
Hudson County, N. J.
John J. McGovern, Clerk.

Testimony

HUDSON COUNTY CIRCUIT COURT

ROBERT JOHANSON, Plaintiff,
vs.
CHARLES IHLE, Defendant.

Transcript of shorthand notes taken on the 10th day of October, 1916, before Judge Campbell and a jury.

Appearances:
Henry W. Runyon, Esq., for plaintiff.
Charles E. S. Simpson, Esq., for defendant.

The Court: Do I understand, gentlemen, there is no dispute as to these notes, that they did exist and legitimately exist in the hands of this plaintiff at one time?

Mr. Simpson: They were legitimate notes up to the 14th of September.

The Court: Is formal proof of the notes necessary?

Mr. Simpson: No; we will waive that.

ROBERT JOHANSON, sworn:

Direct-examination by Mr. Runyon:

Q. Mr. Johanson, how did you come into possession of the four notes mentioned in your com-

plaint? A. Those four notes were turned over to me by Mr. Martin.

Q. You are the plaintiff in this case. Turned over to you by Mr. Edward W. Martin, the payee named in the four notes? A. Yes.

Q. On what transaction were they turned over to you by Mr. Martin?

Mr. Simpson: We admit he being the bona fide holder of these notes.

Mr. Runyon: Do you admit they came into possession of them in regular course before they matured?

Mr. Simpson: We will admit he came into possession in due course up to September 14, 1914.

The Court: These four notes, the first two in February and the other two are in March.

Mr. Simpson: They were after maturity.

Mr Runyon: You admit they did come into his possession before maturity in regular course?

Mr. Simpson: I don't know about it.

Q. How did you get them, Mr. Johanson, and when? A. I received those notes from Mr. Martin.

Q. Are those the notes? A. Yes, sir; these are the notes.

Q. When did you get them with reference to their due dates?

The Court: Did you get them all at one time, Mr. Johanson?

A. They were—I received these notes from Mr. Martin all before they were due. There was none of them due at the time I received them.

Q. What were they given to you for? A. They were given to me for obligations which were due and Mr. Martin gave me those notes.

Q. At the time Mr. Martin gave you those notes did he owe you a greater sum than the amount of those notes? A. Yes, in excess—

Mr. Simpson: I object to that as irrelevant; Mr. Martin is not a party to this suit.

The Court: I do not know as it makes any difference, because the fact he did get them in due course carries the presumption with it, I take it, that they were for a valuable consideration. I think that is one of the presumptions given us by the act.

Q. Now, Mr. Johanson, have those notes ever been paid, or any part of them? A. These notes have not been paid.

Mr. Runyon: I offer the notes. I under-understand my adversay to admit them. We will formally offer the four notes.

Papers marked P-1, P-2, P-3 and P-4.)

CROSS-EXAMINATION by Mr. Simpson:

Q. You say these were given to you for an obligation? A. Yes.

Q. Or did you purchase them? A. No; they were given to me for obligations.

Q. Do you deny that you purchased them? A. Why, I didn't purchase those notes.

Objected to as not proper cross-examination.

Objection overruled.

Q. What was that obligation? A. For money that Mr. Martin owed me.

Q. That is E. W. Martin? A. Edward W. Martin.

Q. Edward W. Martin, the endorser? A. Yes, sir.

The Court: And the payee of the note?

Q. Is that right? A. Yes, sir.

Q. Do you remember being at 40 Milton Avenue on September 12, 1914? A. I remember I vas at 40 Milton Avenue.

Q. Who was present with you? A. With me?

Q. Yes. A. Who was present when I got there?

Q. Or while you were there? A. Yes. Why, at one time Mr. Martin was there and Mr. Ihle was there and one time Mr. Ihle and Mr. Hackett and Mr. Martin was there.

Q. Well, you were there while the other three were there? A. Yes, sir.

Q. At that time you had a conversation about these four notes, did you not?

Objected to as not proper cross-examination.

Objection overruled.

A. I was there at that time and they were discussing these—as to what to do—with regard to payment—in regard to having them paid or do something for it.

Q. You received five notes at that time, didn't you?

Q. What were their denominations? A. One was five hundred and four of them was a thousand dollars apiece.

Q. Who made them? A. Mr. Ihle.

Mr. Simpson: We served a notice to produce those notes. Have you got them, Mr. Runyon?

Mr. Runyon: What notes are they now?

Mr. Simpson: Notes made on September 12, 1914, four of a thousand dollars and one of five hundred dollars, dated July 1st, 1914.

Mr. Runyon: There is three, four—how many altogether?

Mr. Simpson: Five.

Q. You remember there was one for five hundred dollars and four for one thousand dollars each? A. Yes, sir.

Q. Prior to that there was a cash account running between Ihle and you, wasn't there? A. No.

Q. Never? A. No.

Q. Didn't he owe you five hundred dollars—didn't you owe him five hundred dollars at that time? A. I owed him five hundred dollars?

Q. Yes. A. No, I didn't owe him any five hundred.

Q. Do you deny it? A. I deny it.

Q. Positively? A. Yes.

Mr. Runyon: Talk up.

A. I didn't owe him any five hundred, no.

Q. What did you accept those five notes for? A. Those notes were accepted extending the payment of the notes that I held?

The Court: You are speaking now of the four notes of seven hundred and fifty each that you had at that time? A. Well, there was far more money due than that and those are—those notes that were given to me amounted to four one thousand dollars and one five hundred—they were extended, the time, for the payment of the obligations that were due. There was more money due at that time, considerable more.

Q. Of the notes of Ihle's? A. Ihle was the endorser on the notes.

Q. What was the indebtedness due at that particular time on which Ihle was the original maker?

The Court: In other words, I take it, what notes did you hold at that time on which notes Mr. Ihle was the maker? A. Those four notes of seven hundred and fifty dollars apiece I held that Mr. Ihle was the maker?

Q. Yes, and there were no others of which he was the maker? A. No, no others—excuse me. Is that note there of Mr. Ihle the maker—that one there, Mr. Ash?

Mr. Runyon: You want me to show this to the witness? He asked me the question.

The Court: Go ahead and ask the next question.

Q. You did not receive any five hundred dollars in cash then to make up this five thousand dollars, did you? A. Not on that transaction?

Q. No, but just prior to that you had borrowed five hundred dollars from Mr. Ihle? A. No, I didn't borrow five hundred dollars from Mr. Ihle.

Q. At the time these five notes were given didn't you owe Ihle five hundred dollars? A. No, I did not.

Q. Hadn't you received five hundred from him? A. Not on that transaction.

Q. Well, wasn't it part of this transaction? A. No; it wasn't part of the three thousand dollar transaction?

Q. No, this five thousand dollar transaction is what I am talking about? A. No, I didn't receive anything on that five thousand dollar transaction.

Q. Let us get this straight. When you accepted Ihle's five notes aggregating four thousand dollars, didn't you at that time owe Ihle five hundred dollars for a cash loan? A. No, sir.

Q. Did you receive five hundred from him? A. No at that time.

Q. How soon before? A. Quite some time before.

Q. Well, what do you mean by quite some time?

(Witness examines paper.)

Q. What have you got there? A. I have got a memorandum here of the notes.

Q. Well, you can testify without that memornadum, can't you? A. I just got the date on here.

By the Court: Q. You can testify without it? A. I would like to see the date.

Q. Can you testify without seeing it? A. Why, in the month of June.

By Mr. Simpson: Q. These notes were made in July? A. No.

Q. Dated in July? A. One made in July.

Q. Made in September, but dated in July? A. Yes, made in September.

Q. You admitted it in your reply to this case that you had received five hundred? A. Not on that transaction.

Q. Not on that transaction? A. No.

Q. What transaction was it? A. On a separate transaction altogether.

Q. Yes, cash loan? A. No.

Q. Ihle made a number of small loans— A. No, not on this transaction.

Q. I know, outside of these notes? A. Outside of these notes, yes. It was outside of the notes we are referring to.

Q. Yes, outside of the four seven hundred and fifty dollar notes and outside of the forty-five hundred dollars in notes? A. On a separate note altogether.

Q. It was a cash loan he had made to you? A. No, sir.

Q. Well, then, what five hundred dollars did you receive that you admitted in your reply? Where did that come from? A. I issued two thousand dollars between Mr. Martin and Mr. Ihle and of that two thousand dollars I was given two one thousand dollar checks; one of the checks came back and was not paid, and Mr. Ihle asked me to give him five hundred so he would have sufficient money to meet the other check, and that is where the five hundred comes in.

Q. Well then, you were not getting five hundred from Ihle, were you? Ihle was getting five hundred from you? A. I did not admit that I got it.

Q. Let's see if that is right. "Plaintiff admits he received from the defendant the sum of five hundred dollars in cash." You knew who Mr. Trimble was, didn't you? Did you know who Mr. Trimble was? A. Yes.

Q. He was your attorney before Mr. Runyon came in? A. Yes.

Q. You knew that he was drawing a reply for you in answer to our answer, didn't you? Did you or did you not? Did you know that Mr. Trimble was drawing that reply for you? Now did you or did you not? You knew Mr. Trimble was your attorney, didn't you? A. Yes.

Q. You stated all the facts of the transaction

to Mr. Trimble, did you? Did you or did you not? A. Yes, sir.

Q. And you told him that you had received five hundred dollars in cash from Mr. Ihle, didn't you? A. I explained how I received the five hundred dollars in cash just now.

Q. In cash? A. No; in a check. How it was turned over to me. I will just explain that to you. Just this minute. It was—

Q. Now at the time that these five notes were made did you surrender any notes to Mr. Ihle? A. No.

Q. If they were given in satisfaction of some other debts what other debts were they given in satisfaction of? A. They were giving in extending the payment of the notes that were due.

Q. Well then, why didn't you deliver up those notes that were due, and where are those notes? A. The notes? I didn't give up any of the notes.

By the Court: Q. Pardon me. You say notes were due. What notes do you mean? A. There was quite a number of notes due amounting to quite an item there.

Q. Let me make it more particularly. Do you refer as amongst those notes to the four notes of seven hundred and fifty apiece? A. No; there is considerable more than that due. No, I don't refer to those notes.

Q. All right.

By Mr. Stimpson: Q. Well, what notes did you refer to? A. The notes are there which are due. There is quite some there.

Q. Why didn't you deliver those notes up to Mr. Ihle? A. Just as soon as the present notes would be paid I would deliver them all. I couldn't deliver them until they were paid.

Q. You knew you had taken new notes there, didn't you? A. I was taking new notes?

Q. Yes. A. Yes, sir.

Q. Do you generally retain your notes when you take a new note? A. I generally retain the old note until the new note is paid.

Q. You what? A. I retain the old note until the new one is paid.

Q. How long have you been in business? A. Some time.

Q. How long? A. Oh, ten or fifteen years.

Q. What is your business? A. Chandler.

Q. You are a note shaver, too, aren't you? A. No, sir.

Q. No? Don't you deal in promissory notes on men? A. No, sir.

Q. Never did? A. This trip.

Q. This trip? I see. I think that is all. A. I never did.

RE-DIRECT-EXAMINATION by Mr. Runyon:

Q. Now, Mr. Johanson, what do you mean that you have dealt in notes this trip? A. Sir?

Q. What do you mean that you have dealt in notes this trip? A. I didn't deal in notes.

Q. Did you have any transaction in these notes other than to loan these two men money and take their notes for it? A. No, sir.

Q. Have you ever gotten a cent back out of any money that you loaned to them? A. No.

Q. Now just explain to the Court and this jury what that two thousand dollar transaction is that Mr. Simpson has been testifying about and the five hundred dollar transaction, so they will un-

derstand? A. The two thousand dollar transaction was that Mr. Martin asked me to let him have two thousand dollars, and Mr. Ihle—

Mr. Simpson: I object to it because his pleadings do not show any such proposition. They admit that five hundred dollars in cash was received.

The Court: The trouble, Mr. Simpson, is this. It was a matter, as I recall it, which was brought out on your cross-examination of this witness. He is now being asked this question and has a right only to ask this question in order to explain that which was brought out by the cross-examination. He spoke of some transaction between himself and some others involving the sum of two thousand dollars, as I remember it, represented by two checks of a thousand dollars each, one of which was not paid, and said something about advancing five hundred dollars so as to make good the second one. Now he is asked to explain that. Its only relevancy is to explain that which was brought out by the cross-examination and may not have been plain. Whether it has any relevancy to the issue or not I am sure I don't know, because I do not understand his explanation.

Mr. Runyon: The pleadings say cash and he says check. What is the difference between cash and check?

Q. I show you a check—a note dated June 6, 1914, from Edward W. Martin to the order of yourself for two thousand dollars and the check of Charles Ihle Company to your order, dated

June 10, 1914, for a thousand dollars, and ask you if those papers are related to that transaction? A. Yes, sir.

Q. Now explain to the jury what that transaction was, Mr. Johanson, so they understand it? A. Mr. Ihle and Mr. Martin received two thousand dollars from me on June the 6th, 1914, and gave me checks, two checks for a thousand dollars apiece, Mr. Ihle did, promising they would both be paid. One of the checks came back and was not paid.

Q. Is that the check there? A. The check I have right here.

Q. Marked "Not paid"? A. It is marked "Insufficient funds."

Q. What else? What was done? A. I begged Mr. Ihle to kindly see that the other check would be paid and Mr. Ihle—

Q. What did you tell Mr. Ihle? Why did you tell him you wanted it paid? A. I had to have it paid, because I would find myself in very bad straits, because it took all the money I had to meet these two checks, to let him have this money. He only wanted it for a short while.

Q. Then what did Mr. Ihle say? A. Mr. Ihle said if I could let him have five hundred he would have sufficient funds to meet that check of one thousand dollars. I let him have that five hundred and that thousand dollar check was paid. In that respect there is a difference of fifteen hundred dollars due me on that transaction. This has nothing to do with the other transaction.

Q. Is that in anywise related to the transaction on the four seven hundred and fifty dollar notes? A. None whatsoever.

Q. About which we are bringing this suit, and has he paid you the balance on that old transaction? A. No, sir.

The Court: The gist and the pith of the whole thing is his answer to the question which you put next to the last one, has it any bearing with the transaction with which we are concerned in this case, and he says no. That is the pith of the whole thing. That is the benefit we get from the explanation on re-direct-examination. Anything further from this witness?

Mr. Runyon: No.

RE-CROSS-EXAMINATION by Mr. Simpson:

Q. You stated that you did not borrow any money from Mr. Ihle outside of these notes. Do you mean that?

Mr. Runyon: I object to that. He didn't state anything of the kind. He said he never borrowed a cent from Mr. Ihle—not outside of these notes.

The Court: I think he was asked as to whether he borrowed five hundred dollars from Mr. Ihle and he said no.

Mr. Simpson: That is what I am getting at. I will modify the question.

Q. You say you never borrowed five hundred dollars from Mr. Ihle? A. No, not that I can remember that I did. I think I did not.

