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Lanusse Vs. Barker

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Court : US Supreme Court

Decided On : 1818

Appeal No. : 16 U.S. 101

Appellant : Lanusse

Respondent : Barker

Judgement :

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U.S. Supreme Court Lanusse v. Barker, 16 U.S. 3 Wheat. 101 101 (1818)

Lanusse v. Barker

16 U.S. (3 Wheat.) 101

ERROR TO THE CIRCUIT COURT

FOR THE DISTRICT OF NEW YORK

SYLLABUS

B., a merchant in New York, wrote to L., a merchant in New Orleans, on 9 January, 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her

and purchase and put on board of her five hundred bales of cotton on the owners' account "for the payment of all shipments on owner's account, thy bills *on T. & Son,* of Portland," *or me,* sixty days' sight, shall meet due honor." On 13 February, B again wrote to L. reiterating the former request and enclosing a letter from T. & Son to L. containing their instructions to L. with whom they afterwards continued to correspond, adding, " *thy bills on me* for their account, for cotton they order shipped by the Mac shall meet with due honor." On 24 July, 1806, again wrote L. on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which thy bills *on me* shall meet with due honor at sixty days' sight. L. proceeded to purchase and ship the cotton, and drew several bills on B. which were paid. He afterwards, drew two bills on T. & Son payable in New York, which were protested for nonpayment, they having in the meantime failed, and about two years afterwards, drew bills on B. for the balance due, including the two protested bills, damages, and interest.

Held that the letters of 13 February and 24 July contained no revocation of the undertaking in the letter of the 9 January; that although the bills on T. & Son were not drawn according to B's assumption, this could only affect the right of L. to recover the damages paid by him on the return of the bills, but that he had still a right to recover on the original guarantee of the debt.

It was also *held* that L., by making his election to draw upon T. & Son, in the first instance, did not thereby preclude himself from resorting to B., whose undertaking was in effect a promise to furnish the funds necessary to carry into execution the adventure. Also *held* that L. had a right to recover from B. the commissions, disbursements, and other charges of the transaction.

Where a general authority is given to draw hills from a certain place on account of advances there made, the undertaking is to replace the money at that place. In this case, therefore, the legal interest at New Orleans was allowed.

An agreement of the parties entered on the transcript, stating the amount of damages to be adjudged to one of the parties upon several alternatives (the verdict stating no alternative) not regarded by this Court as a part of the record

brought up by the writ of error, but a *venire de novo* awarded to have the damages assessed by a jury in the court below.

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This was an action of assumpsit brought in the Circuit Court of New York by the plaintiff in error against the defendant to recover the amount of 500 bales of cotton shipped by the plaintiff from New Orleans

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on account of John Taber & Son, of Portland, in the District of Maine, upon the alleged promise of the defendant to pay for the same with the incidental disbursements and expenses.

At the trial, a verdict was taken and judgment rendered thereon for the defendant, and the cause was brought up to this Court by writ of error.

On the 19th of December, 1805, the defendant, a merchant in New York, wrote a letter to the plaintiff, a merchant in New Orleans, containing, among other things, the following passage:

"I am loading the ship *Mac* for Jamaica; *she belongs to my friends, John Taber & Son, Portland,* who I expect will order her from thence to N. Orleans, to thy address for a freight, and in that case, if thee makes any shipments for my account to the port where she may be bound, give her the preference of the freight."

This letter was received by the plaintiff on 6 February, 1806.

On 9 January, 1806, the defendant wrote to the plaintiff the following letter:

"New York, 1st month, 9th, 1806"

"PAUL LANUSSE, ESQ."

"Esteemed Friend -- This will be handed you by Captain Robert Swaine, of the Portland ship *Mac,* which vessel is bound from this to Jamaica and from thence to New Orleans in pursuit of freight; she will be to they address; she is a good ship, between three and four years old, has

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an American register; is of an easy draft of water, although rather large; a freight for Liverpool will be preferred; if not to be had, for such other port as thee thinks proper, send her. If no freight offers for Europe, send her to this or some neighboring port with all the freight that can be had, which I have not any doubt will be sufficient to load her; if thee can get three-fourths as much for this port as for Europe, I should prefer it; if not, I should prefer a freight to Europe. Immediately after her arrival, I wish thee to commence loading her on owner's account, who wish thee to ship five hundred bales on their account, but do not wish to limit the quantity, a few bales more or less according as freight offers, and for the payment of all shipments on owner's account, thy bills on them, John Taber & Son, Portland, or me, at sixty days' sight, shall meet due honor; all shipments on owner's account, if the ship goes for Liverpool, address to Rathbone, Hughes, and Duncan; if for London, Thom as Mullet and Co.; if Bordeaux, to John Lewis Brown & Co.; if Nantes or Cherbourg, Preble, Spear & Co.; if Antwerp, J. Ridgway, Merting & Co.; if Amsterdam, Daniel Cromelin & Sons. Captain Swaine will take a sufficiency of specie from Jamaica for ship's disbursements; please write me often and keep me advised of the state of your market, &c.; Of thy shipments by the *Mac* on owner's account let as much go on deck as can be safely secured, and have her dispatched from your port as soon as possible."

"Thy esteemed friend,"

"JACOB BARKER"

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And on 26 January, 1806, the defendant wrote the plaintiff as follows:

"Since writing thee under date of the 9th instant, I have engaged for the ship *Mac* the freight of eight hundred bales of cotton from New Orleans to Liverpool, agreeably to the enclosed copy of charter party. I have therefore to request thy exertions in dispatching her for Liverpool, filling her up either on freight or owner's account, and particularly fill her deck and quarters on owner's account. Her owners wish large shipments of cotton made on their account, which, if bills can be negotiated on New York, I have informed them thee would make; I, however, am clearly of opinion that it will be more for their interest to have her filled up on freight; on this subject I shall write thee again more fully. Capt. Swain will take with him from Jamaica eight thousand Spanish for my private account, which I wish invested in cotton."

This letter was written on the same sheet of paper, and immediately following a duplicate of the preceding letter of 9 January, and was received by the plaintiff on 18 March, when he wrote an answer, saying,

"On my part, nothing shall be wanting to satisfy the contracting parties, when the ship arrives, and your instructions shall be strictly observed, conforming myself to the latter you gave, and in case of necessity, I think, it will be easy to place bills."

