

Schimmelpennich Vs. Bayard

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Appellant : Schimmelpennich

Respondent : Bayard

Judgement :

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Schimmelpennich v. Bayard

26 U.S. (1 Pet.) 264

ON DIVISION IN OPINION AMONG JUDGES OF THE CIRCUIT COURT

OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SYLLABUS

In this case the Court confirms the principle established in the case of [Coolidge v. Payson](#), 2 Wheat. 75, that a letter written 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 letter, a virtual acceptance, binding the person who makes the promise.

If the drawees of a bill of exchange who refuse to honor the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill by a wrongful act. They can acquire no right as the holders of the bill paid *supra protest* if they were bound to honor it in the character of drawees.

A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignees of the property and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill, but directions were given to charge the bill, generally to the account of the shipper; *held* that the drawees were not bound to accept or pay the bill in consequence of the proceeds of the shipment being received by them.

A merchant has a right by the usage of trade to draw on effects placed in the hands of the drawee by shipment, and the consignee must pay the bills if the shipment places funds in his hands.

It is believed to be a general rule that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal is bound to know the extent of his authority; yet if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he would not be permitted to avail himself of the imposition and to protest bills the drawing of which his conduct had sanctioned.

This action was instituted in the Circuit Court of the United States, for the Southern District of New York, upon nine several bills of exchange drawn at Baltimore at sixty days sight by John C. Delprat on the plaintiffs, carrying on business under the firm of N. & J. & R. Van Staphorst, merchants in Amsterdam, and endorsed by the

defendants.

The cause was tried in April, 1825, and a verdict taken for the plaintiffs for \$32,275.95, being for the whole amount of their claim, subject to the opinion of the court upon a case agreed.

The judges of the court below, having divided in opinion

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on the following points, the same were certified to this Court, and the cause was argued upon the case agreed and the points upon which there was a division of opinion by the judges of the circuit court.

1. Whether the authority of J. C. Delprat to draw upon the plaintiffs did or did not amount to an acceptance of the bills.
2. Whether the bills paid by the plaintiffs, *supra protest*, for the honor of the defendants, were drawn and negotiated in conformity to the authority and instructions of the plaintiffs to John C. Delprat.
3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.
4. Whether J. C. Delprat was a competent witness.
5. Whether the letter, offered by the plaintiffs in evidence and rejected, ought to have been admitted.
6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury.

All the facts, with the correspondence between the parties, which were considered by the court as necessarily connected with a full development of the case are stated in the opinion of the Court.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This action was brought on nine bills of exchange drawn by John C. Delprat on the plaintiffs and endorsed by the defendants, a list of which follows:

Baltimore, May 23, 1822, 500 favor of J. P. Kraft

Baltimore, May 27, 1822, 200 favor of defendants

Baltimore, May 27, 1822, 300 favor of defendants

Baltimore, May 27, 1822, 500 favor of defendants

Baltimore, June 12, 1822, 1,000 favor of defendants

Baltimore, June 18, 1822, 300 favor of defendants

Baltimore, July 31, 1822, 1,000 favor of defendants

Baltimore, July 31, 1822, fr. 10,000 favor of defendants

Baltimore, July 31, 1822, fr. 5,000 favor of defendants

These bills were regularly protested for nonacceptance and nonpayment, but were accepted and paid, *supra protest*, by the drawees for the honor of the defendants the endorsers. The jury found a verdict for the plaintiffs, subject to the opinion of the court, on a case stated. The judges were divided in opinion on the following points, which have been certified to this Court:

1. Whether the authority to John C. Delprat to draw on the plaintiffs did or did not amount to an acceptance of the bills.
2. Whether the bills paid by the plaintiffs, *supra protest*, for the honor of the defendants were drawn and negotiated in conformity to the authority and instructions of the plaintiffs to J. C. Delprat.

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

4. Whether J. C. Delprat was a competent witness.

5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted.

6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury.

These questions require an examination of the relations which existed between the drawer of these bills and the drawees.