Q. Just look at this signature, will you, and tell me if it is yours, "Robert Johanson."

The Court: The signature you are asked about, Mr. Johanson; you are only asked as to the signature. A. The signature is mine.

Q. Do you remember writing that letter? A. I have not read the letter.

Q. Read the letter and see if you sent it to Mr. Ihle? A. Yes, sir.

Q. What was the package arranged for? A. The package arranged for was five hundred dollars which I believe I borrowed from Mr. Ihle and returned to him again.

Q. Of course you did. That's all. A. Yes, sir.

Plaintiff rests.

CHARLES ILHE, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live, Mr. Ihle? A. 942 Summit Avenue.

Q. In 1914 where did you live? A. 942 Summit Avenue.

Q. And you had a place of business at that time in Jersey City? A. 40 Milton Avenue.

Q. What business are you engaged in? A. Manufacturing leather goods.

Q. Do you know Mr. Johanson? A. I do.

Q. Mr. Martin? A. I do.

Q. And Mr. Hackett? A. Yes.

Q. Do you remember you four men being together at any particular place on September 12, 1914? A. Yes; by appointment at my office, 40 Milton Avenue.

Q. Did you have any conversation with Mr. Johanson in relation to these four notes which he sues on? A. We did.

Q. Just tell this Court and jury what it was? A. Why, I had made four notes which Mr. Martin had discounted by Mr. Johanson, and being the obligation was not met, I said we may be friendly about that, in fact Mr. Johanson suggested we be on friendly terms about that and arrange to make new notes, which we did, and received five hundred dollars which he had received previous to September 12, and he agreed that he would take the four notes, the four one thousand dollar and one five hundred dollar note, and by accepting those notes he says that would wipe out the old notes, and if I would agree to do that, that was just getting the affair in shape and know where he was at. I told him we had been friendly and we had been helping one another out for a long time, I don't see why I shouldn't do that, so I said I will do that with one understanding, that the old notes should be surrendered, the four notes of seven hundred and fifty each, the total was three thousand dollars, which he agreed he would do, in fact he had said that he never would expect, being on such friendly terms, that the both notes would be paid, and he considered it a favor for me to give him new notes so he could realize some money to help him out. There are a number of letters in my possession there where I had expended money to help him out.

Mr. Runyon: I object. Just produce those letters.

The Court: You are simply asked as to what conversation took place between the several gentlemen in the presence of Mr. Johanson on September 12, 1914? A. Well, that is the way it stood,

and I gave him new notes, and I have paid on those new notes when they came due.

Mr. Runyon: What are you talking about now? A. The five thousand dollars of notes—the forty-five hundred notes, as Mr. Johanson admitted.

The Court: Do not go too fast. You are answering beyond what the question is asking for. You are only asked what the conversation was at this meeting on September 12, 1914. A. Well, the answer was that I had settled that in order for Mr. Johanson to realize some money. He wanted new notes which I had given to him and he would consider the old notes paid, so I gave him the new notes for forty-five hundred dollars.

By Mr. Simpson: Q. Now this five hundred dollars had been handed over to him in what way? A. Well, I can't just recall, because it was often I had given him cash. There was one time I had given him cash. I have a letter of his there that he had written this man would come over and he had his signature enclosed in a letter so I know he would be the right party, and I have a check there that I cashed the money and gave him in cash. There are several transactions of that kind.

Q. I show you this letter, November 16, 1914, signed Robert Johanson; is that the letter you refer to?

Mr. Runyon: Do not talk to Mr. Simpson, just talk to the jury.

By the Court: Q. Is that the letter you refer to? A. Yes, shall I read it?

Q. No.

By Mr. Simpson: Q. Is that the signature of the messenger put on there? A. Yes, Thomas J. Kent—no; that is the signature. That is it. It

reads there in the letter that he would send a man to show his signature.

Mr. Simpson: Any question about that?

The Court: That is the one identified by Mr. Johanson on the stand?

Mr. Simpson: Yes.

Mr. Runyon: What do you want me to admit?

Mr. Simpson: Instead of going into formal proof—I had forgotten that Mr. Johanson had admitted it on the stand. I offer that in evidence.

Mr. Runyon: The paper has a lot on it, if the Court please, besides the original memorandum. There is a memorandum made by, I suppose, counsel and by the parties and every one else on it.

Mr. Simpson: We will strike all these out.

Mr. Runyon: I will admit we will read it into the record then.

The Court: Suppose you do. I understand Mr. Johanson has admitted his signature and admitted that is a letter he sent. Let it be read then.

Mr. Simpson: I don't quite get at what you are getting at. This is the important part. This was the only witness who could testify to it.

The Court: What is that?

Mr. Simpson: This notation here, "Pay Johanson five hundred, Thomas J. Kent." He has just recognized that as the messenger who got the money.

The Court: Just ask him again what that means, if he knows.

By Mr. Simpson: Q. Who put the notation, "Gave Johanson five hundred." A. I did.

Q. Who signed that, the messenger? A. This here?

Mr. Runyon: I object to that as leading.

Q. Who put "Kent." A. He signed that.

The Court: That is the man that came for the money.

By Mr. Runyon: Q. Signed what? A. This is my signature.

Q. That is to say the signature— A. He verified his signature.

Q. "Thomas J. Kent" is signed by who? Did you see it signed by anybody? A. Yes, I seen him sign this signature here, "Thomas J. Kent," before I gave the five hundred.

Q. Then you marked on the paper, "Gave five hundred"? A. Yes, sir.

Q. So the pencil mark is your mark and not Mr. Johanson's mark, as you would have us believe? A. I don't deny that.

The Court: He says the pencil portion of the receipt he put on himself, and then the messenger to whom he gave the money signed his name in his presence, "Thomas J. Kent."

Mr. Runyon: So we have no objection to the letter being read into the record, but we do not think that the evidence which he has created ought to go in as an exhibit against us.

Mr. Simpson: Yes.

The Court: I understand counsel is

trying to show this witness says when the letters of this kind came he recognized the signature of Mr. Johanson thereupon, and he also had put upon it the signature of the messenger.

The Witness: Yes.

The Court: That is the signature of Kent, and when he turned the money over to the messenger, he, Mr. Ihle, wrote the receipt thereon and had the messenger sign it, in his presence, so he would know that he was the proper man to give the money to, by comparison of signatures. That is the reason why counsel says he is entitled to use the whole thing so as to show the whole transaction.

Mr. Simpson: I will just take a minute to read this to the jury. "November 16, '14." This is on the letterhead of Robert Johanson, Grocer and Butcher, New York.

"Mr. Charles Ihle, 40 Milton Avenue, Jersey City. Dear. Mr. Ihle; The bearer, Tom Kent, is sent to call for the package that was arranged for this morning. Below is his signature and you can have him sign again so that you can compare the handwriting. Very truly, Robert Johanson." The signature of Thomas J. Kent below the receipt for five hundred dollars. "Thomas J. Kent."

Mr. Runyon: Below what?

Mr. Simpson: A receipt for the five hundred dollars.

Mr. Runyon: I will not admit any such statement. The paper does not show any such thing.

The Court: Will the paper show itself?

Mr. Runyon: He has put on there he gave five hundred to Johanson.

Mr. Simpson: It says "Gave Johanson five hundred."

Mr. Runyon: I object to making such a remark to the jury, and ask that the paper be submitted for what it is worth.

The Court: Together with the testimony of this witness, that is the order, and that is the testimony after all. The paper does speak for itself, as it will go with the testimony of this witness or whatever other testimony there may be upon the subject that the jury believes.

Paper marked Exhibit P-5.

By Mr. Simpson: Q. Now did Johanson ever return those notes to you? A. No, sir.

The Court: What can be the value of this exhibit that has gone in? It is after the date.

Mr. Simpson: It contradicts a statement of this plaintiff that he never borrowed any money from this man.

The Court: I thought it had no bearing on the issue before us. It was simply used for contradiction.

Mr. Simpson: That is all.

CROSS-EXAMINATION by Mr. Runyon:

Q. Now, Mr. Ihle, you are a leather manufacturer, aren't you? A. Yes, sir.

Q. At the time that you gave Mr. Johanson these four notes of a thousand dollars each and an additional note of five hundred, how much

money did you owe to Mr. Johanson, either by your own notes or on notes which you had endorsed and which Mr. Johanson had taken in the regular course.

Mr. Simpson: I object.

A. I do not think that is proper.

Mr. Simpson: I object to it on the ground it is irrelevant and immaterial.

A. It has no bearing.

The Court: Wait a moment, Mr. Ihle. You cannot conduct this case. You are a witness. The only relevancy I can see it has, Mr. Simpson, is that it may go towards establishing the truth of the situation as portrayed by the witness. That is the only bearing. For instance, if I may be permitted to say so, it may be considered with the testimony of the witness as to whether or not it is reasonable that these notes should have been given under all the circumstances and the manner and for the purpose he says they were. I think it is a situation which may be shown. Mr. Ihle, keep in mind that you are a witness on the stand. You are not to negotiate or to manipulate the proceedings here. You are simply to answer questions. If they are objectionable your counsel will take care of you and the Court will rule.

Q. On your endorsement or on that paper at that time you owed Mr. Johanson nine thousand nine hundred and fifty dollars, every cent he had in the world, didn't you?

Mr. Simpson: I object.

The Court: That may be stricken out, the nine thousand and nine hundred and fifty dollars may remain.

Q. Didn't you?

"Question repeated as follows: "On your endorsement or on that paper at that time you owed Mr. Johanson nine thousand nine hundred and fifty dollars?"

A. Not to my knowledge.

Q. Well, you also prepared and had an answer prepared in this case, didn't you? A. Afterwards I was informed of that fact, but at the time I didn't know it.

Q. Your counsel did not inform you of the answer you drew, till after? A. That is not what I said. You asked me whether I knew I had endorsed nine thousand seven hundred and some odd dollars, and I said to my knowledge I didn't know that I endorsed that amount, and when I was informed of the amount I endorsed I was under the impression that those old notes were just being renewed, and they were not new notes going in, but in place of Mr. Johanson returning the old notes he kept those and the new notes I endorsed he gave more moneys on those notes for a consideration, but at the time I didn't—

Q. At the time— A. Do you want me to finish?

The Court Finish it. A. At that time I didn't know that it was that amount. I never realized it was more than about five thousand dollars or somewheres around that. For that reason we got together and Mr. Johanson was to take a new five thousand dollar note, including the five hundred in cash—forty-five hundred dollars in notes and five hundred in cash, and wipe out the old notes

of three thousand dollars. Mr. Johanson came to me with the proposition and he says that is the only way we can adjust that. He said, "You don't realize how many notes I have," and I put it up to him, and I told Mr. Johanson why under the sun or moon you give a man more money on new notes when the old notes are in default; I said, why didn't you demand a payment on the old notes? What did you want to give him more money for. Afterwards I learned why he didn't do it, because he had—

Mr. Runyon: I object.

The Court: It seems to me to have been fully answered.

A. I will go further.

The Court: Oh, no.

Q. At the time you gave Mr. Johanson four one thousand dollar notes and the one five hundred dollar note how much did you owe Mr. Johanson? A. Well, I don't quite understand the question.

Q. You said in your answer that you owed him nine thousand nine hundred and fifty dollars at that time, haven't you? A. Afterwards I learned that, yes, but at the time—

Q. Is your answer correct or not? A. It is.

Q. Oh, then at that time you owed him nine thousand nine hundred and fifty dollars by your note and your endorsements is that correct? A. I understand that, yes.

Q. At that time you had this conversation? A. Yes.

Q. You admit that? A. We admit that.

Q. And Mr. Johnson came in your office and you tendered him four thousand five hundred

dollars worth of notes—withdraw that. Now in addition to that nine thousand nine hundred and fifty dollars worth of obligations that you were on at the time Mr. Johanson came to your office, there was also outstanding against you these notes upon which we are bringing this suit, wasn't there, and you owed them? A. I learned that afterwards. I didn't know it before that.

By the Court: Q. One minute, Mr. Ihle. Let us see if we understand the question. As I understand the question just recently put to you it was at the time you gave these four notes of one thousand and the one note of five hundred and the cash transaction of five hundred, making five-thousand dollars—A. Yes.

Q. —you owed by paper which you had made yourself or upon which you were endorser to Mr. Johanson nine thousand nine hundred and fifty dollars, and also these four notes of seven hundred and fifty dollars which are the matters of this suit? A. Well now, I will have to recall that. Is that right? Did I answer that question?

Q. You are asked what your recollection is? A. I don't recollect just exactly.

Q. Was your total obligations by making and endorsing, nine thousand nine hundred and fifty dollars, or was it nine thousand nine hundred and fifty dollars and these four notes of seven hundred and fifty dollars besides the three thousand dollars more? A. Well, as I stated, perhaps I had endorsed those notes, but I was always under the belief that the notes were being renewed and not more money paid on the notes that I had endorsed. Therefore when I learned that Mr. Johnanson was still giving more money on new

notes, I was under the belief they were the old notes renewed.

Mr. Runyon: I ask that the answer be stricken out.

Q. What do I understand you to say, that you did not know and do not know now whether at that time you owed nine thousand and nine hundred and fifty dollars and these four notes, or whether the total amount that you owed was nine thousand nine hundred and fifty dollars? A. Well, that is just what I don't know.

Q. You don't know? Very well. That answers the question.

By Mr. Runyon: Q. Well, is it true that on or about February 18, 1914, you made certain promissory notes for seven hundred and fifty dollars referred to in the first count of your declaration and complaint, together with three other promissory notes each in the sum of seven hundred and fifty dollars, one of which said notes was dated February 18, 1914, and two of which were dated March 2, 1914? Is that true?

Mr. Simpson: Those are all admitted.

A. Will you kindly repeat that?

By the Court: Q. Those are the four notes in this suit. Do you admit that you made those notes? A. The four seven hundred and fifty dollar notes?

Q. Yes? A. I do.

By Mr. Runyon: Q. Do you admit further on February 18 you endorsed certain other promissory notes made by the same Edward W. Martin to the order of Mr. Johanson, aggregating the sum of nine thousand nine hundred and fifty dollars? A. On that date I endorsed them?

Q. Yes? A. I don't know.

Q. Is that so or isn't it so? A. I don't know if I endorsed them on that date, one date, I hardly think I did.

Q. I am reading from his own answer? A. I said before I understood they were notes being renewed.

Q. Did you endorse those notes on that date, February 18, 1914? A. No; I never endorsed to that amount.

Q. I am reading from the answer in your case. Then you don't know whether your answer is true or not? A. I know this much, that they had told me that the amount was that much and I was on them papers, but they were not signed all at one time. They were notes that I understood were renewed.

Q. I ask the answer be stricken out as not responsive. So that on the occasion of this conversation you were endorser on nine thousand nine hundred and fifty dollars worth of notes held by Mr. Johanson, and in addition to that you were the maker on the four notes upon which we bring this suit; is that so or not? Is it so alleged in your own answer? A. Yes, sir.