On 13 February, 1806, the defendant wrote to the plaintiff as follows:

"Enclosed, I hand thee a letter from the owners of ship *Mac,* to which I have only to add that thy bills

on me for their account for the cotton they order, shipped by the *Mac,* shall meet due honor."

On 29 August, 1806, the plaintiff wrote the defendant:

"A few days ago I was favored with a few lines from Messrs. John Taber & Son, importing that they wrote to you, to Capt. Swaine, and me such directions as you might think proper, but I have not as yet been favored with any of yours. The *Mac* remains precisely in the same situation. $4,250 demurrage have been paid on her

account, and I only wait for further information from you to act in case demurrage is refused."

On 24 July, 1806, the defendant wrote the plaintiff as follows:

"Relative to the unfortunate situation of the *Mac,* I have to observe that if she remains at your port idle, Fontaine Maury or his agent there must pay the demurrage every day, or the master must protest and end the charter; as long as the demurrage is paid agreeable to charter party, the ship must wait; as soon as that is not done, the captain or owners' agent can end the voyage by protesting, and entitle the owners to recover their full freight, so that thee had better take the eight hundred bales, on account of Fontaine Maury at a low rate than to subject him to such a heavy loss; thee will on receipt of this be pleased to receive the demurrage daily or end the charter and dispatch her for Liverpool on owners' account, taking all the freight that offers, and fill her up with as much cotton as possible [not less than five hundred bales], logwood and staves, as it will not answer to keep so valuable a ship there any longer without earning something

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for her owners. Although I say fill her up with cotton, logwood, and staves on owners' account, thee will please understand that I should prefer her being dispatched agreeable to charter party, if that can be done, I prefer her taking freight for Liverpool, excepting about five hundred bales, the owners wish shipped on their account; yet rather than have her there idle, the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet due honor at 60 days' sight, which I presume thee can easily negotiate."

On 26 September, 1806, the plaintiff wrote the defendant:

"Since my respectful last 29 August, 1 am favored with your much esteemed of 24 July, the contents of which I have duly noticed."

"I have to inform you of the disaster which has befallen the *Mac.* On the night of the 16th and 17th inst., we experienced a most violent gale, which has done great

injury to the shipping, and drove the *Mac* from her moorings to a considerable distance from the town. . . . Nor can I flatter you of procuring either freight for her or accomplishing your order before December. . . ."

On 6 September, 1806, the defendant wrote the plaintiff as follows:

"Since I last had this pleasure, ordering a protest against the charterers of the *Mac,* and that vessel dispatched on owners' account for Liverpool with staves, logwood, and cotton, I have not received any of thy acceptable communications. I now confirm that order

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and request, if a full cargo be not engaged for the *Mac,* on receipt of this that you ship two hundred bales of cotton for my account to the address of Martin Hope & Thornley, and thy bills on me, at 60 days' sight, shall meet due honor for the same. On receipt of this, lose no time in purchasing the two hundred bales, and what may be yet wanted for the ship on owners' account, as a very considerable rise has taken place in that article at Liverpool; therefore thee will not lose any time in making the purchase."

On 10 October, 1806, the defendant wrote the plaintiff:

"By thy letter of 29 August to John Taber & Son, I observe thee had an idea of sending the *Mac* here, if a freight did not soon offer, which I think thee would not (on reflection) do if a freight from this port did not offer, as she had much better remain at New Orleans than be sent here in ballast. Therefore request, if she is not dispatched agreeable to charter party, that she remain at your port until a freight can be obtained for her, with what thee can ship on owner's account. They wish at least five hundred bales of cotton. I hope thee did not ship logwood, as I find that article will not pay any freight; therefore, if thee has not made a shipment of that article, please omit it. Thee must, of course, keep the ship as long as demurrage is paid."

On 26 November, 1806, the defendant wrote the plaintiff:

"I wish the *Mac* got off as soon as possible and prepared for a voyage, when I wish five hundred bales of cotton shipped, on account of her owners, for Liverpool, and the ship filled up with freight goods, even at a low rate. If freight should be scarce, and thee can purchase good flour at about four and a half per barrel, thee will please to ship from five hundred to one thousand barrels on account of the owners of the *Mac,* and on thy making any purchase for those objects, inform Rathbone, Hughes & Duncan, Liverpool, by letter duplicate and triplicate, requesting them to have the full amount of thy shipment on owners' account insured, stating particularly when thee expects the ship to leave New Orleans, &c.; If cotton falls to twenty cents, pleas ship five hundred bales of cotton for my account, by the *Mac,* consigned to Martin Hope & Thornley, drawing on me at sixty days for the same. I do not wish a bale shipped at a higher price than twenty cents, and I hope thee will engage the freight as low as 1 1/2d. My only reason for ordering it in the *Mac* is to assist her owners; therefore, if a full charter offers for her, or if anything should prevent her going, thee will ship five hundred bales by some other good vessel, or vessels."

On 29 December, 1806, the defendant wrote the plaintiff:

"I am favored with thy letter of the 7th, by which I am pleased to observe the *Mac* was off, and likely to be dispatched for Liverpool. Her owners are desirous that she be dispatched for that place without delay, as I mentioned to thee in my last letter on the subject

of the Mac's business. If thee has contracted for the cotton, or any part thereof, that I ordered, let all that has been contracted for be shipped according to my last request, but do not purchase a bale for my account after this letter reaches thee above sixteen cents, as that article has become very dull at Liverpool, and likely to be low in consequence of the success of the French army on the continent. If thee can purchase at or under sixteen cents before May, thee may purchase and ship

such part of the five hundred bales as has not been purchased before this letter reaches thee."

On 22 January, 1807, the plaintiff wrote the defendant as follows:

"I have now commenced the purchase of cotton for account of Messrs. John Taber & Son, and have paid hitherto twenty-two cents cash, at which price seventy two bales were ready to be shipped, as I expect to find an opportunity of placing my bills upon you. I shall complete the purchase of 500 bales, which will be necessary, in order to get a full freight. . . . I have now to inform you that I have drawn on you, under date of 15 January, for $1,800. Say $1,800, payable sixty days after sight, to the order of Mr. A. Brasier in Philadelphia, which draft goes on account of the 72 bales of cotton already purchased, and request you to honor the same."

