

No. 14668

# Supreme Court of Illinois

Jones et al.

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vs.

*FF*  
Council Bluffs Branch of  
the State Bank of Iowa.

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STATE OF ILLINOIS,  
SUPREME COURT,  
THIRD GRAND DIVISION.

No. 218

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

*Case No. 218  
Robert Bluff*

1466



218

123

STATE OF ILLINOIS.

SUPREME COURT,

APRIL TERM, A. D. 1864.

*Daniel A. Jones and  
Charles M. Culbertson,*

APPELLANTS,

vs.

*The Council Bluffs Branch of  
the State Bank of Iowa,*

APPELLEE.

} Appeal from Superior  
Court of Chicago.

POINTS AND AUTHORITIES,

BY WALKER & DEXTER,

COUNSEL FOR APPELLEE.

*Filed May 10, 1864.  
L. Seland  
Clk.*

CHICAGO:

JAMESON & MORSE, PRINTERS.  
1864.

# SUPREME COURT,

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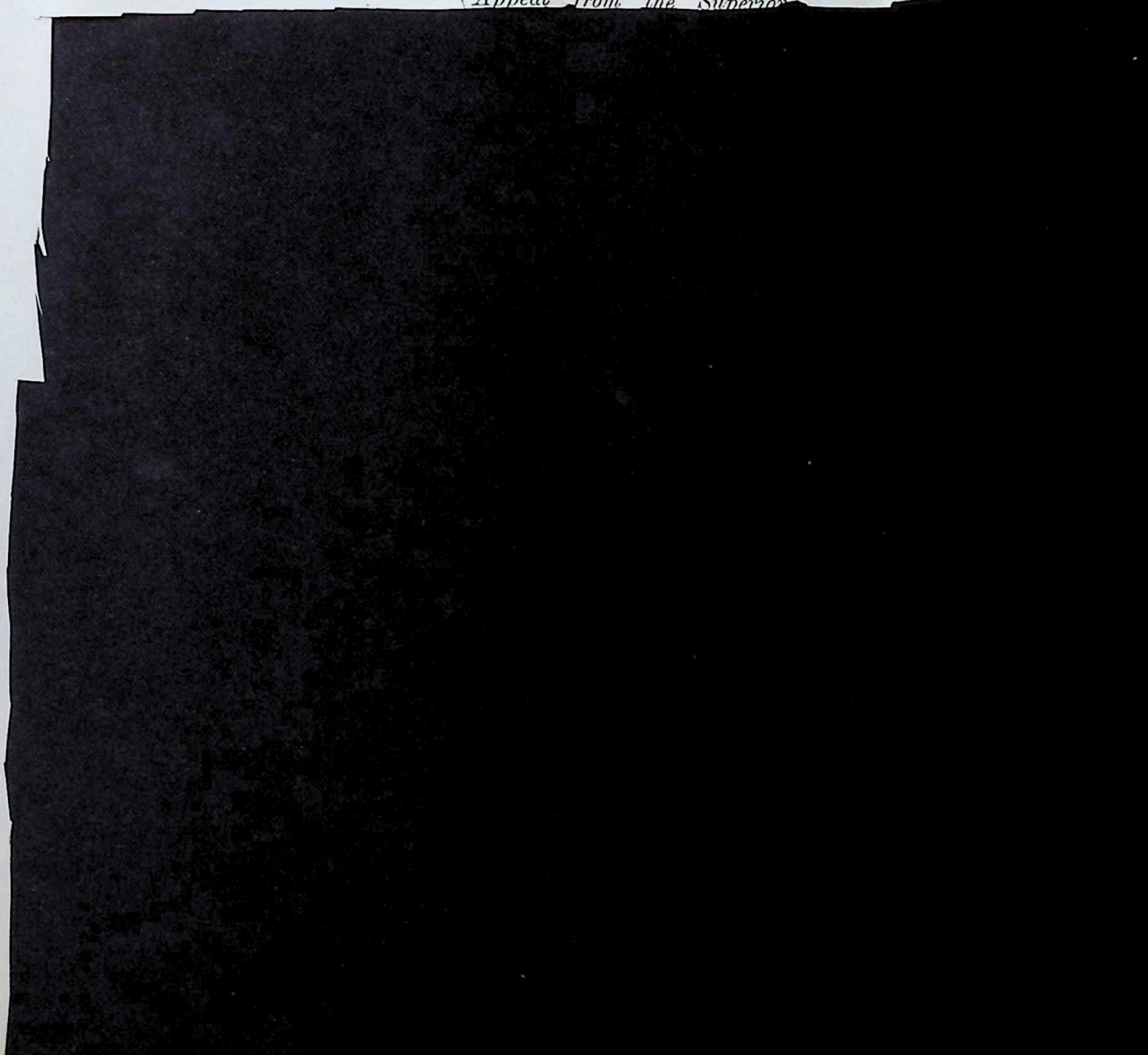
THIRD GRAND DIVISION, APRIL TERM, A. D. 1864.

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DANIEL A. JONES AND  
CHARLES M. CULBERTSON,  
*Appellants,*

vs.

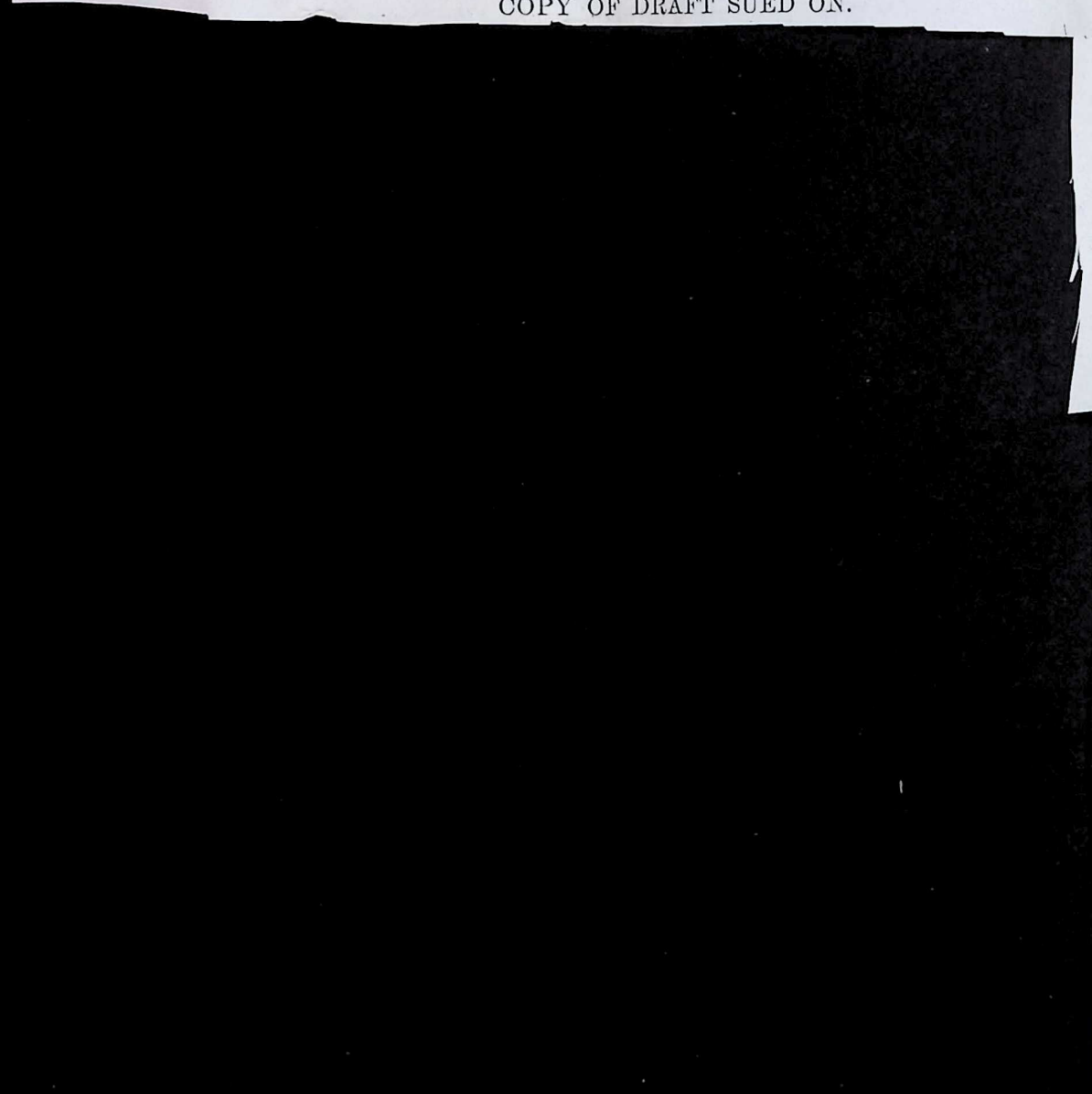
*Appeal from the Superior*





by them, but before the acceptance of the third--being the draft in controversy--Culbertson, learning that Green & Stone were about to, or had suspended payment, and fearing that it might injure the credit of the house of Jones & Culbertson, went to Muscatine, and it was then and there agreed between him and Stone, of the firm of Green & Stone, that Green & Stone should release all their interest in the commission business to Jones & Culbertson, and transfer to them certain oats belonging to Green & Stone, then in store in Chicago; in consideration of which, Culbertson, on behalf of Jones & Culbertson, agreed to pay the two drafts so drawn and accepted as aforesaid, and to accept and pay the draft in question, then in possession of the appellee.

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The declaration contained six special counts, and the common counts.

The first, second, third, sixth and seventh counts of the declaration allege, in substance, as follows: "That on the 1st day of August, A. D. 1861, by an agreement with Green & Stone, in consideration that Green & Stone had, and did then and there sell and release to the defendants \$40,000 bushels of oats held by the defendants for Green & Stone, and also would and did then and there release to the defendants all the interest of Green & Stone in a commission business before then carried on by the defendants and Green & Stone, in Chicago; the defendants agreed to and with Green & Stone, to pay two certain drafts before then drawn by Green & Stone on, and accepted by the defendants, one for \$3,000, in favor of the Muscatine Branch, and the other for \$2,800, in favor of the Washington Branch of the State Bank of Iowa, and also to accept a draft before then drawn by Green & Stone upon the defendants for \$2,050.25, dated July 16th 1861, and payable to the order of J. D. Lockwood, Cashier (meaning cashier of plaintiff), sixty days after date. That the plaintiff, at the time of said agreement; was, and still continues to be, the owner and holder of the draft last referred to. That afterwards, to wit, on Aug. 9th, 1861, said last mentioned draft was presented to the defendants for acceptance, and acceptance refused, and although often afterward, and after the same became due and payable, requested to pay the same,

...the defendants, on August 1st, 1862, the defendants  
said bill of exchange, and thereby became liable to pay, and being  
so liable, promised to pay the plaintiff said sum of money, according  
to the tenor of said bill of exchange, and of said acceptance, and  
that afterwards, to-wit, on the 18th of September, 1861, the bill so  
accepted was presented to the defendants for payment, and the pay-  
ment thereof refused.

To this declaration the defendants filed the plea of general  
issue, and twelve special pleas, setting up, in different ways, fraud  
and warranty on the part of Green & Stone, and a total and partial  
failure of consideration for the agreement to accept and pay the  
draft in question.

To these special pleas, and each of them, the plaintiff filed a  
special demurrer, which was sustained to the 3d, 4th, 5th, 7th, 8th,  
9th, 10th, 11th, 12th and 13th pleas, respectively, and overruled as  
to the 2d and 6th. The defendants then asked leave to amend the  
7th and 11th pleas, which was denied, on the ground that the de-  
fense would come in under the general issue.

Upon the pleadings and issues thus joined, the cause was tried  
at the March term of the Superior Court of Chicago, before the  
Hon. Van H. Higgins—without the intervention of a jury—who  
found the issues for the plaintiff, and assessed the damages at  
\$2,351.15-100. The defendants moved for a new trial, which was



denied, and exception reserved; they then moved in arrest of judgment, which motion also being overruled and exception reserved, judgment was rendered on the finding of the court, and an appeal taken to this court.

### ERRORS ASSIGNED.

That the Superior Court erred in finding for the plaintiff, and in overruling said motion for a new trial, and in arrest of judgment; and in sustaining the demurrer to the 3d, 4th, 5th, 7th, 8th, 9th, 10th, 11th, 12th and 13th pleas, and each of them respectively; and that the finding and judgment respectively, were for an excessive amount; and that the finding and judgment respectively ought to have been for the defendants.

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### POINTS MADE BY THE COUNSEL FOR THE APPELLEE.

#### I.

In the first place, we claim that the court below committed no error in sustaining the demurrer to the several pleas above mentioned.

#### II.

That the motion in arrest of judgment was properly overruled by the court.

#### III.

That the court committed no error in finding for the plaintiff, and overruling the motion for a new trial—or in entering judgment for the plaintiff.

*Did the court below err in sustaining the demurrer to the 3d, 4th, 5th, 7th, 8th, 9th, 10th, 11th, 12th and 13th special pleas of the appellants or to either of them?*

The defense attempted to be set up in these pleas, and each of them, is either a total or partial failure of the consideration for the agreement to accept and pay the draft in question, as stated in the several counts to which they are pleaded respectively, on the ground of fraudulent misrepresentations and special warranty on the part of Green & Stone, in the sale of the goods and chattels which constituted the consideration for their promise to accept and pay said draft.

These pleas, and each of them, are bad, it seems to us, for three reasons.

*First.* Allowing pleas of this character to be proper in this action, these pleas and each of them are fatally defective in omitting material allegations, necessary to be averred in pleas of this description.

*Second.* As pleas of warranty and fraud they are bad, as presenting an immaterial issue, the warranty and fraud set up in them constituting no defense to this action.

*Third.* Because the defense set up in each of said pleas might have been given in evidence under the general issue.

In discussing the first objection, which is technical, it will be necessary to consider each plea by itself; therefore we will take them up in their order, and note our objections briefly to each of them.

In discussing this question, we take the position that the consideration for this agreement to accept and pay this draft, being a sale and transfer of goods and chattels; the appellants in making the agreement acted at their peril, and could not set up a defect in quality or a deficiency in amount or value of such goods and chattels as a defense to this action *in the absence of fraud or an express warranty*, even were it brought by Green & Stone themselves; the rule being *caveat emptor*.



The pleas in question were drawn with reference to this rule, and all of them attempt to set up fraud and a special warranty; fraud as to a portion of the consideration, warranty as to the balance.

The third plea was to the first, second and third counts, and alleged that the sole and only consideration for the defendant's supposed promises, was, that the oats in said counts respectively referred to, should upon sale of the same, which was to be made in a reasonable time, net \$4,800, and that upon examination of the books pertaining to the commission business, it would appear, as Green and Stone deceitfully represented to defendants, that the interest of said Green & Stone in said business, and their share of the assets and profits of the same, amounted to at least \$3,000, the untruth of which representation was unknown to the defendants, whereby they were deceived and misled by said representation. The plea alleged that the oats only netted \$4,211.71, and that the share of Green & Stone in said net profits, and in said commission business, and in the assets thereof, was less than was so represented, and no more than \$1,500; and by reason of the failure of the consideration as aforesaid, nothing was left to apply on said bill for \$2,050.25, after the payment by the defendants of the other two bills of exchange, which were paid by the defendants, and that as soon as said failure of consideration could be ascertained, and before defendants' promises were communicated or made known to the plaintiff, through Green and Stone, the plaintiff's agent in that behalf, that the consideration had so failed, and that the defendants could not pay said draft for \$2,059.25.

Our objection to this plea, as a plea setting up fraud, is, that it neither contains an averment that Green & Stone intended to deceive and defraud, nor that they made the alleged false and deceitful representations knowingly, or with a knowledge of their falsity. Fraud consists in intention, and without an intention to deceive and defraud, there can be no fraud. The intent is the very gist of the plea; and in this plea this intent is in no manner alleged. So far as appears by this plea, these representations may have been made in the utmost good faith on the part of Green & Stone; the fact that appellants were deceived can make no differ-

ence, if these representations were made in good faith; this plea is therefore bad, as a plea of fraud.

*Moss vs. Riddle & Co.*, 5 *Cranch*, 351 to 358.

*White vs. Watkins*, 23 *Ills.* 480.

*Miller vs. Howell*, 1 *Scam.* 500.

*Breese*, 234.

This portion of the plea being bad, it shows at most but a partial failure of consideration, whereas it purports to be a plea of total failure; consequently it was obnoxious to the demurrer on that ground.

*Johnston vs. Clark*, 5 *Blockpont*, 563.

It is also bad as to that portion wherein it attempts to set up a warranty, as it fails to allege an undertaking and promise, and does not aver that the defendants relied upon the representations as a warranty.

The fourth plea, being to the 1st, 2d, 3d and 7th counts, averred that defendants' promises were made at an interview had in the absence of the books relating to the said commission business, and in consequence of a representation made at that time by Green & Stone, that according to such books, the share of Green & Stone in the net profits of said business amounted to at least \$3,000, taking into consideration, in estimating the same, the available assets of the enterprise, which representation was false and fraudulent, and so known to Green & Stone, who, also, at the same time undertook and promised that said oats should net \$4,800; in consideration of which said representation and promise of said Green & Stone, the defendants (not knowing to the contrary of said representation, but relying on said representation and promise), made their supposed promises. The plea then negatived the truth of said representation, showing that said share of the net profits, &c., amounted to only \$1,588.29, and that the oats only netted \$4,211.71 on sale, as agreed at the making of defendants' promises. The plea also alleged the payment of the other two drafts.



This plea, if the action had been brought by Green & Stone, perhaps, might have been held good, subject to the objection that the defense therein set up might have been shown under the general issue ; but this action is brought by a third party, and no notice of the facts set up in said plea, is averred to have been given the plaintiffs by the appellants ; nor does it appear that they ever in any manner came to its knowledge. But whatever view may be taken of this plea as a plea of fraud and warranty, in the abstract, it is certainly bad when applied to the facts in this case, as we believe we shall be able to show beyond question, when we come to consider our second objection.

The fifth plea, being as to all but \$80.08 of plaintiff's demand in each of the special counts mentioned, alleged as the sole consideration for defendants' supposed promises, an undertaking by Green & Stone, that the oats should net \$4,800, and a representation by Green & Stone to defendants, that said Green & Stone knew the state of the accounts connected with said commission business, and that their share in the profits of said business was at least \$3,000. The plea alleged that the oats were sold August 5th, 1861, for the best price that could be obtained therefor, and netted only \$4,211.71, and that said share and interest of said Green & Stone in the profits of said commission business, amounted to only \$1,668.37. The plea then alleged the payment of said drafts for \$3,000 and \$2,800 respectively.

This plea is clearly bad ; it does not aver that the representations of Green & Stone in relation to the state of the accounts, were made fraudulently, or with a knowledge of their falsehood, or that there was any intent to defraud ; neither is it averred that the appellants relied on these representations, or were in any manner deceived by them. The books of account, as the pleadings show, were the appellants' ; it does not appear from this plea that they were not present, nor do they attempt to set up any facts as an excuse for their want of knowledge of their own books ; neither is it averred that the defendants did not know the state of the accounts. The following authorities we will here refer to, to sustain our objections to this plea, as well as those we have to make to each of the others.

of defendants' supposed promises by a like false and deceitful representation, as to the amount of the share of Green & Stone in said net profits, which representation was made when the books were not accessible, and as to the truth of which representation defendants were ignorant, and being thereby deceived as to the facts, and for no other cause or consideration, made the supposed acceptance of said draft for \$2,050.25. The plea averred the untruth of this representation in this, that said share amounted to no more than \$1,000, and that before the maturity of the said last mentioned draft, the defendants paid said other two drafts for \$3,000 and \$2,800 respectively.

The eleventh, twelfth and thirteenth pleas, the substance of which is above given, are bad, if the objections we have pointed out in the others are tenable. To the eleventh and twelfth there is one objection which does not appear in any of the others, viz: It is not averred in those pleas that the other two drafts have been paid, and if not paid, money sufficient to pay this draft, which the pleas admit was received from the sale of the oats and the interest in the business, still remains in the hands of the appellants so far as appears from these pleas, and if these pleas are good in this action, they would be good in suits brought to collect the other two drafts, and the appellants would be enabled to defeat the collection of any of these drafts and still retain the money which they admit they have received.

These are all the pleas to which the demurrer was sustained, and it seems to us from an examination of the authorities above cited, that they are all defective, and were properly held bad on the demurrer.

*Second. In the second place, we claim that all the foregoing pleas are bad, as presenting an immaterial issue. Neither warranty or fraud on the part of Green & Stone constitute any defense to this action.*

The declaration alleges that at the time the agreement to accept and pay the draft in question was made, the plaintiff was the



owner and holder of the same, and that in and by said agreement the appellants agreed to accept and pay said draft *to the holder at maturity*. These facts are admitted by the pleas. Here we have an absolute promise, made by the appellants with a third person, Green & Stone, for the benefit of the plaintiff, founded upon a valuable consideration; an absolute and unqualified agreement on the part of the appellants to accept and pay this draft at maturity, *to the holder thereof, the plaintiff*. Can the appellants now turn around and say to the plaintiff: when we made that promise, Green & Stone warranted that a certain state of facts existed, or would be found true, and upon the strength of that warranty we made the promise; but it turns out that the facts are not as they were warranted to be, and we will not now fulfill our promise with you? It seems to us not. When the appellants made the absolute promise to accept and pay this draft, upon an undertaking and warranty of Green & Stone that a certain state of facts existed, they elected to look to Green & Stone for any loss they might sustain by reason of a breach of that warranty, and to Green & Stone alone. If A. says to B, I have drawn an order on you in favor of C, for one thousand dollars, which is now in his possession; if you will pay that order to C., I will sell you two thousand bushels of oats, which I have in store, for fifty cents per bushel, and will warrant them to be first quality. If B. accepts this proposition, and promises to pay the order, and the oats turn out to be second quality, and B. thereby sustains a loss, we apprehend that in an action by C. against B., on this promise, B. would not be allowed to set up as a defense, the warranty of A., but would be obliged to fulfill his promise and pay the order to C., and look to A. on his warranty. Neither would the fact that C. had notice of this warranty, on the part of A. make any difference with the rights of C. This warranty would be nothing to him, but would be a matter solely between A. and B., in no matter affecting the rights of C. The promise to him is unconditional, depending upon no contingencies, and must be complied with on the part of B., and then if he has lost by placing too much reliance in the statements of A., A. is the man for him to look to to compensate him for this loss. So in this case, the appellants made an absolute promise to

accept and pay this draft, and relied upon the warranty of Green & Stone to indemnify them against loss, and they must abide by their agreement, and look to Green & Stone for any deficiency in the amount or value of the property sold, and cannot set up this warranty as a defense to this action.

*Voorhees vs. Earl*, 2 *Hill*, 288.

*Crabtree vs. Kile*, 21 *Ills.*, 184.

*Cary vs. Gruman*, 4 *Hill*, 624.

This objection would seem to be equally good as to those pleas which attempt to set up fraud. The agreement was to pay two certain drafts already accepted, and to accept and pay the draft in question. The consideration for this agreement was entire; no particular portion of the property sold was designated or understood as constituting a separate consideration for the agreement to accept and pay this draft; neither do the appellants claim that such was the fact. Here, then, we have an agreement to pay these three drafts, founded upon an entire consideration, the whole of which must be considered as the consideration for each particular draft. The consideration, then, for the draft in question, was all the property so sold and conveyed. Neither of these pleas set up, or claim, that this property was wholly worthless; on the contrary, they all admit that it had some value; that the appellants realized from it quite a large sum of money. This being so, there was then a valuable consideration for the agreement to accept and pay this draft; that it was an inadequate one, or turned out to be less valuable than the appellants at the time supposed, can make no difference in this action. If there had been no consideration, the case would be different, but this the pleas all admit was not the fact, and show on their face that there was a consideration for this promise of *some value*. This is sufficient for our purpose, and shows most conclusively, it seems to us, that the facts set up in these pleas are no defense to this action.

If Green & Stone, by any representations or undertakings on their part, rendered themselves liable to make good any deficiency there might turn out to be in the quantity, quality or value of the property sold, the appellants must look to Green & Stone to make



good such deficiency, and not to the appellee in this action. All such matters must be settled, if at all, between the appellants and Green & Stone, and cannot be set up as a defense in this action; and in this there is no hardship, for such was the voluntary contract of the appellants; they took the risk of the truthfulness or untruthfulness of these representations upon themselves when they made this agreement; they now seek by these pleas to shift this risk upon the appellee. Certainly, this cannot be the law. And these pleas, it seems to us, must be held bad, as presenting an immaterial issue.