Q. Or isn't it so? A. Oh, I learned that after I had endorsed the notes.

Q. But the fact is there? A. The facts are there now.

Q. On this occasion which you have testified to you would have this Court and this jury believe that you, owing to Mr. Johanson nine thousand nine hundred and fifty dollars on obligations, endorsements, and by your notes would accept in lieu of that nine thousand nine hundred and fifty

dollars and this three thousand dollars, four notes for one thousand dollars each; and a note for five hundred dollars, aggregating five thousand dollars?

Mr. Simpson: I object.

A. Yes, I admit he accepted them.

Mr. Simpson: I object to it as being argumentative.

The Court: Well, it is, Mr. Runyon. The fact may be shown as you have been permitted to show that there were outstanding at the time nine thousand nine hundred and fifty dollars worth of other obligations as maker and endorser by this witness, as well as the four notes in question. Of course putting the question the way you do is argumentative and something that may be use before the jury, of course.

A. Can I say a word?

The Court: Never mind. Just wait until you are asked a question and the answer only.

By Mr. Runyon: Q. Just let me get this understanding that you and Mr. Johanson had on that occasion when he came into your office with your attorney present. Just let me get it straight. Was the understanding that Mr. Johanson was to waive his nine thousand nine hundred and fifty dollars plus his three thousand dollars upon which he is bringing this suit, on his part and you to do nothing on your part but to hand him four new one thousand dollar notes and a five hundred dollar note? Is that the transaction, or something else to it? He was to in lieu of that indebtedness, he was to accept your mere promise for

about a third of that? A. No, he placed confidence in Mr. Martin that he would pay him, too, he told me.

Q. Was he to do anything else or were you to do anything else than to give him those four promises to pay of one thousand dollars each? A. Yes; I had Mr. Martin deed him a piece of property as security.

Q. Oh, you did? A. Which he has a deed of, upon the request of Mr. Johanson.

Q. You did not allege that in your pleadings, did you? A. I didn't think it necessary.

Q. When did it ever occur to you that that had anything to do with the transaction? Just now? A. Oh, no. I have the deeds with me. Of course that had nothing to do with the three thousand dollars.

Q. What did you ever do with the deed? A. I have the deed.

Q. You have it in your pocket? A. Certainly.

Q. And never gave it to Mr. Johanson or anything like that, did you? A. No.

Q. This is just what was going on in your mind? A. No, no; Mr. Johanson had 'phoned that being I had the deeds that I should put them on record for him. I was going to Newark and I had to put it on record for him.

Q. That is one year ago, wasn't it, this transaction, way back in 1914? A. Yes.

Q. You still have that deed in your pocket? A. Mr. Johanson asked me to keep it. He said to me you may as well keep it.

Q. Don't you know that Mr. Johanson never heard about such a thing? A. Well, I can get a witness where he told me.

Q. Will you produce that witness? A. Yes; if you give me about fifteen minutes to get him.

Q. And the deed, what deed it it? A. Mr. Johanson knows all about it.

Q. Just tell us what it is about. I want to know something about it. Deed from whom to whom? A. From Edward W. Martin to Johanson.

Q. When was it made?

(Witness produces paper.)

Q. This is one of the many things you have been using since this suit was started to try and get Mr. Johanson to settle with you?

Mr. Simpson: I object.

A. This was a friendly act I was doing to Mr. Johanson.

The Court: Wait, wait. Go back. There was a question.

(Question repeated by stenographer: "When was it made?")

By the Court: Q. Just when it was made? What is the date? A. Dated November 13, 1914.

Q. Has it been recorded? A. Yes, sir.

Q. When was it recorded? A. On the 7th day of December.

Q. What year? A. 1914.

Q. What did you say the date was? A. November 13.

By Mr. Runyon: Q. Let me see it, Mr. Ihle?

(Witness hands paper to Mr. Runyon.)

Q. This is a deed by Mr. Martin and his wife to Mr. Johanson, isn't it?

The Court: That's what he has said.

Q. And it was made in 1914, November, was it? A. November 13, is it? A. Yes, 1914.

Q. Where has it been all this time? Had it in

your pocket all this time? A. When you are ready I will answer it.

Q. Answer it. A. I had an interest in that land.

Q. I ask that the answer be stricken out and the witness required to answer the question.

The Court: The question is where has it been all this time?

A. In my possession, in my safe.

Q. Mr. Johanson has never had it, has he? A. He asked me to keep it for him.

Q. Oh, he did, eh? When did he ask you to keep that for him? A. Before it was put on record. He said, you are going to Newark, have it recorded and you can keep it.

Q. When was this? A. That has been recorded on December 4, is it? What is the date on that?

Q. December 7, 1914. A. December 7th, I guess it was a day before that.

Q. And Mr. Johanson asked you to keep this deed? A. Yes.

Q. Now, Mr. Ihle, don't you know as a matter of fact that Mr. Johanson when you approached him about this subject years ago told you he would have nothing to do with it, that he had to have the money and he needed the money and he would not accept the property, and haven't you kept it ever since? A. Understand—

The Court: Answer yes, or no. You are asked whether that was stated to you? A. I don't recall it.

Q. Whose property is this that is conveyed apparently by this deed which you still hold to Mr. Johanson? Do you consider it Mr. Johanson's property? A. At the present time I do.

Q. Oh, you do? A. If he has a deed to it.

Q. But you have got the deed, haven't you? A. What good is the deed.

Q. You never delivered it, have you? A. I did not deliver it because Mr. Johanson asked me to keep it until everything was cleaned up. Now I am going to make another statement in answer to that. After this suit was started Mr. Johanson—

Q. I ask that the answer be stricken out. A. Can I—it refers to this.

The Court: If he asks you a question you may answer that. If not, counsel will take care of it.

(Mr. Runyon hands paper back to the witness.)

Q. Where is the property in question? A. Did you read the deed?

Q. No, I would like to find out? A. It is in the deed.

The Court: Mr. Ihle, don't you understand you are not the interrogator. If you understand the question answer it if you can.

A. It is in Orange.

Q. Yes. Who has been in possession of it all this time? Is there a house on it? A. No; it is land; there is no house on it.

Q. Just some vacant land you have out there, or Mr. Martin had? A. Yes.

Q. You were trying to get Mr. Johanson to take that stuff instead of giving him back his money? A. Oh, no; this was only given as a security, and when it was paid he was to deed it back to Mr. Martin.

The Court: If that is the situation, gentlemen, need we deal with it any longer?

Mr. Runyon: No. I didn't know it.

The Court: He said it was simply as security. Now whether it was delivered or not I do not care, because Mr. Johanson may never care to exercise his right against the property. Its relevancy falls right with that answer.

Q. Now at the time of this conversation that you have testified to where you say Mr. Johanson agreed to accept your five thousand dollars in promise in lieu of your nine thousand and nine hundred and fifty plus three thousand dollars, twelve thousand nine hundred and fifty dollars of debts, who was present?

Objected to as containing an unwarranted assumption of fact. Question withdrawn.

Q. Now on this occasion of this testimony, who was present, Mr. Ihle? A. At that time we delivered the new notes?

Q. Yes; when you say you agreed to accept the forty-five hundred dollars with the five thousand dollars in lieu of all these obligations. A. Mr. Johanson, Mr. Hackett, Mr. Martin and myself.

Q. Now, Mr. Hackett is your attorney that brought this suit for you, isn't he, the attorney of record? A. Yes, sir.

Q. You have him here as witness to-day? A. Yes.

Q. And Mr. Martin is obligated with you on a great many of these notes, isn't he? A. Yes, sir.

Q. And you have him as a witness here to-day? A. Yes, sir.

Q. Now were any of those notes paid, those

new notes that you gave Mr. Johanson? A. There was part of them.

Q. The four one thousand dollar notes and the five hundred dollar note? A. There was a part of them paid, yes.

Q. Well, part—who paid them? A. I did.

Q. Who did you pay it to? A. The man who holds them.

Q. You did not allege that in your answer, did you? A. It was not necessary.

Q. Who did you pay the money to? A. Cullen the man who holds them.

Q. How much did you pay? A. Two hundred and fifty dollars on one—well, I don't know just exactly the amount.

Q. Have you paid any more than two hundred and fifty dollars? A. Yes.

Q. How much more? Got any receipts showing that payment, or was that a cash payment? A. No, it was check.

Q. Have you your check here? A. I didn't think it was necessary because we were talking about the three thousand. That is taking five thousand into consideration.

Q. Have you paid any greater sum than two hundred and fifty? A. Yes, sir.

Q. How much? A. About six hundred dollars more.

Q. Who did you pay that to? A. Johanson.

Q. When? A. I haven't got the date. Do you think that is necessary? That has nothing to do with the three thousand dollars. There was some payments made.

Q. Altogether that is eight hundred dollars you paid on those notes? A. About nine hundred, I guess. I don't want to hold it to that.

Q. Did you pay anything on any of the other notes? A. No.

Q. Anything on these notes, the three thousand dollars? A. No.

Q. Anything on the twelve thousand nine hundred and fifty dollars? A. I wasn't supposed to pay that.

Q. So to date on all of those obligations you have only paid the sum of around nine hundred dollars, as you claim? A. No; I understand that Mr. Martin has been making payments on the other notes.

By the Court: Q. You were asked what you have paid? A. No; I have not because it was not my obligation.

By Mr. Runyon: Q. Oh, these notes that you have made yourself, signed yourself, without Mr. Martin's name on them, are not your obligations? A. What notes are they?

Q. Four one thousand dollar notes and one five thousand dollar note. A. Yes, they are my obligations.

Q. On those notes how much have you paid? Now Mr. Martin hasn't anything to do with those notes? A. On those notes I paid about eight hundred dollars—or eight hundred and fifty.

Q. Did you pay any of them to Mr. Johanson? A. Yes.

Q. What did you pay to Mr. Johanson? A. Six hundred dollars—I would like to say one thing in answer to that question.

Q. I object to your doing other than answer my question. A. Can I say that?

The Court: No; you have not been asked a question which requires an answer.

Q. When did you pay Mr. Johanson this six hundred dollars, Mr. Ihle? A. Has that any bearing on the three thousand?

The Court: Mr. Ihle, the question is before you to answer and it is not objected to, and you must answer it, if you can. If you cannot, say so. A. Well, I cannot answer that.

Q. Will you try and produce your checks here that will show any such payment as that? A. I could produce them, yes.

Q. Will you do so? A. Well, I haven't got them here. I will have to get them.

Q. Will you try and have them here? A. Will I?

Q. Will you try? A. I said that is not the issue, the three thousand was the issue.

Q. Will you try and have them here?

The Court: If you are given an opportunity to do so will you produce those checks? A. Yes, yes, yes. I beg pardon. I have a letter there. If you would let me have my papers I can refer to it —my other papers on the other side.

(Mr. Simpson hands witness papers.)

A. Come to think, I have a letter here which was written to Mr. Johanson. Can I read it?

Q. I asked you to produce the checks by which you paid this money? A. This here refers to the time I made the payments.

Q. Have you the checks or can you produce the checks?

The Court: The witness has stated—

Mr. Runyon: I object to your reading your private correspondence.

(Witness hands letter to Mr. Simpson.)

The Court: Anything further?

Mr. Runyon: That's all.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. I will ask the Court's indulgence on this; I meant to ask this on direct-examination. Since this suit was commenced, Mr. Ihle, have you seen and talked with Mr. Johanson? A. Yes; he has been to my home and he has been to my office a number of times, have been very friendly.

Q. Do you remember any occasion when he made a particular reference to this case? A. Yes.

Q. When was that? A. It was very fresh in my mind. He came to me one day. I cannot recall the date. After the suit had been started.

Mr. Runyon: I object to it as immaterial and irrelevant.

A. I think it is very important.

The Court: One minute. I am sure your counsel is able to take care of it. What is the purpose of it? To show a statement against interest or something of that character?

Mr. Simpson: Yes.

The Court: If it is for that purpose and develops that of course it is relevant.

Mr. Simpson: That is just what it is.

Q. When was that conversation, Mr. Ihle? A. I couldn't say the date, but Mr. Johanson had been at my home and been to my office a number of times and he said it was very unfortunate that we both happened to be placed in this position, and I said, "What is the reason, after my giving you new notes and made prompt payments after the first notes came due, that you should start a suit on the three thousand, when I understood they were wiped out and you were going to return them," and he made this statement to me, so

help me God, he says, "I am only stating this suit as a bluff to force Martin into a payment, and you should take my word for the friendliness we have been showing towards one another that this would never come to trial," and that is what it led up to, and that is the reason we had exchanged money and helped one another out in a friendly way—

Mr. Runyon: I object and ask that the whole answer be stricken out on the ground that it is irrelevant and immaterial..

The Court: The last portion of what he said may be stricken out.

Mr. Runyon: I ask that the entire answer be stricken out.

The Court: I will decline to strike out the entire answer.

Mr. Runyon: Ask an objection.

The Court: You may have it.

RE-CROSS-EXAMINATION by Mr. Runyon:

Q. Mr. Martin, Mr. Johanson and yourself have always been friendly, haven't you? A. Very friendly. This morning Mr.—

Q. You have every dollar that Mr. Johanson has in the world, haven't you?

Mr. Simpson: I object.

A. No; he has told me he has plenty—

Mr. Simpson: I object to it as not cross-examination.

The Court: I will sustain the objection.

A. I can answer it, Mr. Simpson.

The Court: I will sustain the objection.

EDWARD W. MARTIN, sworn:

Direct-examination by Mr. Simpson:

Q. Mr. Martin, where do you live? A. I live in Montclair.

Q. And you know Mr. Hackett, do you Mr. Ihle and Mr. Johanson? A. Yes, sir.

Q. Do you remember on the 12th day of September, 1914, being at Mr. Ihle's office on Milton Avenue? A. Yes, sir.

Q. Who was present with you? A. Mr. Ihle and Mr. Hackett and Mr. Johanson.

Q. Are you familiar with the four notes of seven hundred and fifty dollars each, which is the subject of controversy here? A. Yes, sir.

Q. Do you remember any conversation taking place on that day with regard to those notes? A. That evening at Mr. Ihle's office?

Q. Yes. What was the conversation?

The Court: Who was present, first, at that time? A. Mr. Hackett and Mr. Ihle and Mr. Johanson.

The Court: All right. Tell us what the conversation was. A. No; I have mixed the matters and you have too, Mr. Simpson. Those four notes—

Q. Well, these four notes of seven hundred and fifty each? A. Yes.

Q. Do you remember any conversation with reference to those notes at Mr. Ihle's office? A. Yes, I do; that they came on to conversation with the disposition of other notes that were to be cancelled, or notes that were to be cancelled by the new five thousand dollar notes, or four thousand five hundred, the five hundred having been paid

in cash, were given; that Mr. Ihle, because he was giving his own direct note, asked for his own direct notes back, and then the difference between three thousand and five thousand he credited on the balance of his liabilities in this entire matter.