And on the same day he wrote the defendant:

"The present merely serves to inform you that I have this day valued upon you. "

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"$1,370 Order Joseph Thebaud"

"607.23 Declaire & Count"

"1,100 Stephen Zacharie"

"$3 ,077.23 sixty days after sight, and refer to my letter of this day"

On 13 February, 1807, he wrote the defendant:

"I have engaged 150 bales for account of Messrs. John Taber & Son, at Market price, which I expect in town in a few days, when I shall without delay ship the same on board the Mac, making the 220 bales in all. This commencement, I hope will encourage shippers to give us some freight; at all events I shall keep you duly advised of my proceedings. Under date of the 6th inst., I took the liberty of valuing upon you $301.22 1-2 sixty days after sight, to the order of Jacob D. Stagg; on the

12th inst., $673 to the order of Samuel Lord, and shall continue drawing as opportunity offers."

On the 16th of the same month he wrote the defendant:

"The present merely serves to inform you that I have this day valued upon you $600. Say $600 to the order of Benjamin Labarte, sixty days after sight, and request you to honor the same, and place to account of J.T. & S."

On 20 February, 1807, the defendant wrote the plaintiff:

"I am in daily expectation of hearing of the *Mac's* progressing for Liverpool. Before this reaches thee, I hope she will have sailed; if not, please lose no time in dispatching her. That thee may be fully acquainted with the wishes of her owners, I annex a copy of the last letter I have received from them, and request thee to comply with their wishes in every particular."

The copy of the letter from John Taber & Son, referred to in this letter, is as follows:

"Portland 2d mo. 9, 1807"

"JACOB BARKER,"

"By last mail we received thy favor of the 2d inst. enclosing one from Captain Swaine to thee. We notice thy proposition for us to give liberty for the *Mac* to take freight for any port in Europe, but as we have got her and her freight insured in Liverpool, at and from New Orleans to that port, we wish to have her go there, even if we load owners' account. We are well satisfied that Lanusse hath not yet loaded her, as we have no doubt cotton will be much lower in a short time. And as we apprehend that shippers of cotton will now turn their attention to other parts of Europe, we think the probability is that cotton will be in demand in Liverpool by the time the *Mac* will arrive there, we likewise think it will answer to ship good flour,

and probably some good staves can be purchased; we had rather have her loaded on our own account with those three articles than to take freight for any other port, but we think there can be no doubt, but that when she begins to loan on owners' account, that some considerable

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freight can be obtained. We really wish thee to write Lanusse to dispatch her, with liberty to take two thousand barrels of good fresh flour, if freight does not offer sufficient with the five hundred bales of cotton before ordered, to load her without delay, as we have no doubt good flour will answer, and we cannot think of her being longer detained at New Orleans."

"We remain, thy assured friends."

"JOHN TABER & SON"

And on 3 March, 1807, the plaintiff wrote the defendant:

"The present merely serves to inform you that I have this day valued upon you $10,000. Say $10,000, payable sixty days after sight, to the order of Mr. Thomas Elmes, and request you to honor the same, and place to account of J.T. & S."

On 6 March, 1807, he again wrote the defendant:

"I refer to my respectful last of 13th, 16th 24th ult. and 3d inst., the contents of which I confirm. On the 16th, I valued upon you for $600, and on the 3d inst. for $10,000, making in all the sum of $16,351.03 3/4, on account of the shipment per *Mac,* for account of Messrs. John Taber & Son. I have already bought 72 bales at .22, 107 do. at .20 3/4, 175 do. at .20 1/2, together 354 bales, and 30m. staves, amounting to about $22,000. There remains 146 bales more to be purchased, which I hope to get; the total amount, with charges and commission,

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will be about $34,000 -- for which sum I shall order Messrs. Rathbone, Hughes & Duncan, to get insurance effected. I shall continue to draw on you as occasion presents."

On 11 March, 1807, he wrote the defendant, informing him that he had drawn on the defendant to the order of Mr. F. Depau, for $6,000, and to the order of Mr. J. P. Ponton for $691.50.

On 15 April, 1807, the defendant wrote the plaintiff:

"I have this moment received the unpleasant information of the failure of John Taber & Son, therefore beg the favor of thy taking every precaution to secure my claim on them for the payment of the cotton thee has shipped for their account by the *Mac.* If that ship has not got clear of your river, take up the bills of lading and fill up new bills, consigning the cotton to my order, forwarding me several of the bills, and instruct Captain Swaine to hold the cotton until he hears from me; and if part of the old set have gone on, let them go, but take a new set, and make all the freight money payable to my order, and if she has got clear of the river, make an arrangement with the shippers of the cotton to pay thee the freight money, and give them a receipt for it, forwarding that receipt to Liverpool, but for the consignee to keep as a secret that the freight money has been paid until they get all the freight goods."

And on 16 April, 1807, the defendant again wrote the plaintiff:

"I have taken the best counsel, and find the goods per ship *Mac* can be stopped for thy account *in transitu,* and have therefore taken all the steps in my power to have that object effected, and shall succeed so far as to keep the property at thy disposal until thy power reaches Martin Hope & Thornley, which will enable them to hold the property for thy use; therefore send the power by the packet, and send duplicates and triplicates by other vessels, and several copies by mail and packet to me to be forwarded; also draw on Rathbone, Hughes & Duncan, for the whole

amount of shipment, ordering Martin Hope & Thornley, to pay them 1,000 of the amount drawn for if they accept the bills. Confirm what I have written, copies of which I enclose for thy government. Thy bills on me will all be protested for nonpayment, that thee can say thee has not received pay for the cotton, but shall endeavor to furnish money that will prevent disappointment to the holders. This, my counsel tells me, is indispensable, to enable thee to benefit by *transitu,* which cannot be done by any other person, nor by thee after thee gets pay for the goods shipped."