*Third. The third objection we make to these pleas is, that the defense set up in each of them may be given in evidence under the general rule.*

They are all pleas of failure of consideration, or no consideration, setting up fraud and warranty, and are pleaded to the several counts of the declaration which set up the agreement to accept and pay the draft sued on, and the consideration for that agreement. If, under the laws of this State, the defense set up in these pleas is such as might be given in evidence under the general issue, then we apprehend there was no error committed by the court below in sustaining the demurrer to these pleas, under the ruling of this court in the following cases:

*City of Quincy vs. Chapman*, 25 Ills., 321.

" " *vs. Warfield*, 25 Ills., 317.

*Curtiss vs. Martin et al.*, 20 Ills., 557.

*Klein vs. Currier*, 14 Ills., 237.

The case last above cited, was an action of assumpsit upon the following guaranty, written at the time of the commencement of the suit by plaintiff's attorney, over the blank endorsement of Kline's name, on a note of Lumsden & Co. to Currier:

"For value received, I guarantee the payment of the sum of money and interest in the within note specified, and agree to pay the same according to the tenor and effect of said note, if the same is not paid by said Lumsden & Co.

"JOSEPH KLEIN."

The note was for \$300 with ten per cent. interest, payable sixty days after date, at the Springfield Fire and Marine Insurance Office.

The declaration contained two counts. *First.* Alleged the consideration of the guaranty to be, that Currier would loan the sum mentioned therein to Lumsden & Co. *Second.* That he would receive the note in discharge of a debt previously due to him by L. & Co.

The defendant pleaded the general issue, and among others, a plea of no consideration; that the consideration was an antecedent debt of L. & Co.; that plaintiff had not used due diligence to collect the same by suit against the makers.

To these pleas a demurrer was sustained, on the ground that they amounted to the general issue.

In deciding the point raised by the sustaining of this demurrer, Caton J. says: "In an action upon a special guaranty like this, it is necessary for the plaintiff to aver and prove a consideration for the guaranty, in order to maintain the action. This is proved, it is true, in the first instance, by showing that the defendant's signature is genuine; for when this is done, the presumption is, that the name was put there at the time the note was made, and as a part of the original transaction, and when this is the case, the consideration for the note is also a consideration for the guaranty. But whenever it is shown that the defendant executed the guaranty after the delivery of the note, in pursuance of some subsequent arrangement, the original consideration for the note will not support the guaranty, and the burden of proof is again thrown upon the plaintiff, to show a new and express consideration for the guaranty. In such a case, the defendant is not bound to show the circumstances of the transaction, and establish that there was no consideration, but he is required to prove the time of the signature, and thus overcome the presumption that it was contemporaneous with the execution of the note. This he can do under the general issue, and he could do no more under a plea of no consideration. Hence, such a plea is in effect but the general issue, and for that reason is obnoxious to a special demurrer. Even admitting what we do not affirm, that this guaranty was such an instrument as is contempla-



ted by the tenth section of chap. 73 R. S., and that the right is there given to the party to plead the defense specially, he should have done so without pleading the general issue, in order to have availed himself of an error in the decision of the court sustaining a demurrer to his special plea. He should not encumber the record with two pleas, when one would secure to him every possible advantage.

"Admitting that the court was technically wrong in sustaining the demurrer, and still he has sustained no injury by the decision. The general issue opened the door as wide for the admission of the proof of no consideration, as a special plea could possibly have done. What good to him to have two issues of precisely the same character? If there was no error, there was no injury; but we are of opinion there was no error."

14 Ills. 237.

In the case of the *Peoria and Oquawka Railroad Company vs. Neill*, in the 16th of *Illinois*, page 269, the action was assumpsit on an acceptance of a bill of exchange, to which was pleaded the general issue and set-off. It was contended that the defense set up in the plea of set-off was good under the 8th section of chapter 73 of the Revised Statutes of 1845. Skinner, J., in giving his opinion, says: "None of the sections of this chapter, except the first and second, have any relation to bills of exchange. The word 'bills' which occurs in the sections subsequent to the first and second, evidently refers to the word 'due bills' in the third section, and does not mean *bills of exchange*. The first two sections are the same as the act concerning bills of exchange passed December, 1826, *R. L.*, 1833, and the balance of the chapter is the same as the act relating to promissory notes, passed January 3d, 1827, *R. L.*, 1833, 482. The first of these acts has no reference to promissory notes, and the last has none to bills of exchange, but materially changes the common law only in relation to damages on protest."

This being the case, the law in relation to bills of exchange with the exception of the matter of damages on protest, remains as at common law. Neither have the rules of pleading in such actions

been in any manner changed, but remain as at common law. If, then, the facts set up in these pleas under the ancient rules of pleading might be given under the general issue, there was no necessity for these special pleas, and allowing them to be technically good, the appellants sustained no injury from the ruling of the court below, sustaining the demurrer. He should not be allowed to encumber the record with twelve special pleas, when the general issue would secure to him all he seeks by the thirteen pleas filed in this case.

*Klein vs. Currier*, 14 *Ills.*, 237.

*City of Quincy vs. Warfield*, 25 *Ills.*, 317.

*Curtiss vs. Martin*, 20 *Ills.*, 557.

That the defense set up in these pleas may be given in evidence under the general issue there can be no doubt. In an action of assumpsit before the recent rules, a party was allowed to give in evidence various matters of defense, although they admitted that the contract had in fact been made, but denied that it was in law obligatory upon the defendant; as that another person ought to have been made co-plaintiff; the defendant's incapacity to contract; that at the time the supposed contract was entered into, the defendant was an infant, a lunatic, or drunk, or a femme covert; that he was under duress; the want of a sufficient or legal consideration for the contract, or illegality in the contract itself, &c., &c.

Chitty, in his work on pleading, sums up the law on this subject in the following language:

"Hence it may be collected that under the general issue any matter which showed that the plaintiff never had a cause of action, might be given in evidence, and also that under that plea, most matters *in discharge* of the action, and which showed that at the time of the commencement of the suit, the plaintiff had no subsisting course of action, might be taken advantage of.

1 *Chitty's Pleadings*, 511 to 514.

In this state, the rules of pleading as laid down by Chitty in his work on Pleading under the head of "The Rules of Pleading before the recent Rules," as we understand the practice, are in



force; and under those rules the defense set up in these pleas might clearly be given in evidence under the general issue, and we insist that it would have been proper for the court below to have struck all of said special pleas from the files as unnecessarily incumbering the record. They are all in the nature of, or in part amounted to, the general issue, and were clearly obnoxious to the demurrer, as it seems to us.

*See authorities above cited.*

If either of the positions we have taken in regard to these pleas be correct, then the court below committed no error in sustaining the demurrer.

This brings us to consider the error complained of in overruling the motion in arrest of judgment.

## II.

*Did the court err in overruling the motion in arrest of judgment?*

In discussing this point we shall only call attention to the declaration, for if this is not fatally defective in *matter of substance*, there could be no error in overruling this motion, as there is no fault in the issue, and all informalities, inaccuracies or defects in the declaration are cured by the verdict.

*Gould's Pleading, 492 to 498.*

1 *Chitty's Pleadings.*

The principal objection made to the several counts of the declaration, other than the count in the ordinary form against an acceptor for non-payment of a bill of exchange, and the common count, is that they do not correctly describe the other two drafts mentioned in the agreement to accept and pay the draft in question. It is not pretended that they, or most of them, do not correctly describe the draft sued on, or that they do not describe this agreement, so far as it relates to the draft in question, with sufficient accuracy; but it is said there is a variance in describing the other two drafts mentioned in this agreement. The first count describes the three drafts as follows, to wit:

"The said defendants then and there agreed to and with the said Green & Stone, to pay two certain drafts before then drawn by said defendants, and accepted by them, one for three thousand dollars, and the other for two thousand eight hundred dollars. The former of said drafts having been drawn in favor of the Muscatine Branch, and the latter of the Washington Branch of the State Bank of Iowa; and also to accept a certain other draft before then drawn upon them by said Green & Stone, payable to the order of J. D. Lockwood, Cashier of plaintiff, sixty days after date, for two thousand and fifty dollars and twenty-five cents," &c. *See Record*, 3.

The second count describes the drafts as follows:

"The said defendants then and there agreed to pay two certain drafts before then drawn by said Green & Stone, on said defendants, and accepted by them, one for three thousand, and the other for two thousand eight hundred dollars; and also to accept and pay at maturity to the holder thereof, another certain draft drawn by said Green & Stone upon defendants, payable to the order of J. D. Lockwood, Cashier of the plaintiff, and dated July 16th, 1861, for the sum of two thousand and fifty dollars and twenty-five cents." *See Record*, p. 6.

The third count describes them as above, except the draft sued on, which is further described as being payable sixty days after date.

The sixth count describes them as three certain bills of exchange in writing, drawn by Green & Stone, and directed to the defendants, one for \$3,000, drawn in favor of the Muscatine Branch of the State Bank of Iowa, and one for \$3,800, drawn in favor of the Washington Branch of the State Bank of Iowa, and the other (the draft in question) was drawn payable to the order of J. D. Lockwood, Esq., Cashier of the plaintiff, bearing date the 16th day of July, 1861, for the sum of \$2,050.25, payable sixty days after date, and directed to said defendants at Chicago, by the name and style of Jones & Culbertson. *See Record*, p. 14.



The seventh count describes them substantially as the sixth.  
*See Record, 16.*

We have thought proper to give here a brief description of said drafts as they are described in the several counts of the declaration, as the description as given in the abstract is not strictly correct in some instances.

By reference to the agreement to accept and pay the draft in question, it will be seen that the two drafts not in controversy are therein described somewhat differently from the description given in the declaration; for instance, in the agreement they are described, one as a draft of Geo. C. Stone on Jones & Culbertson, and in favor of W. H. Hubbard, of Washington, Iowa, for \$2,800, due Aug. 3d, 1861, and the other as J. A. Green's draft on Jones & Culbertson, in favor of T. Harback, calling for \$3,000, due Aug. 17th, 1861; but the draft in controversy is described both in this agreement and in said several counts of the declaration substantially alike, and with sufficient correctness, as will be seen by reference to the draft, copy of which is given herein on page .

It seems to us this variance in the description of the two drafts not in controversy does not in the least affect the declaration, or prevent the giving in evidence, the agreement to accept and pay the draft in question. So far as this draft is concerned, the description of it in most of the counts of the declaration at least, is sufficiently accurate.

The rule of law applicable to variances, as laid down in the case of *Leidig vs. Rawson*, 1 *Scammon*, 272, is: "That whenever an instrument of writing or a record is not the foundation of the action, a variance is not material, unless the discrepancy is so great as to amount to a strong probability that it cannot be the instrument or record described." In this case, which was an action for malicious prosecution, the indictment alleged that Rawson charged Leidig with feloniously taking two yoke of oxen, two plows and two log chains, the property of Rawson. The affidavit stated that Leidig and others did forcibly take away two yoke of oxen and

other articles, which Rawson believed he had an interest in ; and it was held that there was no material variance, and that the court below erred in refusing to permit Leidig to prove the falsity of the affidavit read on the trial.

So in the case of *Hull vs. Blaisdell et al.*, 1 *Scammon*, 332, which was an action of trespass brought by Hull against Blaisdell and Smith, for taking and carrying away the plaintiff's goods. The writ of attachment described in the declaration was for \$38.12½, and the writ of attachment produced in evidence was for \$37.0,5 and it was held that there was no material variance.

*See, also, Nolin vs. Bloom.*, (*Breese*, 98.)

So, also, it is a well settled rule that if an instrument is neither set out in the pleadings, by its tenor, nor described by its legal import, but is merely brought forward to sustain an allegation, a variance will not be fatal, if the substance of what is alleged be proved.

3 *Phil. Ev., C. & H. Notes*, 528.

1 *Starkin's Evidence*, 432.

4 *Gilman*, 40.

This suit was not brought upon this agreement itself, nor do these several counts purport to set it out or describe it, but it was introduced in the same manner as the testimony of a witness might be as evidence of the promise to pay the appellee the draft in question, and it seems to us there is no such variance or defect in any of these counts as to render them fatally defective, or as to prevent the introduction of the agreement in evidence. It was not necessary to set forth any portion of this agreement, except that which related to the draft sued on, and that portion of it is certainly set forth with sufficient correctness.

1 *Chitty's Pleading*, 332-333.

*Owen vs. Barnum*, 2 *Gilm.*, 463.

The agreement to pay the other two drafts was a distinct and collateral undertaking, in no manner connected with the promise to



accept and pay the draft in question, and the averments as to those drafts might have been left out of the declaration entirely without in any manner affecting it. It is always sufficient to state those parts of a contract whereof a breach is complained of, or in other words, to show so much of the terms beneficial to the plaintiff in a contract as constitutes the point, for the failure of which he sues; and it is never necessary to set out in the declaration other parts of a contract not qualifying or varying in any respect the material part. Every allegation in the declaration relating to these two drafts, and all the evidence relating to the same, have, in fact, nothing whatever to do with this suit. Ignore the whole of such evidence, and strike out all such allegations from the declaration, and it can in no manner affect the right of recovery in this action; and furthermore, this is the very thing that must be done to come to a correct determination of this matter. They have nothing to do with this action, and to allow them to have any bearing, either one way or another, in determining the question involved in this action, would be to commit a gross error. These allegations are but needless prolixity and surplusage, and may be stricken from the declaration without affecting it in the slightest degree; mere surplusage never vitiates, and this declaration is not in any manner affected because of these allegations.

1 *Chitty's Pl.*, 332.

1 *Chitty's Pleading*, 332-333.

*Cowper*, 665.

*Ward vs. The Little Red*, 7 *Mis.*, 582.

The fifth count, (the ordinary count against an acceptor for non-payment,) it is claimed is fatally defective in alleging the acceptance to have been at a later period than the commencement of the action. The time of the acceptance is stated under a *vide-lit*, and alleges the acceptance to have been made on Aug. 1st, 1862, instead of on Aug. 1st, 1861. This count describes the draft in question as being a bill of exchange made by Green & Stone, July 16th, 1861, directed to the defendants, requesting them at sixty days after date to pay to the order of J. D. Lockwood,

Cashier, \$2,050.25, and states that the plaintiff at that date became the holder of it, for a full consideration thereof paid to Green & Stone, and afterwards, to wit, Aug. 1st, 1862, the defendants accepted said bill of exchange, and thereby became liable to pay the same, and being so liable, promised the plaintiff to pay him said sum according to the tenor of said bill, and of said acceptance, and that *afterwards, to wit, Sept. 18th, 1861*, the said bill so accepted was presented to the defendants for payment, and the defendants refused to pay it, &c. This is a clerical mistake, and would, perhaps, have rendered this count bad on special demurrer, but as the particular time when this acceptance was made was immaterial, and the date stated in this count is totally repugnant to all the other averments in the count, it does not vitiate it. Blackstone lays down the rule on this subject as follows:

“When the time at which a fact happened is immaterial, and it might as well have happened on another day, then, if alleged under a *scilicet*, it is absolutely nugatory, and is therefore not traversable; and if it be repugnant to the premises, it shall not vitiate the plea; but the *scilicet* itself shall be rejected as superfluous and void.”

*Gleason vs. McVicar*, 7 Cowen, 42.

*Vail vs. Lewis*, 4 John., 457.

*Paine vs. Fox*, 16 Mass., 133.

The time mentioned under the *videlicet* being struck out, the averment of the time of acceptance is sufficiently stated, especially after verdict.

Where a declaration, in stating the date of a note and day of payment, showed it to be payable anterior to its date, it was held to be a mere clerical error, and cured by the verdict:

*Shrock vs. Bowden*, 4 How. Miss., 426.

*Smyth vs. Prov. Wright*, 757.

So in *Bemis vs. Faxon*, 4 Mass., 263, which was an action of assumpsit, commenced by a writ dated April 9th, 1805. The plain-



tiff declared upon a promise made by the defendant on the 1st day of September, 1805, to carry a certain stone post for the plaintiff to a certain place, within a reasonable time, and that the defendant, although afterwards, on the 1st day of March, 1805, requested, never performed his promise, &c.

The court in this case say, "If we take the whole declaration together, it seems impossible that the defendant could doubt as to the specific nature of the complaint against him, or that the jury could have been misled. It is true that the promise is alleged to have been made at a day to come, but the breach is alleged to be committed afterwards on a day then passed. We therefore feel a disposition to support this verdict." The verdict was sustained.

So in the case of *Sorrel vs. Lewis*, reported in 1 *Keb.*, 354, and referred to in the authority last cited. In that case *indebitatus assumpsit* was brought, and the assumpsit laid on a day subsequent to the commencement of the suit. Infancy was pleaded in bar, to which the plaintiff replied, that it was for necessities, and on issue being joined, the verdict was for the plaintiff. Upon motion to arrest the judgment for this fault in the declaration, the court observed that there should have been a special demurrer, and it was well enough after verdict, which could not have been found for the plaintiff but on evidence of a promise made before the action, and a duty before the promise. And the plaintiff had judgment.

The principle of these cases is certainly reasonable, and the cases are strictly in point, and must, it seems to us, be conclusive as to this count of the declaration.

It seems to us, therefore, that there are no defects in the declaration or any of the counts thereof, which are not cured by the verdict. And if any one of the counts in the declaration are good, the motion in arrest of judgment cannot prevail, as the law now stands in this State.

*Bradshaw vs. Hubbard et al.*, 1 *Gilman*, 390.

*Peoria M. & F. Ins. Co., vs. Whitehill*, 25

*Ills.*, 466.

But this declaration, among others, contains the common counts, and under the rulings of this court in the following cases, if all the special counts are defective, we certainly had the right to introduce this evidence under the common counts.

*Eggleston vs. Buck, use, &c.*, 24 Ills., 262.

*Brower vs. Rupert et al.*, 24 Ills., 182.

*Bradshaw vs. Hubbard et al.*, 1 Gilman, 390.

*The Peoria & Oquawka R. R. Co. vs. Neill*,  
16 Ills., 269.

In the last case above cited it was held that an acceptance might be given in evidence under the common counts, even though variant from the instrument described in the special counts, citing  
*2 Starkie's Evidence*, 182.

### III.

It is objected that the draft in question is not a bill of exchange, for the reason that it requests the appellants to pay "\$2050.25 in New York Exchange."

Grant, if you please, that this objection is a good one, still, as far as the right of recovery in this action is concerned, we maintain that it is not of the slightest importance whether it is a bill of exchange or not. If it is not a bill of exchange, it is certainly a contract for the payment of money when taken in connection with the agreement to accept and pay it. It was a request in writing on the part of Green & Stone, that the appellant pay to the appellee the sum of money therein mentioned; this written request was transferred for a valuable consideration to the appellee while it was yet simply a request, and before there was any binding contract. While in the possession of the appellee, the appellants having been notified by Green & Stone that they had made this request, and that the appellee had purchased the same in good faith, and for a full consideration, the appellants, for a valuable consideration paid to them by Green & Stone, agreed to comply with this request, and completed the *as yet inchoate* contract by agreeing absolutely and unequivocally to pay the money to the appellee as requested. This



completed the contract, and the facts in the case show that the consideration for it was sufficient. It being then a valid contract to pay the appellee this sum of money, if the money was not paid in accordance with it, the appellee could certainly sue them on it, and by making the necessary allegations and proof of consideration, &c., could most certainly recover the money so agreed to be paid.

The only difference between bills of exchange, or negotiable paper, and other simple contracts is, that the former imports a consideration, while the latter do not; and in an action upon the first it is not incumbent on the plaintiff to state or prove upon what cause or for what consideration they were made; while in the latter the plaintiff must both aver and prove that they were made for a sufficient consideration. In this action the appellee both alleged and proved a valuable consideration for this agreement to accept, and unless all the counts of the declaration are totally defective in substance as counts on this agreement, considered as an ordinary simple contract, the appellee was entitled to the verdict and judgment, whether the instrument be a bill of exchange or not.

*Love vs. Bliss et al.* 24 *Ills.* 168.

If it is not a bill of exchange, it is a money contract, the exchange not having been paid or tendered at the time stipulated, and the evidence was admissible under the common counts.

*Miller vs. McClain*, 10 *Yerger*, 245.

*Vanhooover vs. Logan*, 3 *Scam.*, 389.

*Crandal vs. Bradley*, 7 *Wend.*, 311.

*Stewart vs. Donnelly*, 4 *Yerger*, 177.

*Church vs. Feterow*, 2 *Penn. Rep.*, 301.

But let us see if this instrument is not a bill of exchange. The cases of *Lowe vs. Bliss*, 24 *Ills.*, 68, and that of *Hill vs. Todd*, in the 29 *Ills.*, 101, it seems to us, have not decided the question here raised. Those cases turned on the question as to whether those drafts were for a certain, or an uncertain, or contingent sum of money. In the former case, the court decided that as the sum of

money to be paid depended upon a contingency, or the price of exchange, and was not for a sum certain, the instrument in that case was not a bill of exchange. In the latter case, the same question was presented, but as the bill was made payable in Chicago, and no particular exchange, or exchange on no particular place was specified, the words "with exchange" were held to be surplusage, and the instrument held to be negotiable, being for a sum certain.

In this case, the question is simply whether or not the instrument is for the payment of money. The sum to be paid is, in this case, definite, but the old technical objection is revived, that it is not money that is to be paid, but something else. It is true the authorities both in England and in this country seem to be somewhat conflicting on this point, but it seems to us that the better and more reasonable doctrine is, that an instrument of this kind is a bill of exchange and negotiable. The words are, "Pay," &c., "*two thousand fifty 25-100 dollars in New York exchange*"

In *Swetland vs. Creigh*, 15 *Ohio*, 18, it was held that a note payable "in current Ohio bank notes" was for a sum certain and negotiable. The same was held in *White vs. Richmond*, 16 *Ohio*, 5, where the note was payable "in current funds of the State of Ohio." In *Lacy vs. Holbrook*, 4 *Ala.*, 88, it was held that a note payable in "funds current in the city of New York," was negotiable.

See, also, *Carter vs. Penn*, 4 *Ala.*, 140.

In Arkansas it has been held that a note payable "in good current money of this State, or in Arkansas money, is negotiable."

*Graham vs. Adams*, 5 *Ark.*, 261.

*Wilburn vs. Greer*, 1 *Eng.*, 255.

So in New York, a note payable in New York State bills or specie was held good, *Keith vs. Jones*, 9 *John.*, 120, and so was a note payable in bank notes current in the city of New York, *Judah vs. Harris*, 19 *John.*, 144.



So in Mississippi, a note payable in the currency of the State of Mississippi has been held to be payable in specie, and negotiable. *Mitchell vs. Hewitt*, 5 *Smeads & Marsh*, 361.

From the above authorities it will be seen that bills of exchange and promissory notes, payable in bank bills, and other like promises to pay, have been frequently held in this country to be a sufficient promise to pay *money* within the meaning of this rule.

Drafts or bills like the one in question have become almost universal. That universality has its foundation deep in the convenience and necessities of commerce, and we submit that courts should not destroy so large and increasing a class of commercial paper simply because it may not square with certain old and arbitrary definitions.

The appellants invoke a technical rule to defeat this action. They may do this, unless they have previously done some act which is a waiver of all such defence. We say to them, by your agreement of August 1st, 1861, you undertook for the payment of this paper. You called it a draft; there can be no doubt that it is the same you contracted in relation to. You are now in no situation to split hairs about its character. You are beyond the relief which the technical rule might afford a stranger. You are called upon to carry out your written contract, made upon a good consideration, which you have since enjoyed. You have not been misled or deceived. You must perform.

The next proposition we shall discuss, is, whether an *existing* bill must be taken on the faith of the promise to accept, in order to make that promise available to the holder.

It must be borne in mind, that both the English and American authorities make a difference between the acceptance of an *existing* and *non-existing* bill. Says Lord Eldon: "A non-existing bill is not, in *esse*, and there is no certainty that it ever will be; the promise to accept reposes upon no foundation, as in the case of an existing bill; there is, in fact, nothing but the promise." This

distinction between an existing and non-existing bill, has been preserved from the earliest cases to the present time. Nor, as the counsel for the appellants maintain, is the American, different from the English rule.

The first authority we cite, is, *Parsons on Notes and Bills*, Vol. 1st, 295.

*Story on Bills*, §244, says: "Thus a writing containing a promise to accept an existing bill, will amount to an acceptance, &c.; and it will make no difference whether the holder knew of the letter or not." *Chitty on Bills*, 398, where it is said: "So a letter promising that a bill already drawn shall be paid, will operate as an acceptance, although the letter be not received until after the bill has become due, and *although no person has been induced by such promise to take the bill.*"

*Powell vs. Monnier*, 1 Ak., 611, is a leading English case, in which it appears that the letter of acceptance was not known to the holder until after he had received the bill. Still, it was held, that he could avail himself of the promise as an acceptance, for his benefit.

In *Wynne vs. Raikes*, 4 East, 514, the holder and plaintiff did not take the bill on the faith of the promise to accept; yet it was held, that an undertaking, to be answerable for the bill, was an absolute acceptance, whether written on the face of the acceptance, or in a collateral writing.