Mr. Runyon: I object and ask to strike it out on the ground that is mere language of conclusion by the witness.

The Court: No, I do not know that it is, Mr. Runyon. Understand, Mr. Martin, you are not to give us your conclusions drawn from what was said, but you are to give us if you can the exact language that was used in this conversation. If you cannot give us the exact language, then as best your recollection serves you, you are to give us the substance of what that was, distinguishing that from what your idea was of it, or your conclusion was of it.

A. Then, if you wish, I will detail more perfectly the conversation of one an another.

The Court: All right. Do so. A. Mr. Ihle asked for his notes back. Mr. Johanson said he didn't want to give them back until these notes were paid, and he would return the two at once. Mr. Ihle protested on the ground that he would have notes out for double amount doubling his liability, and it was not fair to him; that he was perfectly willing to be liable on the amount of the new notes he was giving, but he wanted the other amount to be given back to him—asked that they be given back to him—and Mr. Johanson protested again that they would never be collected twice, and it was under that protest that they were retained.

Q. Do you remember these five notes being signed at that time and delivered to Mr. Johanson? A. Yes.

Q. Did you leave the office before Mr. Johanson or after him? A. I think we all, left together, at the one time.

Q. What time of day was it? A. Oh, this was in the evening, after all our business hours—eight o'clock.

CROSS-EXAMINATION by Mr. Runyon:

Q. Now when was this conversation? A. This conversation was at the office I speak of.

Q. What date was it? A. Well, I say the date that was referred to—it was September 12, if that is correct. I have not looked that date up.

Q. You don't know what date it was? A. It was the date—the one occasion that we all met—the occasion Mr. Johanson himself referred to.

Q. And your conversation was with reference to the nine housand nine hundred and fifty dollars worth of obligations which Mr. Ihle was indebted to Mr. Johanson on, wasn't it? A. Yes, all our obligations.

Q. In reference to these earlier obligations? A. Not particularly so—all our obligations.

Q. All of your obligations? A. Yes.

Q. And they consisted of various prior notes, did they? A. Yes, sir.

Q. You were interested to see that your obligations were clear? A. I wanted to, yes.

Q. Now did you see any five hundred dollars pass? Did you see Mr. Ihle pay Mr. Johanson five hundred dollars? A. No, but I knew that such payment had been made.

Q. Did you ever see it made? A. No, sir I did not.

Q. Mr. Ihle told you he had paid it? A. No, it was Mr. Johanson said so too, because he would have taken—

Q. Didn't you know the transaction upon which that five hundred was paid? Didn't you know that Mr. Johanson held Mr. Ihle's check for a thousand dollars? A. Yes, sir.

Q. And wanted it paid and Ihle came to Johanson and said he would have to give him five hundred to put in his bank to make the check good, and Johanson gave it to Ihle and it was put in Ihle's bank and it was paid in that way? Don't you know as a matter of fact that was the five hundred transaction? A. I couldn't say whether it was or not, sir.

Q. I show you, Mr. Martin, a note, made by you to Mr. Johanson for two thousand dollars, dated June 6, 1914. Has that ever been paid? A. No, sir.

Q. Any part of it ever been paid? A. It is possible. It depends on how Mr. Johanson will apply the sum of just one thousand dollars that I have given him this last twelve months.

Q. That is the thousand dollars which Mr. Ihle has testified to? A. No, sir.

Q. Well, you gave Mr. Johanson a check for a thousand dollars—Mr. Ihle's check for a thousand dollars on this note, didn't you, Mr. Martin? A. Whether I gave it to him myself or whether Mr. Ihle mailed it to him I do not know, but I knew it had been given to him.

Q. That was on this two thousand dollar note, wasn't it? A. Yes.

Q. And after giving Mr. Johanson the check—Mr. Ihle's check—for a thousand dollars, the bank did not pay Mr. Ihle's check, did it? A. I was told it did not.

Q. And either you or Mr. Ihle went to Mr. Johanson and said, " Mr. Johanson, you have to give us five hundred more to put in our bank, so as to get that check paid," didn't you? A. I did not.

Q. Was not that the transaction? A. It may have been, but I did not know it.

Q. Wasn't that the five hundred—the only five hundred transaction that was between the parties? A. No, sir.

Q. Do you know of your own knowledge of any other five hundred transaction? A. I know that through the acquaintance of Mr. Johanson and Mr. Ihle, which was becoming intimate—not intimate but more personal—that they had been exchanging matters with each other, that I had been informed.

Q. You were also liable on the nine thousand nine hundred and fifty dollars worth of obligations mentioned by Mr. Ihle in his answer, weren't you, Mr. Martin? A. Yes, sir.

Q. You are still liable? A. I am not liable for that amount, no, sir.

Q. Well, nearly that amount? A. Not more than seven thousand dollars.

Q. Yes. How much of it have you paid off to Mr. Johanson? A. Well, when Mr. Johanson accepted the five thousand dollars—

Q. I object to your answer? A. I am trying to answer your question.

Q. How much of that obligation—you say

around seven thousand dollars—have you paid off? How much of the obligation of nine thousand nine hundred and fifty dollars have you paid off? A. It would be about fifteen hnudred dollars.

Q. To whom have you paid the fifteen hundred dollars? A. To Mr. Johanson.

Q. So that with the exception of some fifteen hundred dollars which has been paid to Mr. Johanson, nothing has been paid on any of those obligations; is that true? A. Excepting what Mr. Ihle has paid to him.

Q. Well, do you know how much Mr. Ihle has paid? A. No, sir; I do not.

Q. Of your own knowledge? A. No, sir.

Q. Now you say that Mr. Ihle on this occasion asked for his notes back—asked Mr. Johanson for his notes back. By that you mean all of those old, prior obligations upon which you were a party, don't you, Mr. Martin? A. I do, yes, beyond the three thousand dollars.

Q. With the exception of the three thousand? A. No, sir; beyond the three thousand dollars—including the three thousand dollars.

Q. You were not on the three thousand dollars? A. I was endorser on them, but that was not my matter, it was Mr. Ihle's matter then and he was giving his direct notes.

Q. Now at that time, as between you and Mr. Ihle, Mr. Ihle was obligated to the extent of about four thousand five hundred, wasn't he, or five thousand dollars, and you were obligated on the balance of the full obligation, the full obligation being in the neighborhood of nine thousand dollars? A. You mean at that time?

Q. On the occasion of this conversation, divid-

ing this joint obligation of Mr. Ihle and yourself to Mr. Johnson? A. Yes.

Q. Your end of it as between you—Mr. Ihle's end of it was approximately five thousand dollars, wasn't it, as between you two gentlemen? A. You mean after the notes—

The Court: As to the total sum of nine thousand nine hundred and fifty dollars you mean.

Mr. Runyon: As to the total sum of twelve thousand.

A. I am trying to find out whether you want me to say before the notes had been given, the five thousand dollars, or after?

Q. Before those notes were given, at the time there stood out nine thousand nine hundred and fifty dollars' worth of obligations? A. Yes.

Q. Plus three thousand dollars that we are bringing this suit on? A. Yes.

Q. That made twelve thousand nine hundred and fifty dollars? A. Yes, sir.

Q. At that time, of that twelve thousand five hundred dollars' worth of obligations of yours and Mr. Ihle's to Mr. Johanson, Mr. Ihle's share of them was about five thousand dollars, wasn't it, as between you two gentlemen? A. By transaction—

Q. Yes? A. Yes. He was to have taken over and assumed directly five thousand dollars worth of that indebtedness, of the twelve thousand nine hundred and fifty.

Q. Yes, that is it. He was to have assumed that? A. Of the entire indebtedness?

Q. Yes, that was as between you and Mr. Ihle, that the five thousand of the twelve thousand five

hundred was his part, and the balance, seven thousand nine hundred and fifty, was your part of that indebtedness; isn't that so, Mr. Martin? A. No, sir; we did not—

Q. It is about so, isn't it, in dollars and cents? A. Taking the two sums together, making the twelve thousand, and deducting the five, yes, then there would be seventy-five hundred or so that was my end of it.

Q. And five thousand dollars was Mr. Ihle's end of it? A. Yes.

Q. So that about that time you were trying to make the note arrangement so that Mr. Ihle's end, for your private purposes and his private purposes, would take care of this and your end would take care of this? A. Yes.

Q. That is what you gentlemen, between yourselves, without reference to Mr. Johnson, had in mind? A. Yes.

Q. Isn't it for that reason that the sum of five thousand dollars was determined upon as the figure at which new notes were to be given, that is to say, new notes, four one thousand notes and the five hundred dollar note, and the five hundred cash transaction? A. Yes.

Q. That is the reason that sum was agreed upon? A. Yes.

Q. That is the only reason? A. That sum of five thousand represented the sum that Mr. Ihle would be obligated to me on a matter, and we agreed that if Mr. Johnson would take two new notes for five thousand dolars that that—

Q. Of course those figures hadn't anything to do with Mr. Johanson; they were figures calculated between you and Mr. Ihle to adjust your matters? A. Yes, sir.

Q. Between yourselves? A. Yes; we had to talk it first, of course.

Q. But those figures had nothing to do with Mr. Johanson? A. Not until our conversation took place.

WILLIAM HACKETT, sworn:

Direct-examination by Mr. Simpson:

Q. You are a counsellor-at-law of this state, Mr. Hackett? A. Yes, sir.

Q. Practicing in this county? A. Yes, sir.

Q. Know Mr. Ihle, the defendant here? A. I do.

Q. Did you on the 14th of September, or the 12th of September, 1914, meet Mr. Johanson, this plaintiff? A. I did.

Q. When did you meet him? A. At Mr. Ihle's office.

Q. At 40 Milton Avenue, in this city? A. Yes.

Q. Who was present at that meeting? A. Mr. Johanson, Mr. Martin and Mr. Ihle and myself.

Q. As the result of a conference which Mr. Ihle had held with you, you attended that meeting, did you? A. I did.

Q. Do you remember the question of these four notes which are now in suit being brought up? A. I do.

Q. What conversation was it? Tell the Court and the jury. A. The substance of the conversation was to the effect that new notes, the four one thousand dollar notes and the one five hundred dollar note, was to take care of the four seven

hundred and fifty dollar notes, and the four seven hundred and fifty dollars notes were to be surrendered up by Mr. Johanson. At that time Mr. Ihle asked Mr. Johanson for the notes, and he told him that he didn't have them, and Mr. Ihle protested against that and Mr. Johanson told him that he would never have to pay the notes twice.

CROSS-EXAMINATION by Mr. Runyon:

Q. You are the attorney of Mr. Ihle, aren't you, Mr. Hackett? A. Yes, sir.

Q. You are the attorney of record in this suit, aren't you? A. Yes, sir.

Q. And have taken care of this suit until the trial thereof today? A. No; prior to this Mr. Simpson was engaged.

Q. But Mr. Simpson did not know about the case until about three days ago, did he? A. Mr. Simpson knew about the case at the December term, or rather the April term.

Q. You talked to him over the telephone about it? A. I spoke to Mr. Simpson during the April term of Court.

Q. You have been in the preparation of this case assembling the witnesses and bringing it on to trial with the exception of trial work which Mr. Simpson has done? A. Mr. Simpson, yes.

Q. You are quite clear as to that conversation, are you, Mr. Hackett? A. Yes, sir.

Q. That was the only conversation, was it, had at that time? A. Why, I got into the—when I arrived there it was about half-past nine in the evening, Mr. Johanson and Mr. Ihle and Mr. Martin were there some time before that.

Q. That is all you heard? A. I was there at the time that the notes were delivered, and that as I testified—.

Q. Did you see any cash pass? A. Not at that time, no.

Q. Did you ever at any other time? A. Not in my presence.

Q. So that your version of it is different than both Mr. Ihle's and Mr. Martin's?

Mr. Simpson: I object to that question on the ground that it is argumentative.

Q. You say that these five notes aggregating four thousand five hundred and the five hundred cash which you did not see paid, was in lieu only of the three thousand dollars worth of notes? A. No; the understanding was that part of those notes would take up the four seven hundred and fifty notes to pay them off.

Q. And what else was there to it? A. The other two thousand dollars was to take care of other obligations that existed between Mr. Johanson and Mr. Ihle.

Q. You did not mention that before? A. Well, that is the fact.

Q. What was the conversation now? A. I am telling you the substance of the conversation, as I understand it, or remember it, is this, that the four thousand five hundred in notes—

Q. I don't care what your conclusion may be, I want conversation.

The Court: Of course, Mr. Hackett, it comes down to this, you are asked not what your understanding was, but what your recollection is of what the conversation was.

A. My recollection of the conversation was that the new notes that were delivered, the four—

Mr. Runyon: I object, on the ground that is a statement of a conclusion.

Q. Mr. Hackett, you are an attorney-at-law—

The Court: One minute. Mr. Hackett, as a lawyer you know what is proper and what is not proper. You are not to state what your recollection is of what was said, either giving exactly the conversation, or if you cannot do that, then giving it in substance as best your recollection serves. With that in mind, go ahead and tell us what the conversation was?

A. In substance the conversation was to this effect, that part of those notes, part of the four thousand five hundred dollar notes was to take care of the four seven hundred and fifty dollar notes and the balance was to be applied on other obligations that existed between Mr. Ihle and Mr. Johanson.

Mr. Runyon: Well, I ask that the answer be stricken out and the witness again be—

The Court: No, I won't strike it out. I think he has given his recollection.

Q. You do not remember what the conversation was? A. I am telling you the substance of the conversation.

Q. Do you remember the conversation that happened here two years ago on that occasion? A. I am giving you, Mr. Runyon, the substance of the conversation as I recollect it.

Q. Can't you state the full conversation? A. I cannot tell the exact conversation. I am giving you the substance of it as I recollect it. That is as far as I can go.

Q. And you were present on that occasion rep-

resenting your client, Mr. Ihle? A. Mr. Ihle telephoned for me and asked me to come around.

Q. Was anything else said? A. In what respect?

Q. Between any of the parties, oh, with respect to the subject-matter? A. Well, that was about the—that about included the whole matter as far as the notes were concerned.

Q. You were there to take care of your client, Mr. Ihle? A. Mr. Ihle telephoned me and asked me to come around.

Q. Under retainer? A. No, sir.

Q. You were there in his interest? A. Yes.

Q. Was there any one there taking care of Mr. Johanson's interest? A. No attorney.

By Mr. Simpson: Q. When you all parted, these three gentlemen parted as friends apparently; no harsh words about it? A. No; they all parted as friends.

Defendant rests.

Plaintiff's Testimony in Rebuttal

ROBERT JOHANSON, re-called:

Direct-examination by Mr. Runyon:

Q. Mr. Johanson, you have heard Mr. Ihle's statement, and Mr. Hackett's statement that you said that you would accept the forty-five hundred dollars' worth of notes and five hundred dollars in lieu of all of their obligations on the occasion which they testified. Was there any such conversation on your part? A. No, sir.