And on the same day the defendant wrote to Martin Hope and Thornley, of Liverpool, as follows:

"I enclose a letter written as agent and friend of Paul Lanusse to Rathbone, Hughes and Duncan, which you will have the goodness to hand them, and make a memorandum of the delivery, and endeavor to make the contract for Lanusse as therein mentioned, and I will indemnify you from all loss in so doing; if you cannot make an absolute agreement

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with R.H. & D. to receive all the property Lanusse has or may ship by the *Mac* for account of Taber & Son, to be applied for the payment of the bills Lanusse has or may draw on them, excepting 1,000, and the profits on the adventure, which they may place to the credit of Taber & Son, if they are so much indebted to H. & D.; if not so much, then such sum as may be due them. You will cause insurance on the cargo of ship *Mac* to the amount of 9,000, and proceed as the agent of Lanusse to get hold of the property; you certainly can stop it *in transitu.* "

On the same day the defendant also wrote to Rathbone, Hughes & Duncan:

"As the agent of my friend Paul Lanusse at New Orleans, I have, in consequence of the failure of John Taber & Son, to inform you that the goods he is shipping on board the *Mac,* Captain Swaine, have not in any part been paid for; therefore they are to be stopped *in transitu* for the benefit of my said friend Paul Lanusse, who is by me represented, and as his agent I charge you, on your peril, not to

accept or in any manner commit yourselves for said Taber & Son on account of said shipment, but if you are willing to receive said consignment, sell the same and apply the whole proceeds to the payment of such drafts as Lanusse may draw on you, which shall not exceed the amount of invoice."

On 30 April, 1807, the defendant wrote the plaintiff:

"I annex copy of my last respects, and have to request in the most pointed manner thy particular attention

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to my request therein. I have sent out many letters in hopes of meeting the *Mac;* if any of them meet her in the Mississippi, Captain Swaine will return to New Orleans with all his papers for thee to alter the direction of the goods shipped by that vessel for account of Taber & Son; if not so successful as to meet her, but if any of them meet her after she leaves the Mississippi, she will stop at this port, when I will make the necessary alterations; but if none of my letters meets her, my only chance for securing, myself is by thy stopping the property *in transitu.* To have that done, thee must immediately send out powers to Liverpool; therefore I beg thee to confirm all I have written to Martin Hope & Thornley."

On 20 May, 1807, the plaintiff wrote to the defendant:

"Your esteemed favor of the 15th ultimo has just reached me, and with much regret do I learn the failure of Messrs. John Taber & Son. I hope that you will not be a sufferer, and that you have taken timely precaution. Agreeably to your request, I have written on to Liverpool, but am afraid my letters will come too late, as the *Mac* sailed from the Belize on 23 April, and as she is a good sailer, will no doubt have discharged her cargo before the receipt of my letter. For your government I enclose you invoice and bill of lading of the 500 bales cotton shipped per *Mac;* also my account current with Messrs. John Taber & Son, according to which a balance of $1,251.28 1/2, for which amount I shall value upon you as occasion offers. You will, I hope, have taken the necessary measures to meet my drafts dated March 20, drawn

direct on Messrs. Taber & Son in Portland, payable in New York, of which I advised you. I am anxious to receive your further communications, and most sincerely hope that you have been able to cover your claim, and not be a loser by this unfortunate accident."

And on 9 June, 1807, he wrote the defendant:

"I have only time to inform you of the receipt of your favor of 16 and 30 April and to assure you that I shall punctually follow your instructions and lose no time in forwarding to you and to Liverpool all necessary papers, relying on your integrity and honor. I feel no uneasiness respecting my concern in this unfortunate business; at the same time, I most sincerely regret that you should be a sufferer, but hope things may yet result favorable."

On 28 August, 1807, the plaintiff wrote the defendant:

"The last mail brought me the nonacceptance, protest, &c.;, of the two bills of exchange drawn by me on the house of John Taber & Son under date of 20 March, 1807, in favor of Thomas Elmes and endorsed by him to Messrs. Corp, Ellis & Shaw, each for five thousand, making the sum of ten thousand, and which I have been obliged here to pay to Mr. Elmes, together with ten percent damages, amounting to the further sum of one thousand, giving a total of eleven thousand. It is unnecessary for me to dwell upon the serious inconveniences which have resulted from this circumstance or to repeat how prejudicial the whole of the transaction with the house of John Taber & Son has been to my

affairs. I, however, rely upon you for the payment of this money, as it was entirely upon your recommendation, upon the strength of your assurances and the respectability of your guarantee, that I was induced to embark in this business and to procure cotton for the cargo of the ship *Mac;* but this subject has already been sufficiently enlarged upon in my former letters to you, and I sanguinely trust that

you will not delay making the necessary arrangements for this reimbursement. No information has as yet been received by me from Liverpool respecting the fate of the 500 bales of cotton shipped on board the *Mac.* I feel anxious to know the success of the steps which have been taken in that quarter. I trust that you will communicate to me the earliest information that you may receive on this subject."

On 30 January, 1806, John Taber & Son wrote to the plaintiff as follows:

"We wrote thee the 24th inst., since which we have received a letter from Jacob Barker informing that he had engaged eight hundred bales of cotton for the *Mac* previous to her sailing from New York from your port to Liverpool, which has fixed her rout; as she hath so much freight engaged, we flatter ourselves that she will be filled up immediately. It is our wish to have two hundred bales of good cotton shipped on owners' account, and as much more as may be necessary to make dispatch, as we are not willing to have her detained in your port for freight. To reimburse thyself for the cotton purchased on owners' account, thou may draw bills at sixty days' sight, either on Jacob Barker or on us. If thou can sell bills on Rathbone, Hughes &

Duncan, merchants at Liverpool, at par, thou may on them, taking care not to send the bills before she sails and to write on timely to them to get insurance made on the amount of property shipped on our account."

On 27 March, 1806, the plaintiff wrote J. Taber & Son:

"Your much respectful favor of 30 January last came duly to hand. I observe what you say respecting the purchase of cotton for your account to go by ship *Mac,* of which our friend Jacob Barker, likewise makes mention; this ship has not yet made her appearance, but as soon as she does you may depend on my utmost exertions to follow your orders and give the ship all dispatch that lays in my power. The mode of reimbursements for purchasers made here will be by drawing on our friend Barker, agreeable to his advice, as I think it will be less difficult for me to place bills on New York. Cotton is rising, and fetches now 26 cents.