On 11 January, 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy:

"The undersigned N. and J. and R. Van Staphorst, merchants in this city, and John C. Delprat of Philadelphia, present the

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last, choosing for the present act his *domicilium citandi et exequendi* at the office of the youngest notary here, have entered with one another into the following arrangement and stipulations:"

"ARTICLE I. The second undersigned (viz., J. C. Delprat) shall, to the benefit of the first undersigned (N. and J. and R. V. S) manage in the United States of America the mercantile interest of said first undersigned, consisting chiefly in the forming of new solid connections and procuring of consignments, and shall further perform everything the first undersigned will appoint him to do as their agent."

"ART. II. The second undersigned binds himself to procure to no person or persons in this kingdom any consignments or commissions from himself or any other except to the first undersigned, but on the contrary to use his utmost

exertions towards the benefit of the mercantile house of the first undersigned, they being willing on their side to facilitate all such commercial operations as might benefit the second undersigned, without their prejudice."

"ART. III. The first undersigned allows to the second undersigned the *faculty to value* on them direct, or payable in London, at no shorter date than sixty days sight, *for such moneys* as the second undersigned shall employ to *make advances* on whole or part of cargoes of current articles, *viz.*, to the amount of two-thirds of the invoice price of articles laden in chartered vessels, and of three-fourths in vessels owning to the shippers, and likewise consigned to the first undersigned, it being left to the knowledge and prudence of the second undersigned to judge of the invoice price of the aforementioned goods, and it *being understood* that the second undersigned, at the same time that he gives advice of his drafts furnished in the above manner, shall enclose and forward or cause to be enclosed and forwarded to the first undersigned the bill of lading and invoice of the goods on which the above mentioned advances might have been made, and shall cause the above goods to be duly insured in America to that effect that the policy of said insurance be delivered up, duly endorsed, to the second undersigned, *and rests with him until the end of the expedition*. It being further a fixed rule that the first undersigned must never come in the predicament of having made any advances on cargoes or part of cargoes which are not duly insured in America."

"The first undersigned *further* oblige themselves to open a credit of \$40,000, say forty thousand dollars, with Messrs. Le Roy Bayard & Co. New York, to be made use of by the second undersigned in case any advances are required on consignments *to be made to the said first undersigned, that credit to be renewed*

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every time by the said first undersigned, after the arrivement of the consigned goods shall have been duly advised by them."

"If, however, against all probability, it happened that the multiplicity of consignments rendered it desirable to the first undersigned to stop for a while further consignments, then the said first undersigned retain the FACULTY to prescribe to the second undersigned such *limits and orders* as they shall find proper according to circumstances, which orders and limits the second undersigned shall be obliged to follow."

"ART. IV. As sometimes an opportunity might offer to procure a good *consignment* to the first undersigned on condition of their taking an interest in that expedition, they authorize the second undersigned *to make use likewise of the above mentioned credit of \$40,000, to interest the first undersigned* in such expeditions for a proportion not larger than one-fourth, with this restriction, that said proportion must never exceed the amount of \$10,000, say ten thousand dollars. The choice of the articles to be shipped to the first undersigned on their own account being left to the commercial knowledge of the second undersigned. This authorization will be considered as renewed after the termination of each expedition, *viz.*, after that termination shall have been duly advised to the second undersigned by the first undersigned."

"ART. V. That the first undersigned, in consideration of the services to be rendered by the second undersigned, shall grant to the second undersigned one-third of the amount of the two percent commission to be earned by the first undersigned on the consignments to be procured, and further one percent from the purchase of such goods which might be shipped for the account of the first undersigned, as is more amply specified in article four; it is to be understood, that then no benefit arises from the third of the two percent commission of those goods, and finally that the second undersigned is promised an allowance for traveling and other expenses the sum of \$2,000, say two thousand dollars, per annum, to commence with the first of February, 1818."

"ART. VI. These arrangements shall last for the term of two consecutive years, and thus end with the last day of January, 1820. It being understood that (in case of no denunciation to the contrary made by any of the parties aforesaid) this contract will be continued from year to year, but that in case one of the parties

should desire the annulment of the present contract, said party shall be obliged to signify his intention to the other party four months before the expiration thereof."