Q. Was there ever such a proposition made to you? A. No, sir.

Q. What was the proposition? What was the conversation? A. The new notes were to extend the time of payment with the present obligations that I had, the total amount of the obligations, to take care of some of them as far as it would cover.

By the Court: Now, Mr. Johanson, won't you explain, if you can, more fully, what you mean by what you have just said, that this forty-five hundred dollars worth of new notes and the five hundred in cash was to extend the payment? I don't quite understand.

A. There were no payments made up to that time, and there is a transaction between Mr. Ihle and Mr. Martin so that Mr. Ihle issued himself five thousand dollars' worth, or forty-five hundred dollars' worth of new notes, that he had guaranteed and promised to pay as they came due, so as to let me have some money, and that to take care of forty-five hundred dollars at least. They were to come due right in the near future.

Q. What indebtedness was that forty-five hundred dollars and the five hundred dollars in cash to take care of, Mr. Johanson? I am speaking now of the five notes, four of one thousand dollars and one of five hundred dollars, and the five hundred dollar cash payment of Mr. Ihle? A. That would reduce the total sum by the amount that would be paid, forty-five hundred dollars.

Q. Now what was the total sum that you are referring to? A. The total sum altogether amounted to over twelve thousand dollars.

By Mr. Runyon: Q. And of that total sum that

was due you from Mr. Ihle at that time, twelve thousand nine hundred and fifty dollars, how much of it as between Mr. Ihle and Mr. Martin, without regard to you, did Mr. Martin claim that he was directly morally liable for and how much did Mr. Ihle claim was his moral obligation, outside of legal obligations? In other words, how did these two gentlemen divide that obligation between themselves for their own purposes? A. There is no man on earth could say that. I could not answer that question. I wouldn't know that. I wouldn't know how they stand between themselves.

Q. Well, how was the sum of five thousand dollars arrived at? A. Between—some transaction they had between themselves, Mr. Ihle issued forty-five hundred dollars of notes to me to come due right in the near future after they were given to me.

Q. How was the figure five thousand—forty-five of notes and five hundred in cash, ever arrived at? A. Some transaction between them two that they had on real estate or other transactions that Mr. Ihle gave me forty-five hundred dollars of notes. Just what their transaction was I do not know. That was their own business and did not concern me. All that concerned me was my notes.

Q. Did Mr. Ihle ever speak to you anything about this property transaction that has been testified to? A. They had some property there and I wouldn't have nothing to do with it.

Q. Did you ever have a deed to that property? A. No, sir.

The Court: Mr. Runyon: I say now as I said before, you need not concern yourself about it, because it will not concern the Court, because at best it was given, if given at all, as security, and need not be followed up.

Mr. Runyon: I will withdraw it.

Q. Did you ever receive any five hundred dollars on the occasion of the giving of these forty-five hundred dollars worth of new notes? A. No, sir.

Mr. Simpson: We do not contend that he did.

Mr. Runyon: You allege it.

The Court: The question is how the words are interpreted. It is not alleged that actually five hundred dollars in cash was paid over, but it is alleged, as I understand it, that there was an indebtedness due between the parties which was cancelled and which gave Mr. Johanson the benefit of five hundred dollars.

Mr. Simpson: Yes, and which he admits in this reply.

Q. Was that on this occasion, Mr. Johanson? The five hundred of which you have testified to, was that on the occasion of this conversation and on the occasion of the transaction of the forty-five hundred dollars of notes? A. No, sir; no, sir.

Q. Or anywhere near that time? A. No, far previous to that.

Q. Long while before that? A. Dealt on a different subject.

Q. How many months before it? A. In the month of June, the time that—

Q. On the occasion of the delivery by Mr. Ihle to you of the forty-five hundred dollar notes did you get any five hundred dollars? A. No, sir.

By the Court: Q. Or did you get credit for five hundred that you owed him? A. No, sir; I didn't owe him anything.

By Mr. Runyon: Q. How did the five hundred dollar transaction relate to it? A. Only the forty-five hundred dollars in notes I received, that is all.

Q. What is the five hundred dollar transaction which seems to be mentioned in this letter that Mr. Ihle offered in evidence?

The Court: That letter was afterwards, and has no bearing, except it was used to contradict the witness in what he said he had to do in a cash transaction with Mr. Ihle. You mentioned at the time it was November 16, 1914, two months after the transaction in question.

Mr. Runyon: You do not claim, Mr. Simpson, this was related to this transaction?

Mr. Simpson: No, only for contradictory purposes, that is all.

The Court: I thought that was understood at the time the offer was made.

Q. Now how much altogether on all of those obligations, twelve thousand nine hundred and fifty, have you received up to the present day? A. Well, it may be about a thousand dollars paid on it.

Q. Between the two of them? A. Yes, about that; I am not positive of the exact amount, but that is about what it is.

Q. Were you ever called upon to surrender these four notes we are bringing suit on, the four seven hundred and fifty dollar notes, aggregating three thousand dollars? A. I refused to surrended any notes until the obligations were paid up.

By the Court: Q. That is not the question. Were you ever called upon by Mr. Ihle, I presume, to surrender to him these four notes of seven hundred and fifty dollars after the notes amounting to forty-five hundred dollars had been given? Did Mr. Ihle ever make a demand upon you to deliver back to him the four notes of seven hundred and fifty dollars at any time after the giving of the notes amounting to forty-five hundred? A. Mr. Ihle asked me to return him some notes but the notes he gave me, and I refused it.

Q. What notes did he ever refuse you?

The Court: What notes did he ask you for?

A. The oldest notes would be the ones that would be turned out, and I refused to turn out any notes. I don't remember now as to any particular notes I was asked for.

By Mr. Runyon: Q. At that time you held obligations of his to the extent of nine thousand—

A. Yes, I held that—

Q. —nine hundred and fifty dollars plus this three thousand dollars? A. Yes.

CROSS-EXAMINATION by Mr. Simpson:

Q. So you were going to hold this name on paper aggregating nine thousand nine hundred and fifty dollars and three thousand dollars and forty-five hundred dollars and have five hundred cash besides, weren't you? A. I had no five hundred cash on any of the notes.

The Court: Well, aside from the five hundred, which is not in dispute?

A. I held the notes until the new ones were to be paid. No notes were paid.

Q. You got almost a thousand dollars on one of those thousand dollar notes that were paid, didn't you? A. There has been payments made to the amount of probably a thousand dollars, yes.

Q. Then why didn't you return one of those seven hundred and fifty dollar notes? A. Because that payment was not made then—it was only made at different times. I don't just remember when the last one was made.

Q. Why didn't you return it any time? A. It was not made at the time they requested it—there was no request ever made before, because it was applied on the total amount.

Q. Why didn't you return a like amount in notes or one of the notes which would be included in the thousand dollars paid to you? Why didn't you do that? A. I don't know whether a thousand dollars is paid or not. I didn't say a thousand. I said in the neighborhood of a thousand dollars. Probably it would not be a thousand, if you figure up the notes with the interest, probably it would be more than the payment.

Q. On January 14th did not Mr. Ihle send you six hundred dollars? A. I cannot state that right now. I do not deny that—

Q. You got a letter from him in which it was enclosed to you under date of January 14, 1915? A. I can't say that.

Q. Did you receive it through the mail from Ihle? A. I can't say that, I don't know what you are referring to.

Q. There was a note due January 15, 1915, one of those thousand dollar notes, wasn't there? A. Well, the date is on the notes.

Q. Didn't he pay you interest and six hundred dollars besides? Didn't you know when you were paid any money? A. I cannot tell you now as to when he made that payment.

Q. Is it on there? A. Sir?

Q. Is it on that memorandum that you have got? A. Yes.

Q. Did you keep books? A. Yes, sir.

Q. Where are your books? A. Haven't got them with me.

RE-DIRECT-EXAMINATION by Mr. Runyon:

Q. Did you ever state to Mr. Ihle that you only brought this suit for the purpose of using it as a club over Mr. Martin's head or words to like effect such as he has testified? A. No, sir.

RE-CROSS-EXAMINATION by Mr. Simpson:

Q. What has become of those forty-five hundred dollars in notes? Are you the holder of them?

Mr. Runyon: I object.

Q. Are you the holder and owner of them?

Mr. Runyon: We have produced them.

Q. That is all right. They are here. Are you the holder and owner of them? A. No.

Q. Who owns them? A. Mr. Cullen.

Q. He is a New York broker, isn't he? A. No, sir.

Q. What business is he in? A. He is in the barge business.

Q. And you passed them over to him? A. Mr. Cullen owns them.

Q. For value? A. For value received.

Q. And he loaned them to you to bring over to Court today; is that right? A. Yes, sir.

The Court: Those notes are all past maturity now, are they?

Mr. Simpson: I believe three are.

The Court: According to the answer they must be all past maturity.

Mr. Simpson: They are all past maturity.

Adjourned to October 11, 1916.

Jersey City, N. J., October 11, 1916.

Mr. Simpson: If your Honor please, before the testimony was closed yesterday Mr. Runyon asked the witness Ihle if he would produce the checks which were given on account of payments on the four one thousand dollar notes and the five hundred dollar note. He said that he would and he has them in Court this morning, if Mr. Runyon wishes to use them, one for four hundred dollars and one for two hundred and fifty dollars, one dated January 2, 1915, and one dated January 8, 1915. (Hands papers to Mr. Runyon.)

Mr. Runyon: Yes, I would like to question Mr. Ihle about them.

Mr. Simpson: When the Court rules on them. I want to set myself right on the record.

The Court: I am wondering what ma-

teriality it has in this case, except as it might be used, if used at all, to test the credibility of the witness himself. As to any other point, any other issue here, Mr. Runyon, what is its relevancy?

Mr. Runyon: Well, I don't know that it is relevant, I cannot urge that it is relevant, except to test the credibility of the witness.

The Court: If that is the purpose, of course, if you desire to use them, all right, if it is for no other purpose. If that is not your purpose then I do not see the relevancy.

Mr. Runyon: Except perhaps, if the Court please, to show, too, on what account these payments were made, in what manner they were made. It appears there were obligations aggregating over twelve thousand nine hundred and fifty dollars between the parties; no part of it has ever been paid by any one except by the few payments which were testified to—this representing the principal part of the payments. Now it becomes important to know to what account they were applied.

Mr. Simpson: No; the witness Ihle testified in answer to Mr. Runyon's questions on cross-examination that he had made payments on account of these five notes.

The Court: Aggregating somewheres in the neighborhood of between eight and nine hundred dollars.

Mr. Simpson: Something of that sort, yes; and then he was asked if he did it by check and he said he did; he was then asked

if he could produce those checks, and he said he could produce them but not at that instant.

Mr. Runyon: Well, if the Court please, then I will offer them in evidence.

Mr. Simpson: I consent to them going in evidence.

Mr. Runyon: I will recall Mr. Johanson to just ask him a question about it, with your Honor's permission.

Checks marked Exhibits P-6 and P-7.

ROBERT JOHANSON, re-called:

Direct-examination by Mr. Runyon:

Q. I call your attention to two checks, one dated January 2, 1915, for two hundred and fifty dollars, and another dated January 8, 1915, to your order for four hundred dollars, made by Charles Ihle Company, signed by Charles Ihle, the defendant. Did you receive those checks? Did you receive the money on those checks? A. Yes, sir.

Q. To what account did you apply it? A. This is applied to the—both these are applied to the general account, of all obligations.

Q. Did you ever agree with Mr. Ihle to apply these on the four thousand five hundred worth of notes? A. Oh, no.

CROSS-EXAMINATION by Mr. Simpson:

Q. You testified yesterday that the five notes aggregating forty-five hundred dollars were held by Edward F. Cullen. Do you remember that?

And that he had loaned them to you to bring over here for the purpose of this suit; remember that? A. Yes, sir.

Q. Now what is Edward F. Cullen's endorsement doing on that check for four hundred dollars if you applied it on the general account? A. We had the check and Mr. Cullen deposited the check.

Q. You turned it over to Mr. Cullen's concern, didn't you? A. Yes, sir.

Q. Do you remember what was done with this two hundred and fifty dollar check besides being deposited by you? A. It does not state on the check anything that was done with the check.

By the Court: Q. No, you are asked for your recollection? A. No, nothing was done with the check.

Q. In other words, the money obtained on that check was that turned over to Mr. Cullen by you? A. Not to my memory.

Q. What is your memory? A. It was deposited in the bank.

Q. After being deposited and the check was paid did you transmit the amount thereof to Mr. Cullen? A. I can't say that now, I don't remember.

By Mr. Simpson: Q. Do you remember getting or reciving a letter from Mr. Ihle, dated January 14, 1915, containing these words:

"Dear Sir: As per our conversation I have paid six hundred and fifty dollars on note due January 15, 1915. We can figure six months interest on one thousand is the thirty dollars and the extra allowance twenty dollars which will figure fifty dollars, have been paid, and the six hun-

dred and fifty dollars less fifty dollars which will make six hundred dollars paid on the note, and the new note for four hundred dollars will take care of the thousand dollar note. Will ask you to accept this new note, and if I can take care of them sooner will do so. You know Martin has me all tied up just now. Please return my old note for one thousand dollars. Yours truly, Charles Ihle."

Q. Do you remember receiving a letter to that purport? A. I can't say as I do.

Q. Do you remember receiving any letter on January 14th or 15th from Mr. Ihle? A. I don't know at what date that I received a letter from him. I don't know what date I received any letter from him.

Q. Will you deny you received such a letter from Mr. Ihle? A. To my knowledge—I deny it. To my memory I deny it.

Q. You have a very poor memory, have you? A. No.

Q. Got a good memory? A. Pretty fair.

Q. And you cannot recall these incidents regarding these notes, can you? A. I can't recall it, no, sir. I cannot.

Mr. Runyon: I desire to offer in evidence, if the Court pleases, the original pleadings in the case of Cullen Barge Corporation, plaintiff, vs. Charles Ihle, including the claim which sets forth the claim of Cullen Barge Company on these identical notes in question and to which Mr. Charles Ihle has filed an answer claiming he does not owe those notes. That is the forty-five hundred dollars worth of notes which he says he gave in full acceptance. We offer

this to discredit the testimony of Charles Ihle. In other words, here he is asserting in our suit that in lieu of twelve thousand nine hundred and fifty dollars claimed, that he gave us forty-five hundred dollars worth of notes in full satisfaction. Now he is sued on those subsequent notes, and in that suit he is claiming he does not owe that forty-five hundred dollars worth of notes, because of certain matters arising in this suit.

The Court: Well, all right. You are offering the pleadings from the records of the case?

Mr. Runyon: The original pleadings on file in that cause, being the suit on those identical notes, against Mr. Ihle.

Mr. Simpson: I object on the ground that there is nothing in the offer to identify either this defendant or the plaintiff or the alleged plaintiff in that suit.

Mr. Runyon: Withdrew the offer. I will call Mr. Ihle, if you want to put us to that trouble.

Mr. Simpson: I object. The case is closed.