Notwithstanding, I shall follow your orders with respect to the *Mac,* unless anything to the contrary should reach me before she arrives. As for drawing on Liverpool, it is altogether out of my power, for such bills are seldom asked for here. I shall advise Messrs. Rathbone, Hughes & Duncan, in due time, to effect insurance on the property I may ship on your account. Awaiting the pleasure of announcing you the *Mac's* arrival, I continue with respect,"

&c.;

On 5 June, 1806, the plaintiff wrote J. Taber & Son:

"Cotton is pretty steady at 22 cents. Should circumstances authorize my purchasing for

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your account, I shall, in preference, value for the amount of Mr. Jacob Barker."

On 29 June, 1806, John Taber & Son wrote to the plaintiff:

"We have not been favored with any of thy communications since 4th month, 7th. We have been daily expecting to hear of our ship *Mac* being laden and ready for sea, as we had not the least idea but that the eight hundred bales that Jacob Barker contracted for would be ready at the time agreed on, and expected thou would have purchased a sufficiency to fill up on owners' account, provided freight did not offer in season. By last mail we received a letter from Mr. Jacob Barker informing that he feared the contractors would not furnish the eight hundred bales, and that in consequence thereof the *Mac* would be detained until further orders from us. We therefore have this day wrote Barker to give thee and Captain Swaine such directions as he may think proper. But we hope she will be dispatched for Liverpool before this reaches thee, as it is our wish to have her go there."

On 15 July, 1806, John Taber & Son wrote the plaintiff:

"Thy favor of the 5th ultimo by mail was this day received, the contents noticed, we are very sorry to find that the *Mac* is so detained with you, we having flattered

ourselves that she would have been at Liverpool by this. We wrote thee 27th ultimo by mail, directing thee to follow Jacob Barker's instructions respecting the *Mac,* which we now confirm, and say that we wish

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thee to follow his instructions at all times the same as from us."

On 29 August, the plaintiff wrote J. Taber & Son:

"Your esteemed favor of 29 June has duly come to hand, but I have in vain expected further directions from Mr. Barker, for the want of which I have experienced many difficulties."

On 25 July, 1806, J. Taber & Son again wrote the plaintiff:

"Thy favor of the 13th ultimo was this day handed us by Captain Webb of the *Phoenix.* It had been broken open at sea by an English cruiser. We have not received a copy of thy protest; we should like to see it. We are extremely sorry that we had not in the first instance given thee orders to have laden our ship with staves, logwood, and cotton on our account, with what freight could be obtained; we should certainly have done it if we had the least idea that we should have been disappointed of the 8 hundred bales. We have this day received letters from Jacob Barker informing he had given thee direction to load immediately as above; hope thou can make it convenient to put a large share of cotton on board on our account, as we think that article will pay much more than staves; we trust thou will send to Jacob Barker such documents as will enable him to recover the freight and demurrage."

And on 30 July, 1806, Taber & Son wrote the plaintiff.

"We hope that the *Mac* will sail for Liverpool before

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this reaches thee, with a cargo on owners account, and a large proportion of cotton."

On 16 September, 1806, the plaintiff wrote J. Taber & Son:

"I am successively favored with your much esteemed of 15, 25, and 30 July, and have taken due notice of their contents. Mr. Jacob Barker has likewise wrote me, and shall follow his instructions as far as lays in my power."

On 3 October, 1816, Taber & Son wrote the plaintiff:

"We observe that thou had thoughts of sending the *Mac* to New York after a few weeks, if thou did not receive further instruction, but we trust that will not be the case, as we presume that thou received Jacob Barker's orders soon after, to load her on owners' account for Liverpool, except the demurrage was continued to be paid. If so, we are willing to let her lay until the charterers procure the 800 bales freight. When that is the case, we presume thou will not let her be detained for the remainder part of the cargo to the charterer's damage. We renew our request for thee to continue to follow Jacob Barker's instructions from time to time respecting the *Mac* the same as from us. We are well satisfied with thy proceedings."

On 12 December, 1806, the plaintiff wrote J. Taber & Son acknowledging the receipt of their letter of 3 October and saying,

"I have not, as yet, commenced the purchase of cotton, only small parcels have as yet come to hand; as soon as I can

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succeed I shall value upon Jacob Barker for the amount,"

&c.;

On 9 November, 1806, J. Taber & Son wrote the plaintiff:

"We do not pretend to give thee any positive order respecting the *Mac,* as we have heretofore directed thee to follow Jacob Barker's directions; but we will give

thee a sketch of our wishes, *viz.,* to have the *Mac* dispatched to Liverpool, as soon as possible, with about five hundred bales of cotton on owner's account and the remainder of her cargo on freight,"

&c.;

On 22 January, 1807, the plaintiff wrote J. Taber and son:

"I have written this day to Mr. Barker, and keep him advised of the state of affairs here. Upon his remarks on the subject of demurrage, I have unconditionally passed to your account the total sum paid in, and shall employ the funds for the expenses of the ship, and the surplus for the purchases of cotton for your account. I am happy to inform you that I have already made a commencement and purchased 72 bales at .22, which are now ready to be shipped on board the *Mac.* I shall, as opportunity offers, draw upon Mr. J. Barker for the amount, and complete the 500 bales to be shipped for your account which will be absolutely necessary to procure a full freight."

"I valued upon Mr. J. Barker $1,800, which sum is passed to your credit. I need not recommend to you to take the necessary measures, in order to have my drafts duly honored by that gentleman. "

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On 13 February, the plaintiff wrote J. Taber and Son, and after mentioning a further purchase of cotton for their account he states: "I add you a note of my drafts upon Mr. J. Barker on account of this shipment, for your account, and shall keep you constantly advised of my proceedings."

On 9 February, 1807, Taber & Son wrote the plaintiff:

"We having by last mail received account that the *Mac* had not begun to take her cargo on New Year's day; we are well satisfied that thou had not purchased cotton for us at the high price that we understood it was selling at, as we presume it will be much lower by the time this reaches thee. If the *Mac* hath not taken in any of her cargo before this reaches thee, we wish thee to commence loading her on

owners' account immediately, as we have ever found that when our ship commenced loading on owners' account, that freight soon offered. Jacob Barker informed us some time past that he had given thee directions to ship five hundred bales of cotton on our account, and liberty to ship some flour, which we think may answer well, provided it is good. If freight cannot be obtained to fill her up with the flour and cotton that Barker hath ordered, we should like to have her filled up with good staves of timber, the growth of your country, but no logwood or mahogany. We much wish to have the *Mac* dispatched for Liverpool as soon as may be."