In *Fairlee et al. vs. Herring*, 2 Bing., 625, the plaintiff did not take the bill on the faith of the promise; still, it was held that he had a right to avail himself of it as an acceptance.

A great many English cases might be cited to sustain this doctrine; indeed, there are none to the contrary. Without citing any more at length, we refer to 2 *American Leading Cases*, where nearly all the cases are commented upon, the author saying: "The Law" (as above stated) "would seem thoroughly well settled, both in this country and England."



We cite one other English case, to show the firmness and full extent of the administration of this rule—*Billing vs. Devaux*, 3 *Manning and Granger*, 565. The plaintiff and payee took the bill, and sent it forward to the defendants and drawees, who *refused* to accept, and the bill was protested for non-acceptance, thus giving the plaintiffs notice that they would not pay, and thereby rebutting, in the strongest possible manner, any reliance upon the drawees. Still, after all this, the plaintiff recovered upon a promise to accept, (as an acceptance,) made subsequent to the protest, and made to the drawer, and not to the holder.

When we come to America, the case of *Edson vs. Fuller*, 2 *Foster*, 183, is a leading one. In that case, recovery was had on a parol acceptance; yet the bill was not taken on the faith of the promise to accept. The Court say: "It would seem to be well settled, that a promise to *pay* an existing bill by the drawee, is an acceptance, or in law amounts to an acceptance." In this case the Court quote Lord Ellenborough's Syllogism—"A promise to accept an existing bill is an acceptance.

"A promise to pay it, is also an acceptance.

"A promise, therefore, to do one or the other, i. e. to accept, or certainly pay, cannot be less than an acceptance."

Also from Chitty. "Acceptance may be defined to be the act by which the drawee evinces his consent to comply with and be bound by the request contained in the bill," &c. Apply this rule to the case at bar:

The defendants in their own hand, draw a writing, describing particularly the bill or draft, promising to pay the same for a consideration recited therein. Could the defendants in any stronger manner evince their consent to pay the bill, having in this very written agreement described the plaintiffs as payees?

If the manifest intention of the parties to a contract should guide and almost control courts in their adjudications, there would seem to be but little doubt surrounding this case. Indeed, the defendants have left us in no doubt. They draw a paper in which they

describe the bill, reciting also that the plaintiff was payee of the same, and that they were to pay the same—containing no condition such as the appellants set up in the court below. Can such an instrument, without conditions, leave us in doubt as to the *mind* and purpose of the appellants when the writing in question was made?

*Ward vs. Allen*, 2 Met., 53. A parol promise was held to bind the drawee, although the bill was not taken on the faith of the promise.

*Read & Son vs Marsh*, 5 B. Munroe, 8. In March, 1842, the bill was drawn on Read & Son and passed to Marsh, who presented it for acceptance, which was refused. Afterwards, in June, Read & Son wrote to Alexander, the drawer, that the bill should be protected. This promise was held to be for the benefit of Marsh, the holder, and he recovered on it against the drawees, although he did not take the bill on the faith of their promise, but on the contrary was warned by their refusal to accept that they did not intend to pay.

*Joseph Hough vs. David Loring*, 24 Pick., 254. In this case the draft was not taken on the faith of any promise of acceptance. The holder sent the same to the drawee, who retained it, and his so doing was held to be an *implied* acceptance.

*Hatcher vs. Stalworth*, 3 Cushman, 376. In this case, *after* the plaintiff took the bill, the drawee promised by letter to pay. This was held to be an acceptance.

*Stockwell vs. Bramble*, 5 Ind., 428. In this case the plaintiff and payee took the bill without any promise having been made by the drawee, sent it forward, and the word protested was written on the bill. Subsequently the drawee said he would pay the bill. Held to be an acceptance.

The counsel for the appellants intimate that the rule in America in regard to parol acceptances is different from the English rule, in support of which we have cited the foregoing cases. They do not explicitly affirm this, but content themselves with saying:



"It is submitted that the rule of the American Courts still stands as it was announced by Chief Justice Marshall in *Coolidge vs. Payson*, 2 *Wheat.*, 66, that a writing made within a reasonable time before or after the date of a bill of Exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the writing, a virtual acceptance, binding the person who makes the promise."

Certainly this rule "still stands," and long may it stand—but what has it to do with the case at bar? It has never been doubted that when a bill was taken upon the faith of a promise to accept, that such promise constituted an acceptance either as to an existing or non-existing bill, and that is all Judge Marshall says or intended to say, or that was necessary to say, in deciding the case before him.

The question involved now is a very different one, to wit: whether a promise to pay binds the drawee, although the holder may not have taken the bill on the faith of any such promise. This question the counsel have not discussed at all, but simply say the view the appellees take is not supported by the American decisions. Let us examine the authorities they cite to that end.

The first case is

*Ontario Bank vs. Worthington*, 12 *Wend.*, 593.

The action was brought on a promise made on the 27th of September *preceding* the date of the bill, which was October 28. Then this was a partial promise to accept a *non-existing* bill, and does not touch the question of an existing bill. Besides, as is said in *American Leading Cases*, 291, this opinion is extra-judicial, there being a statute in New York making all acceptances void unless in writing.

The next case cited is

*Strohecker vs. Cohen*, 1 *Speer*, 349.

In this case the court say: "An acceptance would transfer the funds, but a verbal promise to accept is an executory contract." It is sufficient to say that in the present case the promise was in writ-

ing. So that, if the case cited were good law, it would not touch the case at bar; but it is not law, for all the authorities on both sides go to show that a verbal promise to accept is an acceptance. The principal point in the case of 1 *Speer* is, that the promise was made without any consideration. In the case at bar, a consideration passed between *parties to the bill* at the time of the acceptance, and was expressed in the written agreement.

The next case cited is

*Evers vs. Mason*, 10 *John.*, 207.

In this case the letter relied upon as an acceptance bore date January 28th, 1809; the bill was drawn October 8th, 1810. So again, the question was only as to a promise to accept a *non-existing* bill. In this case, *Kent, C. J.*, cites the leading English cases which we have quoted, and calls attention to an existing and *non-existing* bill.

The next case cited is *Goodrich vs. Gordon*, 15 *John.*, 6. Here the promise to accept bore date fifteen days *previous* to the date of the bill, and hence it does not touch the question of an existing bill.

The next case cited is 1 *Peters*, 264. In this case none of the bills existed when the promise was made on which recovery was sought. Indeed, it was nearly four years previous.

The next case cited is *Parker vs. Greele*, 2 *Wend.*, 545. The bill was dated February 11th, 1827, and the promise of acceptance was by letter of *February 9th*; thus only raising the question of a promise to accept a *non-existing* bill, and the question is so considered by the Court.

Another case cited is *Murdock et al. vs. Mill et al.*, 11 *Met.*, 5. Here the authority to draw and the promise to accept were *previous* to the time the bills were drawn. Thus again raising *only* the question as to a *non-existing* bill.

Another case cited is *Bayard vs. Lathay*, 2 *McLean*, 462. In this case the bills were dated Dec. 13, 1838, and the letter of acceptance Oct. 12th, of the same year, being two months previous. Hence the only question was as to a promise to accept a *non-existing* bill.



Another case cited is *Greele vs. Parker*, 5 Wend., 414. This is the case already commented upon in 2 Wend., 545. The case went to the Court of Errors and was affirmed.

Another case cited is *Ogden, F. & Co. vs. Gillingham M. Co.*, 1 Baldwin, 38. This was a promise to accept a *non-existing* bill. The letter containing the promise was dated March 13th, and the bill March 15th.

The next case cited is *Cunningham vs. Shaw*, 4 Barr., 401. The promise of acceptance in this case was a letter of credit dated *before* any of the bills. Hence, the question of an existing bill was not involved.

The next case cited is *Vance & Dicks vs. Ward*, 2 Dana, 96. At the date of the letter of credit, the bill was *non-existing*.

The next case cited is *Boyce & Henry vs. Edwards*, 4 Peters, 111. In this case the bills bore date February 8, 1827, and the letters showing the contract of acceptance March 9, 1825, and 4th January, 1827, respectively. Thus raising only the question as to a promise to accept a *non-existing* bill.

The next case cited, is, *Wildes et al. vs. Savage*, 1 Story, 22. The letter of credit was dated June 27, 1837; the bill was dated April 25, 1837. So, again, the only question was as to a promise to accept a *non-existing* bill, and the Court do not seek to go beyond that in the opinion.

No case cited by the appellants impairs the rule contended for by the appellees. It is believed that none can be found, either in England or America, where a promise to pay an *existing bill*, based upon a good consideration, is not held to be an acceptance. Certainly it was the intention of the appellants to pay this draft, or bill, when they reduced the agreement to writing, describing the appellee as payee thereof. They have taken and enjoyed their portion of the contract, never offering to rescind it, and should now be compelled to perform the agreement made at their solicitation, and ratified by their subsequent proceedings under it.

However the foregoing questions may be determined, it seems to us that the law on the subject of warranty is decisive in this case.

It is not claimed by the appellants, that the facts of this case reveal anything approaching the legal definition of fraud, as applied to the sale of personal property, and therefore no discussion of that doctrine is necessary.

We think it equally clear that there was no warranty. If not, there is no defence, for there is no such principle known to the law as that of "Mistake," urged by the appellants, applicable to cases of sale of personal property, where the bargain is *consummated*. If there is a misapprehension as to certain facts involved in the sale, the buyer may refuse to carry out the trade. He may rescind it,—*must* return the property. It is not pretended that this course was pursued in the present case, as the appellants held on to their purchase, and have ever since enjoyed it, never proposing to rescind the contract.

On this subject see

*Hogan vs. Weyer*, 5 *Hill*, 389.

*Buchanan vs. Horney*, 12 *Ill.*, 336.

*Jennings vs. Gage*, 13 *Ill.*, 610.

## WARRANTY.

The words of a warranty are usually subjected to a careful, if not a precise and stringent interpretation in favor of the warrantor; as it is the fault of the buyer who asks for or receives a warranty, if it does not cover as much ground, and give him as much protection as he intended.

1 *Parsons on Cont.*, 459.

In the first place, the relation of the parties was not such as would justify the appellants in reposing upon any representations made by Green & Stone. Green & Stone lived at Muscatine, Iowa. The appellants went from their home at Chicago to Muscatine, and purchased a certain quantity of oats, then in their own possession at Chicago,—also, Green & Stone's interest in the com-



mission business at Chicago, the books of which were kept by appellants at Chicago; certainly they had more means of information on the subject matters of this sale than any one else.

To constitute a warranty, it must appear that not having information, or by reasonable effort being unable to procure it, the buyer had a right to rely on the seller, and beyond that, that he did in point of fact rely upon him. No evidence can be found in the record at all approaching the legal requirements of a warranty. Witness Stone (*pages 13 and 14, Ab.*) says, "That he did not know what the profits of the Chicago business were;" "that Mr. Culbertson knew better than he did;" "that he got his ideas as to the price of the oats, and as to the storage thereon, from Culbertson."

And so through all the evidence, while some general statements were made in the nature of mere opinions, nothing will be found at all approaching the well settled legal conditions of a warranty. The law upon this subject is too well understood in the profession to need a full discussion. We cite on the subject:

*Hawkins vs. Berry*, 5 *Gil.*, 36.

*Adams vs. Johnson*, 14 *Ill.*, 345.

*Ender vs. Scott*, 11 *Ill.*, 35.

If we are right in our view of this subject, the appellants are precisely in the same situation as any other party relying upon a contract of warranty when in law there was no such contract.

Before closing our argument, we wish to call attention to a striking misapprehension found on page 3 of the counsel's argument for appellants. They say:

"The writing relied upon by the Plaintiff merely recites a transaction between the appellants and Green & Stone for the exclusive benefit of the parties to it, having no reference to the plaintiff, &c."

By referring to page 12 of the abstract, it will be seen that the writing describes the draft in suit as being held by the plaintiff, and the undertaking therein is to pay the plaintiff.

As indicative of the intention of Green & Stone, one of the parties to that writing, (*p. 15, Ab.*) Green & Stone, August 7, (seven days after the writing was executed,) wrote to appellants that they expected them to accept the draft as arranged; that they had written to appellee that such arrangement had been made; that it was so specified in the paper, (referring to the writing of August 1st,) which would not be good unless this was done.

WALKER & DEXTER,

*Counsel for Appellee.*



# IN THE SUPREME COURT,

THIRD GRAND DIVISION, APRIL TERM, A. D. 1864.

DANIEL A. JONES AND  
CHARLES M. CULBERTSON,

vs.

THE COUNCIL BLUFFS BRANCH OF  
THE STATE BANK OF IOWA,

*Appellants,*

*Appeal from the Superior  
Court of Chicago.*

*Appellee.*

## ABSTRACT OF RECORD.

Assumpsit brought by the appellee against the appellants, Nov. 12, 1861.

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3—19

The declaration contained six special counts and a common count.

3

The first of said counts averred that on the 1st of August, 1861, by an agreement with Green & Stone, in consideration that Green & Stone would, and then and there did, sell and release to defendants 40,000 bush. oats held by defendants for Green & Stone, and also would and did release to defendants all the interest of Green & Stone in a commission business before then carried on by defendants and Green & Stone jointly in Chicago, and in and to all assets belonging to defendants and said Green & Stone jointly, the defendants agreed to and with Green & Stone to pay two certain drafts before then drawn by Green & Stone on and accepted by defendants, one for \$3000, in favor of the Muscatine Branch, and the other for \$2800, in favor of the Washington Branch of the State Bank of Iowa, and also to accept a draft before then <sup>drawn</sup> by Green & Stone, upon defendants, for \$2,050.25, payable to the order of J. D. Lockwood, Cashier, (meaning Cashier of plaintiff,) sixty days after date, (the date not mentioned). That the plaintiff, at the time of said agreement was, and still continues to be, the owner and holder of the draft last referred to. That after the making of said agreement, viz.: Aug. 9, 1861, on presentation of said draft to them, defendants refused to accept it, and although the same had become due, yet defendants refused to pay it, whereby they became liable to pay it, &c., and in consideration thereof, promised the plaintiff to pay it on request.



6       The second count alleged that, as a consideration for an agreement by the defendants to pay said two drafts so accepted by the defendants, and to accept and pay at maturity to the holder thereof said other draft, Green & Stone consented and agreed that defendants might sell said oats, and apply the proceeds of the sale to their own use, and that Green and Stone released to the defendants all interest in the said commission business, and in the partnership assets and profits of the business. The draft in question, viz.: said draft for \$2,050.25, is alleged to have been held and owned by the plaintiff when said agreement was made between Green & Stone and the defendants. This count describes it simply as a draft drawn by Green & Stone upon defendants, to the order of J. D. Lockwood, cashier of plaintiff, as aforesaid, dated July 16th, 1861, for \$2,050.25. The court further alleges that after the making of said agreement, this draft was presented to the defendants for acceptance, and that they refused to accept it, and that, although often afterwards requested to pay it, they refused to do so, whereby they became bound and liable to pay the amount of it to plaintiffs, and being so liable on, &c., undertook and promised to pay the same.

8       The third count gives the same description of the three drafts, except that the last named one is stated to have been payable sixty days after date; and alleges that defendants, in consideration that Green & Stone so transferred and released to them all interest in the said commission business, and in and to the property, credits and assets belonging to them, and employed therein, and also in consideration that Green & Stone sold to the defendants the oats aforesaid, ~~the defendants~~ agreed with said Green & Stone to pay said two drafts previously accepted by defendants, and to accept said other draft whenever presented for acceptance, and to pay it at maturity to the holder, the same then being owned and held by the plaintiff. The count then alleges that the draft was afterwards presented to the defendants for acceptance, and that defendants refused to accept it, and that it had matured, and defendants refused to pay it, whereby they became liable to pay it to the plaintiff, and being so liable, promised to pay the plaintiff on request.

10       The fourth count is a common count for money lent and advanced, money paid, laid out and expended, and money had and received, and for goods, wares and merchandise sold and delivered, and for labor, care and diligence of the plaintiff, &c., and for money due on an account stated.



The fifth count described the draft in question as being a bill of exchange made by Green & Stone, July 16, 1861, directed to the defendants, requesting them, at sixty days after date, to pay to the order of said Lockwood, cashier, as aforesaid, \$2050.25, and states that plaintiff, at that date became holder of it, for the full consideration thereof paid to Green & Stone, and afterwards, to wit: Aug. 1, 1862, defendants accepted said bill of exchange, and thereby became liable to pay, and being so liable, promised the plaintiff to pay the plaintiff said sum, according to the tenor of said bill, and of said acceptance, and that afterwards, to wit: 18th Sept. 1861, the bill so accepted was presented to the defendants for payment, and the defendants refused to pay it.

14        The sixth count described the three drafts aforesaid, as in the first count, and stated them as bills of exchange, and alleged that while the plaintiff was the owner and holder of said last described bill of exchange, to wit: Aug. 1, 1861, defendants agreed with Green & Stone, to to pay the two first described bills of exchange, and also, on behalf of, and for the benefit of the plaintiff, accepted said other bill of exchange, which agreement was in consideration that Green & Stone sold said defendants said oats, and also released their interest in said commission business, and in the assets and profits thereof. After alleging such agreement of the defendants, the counts stated that, by said acceptance, defendants became liable and promised to pay the plaintiff the amount of said last mentioned bill of exchange at the maturity thereof, but that they afterwards refused to pay it when presented to them for payment, &c.

16        The seventh count gave the same description of said alleged three bills of exchange, stating two of them to have been accepted by the defendants, and the other to have been held and owned by the plaintiff, when the defendants, on Aug. 1, 1861, at Muscatine, Iowa, made an agreement with Green & Stone, by which Green & Stone transferred and released to the defendants, a quantity of oats, estimated to be about 40,000 bushels, then in the hands of defendants, and also transferred and released to defendants, all interest of said Green & Stone in said commission business, and in the profits and assets thereof, and in and to the good will and business reputation of the house, the books in which business had been kept by the defendants at Chicago; in consideration of all which, (the count alleged,) the defendants agreed to accept and pay said bill of exchange for \$2050.25, and being thereupon liable, undertook and promised to accept said bill on presentation, and to pay it at maturity. The count then alleged the subsequent presentation of the bill to the defendants for acceptance, and that they refused to accept it, and had also neglected, failed and refused to pay it.



22—37        The defendants pleaded the general issue, with special pleas, as follows:

24        The second plea being to the 2d, 3d and 7th counts, averred that the sole and only consideration for defendants promises therein mentioned, was that Green & Stone undertook and promised to and with defendants, that the oats in each of said counts referred to, should, upon sale of the same, which was to be made as soon as convenient, net \$4,800.00 over and above all charges thereon; and that upon an examination of the books of account pertaining to said commission business, there would and should be found to be coming to Green & Stone at least \$3,000.00, for their share of the net profits in said business, and as their interest in the business, and in the assets to be divided, the amount of said net profits, interest and assets being at the time unknown to the defendants; whereupon the defendants, confiding in said promises of Green & Stone, and for no other consideration, made the promises in said counts alleged to have been made by them. The plea then alleged that as soon afterwards as was convenient, to wit: on, &c., the defendants sold the oats for the best price that could be obtained therefor, and that they netted \$588.29 less than \$4,800.00; also that it was not the fact, nor, on examination of said books, was it found that at the making of said promises, nor at any time thereafter, said Green & Stone's share of the net profits aforesaid, and their interest in said assets and business, amounted to \$3,000.00; but on the contrary the same only amounted to \$1,500.00. Also that defendants had paid said drafts for \$3,000.00 and \$2,800.00 respectively, and that these payments amounted to more than the net proceeds of said oats, and to the said share of said Green & Stone in the net profits aforesaid, and defendants, before their said promises were communicated to the plaintiff, gave notice to Green & Stone, of the aforesaid failure of consideration, and that they would not accept the said other bill of exchange.

35        The sixth plea, being as to all but \$80.08 of the plaintiff's demand, mentioned in each of the special counts, set out like promises on the part of Green and Stone, with a promise by them, that, as a matter of fact, it should be found that said share of the net profits amounted to \$3,000, and averred that this was the only consideration for defendant's undertaking, which was made in reliance on such promises of said Green and Stone. The plea then alleged that the oats, on sale thereof, as agreed, netted only \$4,211.71, and that the share of Green and Stone in the aforesaid net profits, and their interest in said commission business, was found to amount to no more than \$1,668.37, and did not amount to any more



than that sum when Green & Stone made such promises, and that the defendants paid said bills of exchange for \$3,000 and \$2,800, respectively.

58 To said second and sixth pleas the plaintiff replied, that Green did not undertake or promise, as was alleged in said pleas respectively.

27 The third plea was to the first, second and third counts, and alleged that the sole and only consideration for the defendant's supposed promises, was, that the oats in said counts respectively referred to, should, upon sale of the same, which was to be made in a reasonable time, net \$4,800; and that upon examination of the books pertaining to the commission business, it would appear, as Green & Stone deceitfully represented to defendants, that the interest of said Green & Stone in said business, and their share of the assets and profits of the same, amounted to at least \$3,000, the untruth of which representation was unknown to the defendants, whereby they were deceived and misled by said representation. The plea alleged that the oats only netted \$4,211.71, and that the share of Green and Stone in said net profits, and in said commission business, and in the assets thereof, was less than was so represented, and no more than \$1,500; and by reason of the failure of the consideration as aforesaid, nothing was left to apply on said bill for \$2,050.25, after the payment by the defendants of the other two bills of exchange, which were paid by the defendants, and that as soon as said failure of consideration could be ascertained, and before defendants' promises were communicated or made known to the plaintiff, the defendants gave notice to the plaintiff, through Green and Stone, the plaintiff's agent in that behalf, that the consideration had so failed, and that the defendants could not pay said draft for \$2,050.25.

30 The fourth plea, being to the 1st, 2d, 3d and 7th counts, averred that defendants' promises were made at an interview had in the absence of the books relating to the said commission business, and in consequence of a representation made at that time by Green and Stone, that according to such books, the share of Green & Stone in the net profits of said business amounted to at least \$3,000, taking into consideration, in estimating the same, the available assets of the enterprise, which representation was false and fraudulent, and so known to Green & Stone, who, also, at the same time undertook and promised that said oats should net \$4,800; in consideration of which said representation and promise of said Green & Stone, the defendants (not knowing to the contrary of said representation, but relying on said representation and promise,) made their supposed promises. The plea then negated the truth of



said representation, showing that said share of the net profits, &c., amounted to only \$1,588.29, and that the oats only netted \$4,211.71 on sale, as agreed at the making of defendants' promises. The plea also alleged the payment by defendants of the other two drafts.

32 The fifth plea, being as to all but \$80.08 of plaintiff's demand in each of the special counts mentioned, alleged as the sole consideration for defendants' supposed promises, an undertaking by Green & Stone, that the oats should net \$4,800, and a representation by Green & Stone to defendants, that said Green & Stone knew the state of the accounts connected with said commission business, and that their share in the profits of said business was at least \$3,000. The plea alleged that the oats were sold August 5th, 1861, for the best price that could be obtained therefor, and netted only \$4,211.71, and that said share and interest of said Green & Stone in the profits of said commission business amounted to only \$1,668.37. The plea then alleged the payment of said drafts for \$3,000 and \$2,800, respectively.

35 The sixth plea, being to the same part of the plaintiff's demand under the special counts, alleges that the defendants' supposed promises were made solely in consideration that Green & Stone promised them that said oats, which were to be sold at a convenient time after the making the agreement by the defendants, should net \$4,800, and that on examination of the books pertaining to said commission business, it would be found that the share of Green & Stone in said business, and its assets and profits, amounted to about \$3,000—on which promises of Green & Stone defendants relied, &c. A failure of consideration in this, that the oats netted only \$4,211.71, and that said share of the net profits, assets, &c., was found to amount to only \$1,668.37, was next averred in connection with an allegation that defendants paid said drafts for \$3,000 and \$2,800, the same amounting to within said sum of \$80.08 of the consideration actually received by the defendants.

38 The ninth plea was to all the special counts, and alleged a total failure of consideration, except as to the amount of the two drafts previously accepted by the defendants, stating such consideration to have been the value of said oats, estimated at \$4,800, and the share of Green & Stone in said net profits, assets and business, which said Green & Stone falsely and deceitfully represented to the said defendants to amount to \$3,000, by which representation the defendants were misled, in consequence whereof, they made their supposed promises under a mistake as to the facts, when in fact said share only amounted to \$900. The plea



further alleged that plaintiff did not receive or take the said draft for \$2,050.25, on the faith of any contract or agreement on the part of defendants, and that defendants paid said drafts for \$3,000 and \$2,000, respectively.