The Court: Well, gentlemen, you have opened it yourselves, both sides. I supposed it was closed.

Mr. Runyon: I do not want to unnecessarily take the Court's time, but it is just a question of identifying it to Mr. Ihle.

The Court: Very well. It is open. I will allow it.

Defendant's Motion to Direct Verdict

CHARLES IHLE, re-called on behalf of the plaintiff:

Direct-examination by Mr. Runyon:

Q. Mr. Ihle, you have been sued by the Cullen Barge Corporation in this same court on the identical notes which you say you gave to Mr. Johanson in settlement of Mr. Johanson's claim, haven't you? A. Yes, sir.

Q. And in that suit you retained Mr. William J. Hackett, the witness who appeared before you, to defend you, didn't you, and in that suit you filed an answer? A. Yes.

Mr. Runyon: I offer these pleadings in evidence, if the Court please.

Papers marked Exhibit P-8.

Both sides rest.

DEFENDANT'S MOTION TO DIRECT VERDICT

Mr. Simpson: I desire to make a motion.

Mr. Runyon: I desire to make a motion.

Mr. Simpson: I ask the Court to direct a verdict for defendant on the ground that the four notes sued upon were superseded by the five notes referred to in the testimony, namely, the four notes of one thousand each and the one of five hundred dollars, together with the five hundred in cash, admitted by the plaintiff to have been paid. Upon these facts and the further admission by the plaintiff that the defendant has made payments on account of the five notes mentioned, there has been an accord and satisfaction as to

the four notes sued upon. Under these circumstances there is no question to be passed upon by the jury, the matters involved herein being limited to questions of law.

The Court: No, Mr. Simpson, I cannot obey that request. It is a question of fact and a disputed question of fact, and for that reason will have to go to the jury. I decline.

Mr. Simpson: The Court will allow me an exception?

The Court: Yes.

PLAINTIFF'S MOTION FOR DIRECTION OF VERDICT

Mr. Runyon moved for a direction of verdict in favor of the plaintiff, which the Court also declined.

Court's Charge to Jury

Gentlemen of the Jury:

This is an action by Robert Johanson against Charles Ihle, and has for its purpose a recovery upon four promissory notes of seven hundred and fifty dollars each, together with interest. The principal amounts to three thousand dollars, and the interest, as I computed it, to four hundred and seventy-two dollars, so that therefore if the plaintiff is entitled to recover, he is entitled to a verdict at your hands in the sum of three thousand four hundred and seventy-two dollars. There is no dispute as to the amount; the dispute is as to whether or not he is entitled to recover upon these notes at all.

There is only, as I view the case, gentlemen, one issue. It appears undisputedly, if I remember the testimony correctly, that the plaintiff in this action came in possession of these four notes in due course and is at present the holder thereof and produces them and he asserts that upon them nothing has been paid. Under the act which we have controlling instruments of this character, a presumption then immediately arises and stands in his favor that the notes in question are founded upon a good consideration and he has a right to recover what there may be due upon them. The issue, as I understand it, is this, and this only: the defendant says that after these four notes matured and after a maturity of other obligations upon which he, the defendant, was endorser, and which later obligations amounted to nine thousand nine hundred and fifty dollars, an agreement was entered into between the defendant and this plaintiff whereby the defendant gave and delivered to the plaintiff five notes, four of one thousand dollars and one of five hundred dollars, and a cash transaction of five hundred dollars in addition, making a total of five thousand dollars; that that agreement further was that upon the payment of that cash, which he says was paid, and the making and delivering of these five notes aggregating forty-five hundred dollars, amongst other things, the plaintiff agreed to and accepted the forty-five hundred dollars worth of notes and five hundred dollars in cash upon the distinct and specific agreement and understanding that the four notes of seven hundred and fifty dollars, which are the notes in issue before you, should be delivered up by the plaintiff to the defendant.

Now, that, gentlemen of the jury, appears to me to be the only issue in this entire case. The plaintiff says as to that, that is not the agreement that I made, if one was made, but whatever the agreement was with regard to the forty-five hundred dollars worth of notes and the five hundred dollar payment in cash, if it was paid, and he says I deny that was paid, it had no reference whatever to the four notes of seven hundred and fifty dollars which I am now suing on, but it had reference entirely to the other indebtedness of nine thousand nine hundred and fifty dollars which was represented by notes upon which the defendant Ihle was endorser.

Understand now, gentlemen, what the plaintiff says as to that. He says whatever may be said about an agreement concerning the giving of the forty-five hundred dollar notes and cash, that agreement had no reference whatever to the four notes of seven hundred and fifty dollars each I am suing on now, but it had reference entirely to the indebtedness of nine thousand nine hundred and fifty dollars in notes upon which I believe one Martin was the maker and the defendant Ihle was endorser.

The plaintiff says if the agreement did go or had any reference whatever to these notes in question—those four notes of seven hundred and fifty dollars—there was no agreement upon my part nor was it any part of any such agreement that these notes of seven hundred and fifty dollars should be considered at an end and cancelled and delivered up by me. That was not the bargain, if the bargain in question had any reference to the seven hundred and fifty dollar notes at all, but

that the seven hundred and fifty dollar notes were to continue and remain, and whatever the agreement was, it did not become effective until all of the forty-five hundred dollars worth of notes had been paid and satisfied.

Now, gentlemen, as I have said, there is a presumption under the Negotiable Instruments Act in a case where the testimony appears at the outset and upon the part of the plaintiff as it does, that is, that he took them in due course, that the notes were founded upon a valuable consideration, and that he is the proper holder thereof and has a right to recover thereon.

The burden in this case is upon the defendant to satisfy you by a fair preponderance of the evidence to such an extent and my such weight as will offset and overcome that presumption which the law gives in favor of the plaintiff. In other words, as against that presumption of which I have spoken of to you the defendant must have satisfied you by a fair preponderance of the evidence outweighing it that the agreement of which he speaks was this sort of an agreement, and had this particular feature to it, that upon the execution and delivery of the notes of forty-five hundred dollars and the cash payment of five hundred dollars, amongst all other things that may have been agreed upon, the one particular thing which was agreed upon was that the four notes in question of seven hundred and fifty dollars were to be immediately delivered up by the plaintiff to the defendant and therefore made valueless in the hands of the plaintiff. If he has shown that, if he has shown you that, then, of course, these notes are not of value—these seven hundred and

fifty dollar notes are not of value in the hands of the plaintiff and he has no right to recover upon them; but if the defendant has not shown you that that was the agreement and satisfied you in the manner which I have indicated, if he has not made out his defense, then the plaintiff is entitled to recover.

Now that is all I can see in the case, gentlemen. It is just that one plain, simple issue, and it is an issue of fact for you to determine, and it must be satisfied to you in the manner and to the degree and with the weight of evidence on the part of the defendant which I have indicated. If he has not done so, then the plaintiff is entitled to a verdict at your hands in the sum of three thousand four hundred and seventy-two dollars. If the defendant has satisfied you upon that one point which I brought to your attention and to the manner and to the degree which I have indicated, then the plaintiff is not entitled to recover, but your verdict would be in favor of the defendant. That is all I can say to you, gentlemen. That is all there is in the case.

New Jersey Court of Errors and Appeals

ROBERT JOHANSON, Plaintiff-Appellee, vs. CHARLES IHLE, Defendant-Appellant.	On Appeal from Hudson County Circuit Cou

CHAS. E. S. SIMPSON,
Of Counsel.

BRIEF OF DEFENDANT-APPELLANT

Statement

This appeal is from a judgment entered upon the verdict of a jury, in the Hudson County Circuit Court on four promissory notes for $750 each; two dated February 8, 1914, and two dated March 2, 1914, each due four months after date.

The contention of the defendant-appellant is that about September 12, 1914, it was agreed between the parties that if the defendant-appellant would arrange for the payment to the plaintiff-appellee of the sum of $5,000, $4500 thereof to be by further notes and $500 in cash, the plaintiff

would release the defendant from liability on the four notes in suit here in addition to his liability as endorser on other notes made by one Martin, which aggregated $9,950, but only upon $2,000 of which the defendant-appellant was liable as endorser; in other words the $3,000 which was represented by the four notes in suit, and the $2,000 for which he was liable as endorser on the outstanding $9,950 aggregated $5,000, were embodied in the agreement made September 12, 1914, whereby the liability of the defendant-appellant on the notes in suit, and the $2,000 of the $9,950, was to be extinguished. The defendant-appellant delivered over the four $1,000 notes, and the $500 note, and as Johanson owed the defendant-appellant $500 cash at the time, this $500 was considered paid, and the $5,000, was thereby made up.

The plaintiff-appellee accepted the new five notes, as appears from his testimony at page 21, line 20:

"Q. Well, you were there while the other three (referring to Ihle, Martin and Hackett) were there? A. Yes, sir.

"Q. At that time you had a conversation about those four notes (referring to the four notes in suit), did you not?

"Objected to but allowed.

"A. I was there at that time and they were discussing these—as to what to do—with regard to payment—in regard to having them paid or do something for it.

"Q. You received five notes at that time, didn't you? What were their denominations? A. One was five hundred and four of them was a thousand dollars apiece.

"Q. Who made them? A. Mr. Ihle.

"Mr. Simpson: We served a notice to produce those notes. Have you got them, Mr. Runyon?

"Mr. Runyon: What notes are they now?

"Mr. Simpson: Notes made on September 12, 1914, four of a thousand dollars and one of five hundred dollars, dated July 1st, 1914.

"Mr. Runyon: There is three, four—how many altogether?

"Mr. Simpson: Five."

The plaintiff-appellee had previously accepted the $500.00 in cash. Referring to the four $1,000 notes and the one $500 note the plaintiff-appellee, at page 22, line 28, was asked:

"Q. What did you accept those five notes for? A. Those notes were accepted extending the payment of the notes that I held.

"The Court: You are speaking now of the four notes of seven hundred and fifty each that you had at that time.

"A. Well, there was far more money due than that and those are—those notes that were given to me amounted to four one thousand and one five hundred—they were extended, the time, for the payment of the obligations that were due. There was more money due at that time considerable more.

"Q. Of the notes of Ihle's? A. Ihle was the endorser on the notes.

"Q. What was the indebtedness due at that particular time on which Ihle was the original maker?

"The Court: In other words, I take it, what notes did you hold at that time on which notes Mr. Ihle was the maker?

"A. Those four notes of seven hundred and fifty dollars apiece I held that Mr. Ihle was the maker.

"Q. Yes, and there were no others of which he was the maker? A. No, no other—excuse me. Is that note there of Mr. Ihle the maker—that one there, Mr. Ash?

"Mr. Runyon: You want me to show this to the witness? He asked me the question.

"The Court: Go ahead and ask the next question."

Regarding the $500 in cash, this is admitted in the reply of the plaintiff-appellee, (p. 12, l. 12). On cross-examination the plaintiff-appellee (at p. 24, ll. 1 to 12) was asked the following questions:

"Q. Let us get this straight. When you accepted Ihle's five notes aggregating four thousand dollars didn't you at that time owe Ihle five hundred dollars for a cash loan? A. No, sir.

"Q. Did you receive five hundred from him? A. Not at that time.

"Q. How soon before? A. *Quite some time before.*"

Defendant-appellant testified as follows at page 32:

"Q. Just tell this Court and jury what it was? A. Why, I had made four notes which Mr. Martin had discounted by Mr. Johanson, and being the obligation was not met, I said we may be friendly about that, in fact Mr. Johanson suggested we be on friendly terms about that and arrange to make new notes, which we did, and received

five hundred dollars which he had received previous to September 12, and he agreed that he would take the four notes, the four one thousand dollars and one five hundred dollar note, and by accepting those notes he says that would wipe out the old notes, and if I would agree to do that, that was just getting the affair in shape and know where he was at. I told him we had been friendly and we had been helping one another out for a long time, I don't see why I shouldn't do that, so I said I will do that with one understanding, that the old notes should be surrendered, the four notes of seven hundred and fifty each, the total was three thousand Dollars, which he agreed he would do, in fact he had said that he never would expect, being on such friendly terms, that the both notes would be paid, and he considered it a favor for me to give him new notes so he could realize some money to help him out. There are a number of letters in my possession there where I had expended money to help him out."

The witness Martin testified as follows at page 55, line 33.

"Q. Do you remember any conversation with reference to those notes at Mr. Ihle's office? A. Yes, I do; that they came on to conversation with the disposition of other notes that were to be cancelled, or notes that were to be cancelled by the new five thousand dollar notes, or four thousand five hundred, the five hundred having been paid in cash, were given; that Mr. Ihle, because he was giving his own direct note,

asked for his own direct notes back, and then the difference between the three thousand and five thousand he credited on the balance of his liabilities in this entire matter."

At page 56, line 26:

"The Court: All right, do so. A. Mr. Ihle asked for his notes back. Mr. Johanson said he didn't want to give them back until these notes were paid, and he would return the two at once. Mr. Ihle protested on the ground that he would have notes out for double amount doubling his liability, and it was not fair to him; that he was perfectly willing to be liable on the amount of the new notes he was giving, but he wanted the other amount to be given back to him—asked that they be given back to him—and Mr. Johanson protested again that they would never be collected twice, and it was under that protest that they were retained.

"Q. Do you remember these five notes being signed at that time and delivered to Mr. Johanson? A. Yes."

The witness Hackett testified as follows, at page 63, line 29:

"Q. As the result of a conference which Mr. Ihle had held with you, you attended that meeting, did you? A. I did.

"Q. Do you remember the question of these four notes which are now in suit being brought up? A. I do.

"Q. What conversation was it? Tell the Court and the jury? A. The substance of the conversation was to the effect that new

> notes, the four one thousand dollar notes and the one five hundred dollar note, was to take care of the four seven hundred and fifty dollar notes, and the four seven hundred and fifty dollars notes were to be surrendered up by Mr. Johanson. At that time Mr. Ihle asked Mr. Johanson for the notes, and he told him that he didn't have them, and Mr. Ihle protested against that and Mr. Johanson told him that he would never have to pay the notes twice."

At page 69, line 18, the plaintiff-appellee was asked:

> "Q. Well, how was the sum of five thousand dollars arrived at? A. Between—some transaction they had between themselves, Mr. Ihle issued forty-five hundred dollars of notes to me to come due right in the near future after they were given to me.
>
> "Q. How was the figure five thousand—forty-five of notes and five hundred in cash ever arrived at? A. Some transaction between them two that they had on real estate or other transaction that Mr. Ihle gave me forty-five hundred dollars of notes. Just what their transaction was I don't know. That was their own business and did not concern me. All that concerned me was my notes."

It is perfectly clear from the above testimony that the plaintiff-appellee did not wish to disclose the purpose in giving him the $4500 in notes, and the $500 in cash which he owed to Ihle.