On 6 March, 1807, the plaintiff wrote J. Taber & Son.

"On the 13th ultimo, I last had the pleasure of

addressing you. I have since procured a full freight for the *Mac* at three cents per pound cotton, and she will be dispatched in all this month for Liverpool. I shall ship on board for your account, five hundred bales cotton and thirty thousand staves, of which you now may get insurance effected, the amount per invoice will be about $3,400. I have, since my last, valued upon Mr. J. Barker, for $600 and $10,000 on account of these purchases, and shall continue to draw as occasion offers. As soon as the entire purchase is completed, I shall hand you the invoice and account current, and shall acquaint Messrs. Rathbone, Hughes and Duncan, with my proceeding respecting the above order for insurance, and shall have early opportunities of giving them timely information. I have communicated to Mr. Jacob Barker the present State of affairs."

And on 20 March, 1807, the plaintiff wrote to J. Taber & Son:

"The present merely serves to inform you that I have this day valued upon you, payable in New York, the sum of $10,000, in two bills of $5,000 each, say, $10,000, sixty days after sight, to the order of Thomas Elmes, Esq. which drafts go on account of cotton purchased for your account, and shipped on board the ship *Mac.* It is upon the particular request of Mr. Elmes, that I have altered the mode of my drawing direct on Mr. Jacob Barker."

On 17 April, 1807, the plaintiff again wrote J. Taber & Son:

"I have now the pleasure of informing you that

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the *Mac* has sailed for Liverpool, having on board 500 bales of cotton for your own account, and 549 bales on freight. Enclosed, I hand you invoice and bill of lading of the former, amounting to $33,098.31, for which you will please credit my account. I have engaged 30 m staves, but they were of inferior quality, and I preferred not shipping them. With my next I shall hand you account current, &c.; Capt. Swaine has taken along with him all the necessary documents to recover from the underwriters on the ship *Mac;* the amount of expenses incurred since the gale until she was afloat, was $3,042.25."

On 24 April, 1807, the plaintiff wrote to J. Taber & Son:

"I refer to my respectful last of the 17th instant and have now the pleasure handing you account current to this day, and other papers respecting our transactions, agreeable to which, there is yet a balance due me of $1,276.51 1/2, for which amount I shall value upon you as occasion may offer."

Besides the above correspondence, the plaintiff produced in evidence an answer of the defendant to a bill of discovery, filed by the plaintiff in a suit formerly depending in the supreme court of the State of New York, which was commenced in April, 1810, and discontinued in October, 1813, of which answer the following is an extract:

"And this defendant, further answering, says that previous to the month of May, 1807, he had large commercial dealings with the house or firm of John Taber & Son, of Portland, in the State of Massachusetts.

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And that the said firm or house of John Taber & Son, having failed prior to the said month of May, 1807, and at the time of such failure largely indebted to the

defendant, and this said defendant visited Portland for the purpose of securing his demand against said firm or house of John Taber & Son, and soon after his return, he, about 1 May 1807, in conversation with Gabriel S. Shaw, of the firm of Corp, Ellis & Shaw, Merchants, residing in this city, about the charter of a ship, mentioned to said Shaw, that he, Barker, had just returned from Portland, where he had been for the purpose of getting security from John Taber & Son, when he, said Shaw, informed him that they had, a few days previously, sent bills drawn at New Orleans on said Taber and Son, under cover to the said Tabers, for acceptance, to the amount of $10,000, and inquired if he, this defendant, supposed they would, in the deranged state of their business, return them regularly protested or accepted. From this defendant's knowledge of said Taber's business, he believed that those bills were drawn in payment for the ship *Mac's* cargo, this being the only information this defendant had of any bills being drawn at New Orleans on said John Taber & Son, he was induced to accompany the said Gabriel Shaw to his office, to ascertain the particulars, who, at the instance of this defendant, exhibited to him either a letter or one of the same sets of bills by which this defendant learnt they were drawn by Paul Lanusse, at New Orleans, on John Taber & Son, Portland, in part payment for the cargo of the *Mac.* That this defendant, acting

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from the information so received, and from no other in formation or advice whatever, and also from an apprehension that the said complainant, when he should hear of the failure of the said house of John Taber & Son, would claim from this defendant the amount for which the said bill or bills were drawn, and thereby expose this defendant to an expensive course of litigation in resisting the said claim, if any should be made, he, this defendant, wrote to the said John Taber & Son a letter on the subject of the said bill or bills, and which letter, he believes, is as follows, to-wit: "

"New York, 5 mo. 5th, 1807"

"John Taber & Son,"

"I am this day advised of Paul Lanusse's having drawn on you to the amount of $10,000, which bills were forwarded to you for acceptance; for the payment of those drafts I am not liable, as I only promised to accept in case of his drawing on me. You undoubtedly accepted those bills; if not, and you have them, be pleased at all events, to accept them, as if they are returned without acceptance, the charge will be, as at first, for the shipment for which Lanusse may possibly think me answerable, but if the bills are accepted, he can only look to you. The debt, as to him, thereby becomes of another nature, but as to you it is the same thing, and cannot place you in any worse situation. Therefore let them be accepted, and if you have returned them without acceptance, authorize me to accept them as your agent to this business;

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give immediate attention, as I must not he made answerable for them; although injured,"

"I am yet your friend,"

"JACOB BARKER"

And that afterwards this defendant wrote another letter to the said John Taber & Son, which he believes is as follows:

"New York, 5 mo. 15, 1807"

"John Taber,"

"This day's mail brought me thy letter, by which I am surprised to observe thee has refused compliance with my request. I cannot account for the strange advice your merchants gave respecting protesting those bills. I, however, admit that in ordinary cases there would not be much impropriety in protesting them, though I could not possibly alter the state of your business, the debt being indisputable, their being accepted only acknowledged the debt to be due; but I must insist if thee has any regard to justice, that thee will, if not returned, accept them for account of John Taber & Son; if returned, authorize me to accept them for their account. I consider

the argument that I expected to secure the *Mac* and cargo no excuse at all, particularly as no attachment can be made in this state for partial benefit, all attachments must be made for the benefit of all the creditors. So that if I have property in my hands, the best possible step the creditors could take would be for one of them to attach it in my hands; therefore, must pointedly insist on thy accepting or ordering me to accept those bills. As to

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advice from thy neighbors, it is one of those simple cases that do not require advice, and I say expressly, when thee considers my situation, thee cannot honestly refuse my request. If I was in thy situation, and all the world advised me not to do it, I should not pay the least respect to such advice, but accept the bills without a moment's hesitation. If thou thinks Paul Lanusse will be a more difficult creditor than I shall be, thee will, under present circumstances, be mistaken, to where I am thus forced into a monstrous loss, I shall be very difficult, although, in common cases, should be favorably disposed."