41 The tenth plea being as to \$2,000 of plaintiff's demand in each special count, alleged the like consideration and failure of the same to the amount of \$2,000, and also alleged that the books were not present nor accessible at the time of the alleged contract between the defendants and Green & Stone, and that Green & Stone falsely and deceitfully represented to defendants that there was coming to Green & Stone, for their share or one-half of the net profits of said business, at least \$3,000, while in fact no more than \$900 was so coming. The plea further alleged that the plaintiff did not receive or take said bill for \$2,050.25 on the faith of defendants' promises, which promises were induced by defendants' reliance on said false representation. The plea further alleged that the defendants paid said drafts for \$3,000 and \$2,800 respectively, and that at the time of the said supposed promises of the defendants becoming known to the plaintiff, the plaintiff had notice that the consideration of said promises was as in this plea stated.

45 The eleventh plea averred a failure of consideration as to \$900 of plaintiff's demand under each of the 5th and 6th counts, in this, that defendants' supposed promises were induced by, and made under a mistaken reliance on a deceitful representation of Green & Stone, that their share of said net profits of said commission business amounted to at least \$3,000; said Green & Stone representing at the time that they knew the state of the affairs of said business, and the books relating thereto not being present nor accessible, which representation the plea alleged to have been untrue in this, that said share amounted to no more than \$900. The plea then alleged that said draft for \$2,050.25 was not taken by plaintiff on the faith of said agreement, and that before and at the time of the supposed acceptance of the same, the plaintiff had notice that the consideration for the acceptance was as aforesaid, the failure of which consideration was not then known to defendants.

48 The twelfth plea, as to \$2,000 of the plaintiff's demand in each of the special counts, alleged a like failure of consideration to that amount.

51 The thirteenth plea as to \$2,000 of the plaintiff's demand in each of the 5th and 6th counts specified, alleged that Green & Stone, acting in that behalf on the part of the plaintiff, induced the making of defendants'

supposed promises by a like false and deceitful representation, as to the amount of the share of Green & Stone in said net profits, which representation was made when the books were not accessible, and as to the truth of which representation defendants were ignorant, and being thereby deceived as to the facts, and for no other cause or consideration made the supposed acceptance of said draft for \$2,050.25. The plea averred the untruth of this representation in this, that said share amounted to no more than \$1,000, and that before the maturity of the said last mentioned draft, the defendants paid said other two drafts for \$3,000 and \$2,800 respectively.

54 The plaintiff demurred specially to these pleas and the demurrer was sustained; that is as to the said 3d, 4th, 5th, 7th, 8th, 9th, 10th, 11th and 13th pleas respectively. The demurrer assigned causes of demurrer as follows:

That the pleas did not set up such a total failure of consideration as was sufficient to discharge the defendants.

That the pleas alleging a partial failure of consideration did not show wherein and to what extent, the consideration had failed, and did not show facts sufficient to discharge the defendants, and purported to be pleas of partial failure in the commencement, and concluded as pleas of total failure of consideration.

That they attempted to set up fraud and warranty, but did not set forth facts sufficient to show either fraud or warranty, &c., &c.

57, 58 On the sustaining of said demurrer, the defendants asked leave to amend the 7th and 11th pleas, which leave was denied, on the ground that the defence would come in under the general issue.

63 The cause was tried at the March Term of said Superior Court, A. D. 1864, before Hon. Van H. Higgins, without the intervention of a jury. The plaintiff put in evidence a draft as follows:

"\$2,050.25. MUSCATINE, Iowa, 16 July, 1861.

"Sixty days after date, pay to the order of J. D. Lockwood, Esq., Cashier, two thousand and fifty dollars 25-100 dollars, in New York exchange, value received, and charge the same to account of

To MESSRS. JONES & CULBERTSON,

GREEN & STONE.

*Chicago, Ill.*



Noted for non-acceptance, Chicago, August 9, 1861.

M. D. BUCHANAN,  
*Notary Public.*

Noted for non-payment, Chicago, Sept. 18, 1861.

M. D. BUCHANAN,  
*Notary Public.*

- 66, 68      The plaintiff next read the deposition of Joseph Richardson, who testified that in the summer of 1860, Green & Stone entered into an agreement with Jones & Culbertson for carrying on, in the name of the latter firm, on the joint account of the two firms, a general commission business in Chicago, which business was thus so carried on until August 1, 1861, when Green & Stone disposed of their interest therein to Jones & Culbertson :
- 69      that Jones & Culbertson were to procure for use in the business such funds as might from time to time be required therein, by paying interest on the same.
- 70      That on the 1st of August, 1861, he had not the means of knowing what were the assets of the business, not having seen a balance sheet thereof for three months; but from daily reports of receipts of produce, and from his own observation, supposed that the profits should have been some \$6,000; that in the winter and spring of 1861, Jones & Culbertson, with funds of Green & Stone, purchased some 40,000 bushels of oats, at a cost of about \$9,000, which, at the time of the dissolution of said partnership, were estimated by said Stone to be worth \$4,800, which estimate the witness found to be correct, according to the last quotations of sales in Chicago; the amount of charges on which oats was not, however, then known.
- 71      That said co-partnership was dissolved August 1, 1861, at an interview between said Stone and said Culbertson, by an agreement in behalf of their respective firms, which was made while the witness was present, the conditions of which were, that whereas Jones and Culbertson had previously accepted two time drafts for \$5,800, drawn on them by Green & Stone; and whereas Green & Stone had also drawn on Jones & Culbertson another draft, in favor of the Council Bluffs Branch of the State Bank of Iowa, for \$2,000, which draft had not then been presented for acceptance, Culbertson agreed that Jones & Culbertson would accept said last named draft, when presented; and Stone agreed that Jones & Culbertson might sell said oats, and retain the proceeds thereof, and Green & Stone relinquished all their interest in said commission business:



the substance of which agreement was embodied in a writing drawn by Culbertson, signed by Stone in behalf of Green & Stone, and retained by Culbertson.

73 That this agreement was made in the office of Green & Stone, in Muscatine, Iowa; that the proposition for the dissolution of the co-partnership was first made by Culbertson, who stated that he had heard that unless such a course was pursued, the reputation of the house would be injured by the suspension of Green & Stone; that Stone then stated that he wished to have Jones & Culbertson accept, when presented said last named draft, and that he believed the proceeds of the oats then held by Jones & Culbertson, with the amount to which Green & Stone were then entitled as their share of the profits of said business, would be enough to reimburse Jones & Culbertson for paying said drafts, amounting to \$5,800.00, and also for accepting and paying said other draft, and if Jones & Culbertson would agree to accept when presented, said draft last referred to, Green & Stone would assign to Jones & Culbertson said oats, and relinquish all interest in said business, and all profits then accrued or to be thereafter earned therein: to which proposition Culbertson objected, assigning as an objection that the proceeds of the oats, with Green & Stone's share of the profits, would not, as he believed, amount to \$7,800.00; and Stone claimed that they would be equal to that sum, and urged that if the same should be less, Jones & Culbertson could well afford to accept and pay the draft, as the business which had been mostly influenced by Green & Stone had become profitable, and Jones & Culbertson, if this agreement were made, would receive the whole profit of it; and also said to Culbertson that if it should turn out on sale of the oats, and figuring up of the commission business, that the amount should be much short of enough to pay all of said drafts, amounting to \$7,800.00, Green & Stone would thereafter adjust the amount with Jones & Culbertson. The witness then stated that the agreement was concluded on these terms.

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77 Also, that he could not recall any further particulars of the said conversation and agreement, except the fact that Culbertson expressed his anxiety to have the co-partnership dissolved, and to have a writing from Green & Stone showing such dissolution.

78 *Cross-Examination.*

79 That he did not know of any written articles of such co-partnership; that when said agreement was made between Stone & Culbertson, he was occupied in the settlement of the affairs of Green & Stone, and was



writing at his desk in the front room of their office, but was frequently interrupted and called from his desk by questions and appeals from both Stone and Culbertson; that while in said front room he was within fifteen to twenty feet of said Culbertson & Stone, directly facing them, the rooms being separated by a glass partition, the doors in which were open; and that while said agreement was being made, he was not almost all the time in a different room from that in which they were.

80        That Stone stated that the share of Green & Stone in said business could not, he thought, be less than \$3,000.00, and claimed that it ought to be equal to that amount, and appealed to the witness to say to Mr. Culbertson whether the share then coming to Green & Stone from said net profits amounted to \$3,000.00, and the witness then stated that Green & Stone were entitled to fully \$3,000.00, but could not remember saying that it should be nearer \$4,000.00.

81        That during June, 1861, the witness was in the office of Jones & Culbertson, in Chicago, a considerable part of the time, and afterwards saw their letters giving Green & Stone daily reports of their business, but had not seen a trial balance from them for some three months before the suspension of Green & Stone; that before the witness was appealed to as last aforesaid, Culbertson expressed doubt whether the net profits coming to Green & Stone, would amount to \$3,000.00, and at a later part of the conversation said that if the net profits did so amount to \$3,000.00, Jones & Culbertson could just about take up said three drafts.

82        That the witness thought the agreement was not wholly upon the understanding that Green & Stone's share of the net profits aforesaid, would amount to at least \$3,000.00, for Culbertson claimed during the whole interview, and after Stone signed said writing, that such share would not amount to \$3,000.00, and Stone said in reply that even if it should not, Jones & Culbertson would not suffer, as they were now doing a good commission business, which had been procured for them by the exertions of Green & Stone, and finally said, if there should be any considerable deficiency, Green & Stone would in some way make it all right with Jones & Culbertson.

83        That he, the witness, thought it was on the day of this agreement that defendants first had knowledge of the draft last aforesaid, and judged from Mr. Culbertson's conversation, that his visits to Muscatine, was entirely to get a paper from Green & Stone, stating that they had ceased to have any connection with said commission business, and also



84 that said Culbertson left Chicago to go to Muscatine, on the day he learned of the suspension of Green & Stone. That Jones & Culbertson were to have the oats, and could sell them whenever they chose to do so; that Stone estimated the oats to be worth at that time about \$4,800.00, and Culbertson said they were not worth so much; that it was not wholly on the basis that such share of the net profits was supposed to be not less than \$3,000.00, and that the oats were expected to net at least \$4,800.00, that Culbertson, for his firm, in said interview, agreed as aforesaid, for he steadily disputed the correctness of those estimates; that the consideration of the obligations undertaken by Jones & Culbertson, was the transfer of the oats, and the release of Green & Stone's interest in the commission business; and that a writing was drawn to express the terms of said agreement.

That the partnership was dissolvable at the pleasure of either of said firms.

85 Sundry parts of said deposition being objected to by the defendants, it was read with the understanding that only such parts of the same as were competent, should be considered by the Court. The defendant's counsel, by stipulation, admitted that the draft referred to in said deposition was the aforesaid draft of \$2,050.25.

87 The plaintiff's counsel next read a writing produced by defendants, on call of said counsel, said writing being as follows:

MUSCATINE, Iowa, August 1, 1861.

In consideration of Jones & Culbertson, of Chicago, Illinois, taking up Geo. C. Stone's draft on Jones & Culbertson, and in favor of W. H. Hubbard, of Washington, Iowa, for \$2,800.00 due August 3, 1861, and J. A. Green's draft on Jones & Culbertson, and in favor of T. Harback, calling for \$3,000, due Aug. 17th, 1861, and also paying draft drawn by us on Jones & Culbertson, and in favor of J. D. Lockwood, cashier, dated July 16th, 1861, at 60 days, calling for \$2,050.25. For the above, and other considerations, we release, relinquish and transfer to said Jones & Culbertson, commission merchants, and resign to them, all claim of whatsoever kind we have in said commission house, and release the said Jones & Culbertson from any and all further obligations, of whatsoever kind and nature with or through us, we only having had at any time only the promise from Jones & Culbertson, of a certain part of the profits arising from the commission house, in consideration of our influencing business to said commission house. We further say, that we



never have at any time put one dollar of capital stock into said house, our interest, as above stated, only being promissory by them for a part of the profits, if any should be made.

(Signed,) GREEN & STONE.

88 The plaintiff here rested, and by leave of the court amended the fifth count so as to make it appear as above set forth.

George C. Stone, of said late firm of Green & Stone, being called by defendants, testified that said draft for \$2,050.25 was sent to the plaintiff on the day it was drawn, to be discounted for currency received by Green & Stone from the plaintiff, before August 1, 1861; that at the suspension of Green & Stone, he, the witness telegraphed to Culbertson to come to Muscatine, Iowa; that Culbertson was anxious to have Green & Stone assign their interest in the commission house, and the above writing, signed by Green & Stone, was then drawn up and signed; that some conversation was had about oats and also about profits on the commission business, but just what it was he was unable to state; that he then informed Culbertson, for the first time, that said draft had been  
89 drawn; that the party who then held the draft had no instructions; that Jones & Culbertson had been in the habit of sending monthly statements as to the commission business, to Green & Stone, and he, the witness, had a vague idea of the amount of the profits thereof, and thought that the share or interest of Green & Stone therein, with the oats, would pay said three drafts. That he got his ideas as to the price of the oats, and as to the storage thereon, from Culbertson; that he did not know what the profits were of the Chicago business; that Mr. Culbertson knew better than he did; that he thought he called in Mr. Richardson, who knew as much about his affairs as he did himself, and who gave his opinion on this subject; that one object he had in calling in Richardson, was to have him know what the contract was; that he was just as anxious as Mr. Culbertson, to arrange matters, and did not wish to make any arrangement with him, by which Culbertson would be the loser; nor to mislead him; that he had as good lights to go by as the witness had; that it was the estimate of the parties that the oats, and Green & Stone's share of said profits, would pay said three drafts, and he the  
90 witness believed at the time it would be so, and that the oats and such share of the profits, would be more rather than less, than the amount of said drafts. That Jones & Culbertson were to sell the oats, and use the proceeds and the share of Green & Stone in the profits, to pay said three drafts.



Defendants' counsel then produced two drafts, which the witness identified as two of said three drafts, said two drafts being as follows: One for \$3,000, drawn by J. A. Green, dated Muscatine, Iowa, April 14, 1861, payable four months after date, to the order of Thomas Harback, directed to and accepted by the defendants; and the other drawn by Geo. C. Stone, dated Muscatine, Iowa, June 1, 1861, for \$2,800, payable sixty days after date, to the order of W. H. Hubbard, Cashier, directed to and accepted by the defendants.

91 Stone further testified, that about a week after said interview, Green & Stone received a letter from defendants, stating that they could not pay said draft for \$2,050.25; but before receiving this letter, Green & Stone had notified the plaintiff that Jones & Culbertson would pay said draft; that in the aforesaid interview, Culbertson perhaps stated that he did not have charge of the books, and did not know the state of the accounts of the commission house, which the witness thought was the fact; but he, the witness, supposed that Culbertson knew about as much about it as he did.

92 On cross-examination he said that he thought Mr. Culbertson did not bring to Muscatine at the time of such interview, any statements of the accounts of said commission house; that the witness had not himself consulted the books connected with said business; that they were kept by Jones & Culbertson at Chicago, who sent to Green & Jones a trial balance every month, but Green & Stone might not have received any for two or three months: that neither the witness nor Culbertson kept the books, but both had a general knowledge of the business; that he, the witness, did not know anything in particular about the market value of the oats; that Culbertson knew what the oats were worth, and what the charges were, and all the information the witness had in relation to the price of the oats was from Culbertson; that he thought he communicated to the plaintiff, on the day of the interview [notice of] a promise of Jones & Culbertson to pay the draft held by the plaintiff; that this was before Jones & Culbertson refused to pay said draft. That he did not think all his information about the profits of said business came through Culbertson, but that he had relied on the integrity of the statements of the defendants as to the commission business.

On re-examination he said he relied on trial balances and letters of defendants as to what defendants had done in the commission business, and also on his own ideas of the business, and that it was not on any statements made that day that he relied.



93 Defendants next read a letter from Green & Stone, as showing the terms on which said commission business was carried on. This letter, dated Muscatine, July 12, 1860, shows that Green & Stone proposed to unite with Jones & Culbertson in the commission business exclusively, and thereupon to do what they could in the way of influencing shipments to the commission houses upon the terms that each of the two firms should have one-half the net profits of the house, or each individual one-quarter of said net profits. That the business was for a time to be done in the name of Jones & Culbertson, as before; that the said arrangement should commence on the 16th of that month, and continue while mutually agreeable and satisfactory; and that traveling expenses should be borne by the house when upon its business, and that monthly statements of the business should be rendered Green & Stone at the end of each month.

94 A. J. Denison was next called as a witness for the defendants. He testified that he was the salesman of Jones & Culbertson, and attended to the details of the business; that ~~that~~ the oats were sold a day or two after Mr. Culbertson's return from Muscatine, and \$4,300.00, to \$4,400.00 was realized for them; that the amount of the net profits of said business was about \$3,300.00, of which between \$1,600.00 and \$1,700.00 was coming to Green & Stone; that a rough estimate of the same was made within two or three days after Culbertson's return from Muscatine, and that the final result did not vary much from such rough estimate; that the \$3,300.00 included some doubtful claims, or bills receivable, most of which were paid; and that the defendants paid the two drafts mentioned in said writing of Aug. 1, 1861, other than the draft in suit.

On cross-examination, he said he was unable to state the price of oats at the time of the suspension of Green & Stone, but thought such price declined one cent per bushel within a week after Aug. 1, 1861. That the oats of Green & Stone were sold Aug. 5, 1861.

95 On being recalled, he stated that after the taking up of the two drafts so paid by Jones & Culbertson there was nothing left of the proceeds of the oats, or of the share of Green & Stone in the profits of the commission business, with which to pay the draft in suit.

Defendants also read a letter from Green & Stone, dated Muscatine, Aug. 7, 1861, directed to the defendants, acknowledging the receipt of a letter of the 5th of that month, from the defendants, and stating that as regarded said draft for \$2,050, Green & Stone wanted Jones & Culbertson to accept it as arranged, and had written that such an arrangement

was made, and that it was so specified in the paper which Jones & Culbertson had, which would not be good unless this was done. The letter concludes, "And we will fix that matter afterwards, when you get things all closed up."

On the foregoing evidence, his Honor, Judge Higgins found the issues for the plaintiff, assessing the damages at \$2,351.15, and the defendants moved for a new trial, on the overruling of which motion they excepted, and then made a motion in arrest of judgment, which motion being also overruled, they excepted to the decision in that regard; and judgment having been rendered on said finding, they appealed to this court, and assigned the following errors, to wit:

100 That said Superior Court erred in finding for the plaintiff, and in overruling said motion for a new trial, and said motion in arrest of judgment, and in sustaining the demurrer to pleas 3, 4, 5 and 7, and 9 to 13 inclusive, and each of them respectively; and that the finding and judgment, respectively, were for an excessive amount; and that the finding and judgment, respectively, ought to have been for the defendants, &c.

ARRINGTON & DENT,

*Atty's for Appellant.*



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Jones & Culbertson

vs.

Council Bluffs & Bank.

Abstract.

Filed A/27 1864  
L. L. L. & Co.



UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Seventh day of March in the year of our Lord One Thousand Eight Hundred and Sixty Eight and of the Independence of the United States of America the Eighth.

Present, The Honorable

John M. Nelson

Chief Justice of the }  
Superior Court of Chicago. }

Van H. Higgins

Joseph E. Gary

Judges. }

Joseph Shoy

Prosecuting Attorney.

David J. Hammel

Sheriff of Cook County.

Thomas B. Carter

Clerk.

Attest,

Be It remembered that heretofore to wit on the  
Twelfth day of November in the year of our Lord  
one Thousand Eight Hundred and Sixty one  
The Comers Pluffs Branch of the State &  
Bank of Iowa by Walter Van Anam and  
Dexter its attorneys filed in the Clerk's Office of the  
said Superior Court of Chicago due certain Bond  
for Costs, Preceps for Summons and declaration &  
which are in words and figures following to wit  
State of Illinois }  
County of Cook } 20 Superior Court of Chicago  
December Term 1861

The Comers Pluffs Branch  
of the State Bank of Iowa }



<sup>vs.</sup>  
David A Jones et al

In assumpsit;

I enter my self security  
for Costs in this Cause and promise to pay  
all costs which may accrue to the opposite  
party in this action or to any of the officers of  
this Court and in default of payment by the  
Plaintiff of any Costs ordered or adjudged to  
be paid by it hereby agree and stipulate  
that execution shall be against my property for  
any Costs taxed against it  
Dated this 12<sup>th</sup> day of November A.D. 1861  
That Dixler,

State of Illinois  
County of Cook

Superior Court  
December Term A.D. 1861

The Commercial Branch  
of the State Bank of Iowa  
<sup>vs.</sup>

assumpsit

David A Jones and  
Charles M Carter

The Clerk of said  
Court will issue a summons in the above cause  
directed to the Sheriff of Cook County on a plea  
of noli prosequi on the case on promissory Returnable at the  
December Term of said Court A.D. 1861 to the  
damage of the plaintiff of three thousand dollars  
to Walter Kimball Esq Clerk. Walker Van Inman & Dexter  
Chicago November 12 1861 Plaintiffs Attorneys



(3)

State of Illinois ?  
County of Cook 100

Superior Court of Chicago  
of the Decem<sup>th</sup>. Term A.D. 1861.

The Commercial Branch of the State Bank,  
of Iowa, a body corporate organized and doing  
business under the laws of the State of Iowa,  
Plaintiffs, in this suit by Walter Van Buren  
& Dexter their attorneys comes and complains of  
David S. Jones and Charles McCreckton defend-  
ants herein in an action of trespass on the case  
upon premises.

For that Whereas heretofore to-wit on the first  
day of August, A.D. 1861 at Muscatine in the State  
of Iowa, but at Chicago in the State of Illinois  
The said defendants by the name style and descrip-  
tion of Jones & McCreckton entered into an agreement  
with George W. Green and Stone by the name  
and style of Green & Stone, in and by which the  
said defendants in consideration that the said Green  
and Stone would and then and there did sell and  
release to them the said defendants, a large  
quantity to-wit about forty thousand bushels of  
oats, belonging to said Green & Stone and held  
in store for them by said defendants, and should  
then and should then and there did also sell  
quit claim and release to said defendants, all  
their said Green & Stone's right title and interest in



(4)

and to a certain Commission business then and  
previously carried on by said defendants and said  
Green & Stone, jointly in Chicago and in and  
to all property monies credits and assets which  
belonged to said defendants and said Green  
& Stone employed in and which had grown  
out of and accrued from the said Commission  
business both the undivided one half of the  
said business and of all of said property &  
monies credits and assets. They the said defend-  
ants then and there agreed to and with the said  
Green and Stone, to pay to certain drafts here-  
after drawn by said Green & Stone on said defend-  
ants and accepted by them the one for three  
thousand Dollars and the other for three thou-  
sand Dollars Eight Hundred Dollars. The former  
of said drafts having been drawn in favor of  
the Muscatine Branch and the latter of the  
Washington Branch of the State Bank of Iowa  
and also to accept a certain other draft before  
then drawn upon them by said Green & Stone  
payable to the order of J. D. Lockwood Cashier (i.e.  
meaning Cashier of said plaintiffs) sixty days  
after date for two thousand and fifty dollars and  
ninety four cents when ever the said draft should  
be duly presented to them and they requested to  
accept the same and also to pay the said draft  
at maturity.



(5)

And the said plaintiffs avers that the date of said agreement last mentioned between the said Green, and Stone, and the said defendants and for a long time before, and ever since the said plaintiffs was the owner and holder of said last mentioned draft.

And afterwards (viz on the ninth day of August 1861 at Chicago aforesaid the said draft was duly presented to the said defendants by the said plaintiffs and the said defendants were then and there <sup>duly requested to accept the same which the said defendants</sup> ~~thereby~~ <sup>they</sup> refused to do. and altho the said draft has long since matured and become due, and payable and altho the said defendants have often since the same became so due, been requested to pay the same to the said plaintiffs yet the said defendants to pay the same or any part thereof, have ever since wholly neglected and refused. and whereby the said defendants became liable to pay the said draft to the said plaintiffs. and being so liable to pay the said draft they the said plaintiffs afterwards took on the said day and year first aforesaid undertook, and faithfully promised to pay the same to the said plaintiffs whenever they should be thereunto requested but the said defendants altho there often since requested and still do refuse to pay the said sum or any part thereof to the said plaintiffs.