Payments had been made by the defendant-appellant on account of the $1,000 notes given to

the plaintiff-appellee under the agreement of September 12, 1914; at p. 73, l. 9, the following questions were asked the plaintiff-appellee:

> "Q. You got almost a thousand dollars on one of those thousand dollar notes that were paid, didn't you? A. There has been payments made to the amount of probably a thousand dollars, yes.
>
> "Q. Then why didn't you return one of those seven hundred and fifty dollar notes? A. Because that payment was not made then—it was only made at different times. I don't just remember when the last one was made.
>
> "Q. Why didn't you return it any time? A. It was not made at the time they requested it—there was no request ever made before, because it was applied on the total amount.
>
> "Q. Why didn't you return a like amount in notes or one of the notes which would be included in the thousand dollars paid to you? Why didn't you do that? A. I don't know whether a thousand dollars is paid or not. I didn't say a thousand. I said in the neighborhood of a thousand dollars. Probably it would not be a thousand, if you figure up the notes with the interest, probably it would be more than the payment."

While the plaintiff-appellee sues on these four notes of $750 each, he has negotiated the $4,500 worth, and he has passed them over to a Mr. Cullen, for value, and the plaintiff-appellee is no longer the holder or owner of them. As a result of this, the defendant-appellant is called up-

on to face a greater liability by $4,500, than before he executed the five notes which were to take up the notes in suit here. These $4,500 worth of notes are in the hands of an innocent holder for value before maturity, and against whom no defense is available. At p. 74, lines 27 to 40, and p. 75, lines 1 to 10, the plaintiff-appellee was asked:

> "Q. What has become of those forty-five hundred dollars in notes? Are you the holder of them?
>
> "Mr. Runyon: I object.
>
> "Q. Are you the holder and owner of them?
>
> "Mr. Runyon: We have produced them.
>
> "Q. That is all right. They are here. Are you the holder and owner of them? A. No.
>
> "Q. Who owns them? A. Mr. Cullen.
>
> "Q. He is a New York broker, isn't he? A. No, sir.
>
> "Q. What business is he in? A. He is in the barge business.
>
> "Q. And you passed them over to him? A. Mr. Cullen owns them.
>
> "Q. For value? A. For value received.
>
> "Q. And he loaned them to you to bring over to Court today, is that right? A. Yes, sir.

POINT I

There was an accord and satisfaction on the part of the plaintiff-appellee.

The testimony of the plaintiff-appellee as outlined above shows that at the time he accepted the

five notes aggregating $4,500 he was given credit for the $500 in cash. He must have accepted the $5,000 for some purpose—what was it? Surely he did not accept the $4,500 and be credited with $500 as the mere gift of the defendant-appellant. Why did the plaintiff-appellee accept the $4,500 worth of notes—why did he permit Ihle to credit him with the $500 he had previously received? It was because the four notes in this suit were to be taken up, and the $2,000 liability as endorser on the notes made by Martin, making $5,000 in all, was to be extinguished. At the close of the whole case the defendant-appellant asked for a direction of a verdict for the defendant, the basis for the motion being that there had been an accord and satisfaction between the parties as to the four notes sued upon (page 81, lines 29 to 40 *et seq.*), and the accord and satisfaction had been brought about by the acceptance of the $4,500 worth of notes, the $500 in cash, and the payment of almost $1,000 on account of the $4,500 worth of notes; by the acceptance of almost $1,000 by the plaintiff-appellee on account of the $4,500 worth of notes, the execution of the agreement involving the four notes in suit was completed, and under the authorities it operated as a complete bar to an action on the four notes sued upon.

> "An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other then or different from what he is or considers himself entitled to; and a satisfaction is the execution of such agreement."
>
> 1 *Corpus Juris* p. 523.

> "Where an accord *has been executed* it operates as a complete bar to an action on the original claim. * * *"
>
> 1 *Corpus Juris* p. 523.

The cases in our own jurisdiction partly form the basis of the definition given in *Corpus Juris.* An accord is one thing, and satisfaction another; but an accord *executed is one entire thing; it is then accord and satisfaction and is a complete bar.*

Oliver v. Phelps, 20 N. J. L., page 180.

In the above case, the Court says, on page 189:

> "Suppose I owe a man one hundred pounds, for which I am going to give him my bond; but before it is executed, it is agreed between us, that if I give him a horse, he shall receive it in full satisfaction of the bond. Now this agreement can never be pleaded in bar, of an action on the bond. But *if I deliver the horse* and he *accept it* in satisfaction, it is a good defence. It is not enough for me, however, to prove that I *delivered* and he accepted the horse; I must prove that he accepted it in *satisfaction* of the bond."

An accord executory, that is an agreement that the debtor *shall* give, and the creditor *shall receive* a hawk or a bird or a horse in satisfaction of the debt, is no bar, but an accord *executed,* that is the agreement carried into effect, is a complete bar, because the party has accepted the thing in satisfaction. See 5 Johns, page 392, and cases there cited.

In same case on page 188 is found the following: In *Pinnel's* case, 5 Co. 117, it was held in an action of debt on bond, that a defendant might plead that

he paid to the plaintiff a less sum than that mentioned in the bond or that he delivered to the plaintiff a hawk etc., in full satisfaction of the debt. The same doctrine is more fully and variously illustrated in *Peytoe's case* 9 Co. 79. In the same case we are told that accords are favored in the law, and the reason is there given. To this point see also *Watkinson vs. Stokes, et al.,* 5 Johns, 387, 392.

The only elements necessary to a valid agreement of compromise are the reality of the claim and the *bona fides* of the compromise. The Court will not inquire into the *adequacy or inadequacy* of the consideration of a compromise fully and deliberately made. *Grandin vs. Grandin,* 49 N. J. L. 508 (9 Atl.) page 756.

The extinguishment of the promisee's rights in the premises, by force of the compromise, is in such cases the benefit to the promisor, which gives it the effect of a consideration. *Conover v. Stilwell,* 34 N. J. L., pp. 54, 58.

The detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise.

Grandin vs. Grandin, 49 N. J. L., p. 508
9 Atl., p. 756).

A consideration sufficient to support a contract may be defined to be either a benefit accruing to the promisor or a loss or disadvantage sustained by the promisee.

If a creditor agrees to relinquish a part of his debt on receiving a new or an additional security for the balance, or if he agrees to receive a chattel of less value than his debt, his promise will have the support of a good consideration and will be held valid.

Day v. Gardner, 42 N. J. Eq., p. 119 (7 Atl., p. 365).

A debtor may be discharged from his debt without a technical release, even on payment of a less sum than is due, by a *parol agreement executed*, or cancelling the evidence of the debt.

Silvers and Britton ads., Reynolds, 17 N. J. L., p. 275.

Parties in executing a contract have the right to depart from its terms, and if they do so, and by consent accept something different in the execution of the contract, they are bound by the acceptance and cannot look back to the contract.

Onderdonk v. Gray, 19 N. J. Eq., p. 65.

The compromise of a doubtful claim, made *bona fide*, is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded. The detriment to the party consenting to a compromise, arising from the alteration in his position forms the real consideration which gives validity to the promise.

Grandin vs. Grandin, 49 N. J. L., p. 508 (9 Atl. p. 756).

Disputes or unliquidated claims.

The payment of an amount less than that for which the debtor is liable does not constitute a valid accord and satisfaction unless there is a *bona fide* dispute or controversy as to the debtor's liability, or as to the amount due from him, or unless the damages are unliquidated.

1 *Corpus Juris*, page 554 etc.

Where plaintiff held defendant's note and mortgage in evidence of the amount of a debt, his acceptance of a less sum than such amount, when he knew that defendant claimed that he did not owe that much, and that he had a defense to the note, that is that it was executed under duress was held to be a good accord and satisfaction of the debt, although it appeared from the evidence that defendant could not have maintained such defense, *it nevertheless being a defensive issue subject to judicial determination.*

Powers v. Harris, 42 Tex. Civ. A., 250; 94 S. W. 136.

It is immaterial whether the dispute arose over a question of fact or law. 1 *Corpus Juris* page 555.

See *Jackson v. Volkening,* 70 N. E. 1101. *Hills v. Sommer,* 53 Hun, 392, 6 N. Y. S., 469.

The word liquidate as applicable to the law of accord and satisfaction means made certain as to what and how much is due. Chicago &c. R. Co. v. Clark, 178 U. S. 353; 20 Ct. 924; 44 L. ed., 1099.

Found in 1 *Corpus Juris,* page 555, note 43.

Unless it appears how much is due a demand is not liquidated even if it appears that something is due.

Nassory v. Tomlison, 148 N. Y., 326, 42 N. E., 715, 51 Am. S. R., 695.

See also

Greenle v. Mosnat, 116 Iowa, 535, 90 N. W., 338.

In the *Pinnel* case, 5 Co. 117 where payment and acceptance of 5 pounds was holden to be no good satisfaction for 8 pounds, the reason as-

signed, being, that five can by no possibility be satisfaction of eight; yet in 2 Term Rep. 24 Ashurst and Bullen, Justices, say, an agreement to take part is *nudum pactum* unless afterwards *accepted;* clearly implying that if it be no longer *executory but executed,* acceptance of part in satisfaction of the whole is a good accord.

Found in *State Bank at Elizabeth vs. Chetwood.* 8 N. J. L., p. 1 at page 20.

An accord and satisfaction must be a satisfaction of the entire debt, so as completely to extinguish it. Here the debt by express agreement remaining, there can be no accord and satisfaction set up. Courts will not so construe an agreement as to give it effect to bar a claim, when such a result is inconsistent with the declared intent of the parties.

Lone v. Nelson & Smalley, 38 N. J. L., p. 358.

In *Freed v. Freed,* 50 Atl. p. 776 on page 778 (Chancery) the Court says. Had the agreement for settlement been executed by the actual delivery of the notes to the complainant herself, it would have been an accord executed, and a bar to the action. Refers to *Day vs. Gardner,* 7 Atl. p. 365.

If by a subsequent executory simple contract, made and accepted in satisfaction of a simple contract debt or cause of action, increased liabilities are undertaken by defendant, if an additional sum of money is agreed to be paid or additional acts and duties to be performed, for the non-performance of which an action will lie against defendant, or if a surrender or exchange of securities has been agreed upon, or an apportionment of property and debts, this new contract with the remed-

ies thereupon will constitute a good accord and satisfaction. Creager v. Link, 7 Md. 259; Comyns Dig. tit. Accord (B-4).

In *Haler v. Hursh,* 151 Pa. 415, 25 Atl. p. 52 Mr. Justice Sterett says:

> "It is no doubt, true, as was held in *Babcock v. Hawkins,* 25 Vt., 561, cited by the learned president of the common pleas, that where the accord is founded upon a new consideration, and is accepted as satisfaction it operates as such, and bars the remedy on the old contract. There is an obvious distinction between an engagement to accept a promise in satisfaction of an agreement requiring performance of the promise if the promise itself, and not its performance, is accepted in satisfaction, this is a good accord and satisfaction without performance."

In the case referred to (*Babcock v. Hawkins,* 23 Vt., 561), it is said:

> "The accord is sufficiently executed when all is done which the party agrees to accept in satisfaction of the pre-existing obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of the former securities, by release or receipt in full, or in any other mode. All that is requisite is that the debtor should have executed a new contract to that point whence it was to operate as satisfaction of the pre-existing liability in the present tense."

Found in *Laughead v. H. C. Frick Coke Co.*, 58 Atl., page 685, at page 686.

Where a new note is given and taken as payment of another note it is not necessary to its operation as a payment that the original note be surrendered or cancelled.

7 Cyc., p. 1014.

An agreement to take up an old note by a new note for a smaller sum is not an accord and satisfaction unless the new note is executed and accepted. *Slover v. Rock,* 96 Mo. A. 335, 70 S. W., 268.

A promissory note given for an antecedent debt, although it does not operate to discharge the debt, *in the absence of any agreement that it should have that effect extends the credit until the note matures.*

Fry v. Paterson, 49 N. J. L., 612 (10 Atl., 390).

Taylor v. Wahl, 60 Atl., p. 63, citing above case.

It seems to be an undisputed principle of law that a promissory note given by a debtor to his creditor does not operate as a payment or discharge of a pre-existing indebtedness *in the absence of an agreement between the parties that it shall so operate.* In the leading case of *Sheehy v. Mandeville,* 6 Cranch, 253, 3 L. Ed. 215 Chief Justice Marshall, rendering the opinion of the Court said: That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. The

note of one of the parties or a third person may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration.

Found in *Natl. Cash Register Co. v. Riley, et al.*, 74 Atl. p. 362 at page 364.

In the *absence of an express agreement between the parties* that it is to be received as payment, the common law rule which prevails in England and has been adopted without question in nearly all of the states in this country is that a draft or bill of exchange, acceptance, order or *promissory note* of the debtor is not payment or an extinguishment of the original demand.

30 Cyc. page 1194.

POINT II

The Trial Judge erred in refusing to direct a verdict for the defendant.

By the *admissions* made by the plaintiff-appellee during the course of the trial, it became perfectly plain *and was undisputed,* that:

(a) He was suing on four $750 notes.

(b) On September 14, 1914, without any particular purpose that he could explain, he accepted four $1,000 notes of that date, and one $500 note dated July 1, 1914, from the defendant-appellant (p. 56, l. 26 etc., also at p. 22, l. 28);

(c) He had received $500 in cash from the defendant-appellant "quite some time before" (p. 24, ll. 1 to 12);

(d) Of the $4500 notes he admitted receiving on September 14, 1914, he admitted that the defendant-appellant had paid probably a thousand dollars (p. 73, ll. 1 to 9);

(e) That although the defendant-appellant had credited the plaintiff-appellee with the $500 and had paid him in the neighborhood of one thousand dollars on account of them, he had negotiated the $4,500 notes by passing them over to one Cullen for value before maturity and Cullen was the owner of them (he not being a party to this suit); see p. 74, lines 27 to 40 and p. 75, lines 1 to 10.

With these facts *admitted* by the plaintiff-appellee, under the authorities, there had been an accord and satisfaction as to the four notes sued on; as a question of law only arose from the admitted facts and the testimony of the defendant-appellant and the witnesses for the defendant-appellant, no question of fact was presented which should have been submitted to the jury. Under these circumstances the Trial Judge should have directed a verdict for the defendant.

We submit the plaintiff-appellee should not be permitted to recover on these four notes, after accepting the $4,500 in notes and accepting the $500 cash, and accepting almost one thousand dollars on account of the new notes, and passing the $4,500 in notes over to an innocent holder for value before maturity.