"Your friend,"

"JACOB BARKER"

The plaintiff further proved by Joseph Thebaud, of New York, the plaintiff's agent, that in the beginning of October, 1807, he received from the plaintiff the following account, dated 1 September, 1807, at New Orleans, which he showed to the defendant and demanded payment of the same, which was refused by the defendant:

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[*See* account reproduced at 16 U. S. 132]

The plaintiff further proved that in the suit first above mentioned, which had been depending between him and the defendant in the supreme court of the State of New York, the plaintiff suffered a nonsuit on 19 December, 1808, after the judge

had charged the jury in favor of the defendant. And the plaintiff further proved that he did, on 30 January, 1809, draw two new sets of bills upon the defendant, which were produced and read in evidence by the plaintiff's counsel, and are in the words and figures following:

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"New Orleans, 30 January, 1809"

"Exchange for $10,055.35."

"Sixty days after sight of this my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, ten thousand and fifty-five, thirty-five cents, value received, which place to the account of"

"PAUL LANUSSE"

"To Mr. Jacob Barker, Merchant, New York."

"New Orleans, 30 January, 1809. Exchange for $2,195.93 1/2."

"Sixty days after sight of this my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, two thousand one hundred and ninety-five, ninety-three and a half cents, value received, which place to account of"

"PAUL LANUSSE"

"To Mr. Jacob Barker, Merchant, New York."

That the said bills were protested for nonacceptance on 11 March, 1809, and for nonpayment on 13 May, 1809. The notary also proved that at the time of presenting the said bills, he offered to the defendant the account and letters herein next stated, which the defendant refused to accept, and desired the notary to take them away, who refused, and threw them on his, the defendant's counter. The bills were accompanied with a letter of advice mentioning that the first bill was for the

balance due for the purchase of the 500 bales of cotton, and the other for disbursements of the ship

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Mac, and $1,500 damages paid on the two drafts of $5,000 each on Taber & Son, returned protested for nonpayment.

The plaintiff further proved that all the bills of exchange drawn by plaintiff on the defendant and contained in the above account, amounting to $23,042.96, had been paid by the defendant after the same had been protested for nonpayment, excepting the last mentioned bills for $5,000 each, drawn in favor of Thomas Elmes, and forwarded as aforesaid to Corp, Ellis & Shaw. It was also admitted that the plaintiff had received no part of the freight of the *Mac's* cargo, although it is mentioned in a letter of his that he had received the freight or a part of it.

The plaintiff then proved that the ordinary interest of money in New Orleans was ten percent per annum, and the lawful interest in New York was seven percent

The plaintiff having made the proofs on his part, here rested his cause. Whereupon the defendant then produced in evidence the following account, forwarded to him by the plaintiff, in his letter of 20 May, 1807.

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[*See* account reproduced at printed version of 16 U. S. 135]

The defendant then proved by Gabriel Shaw, of the house of Corp, Ellis & Shaw, of New York, that the two bills of exchange drawn by Paul Lanusse on John Taber & Son, dated 20 March, 1807, were received by Corp, Ellis & Shaw, from Thomas Elmes of New Orleans, in whose favor they were drawn, about t27 or 25 April in the same year, and were immediately forwarded by him to John

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Taber & Son, of Portland, for acceptance; that they were protested on the 30th of the same month at Portland for nonacceptance, and were received by the witness with the protests about 5 or 6 May, about which day, and after the receipt of the said bills, he either met the defendant in the street or called at his house, but which he cannot recollect, and showed him, he believed, the said bills and protest, having understood the said defendant had in some way some concern in the business. That the said bills at maturity were protested in New York for nonpayment, and were afterwards remitted to the said Thomas Elmes at New Orleans. From the protest it appeared that the two bills of $5,000 each were protested for nonpayment on 2 July, 1807, in New York, and that the limited time mentioned in the said bills with the days of grace, were then expired, since the bills were protested for nonacceptance in Portland.

The defendant then rested his cause; upon which the plaintiff claimed a verdict for the sum of $17,908.02, if the court and jury were of opinion that interest was allowable at the rate of ten percent, but if they were of opinion that interest at the rate of seven percent only was allowable, then the plaintiff claimed a verdict for the sum of $15,910 94, and the plaintiff exhibited the following statement, showing the manner in which the said several sums were calculated, *viz.,*

[*See* tabulation at printed version of 16 U. S. 136]

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The plaintiff then prayed the judge of the circuit court to charge and deliver his opinion to the jury that the plaintiff was entitled to the aforesaid sum of $17,908.02 if the interest was to be calculated at the rate of 10 percent, or to the sum of $15,910.94, if the interest was to be calculated at the rate of seven percent. The defendant insisted that the plaintiff was not entitled to any damages, and the judge so charged the jury *pro forma.* A verdict was thereupon taken for the defendant, and a bill of exceptions tendered. An agreement was entered into by the counsel for both parties that the cause should be carried to the Supreme Court by writ of error, and that if the Supreme Court should be of opinion that the plaintiff was

entitled to a judgment for the principal sum of $11,251.19 with interest at the rate of 10 percent, then the judgment should be rendered for the sum of $17,908.02, with costs. Or if the Court should be of opinion that he was entitled to interest at the rate of seven percent only, that judgment should be rendered for the sum of

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$15,910.94, with costs, or if the Court should be of opinion that any other sum different from either of the above sums is recoverable by the plaintiff, that judgment should be rendered for such other sum as the Court might direct. But if it should be of opinion that the plaintiff is not entitled to recover any damages, then the judgment for the defendant should be affirmed.

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MR. JUSTICE JOHNSON delivered the opinion of the Court.