(6)  
2.  
And for that whereas hitherto trust on the  
first day of August. A.D. 1861, at Muscatine in the  
State of Iowa & wit at Chicago in the State of  
Illinois the said defendants then doing business  
under the name & style and firm of Jones & Cull-  
erton entered into a contract, with George W.  
Green & Stone copartners doing business  
under the name & style of Green & Stone in and  
by which contract and agreement the said defend-  
ants in consideration that the said Green &  
Stone would and did then and there consent and  
agree that the said defendants might sell and  
dispose of a large quantity of oats which the  
said defendants then held in store for the said  
Green & Stone and have and apply to them now  
use the proceeds of such sale and also that the  
said Green & Stone should and did then and  
there release to the said defendants their interest  
& share in and to all the profits of a Custom Commission  
business then and previously carried on by said defend-  
ants in Chicago in the profits of which said Green  
& Stone had an interest and should then and  
there discharge and release said defendants from  
all liability to said Green & Stone & account and  
pay over to them any share of such profits then  
the said defendants then and there agreed to pay  
two Custom drafts, before then drawn by said Green  
& Stone on said defendants and accepted by them



(7)

the one for two thousand and the other for  
 two thousand Eight Hundred Dollars and also to  
 accept and pay at maturity to the holder thereof  
 another certain draft drawn by said Greenstone  
 upon said defendants payable to the order of  
 J. P. Lockwood. Cashier. (meaning and intending  
 thereby the Cashier of the said plaintiff) and  
 dated July 16, 1881 for the sum of two thousand,  
 and fifty Dollars and twenty five cents and the  
 said plaintiffs aver that at the time of such  
 agreement and for a long time before and ever since  
 said agreement, it was the actual <sup>owner &</sup> holder of the  
 said last mentioned draft and that afterwards  
 about on the month day of August, 1881, the said  
 draft was duly presented to the said defendants  
 for acceptance and they were then and there  
 requested by the said plaintiff to accept the same  
 which said defendants then and there utterly re-  
 fused to do and altho the said draft has long since  
 matured and become due and payable and  
 altho the said defendants have often since the  
 same became due been requested to pay the said  
 draft to the said plaintiff yet they have always  
 utterly refused and still do refuse to pay the said  
 sum of money or any part thereof and whereby  
 the said defendants became bound and liable to  
 pay the amount of the said draft to the said plain-  
 tiff and being so liable about on the same day



and year just aforesaid undertook and quite fully promised to pay the same. to the said plaintiffs but the said defendants altho often since requested have often since refused and do still neglect and refuse to pay the same. or any part thereof to the said Plaintiffs

3<sup>d</sup>

And also for that whereas heretofore to wit on the first day of August. A.D. 1861 at Muscatine in the State of Iowa, to wit at Chicago in the State of Illinois, the said defendants by the name, style, and firm of Jones & Culbertson were engaged jointly with George W. Green. & Stone in the business of Commission Merchants in Chicago, and were also connected jointly with said Green & Stone of certain property credits and assets and also held on store for the said Green & Stone a large quantity to wit about three thousand bushels of oats, and the said Green & Stone had before then at different times drawn upon the said defendants, several to wit three drafts each of the said drafts in favor of the Muscatine Branch of the ~~State Bank~~ Iowa State Bank for three thousand Dollars one in favor of the Washington Branch of the said Bank for two thousand Eight hundred Dollars and payable to the order of J.D. Lockwood, Cashier (Cashier of the plaintiffs meaning) for two thousand and fifty Dollars and twenty five cents dated the ~~last~~ day of July 1861 and payable sixty days after



(9)

date the first mentioned two of which drafts  
had been accepted by said defendants the last  
mentioned of which said two drafts belonged  
to and was then held by the said plaintiffs  
and had not been accepted by said defendants  
The said Defendants then and there no con-  
sideration that the said Green & Stone would  
then and there did sell and transfer and release  
to the said defendants, all their right title and  
interest in and to said Commission business and  
all the property credits and debts belonging  
to them. and said defendants employed in  
said business and also would and then and  
there did sell convey and release between the  
said parties and allow them to sell and dispose of  
the same. and receive and apply to them the  
use the proceeds thereof the said defend-  
ants then and there agreed to and with the  
said Green & Stone to pay the said two drafts  
so previously drawn upon them by Green & Stone  
in favor of said Mercantile & Washington Branch  
of said Iowa State Bank. and also to ac-  
cept the said draft so drawn by said Green  
& Stone payable to the order of said J D Lockwood  
cashier whenever duly presented and whenever  
they should be thereunto requested and also to  
pay the said draft at maturity to the holder thereof  
And the said plaintiffs are that at the time



of the said agreement, and for a long time before and  
 ever since such agreement, it was, has been the  
 owner and holder of the said last mentioned  
 draft.

And that afterwards to wit on the ninth day of  
 August 1881. to wit at Chicago aforesaid the said  
 draft, was duly presented by the plaintiffs to the  
 said Defendants, for acceptance the said plaintiffs  
 then and there requested the said defendants  
 to accept said draft. but the said defendants  
 then and there utterly refused to accept the same.  
 and altho the said draft has long since matured  
 and become due and payable yet the said defen-  
 dants, altho often requested have utterly refused and  
 still do refuse to pay the whole or any part of the  
 same whereby the said defendants became liable  
 to pay the amount of the said draft to the said plai-  
 ntiffs and being so liable afterwards to wit on the  
 day and year last aforesaid faithfully promised  
 to pay the said plaintiffs the said sum whenever  
 they should be demanded or requested but the said  
 Defendants altho often requested have ever since  
 utterly refused and still do refuse to pay the same  
 or any part thereof.

4

And whereas also the said defendants afterwards  
 to wit on the ninth day of August in the year of  
 our Lord one thousand eight hundred and eighty one  
 to wit at said County became and was indebted



(11) 4  
into the plaintiffs in a large sum of money to wit<sup>t</sup> &  
Three Thousand Dollars for money before that time  
lent and advanced to said defendants by said &  
plaintiffs at said defendants request and also  
in the like sum for money before that time paid laid  
out and expended for said defendants by the said  
plaintiffs at the like special request of said  
defendants and in the like sum for money before  
that time had and received by said defendants  
and for the use of said plaintiffs and also in  
the like sum for goods wares and Merchandise  
before that time sold and delivered by said &  
plaintiffs to said defendants and at the like &  
special instance and request and also in the  
like sum for the labor care and diligence of  
said plaintiffs before that time done and performed  
by said plaintiffs for said defendants and at  
the like instance and request of said defendants  
and also in the like sum then and there found  
to be due and owing to said plaintiffs on an  
account stated between them and that so in  
debted said defendants on consideration thereof  
then and there undertook and promised to  
pay said plaintiffs said several sums of money  
above mentioned when demanded afterwards  
requested yet the said defendants not re-  
garding their promises and undertakings but  
oblivious &c although often requested so to do



have not paid said plaintiffs, either of  
 said sums of money above mentioned or any  
 part thereof, nor to do. have hitherto wholly &  
 neglected. and refused and still do neglect and  
 refuse to do damages said plaintiff of Thos.  
 Thoms and Pollan and therefore they bring this  
 suit &c

Walter. New. Annan & Dexter,

Additional Counts to Declaration filed June  
 24<sup>th</sup> 1863.

5-

For that whereas hereofore writ on the 16<sup>th</sup>  
 day of July A.D. 1861. at Muscatine Iowa  
 writ at Chicago in the State of Illinois  
 League in Green & Stone by the name  
 and style of Green & Stone according to the usage  
 and custom of merchants made due Certain  
 Bill of Exchange in writing and then and there  
 directed to said Bill of Exchange to the said  
 defendants at Chicago signed and by such  
 Bill of Exchange then and there requested the  
 said defendants at sixty days after date, then of  
 to pay to the order of J.P. Lockwood Esq. Cashier  
 (meaning Cashier of said plaintiffs. Two &  
 Thoms and Pollan and fifty Dollars, & money for cents  
 which said Bill of Exchange was then and  
 there delivered to the said plaintiffs who



(13)

then and there became the holder of it for the full consideration thereof, paid by them to said Green & Stone, & the said defendants afterwards went on the first day of August A.D. 1862 accepted said Bill of Exchange according to the usage and custom of merchants by means whereof, and according to the usage and custom of merchants the said defendants then and there became liable to pay, and being so liable undertook and promised the said Plaintiff to pay of the sum of money in the said Bill of Exchange, specified according to the tenor and effect of the said Bill and of their said acceptance thereof. And the said Plaintiff avers that afterwards and when the said Bill of Exchange became due, and payable according to the tenor thereof, and also went on the 18<sup>th</sup> day of September A.D. 1862 went at Chicago the said Bill of Exchange so accepted as of record was presented and shown to the said defendants for payment thereof and the said defendants, were then and there requested to pay the same according to the tenor of said Bill & of their said acceptance thereof but that the said defendants did not at said time or at any time before or afterwards pay the said sum of money therein specified or pay any part thereof but wholly neglected and



(14)  
6. refused so to do, and still do neglect, and refuse  
Wherefore the plaintiffs brings suit <sup>and before</sup>  
It is that whereas herebefore, the 16<sup>th</sup> day of  
July A.D. 1861. at Muscatine in the State of  
Iowa J. W. at Chicago in the State of Illinois  
George M. Green and Stone by the name  
of Style of Green & Stone. drew three certain Bills  
of Exchange on meeting and directed the same  
to be paid defendants one of which was for  
Three Thousand dollars drawn in favor of  
the Muscatine Branch of the State Bank of  
Iowa, and one of which was for Two Thousand  
and Eight Hundred dollars drawn in  
favor of the Washington Branch of the State  
Bank of Iowa. And one of which was  
drawn payable to the order of J. D. Lockwood  
Esq. Cashier (meaning Cashier of said Bill)  
bearing date the day and year last aforesaid  
for the sum of Two Thousand & fifty dollars  
& twenty five cents payable sixty days after  
date and directed to said defendants at  
Chicago aforesaid by the name and style of  
Jones & Westbrook That afterwards to wit on  
the day and year last aforesaid the plaintiffs  
became the owner and holder of said Bill  
of Exchange for the full consideration thereof  
paid to the said Green & Stone, therefore that  
afterwards to wit on the first day of August



15/5  
1861. the defendants by the name & style of Jones  
& Leubertson entered into an agreement with the  
said Green & Stone did then and there sell &  
assign transfer and release to them the said  
defendants, a large quantity of work about  
fifty thousand Bushels of oats belonging to said  
Green & Stone and then held in store for them.  
by said defendants and then and there did  
also sell quit claim and release to said de-  
fendants all their said Green & Stone right  
title and interest in and to a certain com-  
munion mines then and previously caused  
on by said defendants, and said Green  
& Stone, jointly in charge and in and to all  
property mines credits & assets which belonged  
to said defendants and said Green & Stone, which  
was employed in an ore which had grown out  
of and accrued from the said communion &  
mines limit the undivided one half of the said  
Business and of all said property mines credits  
& assets. And the said defendants in consideration  
thereof then and there agreed to and with the said  
Green and Stone to pay the two Bill of Exchange  
specified as of res a/c, one for the thousand  
dollar & one for the thousand & Eight Hundred  
dollar and also on behalf of & for the benefit of  
the plaintiff accepted the said Bill of Exchange  
so as of res a/c drawn by the said Green & Stone



(16)

and delivered to the said Plaintiff in and by which said acceptance the said defendants then and there became liable & then and there undertook and promised the said plaintiff to pay at the said sum of money in said Bill of Exchange mentioned at maturity according to the tenor and effect thereof.

And the said plaintiff avers that afterwards when the said Bill of Exchange became due and payable according to the tenor thereof the said Bill of Exchange was accepted as aforesaid was presented & shown to the said defendants for payment thereof & the said defendants were then and there requested to pay the same according to the tenor of said Bill & of then acceptance thereof but that the said defendants did not at the said time or at any time before, or afterwards pay the said sum of money therein specified or pay any part thereof but wholly neglected & refused so to do & still do neglect and refuse wherefore the plaintiff brings suit &c

7<sup>th</sup>

For that whereas heretofore and before the 16<sup>th</sup> day of July A.D. 1861. at Milwaukee & Port at Chicago in said County of Cook. George W. Green &

Stone under the name and style of Green & Stone made then certain other three Bills of Exchange in making and then and there directed the same



(17)

to the said defendants, under the name and style  
of Jones & Culbertson, one of which said Bill of  
Exchange was for the sum of three thousand  
Dollars, and in favor of the Muscatine Branch of  
the State Bank of Iowa, one for the sum of Two  
thousand, Eight hundred dollars in favor of the  
Washington Branch of the State Bank of Iowa  
both which had on the day and year last of  
said been accepted by the said defendants, and  
one for the sum of One thousand and fifty dollars  
or twenty two cents bearing date the day and year  
last of said and payable to J. D. Lockwood  
Esq. Cashier sixty days after date (Cashier  
of the said Plaintiff meaning.) and then and there  
delivered the said last mentioned Bill of Exchange,  
to the said Plaintiff who then and there became &  
hereunto have been and now are the owner & holder  
thereof, for a full consideration paid thereof to the  
said Green & Stone and the said Plaintiff say,  
that afterwards to wit on the first day of August  
A.D. 1861, at Muscatine Iowa at Chicago of the  
said the said defendants under the said  
name and style of Jones & Culbertson made and  
entered into an agreement with the said Green &  
Stone agreed to, and did then and there sell  
assign transfer set over with release and de-  
liver to them the said defendants a large quan-  
tity of oats, the property of the said Green & Stone.



the precise amount due of them and due  
 being unknown to the said Green & Stone. the  
 same being at the time in the possession of the  
 said Jones & Culbertson at Chicago but which  
 were estimated to be about forty thousand dollars  
 more or less and did then and there agree to  
 & did sell transfer set over and release to  
 the said defendants all their the said Green  
 & Stone right title and interest in and to a  
 custom commission business ~~business~~ then and for  
 a long time previously thereto carried on by the  
 said Defendants & the said Green & Stone jointly  
 at Chicago (the books of the said business being  
 kept by the said Jones & Culbertson at Chicago)  
 and to all properties, monies & assets belonging  
 to said defendant and said Green and Stone which  
 were then employed in & had grown out of said  
 joint business and to the good will and business  
 reputation of the said Green & Stone and said  
 defendants under the said business name of  
 Jones and Culbertson and the said Defendants in  
 consideration thereof agreed to accept & pay the  
 said Bill of Exchange for Mrs. Thompson and  
 fifty Dollars & money for out By means of  
 which said promise the said defendants then  
 & there became liable and being so liable under-  
 took & promised to accept the said Bill of Ex-  
 change when thereafter presented to them



<sup>6</sup>/<sub>4</sub>  
(19)

for acceptance, and to pay the same at maturity.

And the said Plaintiff avers that afterwards to-wit: on the ninth day of August, 1861, at Chicago, the said Bill of Exchange, was duly presented to the said defendants by the said Plaintiff & that the said defendants were duly and lawfully requested to accept the same, which they the said defendants then & there refused to do, and although the said Bill of Exchange has long since become due & payable, and although the said defendants have often since the same become so due and payable, been requested to pay the same to the said Plaintiff, yet the said defendants, to pay the same or any part thereof have ever since wholly neglected and refused, & still do neglect and refuse, & therefore the Plaintiff brings suit &c.

Walter Newberr Dexter

Plaintiff

Def's atty.

To the Comers of the State Bank of New York

For money lent and advanced

" Money paid out & expended

" Money had & received for the use & paid for

" Goods wares & Merchandise sold & delivered

" Labor & services

" Balance due & account stated,

\$ 300,00

\$ 300,00

\$ 300,00

\$ 300,00

\$ 300,00

\$ 300,00



(20)

And thenceforward until on the day and  
year aforesaid, there issued out of the Clerk's  
office of the said Court the Proper writ of  
Summons, which with the return of the Sheriff  
endorsed thereon, is in the words & figures following  
to wit:

State of Illinois ? The People of the State  
County of Cook 1<sup>st</sup> of Illinois To the Sheriff  
of said County Greeting,  
We command you that you summon David  
A. Jones and Charles M. Brewster if they  
shall be found in your County, personally to be  
and appear before the Superior Court of Chicago  
of said Cook County, on the first day of the  
next term thereof to be holden at the Court  
House in the City of Chicago in said Cook  
County, on the first Monday of December next,  
to answer unto the correct Bluff Branch  
of the Bank of Iowa in a plea of trespass  
on the case on injuries to the damage of said  
Plaintiff as it says in the form of three  
thousand Dollars

And have you then and then met with  
any endorsement thereon in what manner you  
shall have executed the same.

Place

Wm. Waller is Clerk of said Court  
and the seal thereof at Chicago in said County  
10<sup>th</sup> day of Nov. 1881 Walter Waller Clerk



proved by reading this writ to do within named  
defendant, David A Jones. this 22<sup>d</sup> day of Novem.  
br. 1861. do return defendant; not found in my country  
Anthony to the sheriff  
by John W. Nelson Deputy,

And afterwards to wit on the Twenty first day of  
the month of year aforesaid, the said David  
A. Jones & Charles M. Cullerton, by Amington  
& Dent their attorneys, filed in the said Clerk's  
office of said court their appearance in mi-  
ning which is in words and figures following  
to wit,

In the Supreme Court of the State of Iowa  
To the December Term thereof A.D. 1861.  
The Commerce Bluff Branch of the  
State Bank of Iowa

vs  
Daniel A. Jones and  
Charles M. Cullerton

In answer to

The appearance  
of said defendants is hereby entered and service of  
process is waived and the case shall stand as  
said defendants shall plead as if such process  
had been served

Amington & Dent

Deft. attys.  
And afterwards to wit on the 1<sup>st</sup> day of Dec-  
ember in the year aforesaid the said defend.



ans. by Amington & Dent. their attorneys filed  
in the Clerk's Office of said Court. This contains  
affidavit of merits and plea, which are in  
words and figures following to wit:

Daniel & Jones vs. Charles M. Culbertson

ad.  
The Commercial Branch of the State Bank of Iowa  
In the Superior Court of Chicago

State of Illinois? vs  
Cook County? vs Daniel & Jones. Charles  
M. Culbertson being duly sworn, say on oath  
that they are the defendants aforesaid and that  
they believe they have a good defense to said suit  
on the merits. Daniel & Jones

Subscribed and sworn to before me  
this 4th day of  
Dec. A.D. 1861

Alexander Hutto. A.P.

Dece 5

State of Illinois? vs  
Cook County? vs  
Daniel & Jones  
Charles M. Culbertson  
ad.  
Superior Court of Chicago  
December Term A.D. 1861.

The Commercial Branch  
of the State Bank of Iowa  
And now come the said defendants by Amington &  
Dent. their attys and defend the foregoing

In Absentia



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(23)

where and say actions. Because they say they did not undertake or promise in manner and form as said plaintiff has in its declaration complained against them and of this they put themselves upon the Country &c.

And afterwards to wit on the Tenth day of March in the year of our Lord one thousand Eight hundred and sixty two the same being one of the days of the March term of said Court, the following among other proceedings were had and entered of record in said Court to wit the Council Bluffs Branch of the State Bank of Iowa

<sup>vs.</sup> <sup>Respondent-</sup>  
David A. Jones and Charles McCreyston

This day comes said plaintiff by Walter Taw Ammon & Dexter its attorneys and the said defendants by Livingston Deet. their attorneys also come. And on motion of plaintiff's attorneys it is ordered that leave be and is hereby given to amend declaration and thereupon on like motion of defendant's attorneys it is ordered that defendants have leave to amend their pleas herein. <sup>habeantur</sup>

And afterwards to wit on the Twenty Tenth day of June in the year of our Lord one thousand Eight hundred and sixty three the said Council Bluffs Branch of the State Bank of Iowa by Walter & Dexter filed their certain demand to pleas of the said defendants



ordered that defendants, have leave to amend their  
pleas herein. directed

And afterwards took on the Twenty Fourth day of  
June in the year of our Lord one thousand Eight Hundred  
and sixty three the said Council Bluffs Branch of  
the State Bank of Iowa by Walker & Dexter. filed their  
certain demurrer to pleas of the said defendants  
Jones and Culbertson. which in words and figures fol-  
lowing to wit

Superior Court of Chicago

State of Illinois } ss  
County of Cook }

The Council Bluffs Branch of the  
State Bank of Iowa

vs  
Complaint

Daniel A Jones and Charles W Culbertson

And do said plaintiff by Walker & Dexter. In attorney as to the pleas by the  
said defendants by them first and eightly above pleaded wherein of does  
have put themselves upon the country do the like

Walker & Dexter Atty for plff

And do said plaintiff by Walker & Dexter In attorney as to the said pleas by the said  
defendants by them secondly & thirtiently inclusions above pleaded and to each of them re-  
spectively say. that do same and the matters and things therein contained in manner  
and form as the same are therein stated and set forth are not sufficient in law to bar  
or preclude the said plaintiff from having or main taining the aforesaid action  
of against the said defendants and that the said defendants are not bound by law  
to answer the same. and that the said plaintiff is ready to verify the same by reason  
of the non performance of said pleas. from do secondly & thirtiently, inclusions in this behalf do said  
plaintiff pray judgment and damages by reason of the non performance of the said pleas, promises  
and undertakings in the said declaration mentioned to be adjudged to it. And do said  
plaintiff according to the form of the Statute in such case made and provided  
and shall take the Court here the following cause of demurrer to the pleas and each  
of them respectively, to wit that the failure of consideration alleged in said pleas



or not sufficient in law to discharge the said defendants from their  
undisputed claims as in said declaration is alleged.  
2<sup>nd</sup> That the partial failure of consideration, alleged in said pleas, is  
not sufficient in law to discharge the said defendants from the promises in said declaration alleged.  
3<sup>rd</sup> That the matters of account set forth in the said pleas do not in law constitute a defence  
to the cause of action declared by said declaration.

4. That said pleas are double setting forth two separate defences in the same pleas.

5. That the said pleas purport to set up a total failure of consideration and only show a partial failure.

6<sup>th</sup> And also that the said pleas and each one thereof are in other respects uncertain, informal and  
insufficient.

Walker & Dexter Attys for plffs.

And afterwards to wit on the Twelfth day of October in the year aforesaid the same  
being one of the days of the October term of said Court the following among other  
proceedings were had and entered of record in said Court.

The Commercial Branch of the State Bank of Iowa,

vs.

assumpsit.

David A. Jones and Charles M. Quebret on

This day came said plaintiff by Walker & Dexter his attorneys and said  
defendants by \_\_\_\_\_ their attorneys also came and do cause coming  
on to be heard upon the demurrer to the pleas filed herein and Counsel being  
heard thereon and the Court being fully advised in the premises it is ordered  
by the Court that the demurrer be sustained with leave to defendants to amend  
their pleas by coming in of the Court on Thursday morning next.

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by Conington & Deut their attorneys filed <sup>in</sup> ~~the~~ said  
to their office of said Court, their certain pleas  
which are in Words and figures following to-wit:  
Daniel A Jones and  
Charles M Coultrane

<sup>as</sup>  
The Commers Trust Branch  
of the State Bank of Iowa

Inassumpset

Defendants by leave  
of the Court. amend their second plea bring the  
first special plea, so as to make the same read  
as follows.

And the said defendants for a further plea in  
their behalf. as to the first second, third, and seventh,  
counts of the declaration respectively say that the  
sole and only consideration for the supposed pro-  
mise of the said defendants said counts re-  
spectively, mentioned was that the said Green &  
Store then and there bought at the time and place  
in that behalf in the said counts respectively  
mentioned undertook and promised to and with  
the said defendants that the rate on each of  
said counts respectively mentioned and which  
were to be sold hereafter as soon as should be &  
amount should up in the sale of the same  
net Fifty Eight Annals Dollars over and above  
all charges thereon and that upon examination  
of the books of account pertaining to the same.