"ART. VII. Ultimately it has been stipulated that in the unlooked for and wholly unexpected case of any differences taking place between the undersigned respecting the fulfillment of any

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of the articles above mentioned, those disputes or differences shall be entirely adjusted and decided by the decision of two arbiters, to be chosen in the City of Amsterdam, one by each party, who in case of difference of opinion between them shall have the FACULTY of appointing a third or super arbiter, which arbiters then must decide and finally terminate all such differences, *both parties renouncing to all law measures and impediments*, and especially to the *faculty of laying any arrests or hindrance on moneys, goods, or possessions* belonging to any one of the parties undersigned, *all such aforesaid measures* to be considered now and then as *null, void, and of no effect whatsoever*, the consequences thereof to be suffered by the party which might have made use of the aforesaid measures."

Of the present act have been made two copies, &c.;

"Amsterdam, 11 January 1818"

"[Signed] N. & J. & R. VAN STAPHORST"

"JOHN C. DELPRAT"

A copy of this contract was transmitted by the plaintiffs to the defendants in a letter dated the 21st of the same month, a copy of which follows:

"Messrs. LE ROY, BAYARD & CO. N. York (confidential)"

"Amsterdam, 21 Jan., 1818"

"Gentlemen -- Thinking it useful for the extension of our commercial relations in the line of consignments (one of the branches of our establishment) to appoint an

agent to that purpose in the United States of America, we have been decided by the confidence we place in the character and commercial notions of Mr. John C. Delprat to appoint that gentleman to the aforementioned trusts, in which choice we have chiefly been directed by the reliance we have on the principles of loyalty and prudence which must actuate a person employed during such a long period by your worthy house. We judged it necessary for the obtaining of said purpose to leave at the disposal of Mr. Delprat *sufficient means to facilitate his exertions, viz.,* by opening with you in his favor a credit to be made use of by him in the manner pointed out in the enclosed abstract of our contract with said gentleman. We therefore request and authorize you to furnish Mr. Delprat to the extent of \$40,000, *say forty thousand dollars (to be made advances with by him on such cargoes or part thereof as he might procure the consignment of to our house and to be made use of to interest our house in part of cargoes to the forementioned purpose).* The credit to run for the space of two years unless countermanded by us in such a manner that when Mr. Delprat *has availed himself of the whole or part of said credit of \$40,000,* that credit or part of the same must be considered renewed when you receive our approbation of the said disposition of Mr. Delprat. "

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"You will observe the sole object of the mission of Mr. Delprat is to obtain solid consignments from good houses throughout the U.S., and the disposal of the credit opened in his behalf with your house *is exclusively intended to facilitate said business.* In this important matter it will be a point of great security, and as such eminently satisfactory to us that our said agent may be able to have recourse in every circumstance to wise and *friendly counsel,* and we therefore request you to assist Mr. Delprat, as far as opportunity may offer, with the lessons of your long experience, *particularly with respect to those transactions for which, by virtue of the credit aforementioned, we may have recourse to your cash, it being, as you will observe, a material point that we are secured, that the moneys he may dispose of will have no other than the destination just mentioned.* To this effect we authorize you, gentlemen, *in case of moral certainty, that the moneys Mr. Delprat should demand from you* by virtue of the above-mentioned credit would not be

employed in the aforementioned manner, and earnestly request you *not to pay* and to refuse him any moneys whatsoever on account of the above credit."

"In general, as a trust of this nature, which is to have its effect at such a distance, is always a delicate matter, we must claim and dare expect from your known sentiments towards us that you will give the strictest attention to the line of conduct followed by Mr. Delprat, and if unexpectedly that conduct could appear in the least exceptionable, we mean either imprudent or equivocal, then, gentlemen, do give us, with all the frankness of long experienced friendship, your ideas respecting that subject and be perfectly secure that every information of what nature soever will not only be thankfully acknowledged by us but received with the most religious secrecy. We have now, gentlemen, only to request your kind offices in favor of Mr. Delprat, *and to solicit your friendly cooperation towards the attaining the object of his mission*, which we are fully persuaded can be much facilitated by your kind recommendation to the numerous friends you have in different parts of your country. Be assured, gentlemen, of the high sense we have of the obligation we will have to you for your friendly services through the whole of the business we just now took the liberty to explain to you, and of the earnest desire we have to be often in the opportunity of rendering you the like or any services in our power. Referring for commercial information to our general letter of this date, we are, with sincere regard,"