The judgment should be reversed and a new trial granted.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

ROBERT JOHANSON, Plaintiff-Appellee, vs. CHARLES IHLE, Defendant-Appellant.	On appeal from Hudson County Circuit Court. (Judge Campbell presiding)

BRIEF OF PLAINTIFF-APPELLEE

Statement

The contention of defendant is not as stated in his brief, but is as follows:

That to plaintiff's claim on the four promissory notes of $750 each, the defense is (see defendant's answer p. 9, l. 30),

> "on or about September 12, 1914, it was agreed by and between the plaintiff and defendant, that if the defendant *would pay* to the plaintiff the sum of $5,000, as follows: *$500 in cash,* and $4,500 in four (probably meaning five) new certain promissory notes, four in the sum of $1,000 each, and one in the sum of $500 he, the said plaintiff would release and discharge defendant of his liability on said four notes in the sum of $750.00 each, would sur-

> render up to the defendant said four notes, and would further release and discharge him of his alleged liability as endorser on the said certain other promissory notes aggregating $9,950 and accept *said $500* and new notes in full satisfaction and payment of any and all claims which he had against defendant; that in accordance with said agreement said defendant, on or about said September 12, 1914, *paid* to said plaintiff the sum of $500 and made and delivered to him his four certain promissory notes'' as above, * * * ''which said defendant accepted as a full satisfaction and payment of the demand set up in the first count of complaint, and of defendant's alleged liability as endorser as aforesaid.''

Defendant's statement in brief and new theory to contrary and his allegation of actual payment of $500 in cash cannot be supported by the reading of the entire testimony.

No Cash or Consideration Passed at the Time of the Alleged Accord and Satisfaction

To the allegation in defendant's answer (p. 10, l. 12) that

> ''on or about September 12, 1914, defendant *paid* to said plaintiff the sum of $500.-00.''

plaintiff's reply (p. 12, l. 23) alleges that

> ''$500.00 was applied to obligations other than those involved in this suit, and said notes aggregating $4,500.00 were renewal notes of long standing obligations not involved in this suit.''

The alleged occasion of plaintiff making such unholy bargain, defendant says, was on an occas-

ion that this illiterate plaintiff was alone, in the presence of all the other interested parties, to wit, the defendant, his personal attorney William Hackett, and Edward W. Martin (the latter was interested with defendant's enterprises and liable with defendant on the $9,950 additional notes due to plaintiff, but was judgment proof).

Defendant's testimony practically abandons the claim in his answer that the $500 was paid on said date (p. 32, l. 1) and states the transaction, omitting mention of payment of any cash. Every time defendant stated the transaction he never mentioned the alleged payment of any cash at any time and the only part of his testimony which makes any definite statement thereof reads as follows, he being led by his counsel (p. 33, l. 19):

> "By Mr. Simpson: Q. Now this five hundred dollars had been handed over to him in what way? A. Well, I can't just recall, because it was often I had given him cash. There was one time I had given him cash. I have a letter of his there that he had written this man would come over and he had his signature enclosed in a letter so I know he would be the right party, and I have a check there that I cashed the money and gave him in cash. There are several transactions of that kind.
>
> "Q. I show you this letter, November 16, 1914, signed Robert Johanson; is that the letter you refer to? A. Yes, shall I read it?"

This is the only $500 cash transaction defendant even testifies to; and defendant's other, all interested witnesses, failed to prove any such cash payment. The defendant's answer distinctly says that the same was made (p. 10, l. 12) "on or about September 12, 1914."

Defendant's counsel, in his brief, dealing according to his best lights on an impossible situation to qualify, abandons the answer and the testimony and says (p. 2, l. 16):

> "and as Johanson owed the defendant-appellant $500 cash at the time, this $500 was considered paid."

This is counsel's own theory. A reading of the whole testimony refutes it

On the contrary, plaintiff's testimony directly bears out the reply and explicitly (p. 70, l. 10; p. 26, l. 20) shows that the only $500 transaction was November 16, 1914, a month after the alleged accord and satisfaction, being an occasion when the *defendant returned to plaintiff* $500, which defendant had owed him on an entirely different transaction.

In the above respect plaintiff's testimony stands unrefuted, and defendant or no witness could be called to deny it. It was left to remain in the case as the proven fact. Is it believable, as defendant's counsel theorizes, that plaintiff would owe defendant $500 when the latter was so heavily indebted to him? In ordinary transactions, had there been such an account, would it not have been applied on the indebtedness?

> "Q. You did not receive any five hundred dollars in cash then to make up this five thousand dollars, did you? A. Not on that transaction.
>
> "Q. No, but just prior to that you had borrowed five hundred dollars from Mr. Ihle? A. No, I didn't borrow five hundred dollars from Mr. Ihle.
>
> "Q. At the time these five notes were given didn't you owe Ihle five hundred dollars? A. No, I did not.
>
> "Q. Hadn't you received five hundred from him? A. Not on that transaction.

"Q. Well, wasn't it part of this transaction? A. No; it wasn't part of the three thousand dollar transaction.

"Q. No, this five thousand dollar transaction is what I am talking about? A. No, I didn't receive anything on that five thousand dollar transaction."

(p. 24, l. 28):

"Q. You admitted it in your reply to this case that you had received five hundred? A. Not on that transaction.

"Q. Not on that transaction? A. No.

"Q. What transaction was it? A. On a separate transaction altogether.

"Q. Yes, cash loan? A. No.

"Q. Ihle made a number of small loans— A. No, not on this transaction.

"Q. I know, outside of these notes? A. Outside of these notes, yes. It was outside of the notes we are referring to.

"Q. Yes, outside of the four seven hundred and fifty dollar notes and outside of the forty-five hundred dollars in notes? A. On a separate note altogether.

"Q. It was a cash loan he had made to you? A. No, sir.

"Q. Well, then, what five hundred dollars did you receive that you admitted in your reply? Where did that come from? A. I issued two thousand dollars between Mr. Martin and Mr. Ihle and of that two thousand dollars I was given two one thousand dollar checks; one of the checks came back and was not paid, and Mr. Ihle asked me to give him five hundred so he would have sufficient money to meet the other check, and that is where the five hundred comes in.

"Q. Well then, you were not getting five hundred from Ihle, were you? Ihle was getting five hundred from you? A. I did not admit that I got it."

Defendant has not carried his burden of proof on this point. The fact that the $500 cash was not paid stands unrefuted in the case upon the reading of the whole testimony and, at best, the whole claim with regard to it is a shifty, vague remembrance of some $500 transaction which admittedly turns out to be the money defendant owed and he paid plaintiff, not corroborated by even defendant's interested witnesses.

There was no Accord and Satisfaction

On September 12, 1914, according to defendant's testimony (p. 43, l. 34), plaintiff held $9950, of notes, upon which defendant was liable with the other judgment proof witness, Edward W. Martin (defendant's testimony p. 43, l. 34):

> "Q. On that occasion of this conversation you were endorser on $9,950 worth of notes held by Mr. Johanson, and in addition to that you were the maker on the four notes upon which we bring this suit; is that so or not? Is it so as alleged in your own answer? A. Yes, sir."

Such being the case, defendant's story, denied by plaintiff, is that plaintiff agreed to accept four new promissory notes only (the $500 cash item being eliminated), in satisfaction of what, from the confusing testimony, seems to have amounted to a total indebtedness of from $9,950 to $12,950.

To convince the jury of such an alleged remarkable bargain, if it were valid and not without consideration, defendant only offers the testimony of himself, his personal attorney, and the keenly interested Mr. Martin, as to the verbal agreement the unsuspecting, illiterate plaintiff is alleged to have made in these premises. The testimony of

no one of defendant's witnesses agrees with the other.

Was not the jury well warranted in discarding such improbable defense; and if such agreement were ever made, was it not probable that defendant's lawyer and witness, Hackett, would have exacted from this lone unprotected plaintiff some memoranda in writing, or at least have procured the surrender of the old notes?

The $3,000 in notes sued on plaintiff shows, and it is probable, had nothing to do with the $4,500 transaction. The latter were extensions of other notes. (See Johanson's testimony, p. 26, l. 17):

> "Q. If they (the $4500 notes) were given in satisfaction of some other debts, what other debts were they given in satisfaction of? A. They were given in extending the payment of the notes that were due.
>
> "Q. Well then, why didn't you deliver up those notes that were due, and where are those notes? A. The notes? I didn't give any of the notes.
>
> "By the Court: Q. Pardon me. You say notes were due. What notes do you mean? A. There was quite a number of notes due, amounting to quite an item there.
>
> "Q. Let me make it more particularly. Do you refer as amongst those notes, to the four notes of seven hundred and fifty apiece? A. No; there is considerable more than that due. No, I don't refer to those notes.
>
> "Q. All right."

See defendant's testimony (p. 40, l. 21):

> "Q. You said in your answer that you owed him nine thousand nine hundred and fifty dollars at that time, haven't you? A. Afterwards I learned that, yes, but at the time—

"Q. Is your answer correct or not? A. It is.

"Q. Oh, then at that time you owed him nine thousand nine hundred and fifty dollars by your note and your endorsements, is that correct? A. I understand that, yes.

"Q. At that time you had this conversation? A. Yes.

"Q. You admit that? A. We admit that.

"Q. And Mr. Johanson came in your office and you tendered him four thousand five hundred dollars worth of notes—withdraw that. Now, in addition to that nine thousand nine hundred and fifty dollars worth of obligations that you were on at the time Mr. Johanson came to your office, there was also outstanding against you these notes upon which we are bringing this suit, wasn't there, and you owed them? A. I learned that afterwards. I didn't know it before that."

To be charitable and assume that defendant and his interested witnesses were attempting to give their varying vague recollections of the reason for defendant giving the $4500 of new notes in September, which notes were dated back to June, and the $500 cash, making $5000 in all, is not the apparent answer as to the reason for it, the individual personal matters which existed between defendant and the witness Martin, illustrated by the following testimony of Martin at p. 61, l. 26:

"Q. At that time, of that twelve thousand five hundred dollars' worth of obligations of yours and Mr. Ihle's to Mr. Johanson, Mr. Ihle's share of them was about five thousand dollars, wasn't it, as between you two gentlemen? A. By transaction—

"Q. Yes? A. Yes. He was to have taken over and assumed directly five thousand dollars worth of that indebtedness, of the twelve thousand nine hundred and fifty.

"Q. Yes, that is it. He was to have assumed that. A. Of the entire indebtedness?

"Q. Yes, that was as between you and Mr. Ihle, that the five thousand of the twelve thousand five hundred was his part, and the balance, seven thousand nine hundred and fifty, was your part of that indebtedness; isn't that so, Mr. Martin? A. No, sir; we did not—

"Q. It is about so, isn't it, in dollars and cents? A. Taking the two sums together, making the twelve thousand, and deducting the five, yes, then there would be seventy-five hundred or so that was my end of it.

"Q. And five thousand dollars was Mr. Ihle's end of it? A. Yes.

"Q. So that about that time you were trying to make the note arrangements so that Mr. Ihle's end, for your private purposes and his private purposes, would take care of this and your end would take care of this? A. Yes.

"Q. That is what you gentlemen, between yourselves, without reference to Mr. Johanson, had in mind? A. Yes.

"Q. Isn't it for that reason that the sum of five thousand dollars was determined upon as the figure at which new notes were to be given, that is to say, new notes, four one thousand notes and the five hundred dollar note, and the five hundred cash transaction? A. Yes.

"Q. That is the reason that sum was agreed upon? A. Yes.

"Q. That is the only reason? A. That sum of five thousand represented the sum that Mr. Ihle would be obligated to me on a matter, and we agreed that if Mr. Johnson would take two new notes for five thousand dollars that that—

"Q. Of course those figures hadn't anything to do with Mr. Johanson; they were figures calculated between you and Mr. Ihle to adjust your matters? A. Yes, sir.

"Q. Between yourselves? A. Yes; we had to talk it first, of course.

"Q. But those figures had nothing to do with Mr. Johanson? A. Not until our conversation took place."

See plaintiff's testimony (p. 69, ll. 18 to 31).

The inconsistent answer of Defendant Ihle (indicating his testimony here), to the suit of *Cullen Barge Corporation,* was offered in evidence and marked "Exhibit P-8." Defendant has omitted to annex it to his state of case, but it remains among the files of the other Court.

Law

Of defendant's six reasons for a new trial he seems to have abandoned all but the following:

"1. Because the verdict of the jury is against the weight of evidence.

"6. Because the Court refused to direct a verdict for the defendant."

Reason one is fully answered.

With regard to reason six, it seems only necessary to answer that the $4500 note transactions had nothing to do with the four $750 notes sued on, and that the $500 in cash was never paid, and that the payments were applied on the other indebtedness (p. 11, l. 32). If the jury believed plaintiff's story, as it was well warranted in doing, the issue of the $4500 notes, or the negotiation of same, or the alleged payment on account thereof (denied by plaintiff, p. 77, l. 32), has no connection with the notes sued on, and the jury and the Court were warranted in disregarding those allegations. The question was purely one of fact,

and the jury believed plaintiff's simple story and gave its verdict accordingly.

Before the law on the subject of "Accord and Satisfaction" is necessary to be considered, plaintiff's story, upon which the verdict was rendered, must be wholly disregarded.

Defendant submits fragmentary general propositions *re* accord and satisfaction, mostly general rules in *Corpus Juris*. They have little relevancy to the case in question.

The subject has been decided by the New Jersey Courts.

What the evidence shows was done in the case at issue, according to defendant's varying claim, which is not proven, was the mere delivery of notes or new promises in alleged satisfaction of an indebtedness of ~~over three~~ [illegible] times the amount of the new promise; and it is elementary that the acceptance by the plaintiff of such merely new promise does not constitute payment.

In *Fry vs. Pattterson*, 49 N. J. L., 612, p. 613, the Court held:

> "The giving of a note for a debt is not a payment. It merely extends the credit until the note matures. If the note is not paid, the creditor has his election to sue upon the note or the original cause of action.
>
> "This rule is too well established to need citation of authorities in its support. * * *
>
> "The defence of payment has no support in fact or legal effect. * * * The case is unaffected by the number of renewals by paper unpaid at maturity. The defence of payment cannot be predicated upon any number of unkept promises to pay."

In *Joslin vs. Giese*, 59 N. J. L., 130, p. 133, the Court said:

> "The rule, I think properly stated, is that it not being agreed or understood otherwise, the acceptance of the note is presumed by law to be a conditional payment only; *that is, if the note be paid at maturity.* The *giving* of the note was not payment."

In *Corrigan vs. Trenton,* etc., 7 N. J. Eq., 498, p. 499, the Chancellor said:

> "As a general rule the taking of a note from a mortgagor or judgment-debtor for interest due on a mortgage or judgment is not a payment of the interest if the note be not paid."

The new promise or alleged agreement of accord and satisfaction was unsupported by any valuable consideration. The case does not come within the cases mentioned by defendant.

The alleged accord and satisfaction was a *nudum pactum.*

In *Pike vs. Van Riper,* 57 N. J. L., 290, Justice Dixon said:

> "If it means that what the state of demand described as the debt of another was merely the written promise of that person to pay, then this was *nudum pactum,* and could not form a legal consideration for the defendant's 'contract,' neither of these promises affording any evidence of benefit to the promisor or detriment to the promisee, or to any other person, without which such promises have no legal vitality."

The judgment should be affirmed, with costs.

RUNYON & AUTENRIETH,
Of Counsel with Plaintiff-Appellee.