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on business in said amounts respectively mentioned above would and should be found to be owing to the said Green & Stone at least three thousand Dollars for their share of the net profits in the business, and as their interest in the business in the business and on the assets to be divided the amount of said net profits in - (less and assets being then and there common to the said defendants whereupon said defendants considering no said promises of the said Green & Stone and for no other consideration made said supposed promises and inducements on the part of the said defendants and they further say that afterwards as soon as was convenient took on the 5<sup>th</sup> day of August A.D. 1861, at Chicago aforesaid they sold the said oats for the best price that could be obtained therefor and that the same did not net forty eight hundred Dollars, as aforesaid but so little much less (over) Two hundred Eighty Eight dollars and twenty five cents less than that sum. And the said defendants further aver that an examination of the books aforesaid was duly had as soon as was practicable but on the day and year last aforesaid at said city and that it was not found thereby nor was it the fact that the share of the said Green & Stone in the net profits of said business was



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then interest on the business and the assets due  
of. amounted to three thousand dollars at the time; of  
the making of the promise of aid or at any  
time thereafter. But on the contrary thereof it  
appears from said examination and was then  
and there the fact that at the making of said  
several promises and at said several times of re-  
said the share of said Green & Stone in the net  
profit of said business and then said interest  
thereon and on said assets amounted to no more,  
than fifteen hundred dollars. And the said  
defendants further aver that afterwards at the ma-  
turity of the same look at Chicago of said  
the said defendants, paid each of the two drafts  
mentioned in said first record. and two months  
later for \$3000. and \$2800. respectively  
which said two drafts said defendants for  
the consideration of said aid had agreed to pay,  
as in said Comts. respectively and which  
said drafts amounted to more to wit. Eighty &  
Eight Dollars and twenty one cents more than the  
net proceeds of the sale of said oats and the share  
of said Green & Stone in the net profit of said  
business and on the assets and busi-  
ness itself, and the said defendants further say  
that as soon as it could be ascertained what  
owed to be allowed for said oats, and what was  
coming to the said Green & Stone for their share



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of the net profits of the Commission business and assets, both on the 9<sup>th</sup> day of August A.D. 1861, at Chicago aforesaid and before the supposed promise to accept or pay the Bill of Exchange, in each of said Comts mentioned as being held by the said Plffs. came to the knowledge of the said plaintiff that the said defendants gave notice to the said Green & Stone of the aforesaid failure or the consideration of the supposed promises of these defendants, in said Comts respectively mentioned, and that these defendants, should not accept or pay the said last mentioned Bill of Exchange which at the same refusal to accept the same in said Comts respectively, supposed. And that the said defendants are ready to verify. Wherefore they pray Judgment;

3, And for a further plea in this behalf as to the first second and third Comts respectively said defendants say that the sole and only consideration for the several supposed promises of the said defendants in said Comts respectively mentioned was that the return in said Comts respectively refused to should upon sale of the same which was to be made within a reasonable time net the sum of Forty Eight Thousand Dollars and that upon examination of the books pertaining to the Commission business in said Comts respectively named or refused to, it would appear as the said Green &



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Stone, then and then deceitfully represented to these defendants that the interest of said Green & Stone in said business and their share of the assets and profits of the same, amounted to at least three thousand dollars to wit on the 1<sup>st</sup> day of August A.D. 1861 at said time the substance of which said representation was then & there mentioned to the said defendants verbally and by means of said representation said debt was received & made.

And the said defendants further avers that the said debts were afterwards and within a reasonable time to wit on the fifth day of August A.D. 1861 at said place sold for the best price that could be obtained & disposed of and did not as net the sum of \$4800 but netted the sum of \$4211.71 only and that an examination of said books was then and there had so that it did not then and there appear therefrom nor was it the fact that at the making of said representation or at anytime thereafter the share of said Green & Stone in the net profits of said Commission business and their interest in the business and said assets amounted to the sum of \$3000 as they had so intently represented but on the contrary. True it was then and there found on such examination and was the fact that at said several times their share of the net profits and of the assets and interest of said firm amounted to no more than the sum of \$1500. And the said defendants further say that by means of the premises of said the Commission



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for the said several supposed promises of the said defendants failed to more than the amount of the supposed Bill of Exchange in said Combs respectively mentioned as being held by said plaintiff whereby no part of said consideration was left to be applied on said bill of Exchange. after the payment by these defendants as herein after stated of the two other Bills of Exchange in each of said Combs respectively mentioned and the said defendants also aver that as soon as the failure of the consideration as aforesaid could be ascertained and before the said several supposed promises of the said defendants had become known to the said plaintiff or had been communicated to them the said defendants went on the 5<sup>th</sup> day of August. A.D. 1861 at Muscatine to meet at Chicago aforesaid gave notice to the said plaintiff through the said Green & Stone then and then agents of the said plaintiff on that behalf of the failure of the consideration as aforesaid and that these defendants could not therefore accept the Bill of Exchange in each of said Combs respectively supposed to have been then and there held by the said plaintiff. And the said defendants further say that afterwards to wit at the maturity of the said other two bills of Exchange in each of said Combs respectively mentioned met at Chicago & aforesaid they the said defendants paid said two drafts in each of said Combs respectively men.



times. And the said defendants are ready to  
verify. Wherefore they pray judgment &c.  
The fourth plea amended so as to make  
the same apply to the first second third and fourth  
Counts and by inserting the words "which said  
representation was then and there false and fraudu-  
lent and so known to the said Green & Stone."

David A Jones &  
Charles M. Culbertson.

ad.

The Council Bluffs Branch  
of the State of Bank of Iowa

for respondent.

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And said defendants  
for a further plea, in this behalf as to the first second  
third and seventh Counts respectively say that at  
the making of the promise of said defendants in said  
Counts respectively mentioned an interview was had  
had between said Green & Stone of the one part and  
said defendants represented by Defendant Culbertson  
on the other part. which interview was so had in  
the absence of the books relating to a certain comm-  
ission business before then carried on by said defendants  
and in which said Green & Stone had an interest and  
said Green & Stone then and there represented that ac-  
cording to said Books the share of said Green &  
Stone in the net profits of said business then coming  
to them amounted to at least \$3000. &c taking into



consideration in estimating said profits the available assets of the said Partnership enterprise in which said Green & Stone were so interested & which said representation was false and fraudulent and so known to the said Green & Stone and the said Green & Stone then and there also understood and promised that cutaneous of said Green & Stone & then in the hands of said defendants at Chicago for sale on Commission and which were to be sold at a convenient time thereafter should net forty eight thousand Dollars over and above all charges on the same. in consideration of which said representation and promise of said Green & Stone the said defendants not knowing to the contrary of said representation but relying on said representation and promise and for no other or different consideration understood and promised as in said three counts respectively stated And said defendants further aver that said books relating to said Commission business in which said Green & Stone had so been interested did not show nor was it the fact that the share of said Green & Stone in the net profits of said Commission business coming to them at the time of said agreement amounted to \$3000.00 taking into consideration the available assets of said Partnership enterprise in which said Green & Stone had so been interested but on the contrary such share of said Green & Stone in the net profits



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of said business then coming to them amounted to  
no more than \$1888 <sup>29</sup>/<sub>100</sub> And said defendants further  
are that as soon as was convenient after the making  
of the agreement aforesaid on the fifth day  
of August A.D. 1861. at Chicago of said said oats  
were sold by said defendants for the best price that  
could be obtained for them and that the same did  
not net \$4,800. <sup>00</sup>/<sub>100</sub> over and above all charges on  
the same but on the contrary the same only netted  
\$4211 <sup>21</sup>/<sub>100</sub> over and above all charges on the same.

And said defendants further are that afterwards  
upon the maturity of the same at Chicago of said  
they paid and took up two of the drafts in each of  
said three first counts specified to wit the drafts  
for \$3000. <sup>00</sup>/<sub>100</sub> and \$2800. respectively and that by  
reason of the failure as of said of the considera-  
tion of the premises of these defendants in said three  
counts mentioned, no part of said consideration  
remained in the hands of these defendants from  
which to pay the other draft in each of said  
three counts specified

And thus the said defendants are ready to verify  
Wherefore they pray Judgment &c.

5. And for a further plea in this behalf as to all but  
Eighty <sup>08</sup>/<sub>100</sub> dollars of the plaintiffs demand. in each  
of the special counts mentioned said defendants  
say that the sole and only consideration of the same



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(attorneys of said defendants. in said counts respectively specified was that said Green & Stone at the time and place of the making of said supposed undertaking promised to and wrote said Defendants, that certain oats of said Green and Stone, then in the hands of said defendants at Chicago aforesaid for sale on commission for said Green & Stone, and which were to be sold at some convenient time thereafter should net \$4800<sup>00</sup> over and above all charges thereon and that said Green & Stone then and there represented, that they knew the state of accounts connected with a certain lumber firm known & before then carried on in the name of said defendants and in which said Green & Stone had an interest and that the share of said Green & Stone in the profits of said lumber and commission to them on account of such profits was at least two thousand dollars. and said defendants made said supposed promises on their part solely on the faith of said promises and representations of said Green & Stone. And said defendants further say, that as soon after said time as was convenient took on the 5<sup>th</sup> day of August A.D. 1861. at Chicago aforesaid they sold said oats for the best price that could be obtained therefor and that the same did not net \$4800<sup>00</sup> over and above all charges thereon but only netted \$4211<sup>74</sup> over and above such charges.



And said defendants also aver. that in truth and in fact. there was not at the time of the making of said undertakings coming to the said Green & Stone on account of their share in the profits of the Commission business aforesaid. the sum of. \$3000<sup>00</sup>. nor did the share of said Green & Stone in such profits amount to that sum. nor did the same amount to more than \$1668.<sup>37</sup> And said defendants further say that by means of the premises aforesaid the Commission for their said promises and undertakings in each of said three Commts specified failed to the amount of. \$1919<sup>92</sup>

And said defendants further say that afterwards but at the maturity of the same. at Chicago aforesaid they paid and took up. two of the drafts in each of said three Commts mentioned the same being respectively for \$3000.<sup>00</sup> \$2000<sup>00</sup> and that as soon as the failure of the Commission aforesaid could be ascertained but on the 5<sup>th</sup> day of August A.D. 1861 at Muscatine Iowa at Chicago aforesaid said defendants gave notice to the said Green & Stone and the said Plaintiff also then and there had notice that the Commission for the defendants said several supposed promises had failed as aforesaid and that said defendants would not therefore accept the Bill of Exchange in each of said Commts then and there supposed to have been held by said Plaintiff. And that



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the said defendants are ready to verify Murphy  
they pray judgment &c.

6 And for a further plea in this behalf as to all  
but Eighty & <sup>00</sup>/<sub>100</sub> Dollars of the said plaintiffs  
demand in each of the several Counts respectively  
mentioned said defendants say that the sole  
and only consideration for the making of said supposed  
promises on their part in each of said Counts respec-  
tively specified was that at the time and place of the  
making of the same said Green & Stone under-  
took and promised to and with said defendants  
that certain sets of said Green & Stone then in  
the hands of said defendants for sale on com-  
mission and which were to be sold at Chicago  
aforesaid at some convenient time thereafter  
should upon sale of the same as aforesaid net <sup>24500</sup>/<sub>100</sub>  
over and above the charges on the same and also  
the said Green & Stone then and there undertook  
and promised to and with said defendants that  
upon examination of the books pertaining to the  
business and as a matter of fact it should be  
found that the share of said Green & Stone and  
which would then be coming to them for and  
on account of the profits of a certain Commission  
business before then carried on by said defendants  
and in which said Green & Stone had an  
interest, amounted to about three thousand dollars  
and the said defendants then and there relying



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(plea)

on said promises of said Green & Stone in this  
Commt mentioned, and for no other consideration  
whatever made said supposed promises on the  
part of said defendants in each of said special  
Commts mentioned, if any such promises there were.

And said defendants further avr. that afterwards  
as soon as was convenient but on the 3<sup>rd</sup> day of  
August A.D. 1861. at Chicago aforesaid they sold  
said oats for the best price that could be obtained  
therefor and that the same did not net \$4,800.<sup>00</sup>  
over, and after all charges on the same but on  
the balance thereof is netted no more than \$421.<sup>27</sup>

And said defendants further avr. that it was  
not found upon examination of the books put up-  
ping to the Commpin business aforesaid which had  
then come on by said defendants and in which  
said Green & Stone had an interest that the  
share of said Green & Stone in the profits of  
said business then coming to them was about  
\$3000. nor was it the fact that the share of  
said Green & Stone in such profits then amount-  
ed to about said sum. nor did the same amount  
to more than \$668.<sup>37</sup>/<sub>100</sub>. And said defendants further  
avr. that after the making of said supposed pro-  
mises on their part in each of said Commts men-  
tioned look at the maturity of the two drafts for \$3000.<sup>00</sup>  
and \$2800.<sup>00</sup> respectively in each of the first second  
third fourth and seventh Commts respectively specified



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that at Chicago aforesaid they did said defendants  
paid and took up each of said drafts which two  
drafts for the sum of \$3000<sup>00</sup> and \$2800<sup>00</sup> respec-  
tively in each of said Compts specified had been &  
accepted by said defendants, before the making of their  
said several supposed promises to accept or pay  
the other Bill of Exchange in the Special Compts  
respectively mentioned. and which said two first  
mentioned drafts in each of the first second &  
third fourth and seventh Compts respectively  
named were to be paid by these defendants  
in consideration of the promises and undertakings  
of the said Green & Stone in this plea above  
mentioned. the agreement in the premises on the  
part of said Green & Stone, and of the said defend-  
ants, being in this plea, above set forth and con-  
stituting the same supposed promises and under-  
takings of the said defendants in the Special Compts  
respectively mentioned. And thus the said defend-  
ant is ready to verify. Wherefore they pray judgment.

8<sup>th</sup>. And for a further plea in this behalf as to the fourth  
fifth and sixth Compts of the declaration said de-  
fendants say that they did not undertake or per-  
form in manner and form, as the said plaintiffs have  
in said Compts complained against them and of  
this they put themselves upon the Country &c.



And for a further plea in this behalf as to each of the Counts of the declaration. Except the fourth said defendants say that the sole and only consideration for the supposed promises and undertakings on their part in said Counts Except: the fourth thing respectively stated, was, that at the making thereof to wit on the first day of August A.D. 1861. to wit at Muscatine in the State of Iowa, said Green and Stone bargained with these defendants to relinquish to these defendants all claim of whatever kind which the said Green & Stone then had in and to the assets credits property and effects which had arisen or grown out of a certain Commission business before then carried on in Chicago Illinois in the name of Jones and Culbertson for themselves jointly with said Green & Stone or which belonged to the partnership & composed of the defendants and said Green & Stone and also that day the said Green & Stone then and there transferred to said defendants certain notes then held by the said defendants for said Green & Stone for sale on commission the estimated worth of which was then and there \$4800<sup>00</sup> in consideration of all which the said defendants were to pay two certain Bills of Exchange before then accepted by them for the said Green & Stone. one for \$3000<sup>00</sup> the other for \$1800<sup>00</sup>. being the same mentioned in the first second third fourth and seventh Counts



respectively and also to accept and pay the other  
 Bill of Exchange in the special Combs respectively  
 mentioned which is the same promise and undertaking  
 of these defendants in each of said special Combs  
 of the declaration specified. And the said defend-  
 ants further aver that the books pertaining to said  
 Corruption business began then carried on in Chi-  
 cago as aforesaid were not present nor accounted  
 at the making of said agreement and the said  
 Green & Stone then and there falsely and deceitfully  
 represented to said defendants that they the said  
 Green & Stone knew the state of the affairs per-  
 taining to said Corruption business, and that  
 there was then coming to the said Green & Stone  
 not less than three thousand Dollars for their  
 share of one half of the net profits of said Cor-  
 ruption business. And the said defendants fur-  
 ther say that relying upon said representation,  
 not knowing to the contrary thereof but laboring  
 under mistake as to the facts which said mistake  
 was induced by the aforesaid representation of  
 said Green & Stone and for no other consideration  
 the said defendants made the several promises  
 in them put in the declaration except in the  
 fourth Combs thereof specified. And the said  
 defendant further in fact say that at the time  
 of the aforesaid agreement between said Green  
 & Stone and these defendants the said Bill of Ex-



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change in said declaration except the said  
sums. Count three of supposed to be due to the said  
Plaintiffs was held by said plaintiffs and their  
the same was not received or taken by said plai-  
tiffs on the faith of any contract promise or agree-  
ment on the part of said defendants, and the  
said defendants further say that the aforesaid  
representation of the said Green & Stone that there  
was but at the time just in this plea mentioned  
coming to the said Green & Stone at least, three  
thousand Dollars for their share or one half of  
the net profits of the Commission business of the  
said before them or carried on in the name of  
Jones & Robertson was not true but on the  
contrary that there was not then coming to the  
said Green & Stone more than the sum of five  
hundred Dollars for their share of or one half  
of the net profits of the said Commission business  
wherefore these defendants say that the con-  
sideration of the said supposed promises on the  
part of these defendants in each of said species  
Counts specified has failed to more than the  
amount in said Counts respectively supposed  
to be due on the Bill of Exchange in said Counts  
supposed to be due to the said plaintiffs, and  
the defendants aver that after the making  
of the aforesaid undertaking with said  
Green & Stone, to wit at the maturity of



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said drafts for \$3000. and \$2800. respectively at  
said Cornish said defendants paid said drafts &  
for these amounts respectively. And that the said  
defendants are ready to verify. Wherefore they  
pray judgment &c.

10 And the said defendants for a further plea in  
their behalf as to two thousand dollars of the plain-  
tiff's demand. in each of the Counts of the declara-  
tion, except the fourth Count specifies say-  
ing that the sole and only consideration for the sup-  
posed promises and undertakings on their part  
in said Counts except the fourth Count thereof  
respectively stated was that at the making thereof  
first on the first day of August. A.D. 1861. first at  
Muscatine in the state of Iowa said Green &  
Stone bargained with these defendants to relin-  
quish to these defendants all claim of what-  
soever kind which the said Green & Stone  
then had on and to the assets credits property  
and effects which had arisen or grown out of  
a certain Commission business before then car-  
ried on in Chicago Illinois in the name of  
Jones & Caldwell for themselves jointly with said  
Green & Stone or which belonged to the partnership  
composed of the defendants & said Green &  
Stone and also that they the said Green & Stone  
then and then transferred to said defendants, certain



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oats, then held by said defendants for said Green  
& Stone, for sale on Commission the estimated worth  
of which was then and there \$4800, in consideration  
of all which the said defendants were to pay two  
certain Bills of Exchange, before then accepted, by  
them for the said Green & Stone, one for \$300.  
and the other for \$280. being the same men-  
tioned in the first second, third sixth and seventh  
Counts respectively and also to accept and pay the  
other Bill of Exchange in the special Counts,  
respectively mentioned which is the same promise  
and undertaking of these defendants in each of  
said special counts of the declaration specified.  
And the said defendants further aver that the books  
pertaining to said Commission business before  
then so carried on, in Chicago as aforesaid were  
not present nor accessible at the making of  
said agreement. and the said Green & Stone then  
and then falsely and deceitfully represented  
to said defendants that they the said Green & Stone  
knew the state of the affairs pertaining to said  
Commission business and that there was then  
owing to the said Green & Stone, not less than  
three thousand Dollars for their share or one  
half of the net profits of said Commission business.

And the said defendants further say that, &  
relying upon said representation not knowing  
to the contrary direct but laboring under mistake



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as to the fact which said mistake was induced  
by the aforesaid representation of said Green & Stone  
and for no other consideration the said defendants  
made the several promises on their part in the  
declaration except in the fourth count thereof spe-  
cified. And the said defendants further in fact  
say that at the time of the aforesaid agreement  
between said Green & Stone & these defendants,  
the said Bill of Exchange in said declaration  
except in said fourth count thereof supposed to be  
due to said plaintiffs was held by said plain-  
tiff, and that the same was not received or taken by  
said plaintiff on the faith of any contract, promise  
or agreement on the part of said defendants. And  
the said defendants further say that the aforesaid  
representation of the said Green & Stone that there  
was work at the time first in their plea mentioned  
coming to the said Green & Stone at least three  
thousand Dollars for their share or one half of  
the net profit of the commission business aforesaid  
before then so carried on in the name of <sup>joint</sup> partnership  
was not true. And said defendants further say  
that the said representation of the said Green & Stone  
was untrue in that there was not coming to  
the said Green & Stone three thousand dollars  
for their share or one half of the net profit of  
the commission business aforesaid but was so  
coming to them on said account no more than



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the sum of one thousand dollars, the same being  
two thousand dollars less than the said Green &  
& Stone represented. And said defendants fur-  
ther say that afterwards but at the maturity of  
each of the drafts for \$300. and \$280. respectively  
in the declaration except the fourth and fifth Com-  
mits, thereof, specified but at the maturity of  
each of the drafts last named respectively  
but before the other Bill of Exchange in each Commit-  
of the declaration except the fourth and fifth Com-  
mits specified was presented to said defendants for accept-  
ance and payment respectively. And the said  
defendants further say that by means of the premises  
aforesaid the consideration for the supposed promise  
of these defendants in each Commit of the declaration  
except the fourth Commit specified has failed to a  
large amount to wit: Two Thousand Dollars and  
that the said consideration except as to said amount  
was applied towards paying and satisfying said  
drafts for \$300. and \$280. respectively which  
by the terms of the contract of aforesaid were to be  
paid by the said defendants. and which before  
the making of the said contract had been accepted  
by the said defendants at the request of the said  
Green & Stone. And the said defendants further  
aver that before and at the time of the supposed  
promise and undertakings of the said defen-



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into in said special Comts mentioned became known to the said plaintiffs, the said plaintiffs writ on the 3<sup>rd</sup> day of August, A.D. 1861, at Muscatine Iowa writ at Chicago aforesaid had notice that the consideration for said supposed promises and undertakings of said defendants was as in this plea above stated. And defendants further aver that the supposed acceptance by them of the Bill of Exchange in each of the special Comts supposed to have been filed by the plaintiffs (if any such acceptance there was) was made before the failure of the consideration as aforesaid became known to the defendants. And thus the said defendants are ready to verify wherefore they pray judgment &c.

11. And for a further plea in this behalf as to a part writ & for: of the plaintiffs demand in each of the fifth and sixth Comts of the declaration mentioned said defendants say that the sole and only consideration for the supposed promises and undertakings on their part in said Comts, except the fourth clause of respectively stated was that at the making thereof writ on the first day of August, A.D. 1861, writ at Muscatine in the State of Iowa said Green & Stone, bargained with these defendants to relinquish to these defendants all claims of whatsoever kind which the said Green & Stone then



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had, in and to the assets, credits properly, and effects, which had arisen or grew out of a certain commission business before then carried on in Chicago Illinois in the name of Jones & Culbertson for their selves jointly with said Green & Stone or which belonged to the copartnership composed of the defendants and said Green & Stone and also that they the said Green & Stone then and there transferred to said defendants <sup>certain notes then held by said defendants</sup> for said Green & Stone for sale on commission the estimated worth of which was then and there \$4800. in consideration of all which the said defendants were to pay two certain bills of Exchange upon then accepted by them for the said Green & Stone one for \$800. the other for \$2800 being the same mentioned in the first second third sixth and seventh Comts respectively, and also to accept & pay the other Bill of Exchange in the special Comts respectively and mentioned which is the same promise and undertaking of these defendants in each of said special Comts of the declaration specified. And the said defendants further aver. that the books pertaining to said commission business before then so carried on in Chicago as aforesaid were not present nor accessible at the making of said agreement and the said Green & Stone then and there falsely and deceitfully represented to said defendants that they the said Green & Stone knew



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the state of the affairs pertaining to said commission  
business and that there was then coming to the  
said Green & Stone not less than three thousand  
Dollars for their share or one half of the net  
profits of said commission business and the said  
defendants further aver that relying upon the  
said representation of the said Green & Stone not  
knowing to the contrary thereof but believing the  
same to be true, and under mistake as to the  
facts, which said mistake was induced by the  
aforesaid false representation of the said Green and  
Stone and for no other consideration the said  
defendants made the supposed promises and  
undertakings on their part in said letters and  
by the contents respectively mentioned and the said  
defendants further say that the aforesaid false re-  
presentation of said Green & Stone on the faith  
of which said promises and undertakings  
of these defendants were made, was untrue and  
that there was not at the time of said represen-  
tation coming to the said Green & Stone for  
their share or one half of the net profits in the  
commission business aforesaid the sum of three  
thousand Dollars ~~aforesaid~~, but on the contrary  
that there was not then coming to them a  
that amount more than the sum of nine  
hundred Dollars. Wherefore the said defend-  
ants say that the consideration of the supposed



promises and undertakings on their part in said fifth and sixth counts respectively, named has wholly failed and the said defendants further aver that the Bill of Exchange in said fifth and sixth counts respectively specified was held by the said plaintiff at the time of the aforesaid agreement. Between said Green & Stone & these defendants and that the same was not taken by said plaintiff on the faith of said agreement and that before and at the time of the supposed acceptance of the same the plaintiff had notice that the consideration for such supposed acceptance was as aforesaid which said consideration was not given and the same & said defendants have failed as aforesaid.

And that the said defendants are ready to satisfy wherefore they pray Judgment &c.