This case comes up on a bill of exceptions. This charge of the judge was given *pro forma,* generally against the plaintiff, and the verdict conforms to it. There are many counts in the declaration, and if on any of those counts the plaintiff was entitled to recover, the judgment below must be reversed.

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The first count is on a refusal to pay two sets of bills drawn on Taber & Son of Portland, payable in New York. These bills were duly protested and returned, and the amount, with damages, refunded by the plaintiff.

In defense to this count it is contended that the undertaking of Barker, as expressed in his letter of 9 January, 1806, relates to a different transaction from that upon which this cotton was purchased; that this transaction originated in the letters of 26 January or 24 July, 1806, or of the 20 February, 1807, and in neither of those letters is the undertaking on bills to be drawn on Taber & Son reiterated; that the letters alluded to contain, in fact, an implied revocation of the undertaking

in the letter of the 9th of which the plaintiff was bound to take notice.

To the correctness of these positions this Court cannot yield its assent. Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men than to favor the revocation of an explicit contract on the construction of a correspondence nowhere avowing that object. It was in the defendant's power to have revoked his assumption contained in the letter of the 9th at any time prior to its execution, but it was incumbent on him to have done so avowedly, and in language that could not be charged with equivocation. In this case we discover nothing from which such an intention can fairly be inferred. The whole correspondence refers to the same subject and has in view the same object. The expediting of the ship

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Mac on freight, if freight could be obtained, and if not, to be filled up (at least to the quantity of cotton here purchased) on owner's account. This agency the plaintiff undertakes expressly on the credit of Barker for a house with whose credit, except on his introduction, he is unacquainted, and so far from restricting the order contained in the letter of the 9th, there is not one from the defendant in the subsequent correspondence that does not enlarge the order as to quantity upon the contingency of the ship's not getting freight.

But it is contended although the original assumption may not have been revoked, it was not complied with according to the terms in which it was expressed, and therefore was not binding to the defendant. And on this ground, so far as relates to the bills in this count, the Court is of opinion that the defense is supported on legal principles. The assumption is to guarantee bills, "drawn on Taber & Son, Portland, or me, at 60 days' sight." These bills are drawn on Taber & Son, Portland, payable in New York. Now although we cannot see why an honorable discharge of his contract did not prompt the defendant to accept these bills for the honor of the drawer, when they were returned to New York for nonacceptance, yet as it is our duty to construe the contracts of individuals, and not to make them, we are of opinion that these bills were not drawn in conformity to the assumption of the

defendant. Merchants well understand the difference between drawing bills upon a specified place and drawing them upon one place payable in another. We are not to inquire into the

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reasons which govern them in forming such contracts, or competent to judge whether any other mode of complying with a contract may not be as convenient to them as that which they have consented to be governed by. But it will be perceived that this opinion can only effect the right of the plaintiff to recover the damages paid by him on the return of those bills, and has no effect in this view of the case, upon the plaintiff's right to recover upon the original guarantee of this debt when legally demanded.

It is, however, contended that the election to draw in this form, was conclusive upon the plaintiff, and he could not afterwards resort to a draft upon the defendant himself. And this brings up the question upon the plaintiff's right to recover upon the second count. This count is on a refusal to pay a bill drawn on Barker himself for the exact balance of the invoice of the cotton after crediting the defendant with the bills that he had paid. This bill was not negotiated and returned, but drawn in favor of an agent of the plaintiff, and of course no damages are demanded on it.

The defense set up to this count, to-wit that the plaintiff, by making his election to draw upon Taber and Son, is thereby precluded from restoring to Barker, we think cannot be sustained. It is in vain that we look for any passage in the correspondence that holds out this idea, nor is there anything in the nature of the transaction that will sanction this Court in attaching such a restriction to Barker's undertaking. It was in effect a promise to furnish the funds necessary to carry into execution this adventure.

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Had it contained a mere guarantee of bills to be drawn on Taber & Sons, there might have been some ground for this argument; but where the defendant confers the right to draw upon himself, and in fact clearly recommends a preference to

such bills, he makes himself the paymaster, and we consider it an original substantive undertaking. In this view of the case, the law quoted on the subject of securityship undertakings cannot be applicable, and we think the plaintiff ought to recover on this count.

There are other items in the plaintiff's demand on which, as the case will be sent back, it is necessary to express an opinion. The first is the charge of about $1,200 for services and expenses incident to this agency; the other is the charge of interest.

The first of these items we are clearly of opinion the plaintiff is entitled to, and that it is recoverable under the counts for services performed, and money expended in the discharge of this undertaking. And as to the second, we are equally satisfied that interest is recoverable under the second count in nature of damages. But some difficulty has arisen on the question whether the plaintiff is entitled to recover the interest of New Orleans or of New York. The former, the bill of exceptions states to be ten percent, the latter seven percent

Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place. Had this bill on Barker been negotiated and returned under protest, the holder would have been entitled to demand of the drawer the interest of

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New Orleans, and thus incidentally at least, the defendant would have been compelled to pay the plaintiff that interest. But it may be contended that as the letter of the 26th appears to restrict the order for this purchase, so as to make it depend on the condition of the practicability of negotiating bills on New York, the undertaking of Barker was limited to payments to be made in New York. On this point the Court is of opinion that even though we attach this condition to Barker's undertaking, the liability to replace the money at New Orleans still continued, and any necessary loss on the bills on account of the difference of exchange would have been chargeable to the defendant; but we think further that the restrictive

words in the letter alluded to may justly be considered as enlarged into a general order in his subsequent correspondence.

The Court is therefore of opinion that as the money was advanced at New Orleans, and to be replaced at New Orleans, the plaintiff may claim the legal interest at that place.

This Court is of opinion that there is error in the judgment below, and that it must be reversed. But this Court can do no more than order a *venire facias de novo.*

An attempt has been made to obtain from this Court a mandate to the circuit court to enter a judgment in conformity to an agreement of parties entered on the transcript, which states the amount to be adjudged to the plaintiff, upon several alternatives. But we are of opinion that this Court can take no notice of that consent. The verdict presents no alternative,

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and the consent entered on the transcript or on the minutes of the circuit court forms no part of the record brought up by this writ of error. Nor will this Court be led into the exercise of a power so nearly approaching the province of a jury in assessing damages.

Judgment reversed.

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