12. And for a further plea in this behalf as to a part but two thousand Dollars of the plaintiffs demand on the Bill of Exchange in each of the special counts of the declaration specified said defendants say that the sole and only consideration for the supposed promises and undertakings on their part in said counts except the fourth, fifth and sixth respectively stated was that at the making thereof but on the first day of August 1861. but at Muscatine in the state of Iowa said Green & Stone bargained with these defendants to



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relinquish to these defendants all claim of whatever kind which the said Green & Stone then had in and to the assets, credits, property and effects which had arisen or grown out of a certain commission business before then carried on in Chicago Illinois in the name of Innes & Leuberton for themselves jointly with said Green & Stone or which belonged to the copartnership composed of the defendants and said Green & Stone and also that they the said Green & Stone then and there transferred to said defendants certain oats then held by said defendants for said Green & Stone for sale on commission the estimated worth of which was then and there \$4800. in consideration of all which the said defendants were to pay two certain bills of Exchange before then accepted by them for the said Green & Stone one for \$3000. the other for \$1800. & being the same mentioned in the first second third fifth and seventh Counts respectively and also to accept and pay the other Bill of Exchange to the Special Comrs respectively mentioned which as the same promises and undertaking of these defendants in lack of said Special Comrs of the declaration specified And the said defendants further aver that the books pertaining to said commission business before then carried on in Chicago as aforesaid were not present nor accessible at the making of said agreement and the



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said Green & Stone, then and there falsely and de-  
cifully represented to said defendants that they  
they the said Green & Stone knew the date of the  
affair pertaining to said Commission business  
and that time was then coming to the said Green and  
Stone not less than three thousand dollars for their share  
or one half of the net profits of said Commission &  
business. And these defendants further avers that  
relying upon the said representation of the said  
Green & Stone, not knowing to the contrary things  
and believing the same to be true and under  
mistake as to the facts, which said mistake  
was induced by the aforesaid false representation  
of the said Green & Stone, and for no other con-  
sideration the said defendants made the  
said supposed promises and undertakings con-  
tained in said gifts and set to Combs respect-  
ively mentioned. And the said defendants fu-  
ther say that the aforesaid false representation  
of the said Green & Stone, on the faith of which  
said promises and undertakings of these defend-  
ants were made, was untrue and that there was  
not at the time of said representation, coming to  
the said Green & Stone, for their share or one  
half of the net profits, in the Commission business  
agreed the sum of three thousand dollars.  
And the said defendants further say that at the  
making of said representation of said Green &



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Stone & Green was not coming to the said Green & Stone for their share or one half of the net profits of said commission business more than the sum of one thousand Dollars. Wherefore these defendants pray that the consideration of the said supposed promises and undertakings of these defendants in said special counts mentioned has failed to the amount first mentioned in this plea. And the said defendants further aver that the Bill of Exchange in said fifth and sixth counts respectively specified was held by the said plaintiffs at the time of the aforesaid agreement between said Green & Stone and these defendants, and that the same was not taken, by said plaintiffs on the faith of said agreement. And thus the said defendants are ready to verify. Wherefore they pray Judgment. &c.

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And for a further plea on their behalf as to a part, to wit two thousand dollars of the plaintiffs demand in each of the 5<sup>th</sup> and 6<sup>th</sup> counts specified said defendants pray that prior to and at the time of the supposed acceptance of each of the Bills of Exchange in said counts supposed to be due to said plaintiffs said Bills of Exchange were held by said plaintiffs and that the said Green & Stone the drawers thereof acting for the premises for and in behalf of said plaintiffs to induce the acceptance of said Bills and the &



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payment by these defendants of the two other Bills of Exchange. in said 6<sup>th</sup> Count mentioned to wit on the 1<sup>st</sup> day of August A.D. 1861 at some time in the state of Iowa agreed to and with these defendants to sell and then and there did sell to their defendants a large quantity of wheat about 4000 bushels of oats then belonging to said Green & Stone and then held on store by these defendants for said Green & Stone. and the said Green & Stone then and there released to these defendants all the interest of said Green & Stone in and to the assets effects and business of the copartnership before then existing between these defendants. and the said Green & Stone in the Commission business as in the 6<sup>th</sup> Count stated. which said copartnership had been carried on in the name of Jones & Leubborn. and the said Green & Stone then and there falsely represented to these defendants that there was then coming to the said Green & Stone for their share or one half of the net profits of the Commission business of said at least three thousand dollars and that it was so shown by the books pertaining to said business which said books were then and there in Chicago of the said and not accessible at the said interview and as to the truth of the said representations the said defendants were then and there ignorant. and the said defendants bought at the time and place



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Just in this plea mentioned relying upon said re-  
presentations of said Green & Stone and being  
thereby deceived as to the facts and for no other  
cause or consideration than as herein above stated  
accepted the said Bill of Exchange in each of  
said Combs supposed to be due to said plaintiffs  
and which is the same acceptance in each of  
said Combs. stated. And the said defendants  
further aver. that the aforesaid representations of  
said Green & Stone were untrue and that there  
was not at the said time coming to the said  
Green & Stone for their share. or one half of said  
net profits the sum of three thousand dollars  
nor was it so shown by said books but on  
the contrary thereof there was then coming to  
the said Green & Stone on account of. or for  
their share of such net profits, only a small &  
amount. about \$1000.<sup>00</sup> that is to say. two  
thousand Dollars less than was so represented.  
And said defendants further say. that  
afterwards and before the maturity of said  
last mentioned Bill of Exchange and before said  
Bill was presented by said plaintiffs to these de-  
fendants. (omit on the first day of August. A.D.  
1861. at Chicago aforesaid they paid said two  
other Bills of Exchange. in said & the Combs spe-  
cified the same being for \$2800 and \$3000  
respectively. And the said defendants <sup>further</sup> say.



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that by reason of the premises aforesaid the ex-  
pensation for their supplies promises and undertakings  
in each of said facts and a sixth count specified  
has led to a large amount. Contributions and ad-  
vances. And this the said defendants are ready to satisfy.  
Wherefore they pray judgment &c.

And after and to wit on the seventh day of December  
in the year aforesaid, the said plaintiff by  
Walker & Dexter its attorneys files in the Clerk's  
office of said Court. their certain demand to  
pleas which is in words and figures follow-  
ing to wit, Superior Court of Chicago  
State of Illinois } ss. December Term A.D. 1881.  
County of Cook }

The Council Bluffs Branch of the State Bank of Iowa

vs.  
Charles W. Robertson and David A. Jones.

And the said plaintiff as to the said special  
pleas of the said defendants by them above pleaded  
and to each one of said special pleas respectively  
saith that the same and each of them and  
the matters therein contained respectively  
in manner and form as the same and each  
of them are above pleaded and set forth are  
not nor are either of them sufficient in law to  
bar or preclude the said plaintiff from having  
or maintaining the aforesaid action thereof.



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against them the said defendants and that  
if the said plaintiffs is not bound in law, however  
the same or either of them, and that if the said  
plaintiffs is ready to verify. Therefore for want of a  
sufficient plea in this behalf if the said plaintiffs  
prays judgment and its damages by reason of the  
non performance of the said several promises and  
undertakings in the said declaration mentioned  
to be adjudged to him &c

And the said plaintiffs, according to the form of  
the Statute in such case made, and provided  
states and shews to the Court. here the following &  
causes of demurrer to the said special pleas,  
of the said defendants, and to each one of them  
respectively that is to say,

1<sup>st</sup> That said pleas, do not set up such a total  
failure of consideration in law, as is sufficient to  
discharge the said defendants from their under-  
takings in said declaration alleged against  
them.

2<sup>d</sup>. That these pleas and each of them which  
attempt to set up a partial failure of consideration  
do not shew, or set forth facts sufficient in law  
to discharge the said defendants from their promises  
and undertakings in said declaration alleged  
nor do they shew, wherein and to what extent  
the consideration has failed.

3<sup>d</sup>. That said pleas, and each of them commence



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or purport to be pleas of partial failure in the  
Commencement. And conclude as pleas of total  
failure of consideration.

4<sup>th</sup> That said pleas attempt to set up fraud  
& warranty, but do not set forth sufficient &  
sufficient facts to show either fraud or warranty.

5<sup>th</sup> That the matters and things in said pleas  
and each of them set forth do not in law &  
constitute, a defense to the cause of action &  
set forth in the declaration.

6<sup>th</sup> That said pleas and each of them are in  
other respects informal uncertain and insuffi-  
cient.

Walter Dexter Atty for Plff,

And afterwards to wit on the Eighth day of the  
month and year last aforesaid the same being  
one of the days of the December Term of said  
Court. the following among other proceed-  
ings were had and entered of record in said  
Court. to wit

The Commerce Bluff Branch of the State Bank of Iowa

vs  
David S. Jones and Charles W. Creston

And now again come the parties to this  
Cause and by agreement of Council, made  
now here in open Court. it is ordered that

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that all former orders as to the validity of pleading  
in this Cause are suspended and superseded and  
pleas and demurrers thence to be adjudicated as  
new as if such orders had not been made as  
to the validity of such proceedings

And afterwards Court on the Twentieth day  
of the month and year aforesaid, and being  
still one of the days of the December Term of  
said Court the following among other proceedings  
were had and entered of record in said Court  
Court:

The Common Pleas Branch of the State Court of Iowa  
4.8 assigned

David A Jones and Charles M. Culbertson

And now again come the parties to this Cause  
by their attorneys as aforesaid and this Cause  
coming on now upon the several demurrers  
of said Plaintiffs to the several pleas of said de-  
fendants herein first secondly thirdly fourthly  
fifthly sixthly seventhly eighthly ninthly tenthly eleven-  
thly twelfthly and thirteenthly. Pleaded to plaintiffs  
declaration in said Cause and Counsel &  
being heard thereon and the Court being fully  
advised in the premises is of the opinion that  
defendants said second and sixth pleas  
are sufficient in law. the demurrer to said  
pleas is therefore hereby overruled, and that:

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said third fourth fifth sixth seventh eighth ninth tenth, Eleventh twelfth and thirteenth pleas, are not sufficient in law. the demurer to said last mentioned several pleas is therefore sustained and leave to amend said seventh, <sup>and eleventh</sup> pleas denied as defence comes "under" the general issue,

And afterwards took on the Twentieth day of the month and year aforesaid, the said Plaintiff by Walker & Dexter its attorneys, filed in the said Clerk's office of said Court, their certain replication to the pleas of the defendants, which in its words and figures following took.

Superior Court of Chicago

State of Illinois } ss.  
County of Cook }  
The Comptroller of the State Bank of Ind. }  
vs. }  
Account-

David A Jones and Charles M. Culbertson.

And the said Plaintiff as to the said pleas of the said defendants by them secondly and sixthly above pleaded, and as to each one of said pleas respectively says that to the said Plaintiff by reason of only coming by the said defendants in said pleas and in each one of them respectively alleged ought not to be barred from having and maintaining its aforesaid action during



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against the said defendants because it  
appears that the said Green & Stone did not  
under take and promise to and with the  
said defendants in manner and form as  
the said defendants have above in my said  
pleas and in each one of said pleas respect-  
ively in that behalf alleged and thus the  
said plaintiffs pray may be enquired of by  
the Court

Walter & Dexter Attorneys for

And afterwards took on the Twentieth day  
of January in the year of our Lord one &  
thousand Eight hundred and six by & in  
the same being one of the days of the January  
Term of said Court the following among other  
proceedings were had and entered of record  
in said Court to wit

The Connecticut Branch of the State Bank of Iowa  
vs  
David A Jones and Charles M Cavanaugh

This cause being this day called for trial came  
said plaintiffs by Walter & Dexter its attorneys  
and said defendants by Livingston & Dunt; their  
attorneys also came and upon agreement of the  
parties made now here in open Court this  
cause is hereby submitted to the Court for  
trial upon the issues joined therein without

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interruption of a jury and the Court now here  
after hearing evidence and without coming  
to a decision takes the matter under advisement

And afterwards went on the seventh day of March  
in the year aforesaid the same being one of the  
days of the March, then of said Court. the  
following among other proceedings were had and  
entered of record in said Court: to wit,

The Commerce Bluff Branch of the State Bank of Iowa  
vs. Accountant

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David A Jones and Charles M Culbertson

This cause being this day called for trial  
comes said plaintiff by Walker & Dexter to appear  
and the said defendants by Amington & Dent.  
their attorneys also come, and upon agreement  
of the parties made now here in open Court, this  
cause is hereby submitted to the Court for trial  
upon the issues framed herein without interruption,  
of a jury and the Court now here after hearing  
evidence and arguments of Counsel and being  
fully advised in the premises finds issues  
for said plaintiff, and awards damages  
herein against both of the said defendants  
to the sum of Two Thousand three Hundred  
and fifty one dollar and fifteen Cents.  
And the upon said defendants submit their  
motion herein for a new trial in said cause



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which is overruled by the Court. Therefore ruling  
of the Court in overruling of their said ~~last~~ motion  
for a new trial said defendants then and there  
excepted and thereupon the said defendants move  
the Court in arrest of judgment which motion  
is overruled by the Court and defendants  
then and there excepted to the ruling of the  
Court in overruling their said motion in  
arrest of judgment.

Therefore it is considered that said plaintiffs  
do have and receive of and from said  
defendants the damages of Two Thousand

\$2357.15

Three hundred and fifty one dollars and  
fifteen cents, in form as said by the Court.  
Therefrom and assessed together with the costs  
and charges in this behalf expended and have execution  
therefor.

And thereupon said defendants having further  
excepted, pray an appeal herein to the Supreme  
Court of this state from the judgment of this  
Court which is allowed to them on condition of  
filing their appeal bond in the penalty of  
Thirty five hundred Dollars with security to  
be approved by one of the judges of this Court and  
to be filed with their Bill of Exceptions within  
ten days from this day.



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And afterwards went on the Tuesday first day of  
March in the year of record the said David  
A Jones and Charles M Cullenborn by  
Springton and Dent their attorneys filed in  
the Clerk's office of said Court their Bill  
of Exceptions <sup>and appeal as Bond</sup> which was in Words and figures  
following to wit:

Superior Court of Chicago  
The Commercial Branch of the State Bank of Iowa  
Daniel A Jones vs Charles M Cullenborn

Be it remembered that on the 1st day of June 1881  
which was had before the honorable Court  
Diggins one of the judges of said Court without  
the intervention of a jury the plaintiffs agreed,  
and read the following bill of Exchange,

Twenty five days after date pay to the order of L.P.  
Lester or Cashier Two Thousand fifty  
Dollars <sup>or the value of</sup> New York Exchange Value  
Received and Change due same to account of  
J. H. Jones  
Chicago Ill

Endorsement:  
Pay D. R. Holt Esq. cash or order for collection.  
A L Dunning a cas



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State of Illinois }  
Cook County } ss, Be it Remembered that on  
the ninth day of August  
in the year of our Lord one thousand Eight  
hundred and sixty one I Melford D Buck-  
man. Notary Public duly commissioned and  
sworn. and residing in said County and State  
at the Request of D R Holt Cashier met  
with the original Bill of Exchange which  
is hereto annexed to the office of James  
Leubertson, in the City of Chicago and  
demanded acceptance thereof which was  
refused Whereupon I the said Notary  
at the request of said said Protest, and  
by these presents do, Solemnly Protest,  
as well against the drawing of said Bill of  
Exchange the indorsers thereof as all others  
whom it may or doth concern for exchange  
re exchange and all costs charges dama-  
ges and interest already incurred by reason of  
the non acceptance of the said Bill of Ex-  
change.

And I the said Notary do hereby certify  
that on the same day and year above written  
due notice of the foregoing protest was put  
in the Post Office at Chicago as follows.  
Notice for Green & Stone Mercantile Iowa  
" for A L Downing a Cashier Chicago Iowa



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Each of the above named places being the reputed place of residence of the person to whom this notice was directed

In Testimony Whereof I have hereunto set my hand and affixed my official seal the day and year above written  
W. D. Buchanan.

Fees. Noting 25, Protest & Record 50 each, 2 notaries 50, Seal 25 each. Engraving 25 each, Postage 6. 8/18

State of Illinois }  
County of Cook } ss. Be it Remembered that on the Eighteenth day of September in the year of our Lord one thousand Eight hundred and sixty one, I Milford P. Buchanan, Notary Public duly commissioned and sworn to residing in said County and State, at the request of Walter Taw Amman, of Dexter & Hunt. mts. the original Bill of Exchange of which a duplicate annexed, to Mr Jones & to Mr. Leventon members of the firm of Jones & Leventon in Chicago Illinois in and demanded payment thereof which was refused.

Whereupon I the said Notary at the request of said said Protest, and by these presents, do solemnly Protest as well against the drawing of said Bill of Exchange, the in-



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damages thereof, as all others whom it may or  
doth concern, for exchange, re exchange and all  
Costs Charges damages and interest already in-  
curred by reason of the non performance payment  
of said Bill of Exchange.

And I the said Notary, do hereby certify that  
on the same day and year above written due &  
notice of the foregoing protest, was put on the  
Post office at Chicago as follows.

Notice for Green Stone Muscatine Iowa.

for Ad. Doming & Cash, Cornice Bluff Iowa.  
Each of the above named places being the actual places  
of Residence of the persons to whom the notice  
was directed.

In Testimony Whereof I have hereunto set my hand  
and affixed my official seal the day and year,  
above written.

(Seal)

M. P. Buchanan.  
Notary Public

Fee. Noting 25, Protest & Record, 50 Cents 2 notices & ch  
seal 25 Cents Certificate 25 Cents. Postage 6, c  
Total. 1/2

Plaintiff also read in evidence the deposition  
of Joseph Richardson which is as follows,  
Just Intentionally, state your name age.



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occupation and place of residence?  
 First answer. Joseph Richardson at present Paymaster  
 Clerk in the U S Army Residing at Muscatine  
 Iowa

Second, Are you acquainted with the parties in the  
 caption of these interrogatories mentioned, or either  
 of them and which of them and state how,  
 long and when and where you have been  
 acquainted with him or them

Second answer. Have known L. C. Wood. Cash.  
 Cornett Bluffs Branch some six months  
 Daniel A. Jones and Chas. M. Leebottom, &  
 four or five years. Having just known them  
 all at Muscatine Iowa.

Third, Were you at any time acquainted with  
 one Stone, and Green. Comprising the  
 firm of Green & Stone or Stone & Green of Mus-  
 catine Iowa if yes. State when and where,  
 or how you became acquainted with them  
 how long your acquaintance continued what  
 was the style of said partnership and in  
 what business were they engaged and when,  
 and where and how long they were so enga-  
 ged. State fully and state ~~and state~~ &  
 whether you were employed by said firm and  
 how long and in what capacity?

Third answer. Have known Joseph A. Green and  
 George C. Stone of Muscatine Iowa



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Some ten years. Just I knew them in Boston  
Massachusetts during all which time they  
have been engaged in the booting business  
at Amherst Mass under the name and style  
of Green & Stone. Say until about the first  
of August 1861. I was in the employ of said  
firm as Confidential Clerk, and ceased from  
October 1859. until August 1861 the time of  
their suspension.

Q. Now, Had you any knowledge of any connection or  
relation in business between the said Green & Stone  
and the said Jones & Culbertson of year stated &  
what relation existed between them, when the same  
was entered into or formed to what business said  
relation referred where the said business  
was carried on by whose in what name? and  
how long it continued and when it ceased,  
or the said Green & Stone parted with them in-  
terest in the said business?

A. I can answer During the summer of 1861, the  
said Green & Stone entered into an agreement with  
said Jones & Culbertson for the purpose of carry-  
ing on for the front account, of said par-  
ties in the City of Chicago a general com-  
mission business under the name and style  
of Jones & Culbertson which business was  
carried on until August 1st 1861 at which  
time said Green & Stone despaired of their



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inter-<sup>est</sup> in said business to Jones & Culbertson,  
Sept. If in reply to the Amick Antenogalay you  
say that said Green & Stone were engaged  
as copartners in the Commission business in  
Chicago state where in the City of Chicago  
the said business was carried on, and in  
whose direction and control what was the  
capital stock of said copartnership, if it  
had any capital stock and if it had no  
capital stock what was the arrangement  
between the parties in regard to procuring  
money for the use of said copartnership and  
how much money had been so procured and  
embarked or invested in said business and  
what property money or assets there were  
belonging to the said concern at the time  
when said Green & Stone parted with their  
interest therein. State fully all you know  
or have heard from said Jones & Culbertson  
in reference to the matter above in this inter-  
rogatory referred to and your means of knowledge  
thereof. The business was carried on by Jones  
Sept. & Culbertson in their own name. There was  
no capital stock furnished or such by any  
of the parties it being agreed that said  
Jones and Culbertson were to procure for the  
use of said business from time to time such  
funds as might be required by paying



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interest, Green I had not the means of  
knowing what were the assets of the said  
common members on the 1st of August  
1861, and not seen a balance sheet of the  
members for some three months but from their  
daily reports of Receipts of produce and my  
own observation I supposed that the profits  
of the members should have been some six thou-  
sand Dollars.

Q. What was the result of the dissolution of the  
said copartnership between said Green & Stone  
and said Jones & Culbertson. Did Jones & Culbert-  
son had or held any property in store or other-  
wise for said Green & Stone or of any what pro-  
perty, how much how was the same purchased  
and when and by whom, what did it cost, and  
who furnished the money to make the purchase  
and what was the said property worth at the  
time of the dissolution of said copartnership  
state fully all you know upon these subjects, and  
your means of knowledge.

A. During the winter and spring of 1861,  
Jones & Culbertson purchased for Green &  
Stone some forty thousand Bushels of oats  
costing some three thousand and 200 dollars for  
which the funds were furnished by Green  
& Stone. These oats were estimated by G. L.  
Stone at the time of the dissolution of the copart-



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11  
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nursing, to be worth Fifty Eight Hundred dol-  
lars. I examined his estimate of some, and  
found it correct. in accordance with the last  
quotations of sales in Chicago we had not  
a positive knowledge of the amount of charges  
for storage due on the 1st.

Q. Now, was the said Copartnership, between Green &  
Stone and Jones & Leuberton ever dissolved, if  
yes when and how, and if you say by an agree-  
ment, of the parties state whether you were  
present, and witnessed said agreement, and  
if yes, state all the terms and conditions of said  
agreement, and whether any and if any, what  
things were made, and executed by and be-  
tween, the parties or any of them, declare fully  
all you know, in regard to the matter herein  
above inquired of?

A. Answer. The said Copartnership was dissolved  
on the 1st of August 1861, by an agreement  
made between said Geo. G. Stone on behalf  
of said Green & Stone and Chas. M. Leuberton  
on behalf of said Jones & Leuberton. I was  
present during the making of this agreement  
the conditions of which were that where said  
Jones & Leuberton had already accepted  
two Am. Drafts for fifty Eight Hundred Dollars  
drawn on them by said Green & Stone, and  
whereas, said Green & Stone had also drawn

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on said Jones and Culbertson another time  
draft in favor of the Commercial Bluffs Branch of  
the State Bank of Iowa for Two Thousand  
Dollars not at the time presented for accept-  
ance. Said Culbertson did agree that Jones &  
Culbertson would accept the said draft for  
Two Thousand Dollars when presented. In con-  
sideration whereof it was agreed, by G. C. Stone  
that said Green & Stone consented that said  
Jones & Culbertson ~~would~~ "were to sell and retain  
the proceeds of all the rats in their hands  
purchased for account of said Green & Stone  
and further that Green & Stone relinquished  
then and there all their interest in and  
to the said Commission business under the name  
and style of Jones & Culbertson. The substance  
of this agreement was contained in a paper  
drawn up by said John Culbertson and  
signed by said G. C. Stone, in behalf of Green  
& Stone at request of said Culbertson and by  
him retained.

Eighth

If in reply to the last interrogatory you say -  
that the said partnership between Green &  
Stone and Jones and Culbertson was dissolved  
by agreement between them, state whether  
the said members of the said firms res-  
pectively were present at said agreement  
and represented said firms respectively and



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Eighth

which of them, just proposed said dissolution and all that was said by either and all of said partner in reference to the various inducements and considerations which induced said Jones & Culbertson to consent and agree to the terms of the contract or agreement, by which said copartnership was dissolved.

The agreement stated at length in my answer to Smith's inquiry, was made between Geo. E. Stone in behalf of Green & Stone and Chas. M. Culbertson in behalf of Jones & Culbertson and was made in the office of said Green & Stone at Muscatine Iowa. The proposition for the dissolution of the copartnership came from Chas. M. Culbertson, just he stating that he heard unless such a course was pursued that the reputation of the firm would be injured by the suspension of said Green & Stone. Geo. E. Stone then stated that he wished to have them Jones & Culbertson accept when presented the said draft for Two Thousand Dollars favor of the Commerce & Buff. Branch of the State Bank of Iowa, and that he believed that the proceeds of the sale furnished by Jones & Culbertson together with the amount to which said Green & Stone were entitled at that time as their share of the profits of the Commission business of said Jones & Culbertson would be enough, to reimburse said Jones & Culbertson.



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son. for the payment of them acceptance of  
said Green's notes drafts on them for the amount  
of fifty eight thousand dollars and also for  
the acceptance and payment of the draft for  
two thousand dollars. favor of. Connell Bluff  
Branch of the State Bank of Iowa. and  
that of said Jones & Culbertson would agree  
to accept. When presented the said draft  
favor of. Connell Bluff Branch of the  
State Bank of Iowa for two thousand dollars  
the said Green & Stone would assign them  
all the rate and relinquish all their interest  
in and to the said Commission business of  
Jesse Culbertson, and all profits then accruing  
or to be hereafter earned by said business  
and Culbertson objects to this proposition  
saying that Jones & Culbertson would be  
the losers. And by as the proceeds of the  
sale with Green & Stone share of the profits  
of the Commission business would not be  
believed amount to surely Eight thousand  
dollars. said Stone claimed that they must  
be equal to that sum and further urged  
that even if short of the amount that Jones  
& Culbertson could well afford to accept &  
pay the draft. as the business which had  
been mostly influenced by Green & Stone to  
the Commission house. Jones & Culbertson had



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be more profitable and Jones & Culbertson would  
if the agreement was made receive the  
whole benefit thereof and also said to Cul-  
bertson that in case it turns out upon sale of  
the oats and figuring up of the Commission  
business that the amount should be much  
shorter than sum sufficient to pay all  
the drafts drawn by Green & Stone and amounting  
to Seventy Eight Thousand Dollars, said Green  
& Stone would thereafter adjust the amount  
with Jones & Culbertson and the agreement was  
emulated on these terms

Now Do you know any thing about any drafts drawn  
by said Green & Stone upon said Jones & Culbertson  
prior to the dissolution of said copartnership if  
yes state the number date and amount  
of said drafts and in whose favor drawn, & whether  
any and if any, how many and which of  
said drafts had been accepted by said Jones  
& Culbertson and in whose possession the same  
were at the date of such dissolution, answer  
fully all you know in regard to said drafts  
and state your means of knowledge,  
Now answer. Said Green & Stone had drawn  
three drafts on said Jones & Culbertson  
one for three Thousand Dollars. one for Seventy  
Eight Thousand Dollars. one for Two Thousand  
Dollars. which drafts are used respectively



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By the undersigned Washington & Commercial Bank  
Branches of the State Bank of Iowa I do not  
now remember the date or time of maturity  
Jones & Culbertson. had at the time of the  
dissolution, accepted two of the said drafts.

The draft for two Thousand Dollars had  
not yet been accepted presented for acceptance.  
Further, state whether at the time of the dissolution  
or at any time and if at any time, when any  
agreement was made between said Jones & Culbertson,  
and Elid Green & Stone relative to the ac-  
ceptance and payment of said drafts  
or any of them and state fully all the terms  
and conditions of such agreement, and the con-  
sideration of the same.

Paul Answer. This interrogatory is fully answered  
by my answer to number Eight.

Elevante If you say as answer to the said last.  
interrogatory, that the said Jones & Culbertson,  
agreed to accept, pay the said drafts or any  
of them state particularly, what was the  
consideration of such agreement, so to accept,  
and pay them and whether the consideration  
was then paid and executed by Green &  
Stone or was it to be paid or executed  
Elevante Answer. This also fully answered by my  
answer to number Eight.



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Twelfth If in reply to the last above interrogatory & you say that the consideration of the agreement by Jones & Culbertson to accept and pay, said & drafts or any of them was the sale and conveyance of any property, by said Green & Stone, and the release of their interest in said assets, or said Copartnership assets state whether the said property was actually conveyed, and the said assets released, and if yes, when and how, and whether by deed, or in writing and state all the particulars

Thirteenth Answer, This also fully answered in my answer to question seven.

Fourteenth, State whether anything and of what value was paid between the said parties in reference to the value of the property so conveyed, by Green & Stone to Jones & Culbertson and the value of the said assets, property and business of the said Green & Stone and Jones & Culbertson, so released by Green & Stone and state all that was paid by them, or at any time paid in your presence by the parties upon the subject.

Fifteenth, I cannot recall any further particulars of the conversation and agreement between George Stone, and Charles M. Culbertson and I have already stated in my answer to question seven and eight unless it be the fact, that during the entire conversation



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Mr Leubarton often expressed his anxiety to & have the partnership dissolved and a writing & from Green & Stone showing said fact.

Fifteenth. Do you know any other matter or thing of advantage to the said plaintiffs of any state the same fully.

Sixteenth answer. I do not know any mat. of advantage to the said plaintiffs.

Joseph Richardson,

Joseph Richardson, and answers thereto,

1. Did you know of any articles of Copartner-ship between Green & Stone & the defendants Smith & Leubarton.

First answer. I never knew of there having been any written articles of Copartnership.

2. Was the agreement ~~mentioned~~ <sup>direct</sup> mentioned in your answer to the peremptory interrogatory in writing? If so who signed it?

Second answer. It was signed by G. B. Stone on behalf of Green & Stone.

3. What was your occupation and in whose employment were you when the agreement last mentioned was signed or entered into?

Third answer. I was then assisting Messrs. Green & Stone in the settlement of their affairs but did not then consider myself in the employ of anyone.



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4.

In what place and in what room was the same made or entered into?

Smith's answer. In the office of Green & Stone at Muscatine and in both the front and back rooms of said office

5. Were you occupied or not while such agreement was being made or entered into?

My answer. I was occupied in sitting at my desk in the front room but was frequently interrupted and called from my desk by questions and appeals from both Stone & Culbertson

6.

Were you not during the most of the time in a different room from that in which <sup>such</sup> agreement was made or entered into?

Smith's answer. I was during part of the time but always sat directly facing Stone & Culbertson and within fifteen to twenty feet of them. There being a glass partition between the rooms and two doors both of which were then open

7.

Was not such agreement made between McKim Stone & Culbertson almost wholly while you were in a different room from that in which they were at the time?

Smith's answer. No.

8.

Do you remember that on the occasion which took place at the making of such agreement - Mr Stone one of the firm of Green & Stone told Mr Culbertson that the share of Green & Stone, in the net profits of the Commission business before them



carried on in the name of Jones & Leubarton amounted to at least three thousand Dollars or more to that effect Eighth answer. Mr Stone did state that the share of Green & Stone in such business could not be thought to be less than three thousand Dollars.

- 9 Do it not do fact that in the same conversation just engaged about. Mr Stone claimed or represented that there was then coming to Green & Stone for their share of the net profits of the business or business in which they had been concerned with Jones & Leubarton at least the sum of three thousand Dollars.

Ninth answer. Mr Stone did claim that it ought to be equal to that amount.

- 10 Do it not do fact that Mr Stone at the time appeared to you to say to Mr Leubarton whether the share then coming to Green & Stone from the net profits of such business amounted to three thousand Dollars answer to tenth He did.

- 11 Do you not remember that King then appeared to you stated in answer to a question of Mr Stone that the amount was nearer four thousand Dollars than three thousand Dollars.

Eleventh answer. I stated that they Green & Stone were entitled to fully three thousand Dollars but do not remember saying that it should be nearer four thousand Dollars.

- 12 What means had you personally had of knowing



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the state of such Communion business? Had you  
perused balance sheets from time to time sent from  
Jones & Culbertson's office in Chicago or had you  
been in that office much?

Intermittent Answer. I was during the month of June 1881 about  
the office of Jones & Culbertson in Chicago during  
a considerable part of the time and since  
that time had seen their letters growing &  
green & stone reports of their daily business but  
had not seen a trial balance from Jones &  
Culbertson I think in three months prior to  
the suspension of Green & Stone.

13. Did Mr Culbertson at first or before you were  
called upon to state as to the amount of such  
share. Then coming to Green & Stone on account  
of the net profits agreed express doubt as to  
whether such share amounted to three thousand  
Dollars.

Intermittent Answer. He did

14. In the same conversation at a later part of it  
did not Mr Culbertson say that of the net pro-  
fits of such Communion business were as much  
as Mr Stone states that is if the share thereof  
then coming to Green & Stone amounted to three  
thousand Dollars. Jones & Culbertson could just  
about take up three drafts mentioned in your answer  
to the direct interrogatories

Intermittent Answer. He did



(82) 15 Do you not know that it was with the understanding, that the share then coming to Green & Stone on account of the net profits of said Commission business amounted to at least three thousand dollars, that Mr Culbertson in belief of Jones Culbertson in the interview just inquired about agreed to take up or accept three drafts above referred to?

Sylvester answer It was not wholly upon such understanding I think. for Mr Culbertson claimed during the whole interview and after the signing the papers by Mr Stone, that it would not amount to three thousand dollars, and Mr Stone said in reply. that even if it should not, Jones & Culbertson would not suffer, as they were now doing a good <sup>commission</sup> business which had been procured for them by the exertions of Green and Stone, and finally said. if there should be any considerable deficiency that Green & Stone would in some way make it all right with them.

16. When of you know. did Jones & Culbertson just have knowledge that the drafts referred upon in this case. had been drawn upon them?

Sylvester answer I think it was on the day of this agreement being made. between Green & Stone and Jones & Culbertson.

17 How long had such draft. been drawn when the interview above mentioned occurred between Mr.



Jones and Mr. Leuberton

Seventeenth ~~Butterfield~~ Answer The draft was drawn on the sixteenth day of July 1861.

18. Do you know what occasioned Mr. Leuberton's visit to Muscatine when that interview took place, and how long before going there had he been notified of the suspension of Green & Stone in business?

Answer Eighteenth. I inquired from Mr. Leuberton conversation that his visit to Muscatine, was entirely for the purpose of getting from Green & Stone, a paper stating that they had ceased to have any connection with the Commission business of Jones & Leuberton, and I think he left Chicago to come to Muscatine, on the day he learned the suspension of <sup>Eugene & Stone</sup> Green & Stone.

19. Were not certain oats of Green & Stone then in the hands of Jones & Leuberton to be disposed of by the latter firm, on the return of Mr. Leuberton to Chicago to meet the three drafts last above referred to.

Answer Nineteenth. They were to have the entire lot of oats, and could sell them whenever they chose to do so.

20. In the interview of aforesaid did not Mr. Stone estimate and represent that said oats would bring when sold at least forty Eight Thousand Dollars.

Answer Twentieth. Mr. Stone did estimate the oats to be worth at that time about that amount. Mr. Leuberton said they were not worth so much.

21. Was it not on the basis that not up there then



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One hundred dollar was supposed to be the share  
then coming to Green & Stone, on account of the net  
profit of the Commission business aforesaid. and  
that such rate was expected to net at least  
only Eight Hundred Dollars. that Mr Culbertson  
in behalf of Jones & Culbertson in the aforesaid in-  
terview agreed to pay Mr. J. the draft of aforesaid and  
to accept the return of them

Twenty first answer. Not wholly as Mr. Culbertson steadily  
disputed the correctness of those estimates. The  
consideration of the obligations undertaken by Jones  
& Culbertson was the transfer of the rate and  
the release by Green & Stone of their interest in the  
Commission business

22. Finally was not a writing drawn to express  
the terms of the agreement entered into at that  
interview?

Twenty second answer. There was

23. Do you or not know that the partnership pre-  
viously existing between Green & Stone, & Jones & Cul-  
bertson was dissolvable at the pleasure of either  
of said firms

Twenty third answer. It was

24. What business relations if any existed between the plain-  
tiffs and Green & Stone at the drawing of the draft sued  
upon in this case?

Twenty fourth answer Do not know of any

25. State whether such relations continue or not. if you know



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Twenty fifth answer, answered in 24,

26. State whether said Green Stone, or either of them are interested in the draft, said upon in this case  
Twenty sixth answer. I do not know.

27 Do you know anything further that would benefit the defendants. If you answer fully and at large  
Twenty seventh answer. I do not; Joseph Richardson;

Sundry parts of said deposition being objected to by said defendants the same was so read into the understanding between the parties that only such parts of the same, as were competent should be considered by the Court.

The following <sup>articles</sup> was also read by the plaintiff in connection with said deposition -



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The plaintiffs Cornew then read a certain other  
writing produced by the defendants on call of said  
counsel which writing was as follows.

Muscatine Iowa August 1<sup>st</sup> 1861.  
In consideration of Jones & Culbertson of Chicago  
Illinois taking up Geo. W. Jones draft on  
Jones & Culbertson and in favor of W. H. Hunt and  
of Washington Iowa for money Eight Hundred &  
Dollars due August 3<sup>rd</sup> 1861. and J. A. Green's  
draft on Jones & Culbertson & in favor of J.  
Hartback. Calling for three thousand Dollars due  
August 1<sup>st</sup> 1861. and also paying draft drawn  
by us on Jones & Culbertson and in favor of J.  
D. Loomis Cash; dated July 16<sup>th</sup> 1861 at sixty  
days. Calling for two thousand and fifty dollars  
and 25 cents for the above and other considerations  
we release relinquish and transfer to said Jones  
& Culbertson, Commission merchants, and resign to  
them all claim of what so ever kind we have in said  
commission house and release the said Jones Jones  
& Culbertson from any and all further obligations  
or whatever kind and nature notwithstanding  
we only having had at any time only the pro-  
mise from Jones & Culbertson of a certain part  
of the profits arising from the Commission house  
in consideration of our influencing business to  
said Commission house. We further say  
that we never have at any time put in one dollar

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of Capital stock into said Assoc our interest as  
above stated, only being promising by them for a  
part of the profits of any should be made.  
Signed) Green & Stone.

The Plaintiffs here asked & by leave of the Court  
annexed the draft of the Declaration,  
with the understanding and agreement, that the  
defendants need not deny under oath the making  
of an acceptance of the draft in suit.

The defendants then called George C. Stone,  
who was sworn as a witness and testified that  
he was a member of said firm of Green & Stone,  
and that at the giving of the meeting last aforesaid  
the draft in suit was held by the plaintiffs that  
it was sent to the plaintiffs by mail the day it  
was drawn, and was so sent by the plaintiffs  
to be deposited for currency received by Green  
& Stone from the plaintiffs before the 1st of August  
1861. That at the suggestion of Green & Stone, I  
telegraphed to Mr Leuberton one of the defendants,  
and he came down to Muscatine Iowa to see  
them and was anxious to have them assign their  
interest in the Commission Assoc to Forest Leuberton  
and the above writing signed by Green & Stone was  
then drawn up and so signed and at some ex-  
planation was had at the time about oath and also.



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about profits on the Commission business but just that  
the conversation was he was unable to state that  
he then informed Culbertson for the first time that  
the draft in suit had been issued.

He also said the party who then held the draft,  
had no instructions about it. That Jones & Cul-  
bertson had been in the habit of sending monthly  
statements, as to the Commission business to Green & Stone  
that he the witness had a vague idea of the  
amount of the profits of the Commission business  
the witness thought that the share or interest of  
Green & Stone in the Commission business with  
the rats would pay said drafts that he got  
no idea as to the then price of the rats and as  
to the strange return from Mr Culbertson, McIntosh  
did not know what the profits were of the Chicago  
business that Mr Culbertson knew better than  
he did. that he thought he called in Mr Richardson  
who knew as much about witness affairs as  
witness did and who gave his opinion that  
one object he had in calling in Mr Richardson  
was to have him know what the contract was  
that he was not as anxious as Mr Culbertson  
to arrange matters and did not wish to make  
any arrangement with him by which he  
would be the loser. nor to mislead him that  
he had no good lights to go by as witness had  
that it was the estimate of the parties that the



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oats; and Green & Stone share of the profits, would be enough to cover the three drafts, and be the witness believed at the time it would be so. and that the oats and such share of the profits, would be more, rather than less, than the amount of the drafts. That Jones & Culbertson were to sell the oats and use the proceeds with the share of Green & Stone in the profits of the Commission business to pay the three drafts according to the agreement. Here two drafts were produced, and shown by disinterested counsel to the witness who identified them as two of said three drafts and the same as are follow.

\$3000.00 Muscatine Iowa. Apl. 14. 1861.  
 Forty months, after date pay to the order of  
 Thomas Nastack three thousand dollars value  
 received and charge the same to account of  
 To J. A. Green  
 Messrs Jones & Culbertson. Chicago Ill  
 Indorsed Credit my a/c T. Nastack Cas.

\$2800.00 Muscatine Iowa June 1<sup>st</sup> 1861.  
 Eighty days after date pay to the order of W. H. Hubbard  
 Esq. Cash. Twenty Eight hundred dollars value received and  
 charge the same to account of oats in store of Green  
 & Stone Geo H Stone  
 To Messrs Jones & Culbertson Chicago. Indorsed Credit  
 my a/c W. H. Hubbard Cas-

Muscatine, Iowa  
 at the  
 State Bank of Iowa.



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The witness further testified that about a week after this interview Green & Stone received a letter from Jones & Culbertson stating that they could not pay the draft before receiving which letter Green & Stone had advised the plaintiffs that Jones & Culbertson would pay said draft.

The witness also stated in said interview that he Mr. Culbertson stated perhaps that he did not have charge of the books and did not know the state of the accounts of the Commission House. Witness thought this was the fact but supposed that Culbertson knew about as much about it as the witness did.

On Cross Examination the witness stated that he thought Mr. Culbertson did not bring to his attention at the time of such interview any statements of the accounts of said Commission House. That he the witness had not consulted the books connected with the Commission business that the books were kept by Jones & Culbertson at Chicago that Jones and Culbertson sent to Green & Stone a trial balance every month but Green & Stone might not have received any for two or three months before said interview that neither the witness nor Mr. Culbertson kept the books but both had a general knowledge of that business that he the witness did not know any thing in particular about



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the market value of the rats, that Mr. Culbertson  
knew what the rats were worth, and what the  
charges were. All the information the witness  
had, in relation to the price of the rats was from  
Mr. Culbertson, that the witness as he thought  
on the day of said interview communicated  
to the plaintiffs a promise of Jones & Culbertson  
to pay the draft. Made by the plaintiffs that this  
was repudiated by Jones & Culbertson; refused to pay the  
draft. that he did not think all his information  
about the profits of the Commisyon business came  
through Mr. Culbertson but that he had relied  
on the integrity of the statements of the defend-  
ants, as to the Commisyon business

On re examination the witness said he relied on  
trial balances and letters of defendants as to  
what defendants had done in the Commisyon  
business, and also in his own ideas of the business  
It was not on my statements made that day  
that I relied

The defendants next read the following letter from  
Green & Stone, so showing the Court on which  
said Commisyon business was carried on viz  
Muscatine July 12, 1860  
Messrs Jones & Culbertson  
Chicago Ill. Gentl-



(93)

Mr. Green & the writer Stone have thought and considered the matter which we had in view viz. a connection with your house with the business in business exclusively and have decided that we are willing to engage with you and do what we can in the way of influencing shipments and business to your house upon the following terms viz. Jones & Culbertson to have one half the net profits of the house & Green & Stone one half. or in other words each one quarter. The business (at least for the present) to be done in the name of Jones & Culbertson, as at present, and the arrangement to commence on Monday the 6<sup>th</sup> of this month, traveling expenses to be borne by the house when upon its business and we go to work at once to influence all the business we can. This arrangement to continue while it is mutually agreeable & satisfactory; monthly statements of the business to be rendered us at the end of each month.

Respy.

Green & Stone.

The defendants then called N. J. Denison who was sworn as a witness and who testified that he was the salesman of Jones & Culbertson and attended to the details of the commercial business that the rats were sold soon after the return



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of Mr. Culbertson, from Muscatine within a day or two and \$4300. to \$4400, was realized for him. That the amount of the net profits after the commission, Business was about \$3300, of which between \$16. & \$1700. was coming to Green & Stone that a rough estimate of the same was made. Not within two or three days after Mr. Culbertson's return from Muscatine and that the final result, did not vary much from the rough estimate that the \$3300. included some doubtful claims most of which were paid or bills receivable that the defendants paid the mo. drafts mentioned in the aforesaid writing of August 1st 1861, other than the drafts sent

On Cross Examination said witness stated that he was not able to state the price of oats at the suspension of Green & Stone, but thought such price declined one cent per Bushel & within a week after August 1st 1861

That the oats of Green & Stone were sold a August 5th 1861

The defendants next read the following letter from Green & Stone subject to objection.  
Muscatine Aug. 7. 1861.

My dear Culbertson  
Chicago Ill.



(957)

Gents. Yrs. of 5<sup>th</sup> at hand. contents noted.  
 + + + + +. As regards the diff. of 2000  
 we want you to accept it as arranged with  
 us. as we have written that such an arrange-  
 ment was made. and it is so specified in your  
 paper. which you have and it would not  
 be good to you unless so done. And we will  
 fix that matter afterwards when you get  
 things all closed up

Yrs.  
 Green & Stone

Our long rec called said Pitner stated that after the  
 taking up of the two drafts which were paid by  
 Jones & Amberson. as before mentioned there was  
 nothing left of the proceeds of the oats, or of the  
 share of Green & Stone. in the profits of the com-  
 mission business with which to pay the draft.  
 on out~

The finding was all the evidence and on the  
 same. in favor. Judge, Higgins at the March  
 term, of said Court. A. D. 1864. announced  
 his decision to be for the plaintiffs for the sum  
 of \$2351. 15 And thereupon the defendants  
 by their counsel moved the Court for a new  
 trial, for the following reasons, to-wit:  
 Because the finding is contrary to law & the evidence



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Because the same is contrary to the evidence  
Because the same should have been for the defend-  
ant and not for the plaintiff.

Because the Court erred in the admission of  
the testimony offered by the plaintiff

Because the proof did not correspond with the  
allegations.

Amington & Dunt.

Deft. Mfgs.



(97)

And said Court overruled said motion and the defendants by their counsel then and there excepted to the decision of the said Court overruling the same. Whereupon moved the the Court in arrest of judgment but the Court overruled said motion and the defendants by their counsel then and there excepted to the decision of the Court in this regard. Whereupon the Court rendered judgment upon the finding of said

And at the request of the defendants, to have the matters aforesaid, preserved as a part of the records, this Bill of Exceptions is signed and sealed by the said Judge presiding

Wm H. Higgins S.D.J.  
Judge

Clerk,  
Halter & Dexter

Know all men by these presents that we Daniel A Jones and Charles W. Culbertson Notary Public and R. D. Hough are here and firmly bound unto The Council Bluffs Branch of the State of Iowa in the penal sum of Fifty five hundred Dollars for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly severally and firmly by these presents Witness our hands and seals this fifteenth



(98)

day of March A.D. 1864.

Whereas the said Commerce Bluffs Branch of the State Bank of Iowa has received a judgment in the superior Court of Chicago at the present term thereof against the said Daniel A. Jones and Charles M. Culbertson for the sum of \$235.15. damages besides costs, from which judgment the said Daniel A. Jones and Charles M. Culbertson have prayed an appeal to the Supreme Court of the State of Illinois which appeal having been allowed a bond is to be given in pursuance of the order of the said Superior Court to perfect the same And therefore the condition of the above obligation is such that if the said Daniel A. Jones and Charles M. Culbertson shall duly prosecute said appeal and shall pay the judgment costs interest and damages in case the aforesaid judgment of said Superior Court of Chicago shall be affirmed then said obligation shall be void otherwise the same shall remain in full force.

Appraised  
Wm H. Higgins  
Judge

|                       |     |
|-----------------------|-----|
| Daniel A. Jones       | Dea |
| Charles M. Culbertson | Dea |
| W. Spaulding          | Dea |
| R. M. Hough           | Dea |



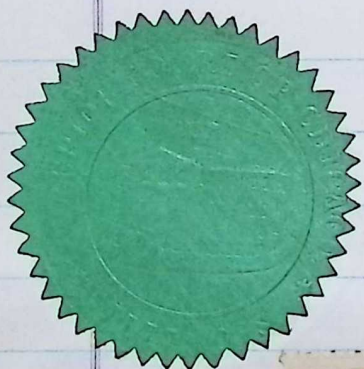
(99)

State of Illinois }  
County of Cook }

I Thomas P. Carter;  
Clerk of the Superior Court of Chicago, within  
and for the County, and State aforesaid do  
hereby Certify, the above, and foregoing to be  
a true perfect, and complete transcript of all  
the papers on file in my office together with  
all the orders and fragments made, and entered  
of record in said Court, in a certain Cause,  
lately pending in said Court on the Common  
Law Side thereof, wherein The Council &  
Bluffs Branch of the State Bank of Iowa  
was Plaintiff and David A. Jones and Charles  
M. Culbertson were defendants.

In Witness Whereof, I have here-  
unto set my hand, and affixed the  
seal of said Court, at the City of  
Chicago, this Twentieth day of  
March A.D. 1864

Thomas P. Carter  
Clerk





And now come the said Daniel A. Jones and Charles M. Culbertson, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

That said Superior Court erred in finding for the plaintiff.

That it erred in overruling the motion for a new trial.

That it erred in overruling the motion in arrest of judgment.

That it erred in sustaining the demurrer to the 3<sup>d</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> & 13<sup>th</sup> pleas <sup>and each of them</sup> respectively.

That said court erred in rendering judgment for the plaintiff.

Also for that the <sup>finding and</sup> judgment ~~respectively~~ ought to have been for the defendants, and not for the plaintiff.

And also that the finding and judgment respectively were for an ~~expired~~ <sup>unperfected</sup> ~~amendment~~, and unsupported by the ~~proof~~.

Wherefore, and for other errors in said record and proceedings, said defendants pray that said judgment be reversed, and that they be restored to all things which they



have lost thereby, &c.

Arrington & Dent,  
Befts. attys.



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Daniel A. Jones  
The Cement Bluff,  
Branch of State  
Bank of Iowa

March 21st

received from

for 12.50  
paid by

Filed April 20, 1864  
L. Leland  
Clerk

(107)