"Gentlemen, your most obedient servants,"

"N. & J. & R. VAN STAPHORST"

"[Endorsed] Confidential. Amsterdam, 21 January, 1818. N. and J. and R. Van Staphorst. Received, March 29. Answered, 24 do. "

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This letter was answered by Le Roy Bayard & Co. in the following terms:

" *PRIVATE*"

"New York, 24 March, 1818"

"Messrs. N. & J. & R. VAN STAPHORST, Amsterdam."

"Gentlemen -- We have the honor of replying to your esteemed favor 21 January, acquainting us with the arrangement you have made with our mutual friend, Mr. Delprat, who has undertaken the agency of procuring you consignments from this country. In the furtherance of the object, we shall be very happy to render our services useful, and beg to offer our best wishes for the success of Mr. Delprat's operations in your behalf. Due note is taken of the credit you are pleased to open to that gentleman with us, to the amount of \$40,000, subject to renewal, as fully expressed in *your letter*. We doubt not from the knowledge we possess of Mr. Delprat's character that he will fully justify the confidence you repose in him, and though he may, under existing circumstances, find it difficult to enlarge to the extent that could be mutually wished, we are persuaded that no exertion will be wanted on Mr. Delprat's part to reap the utmost benefit from the mission entrusted to him."

"Believe us, with honor and esteem, gentlemen,"

"Your obedient servants,"

"LE ROY, BAYARD & CO."

It is proper to observe that several merchants of Holland, whose agents the plaintiffs were, had become large holders of government stock and of shares in the Bank of the United States. Le Roy Bayard & Co. had been employed to draw the interest and dividends and to remit them to Europe. The credit of \$40,000, therefore, which was raised for Delprat with Le Roy Bayard & Co., was merely the application of so much of their funds in the United States to the business of his agency in aid of the bills he was authorized to draw on them. The continuance or discontinuance of this credit might depend on the eligibility of continuing this mode of remittance, as well as on the withdrawal of their confidence in their agent. Several letters passed between the plaintiffs and defendants respecting their transactions in consequence of this credit, which manifest unequivocally the desire of the plaintiffs that its amount should not be exceeded, but which betray no want

of confidence in Delprat. In a letter of 24 June, 1819, they renew the credit of \$40,000, and add

"at the same time, we confirm our former orders not to exceed said amount for our account. In case you have funds in hand for any of our institutions, and you think proper to remit us for the same, Mr. Delprat's bills on us, the nature of which you are well acquainted with, you allow him then the same credit,

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which you do to all persons from whom you take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued."

In answer to this letter, the defendants say, on 24 September, 1819:

"You also accord us the permission to remit this gentleman's (Delprat's) drafts, for any moneys we may have on hand belonging to your various institutions. The confidence which we mutually have in this gentleman's character must, with us, act in lieu of vouchers to exhibit the reality of transactions which may give origin to such drafts, the whole of this gentleman's operations having been hitherto beyond our immediate knowledge."

This correspondence continued until 12 May, 1820, when N. & J. & R. Van Staphorst addressed a letter to Messrs. Le Roy Bayard & Co. of which the following is an extract:

"There being frequent opportunities of drawing here, now, on New York, we will probably have for some time to come occasion to dispose of the dividends which 'you will receive for our account, in October next,' and so on, and we have therefore directed Mr. Delprat not to make use of his credit of \$40,000 lately opened in his favor. We thus also request you, by the present, to consider the same as annulled until we may again renew the same."

The agency of Delprat continued after this revocation of his credit with Le Roy Bayard & Co. He continued to solicit consignments for their house in Amsterdam and to draw bills on them for advances without any other alteration in his powers

than is contained in a letter of 6 Feb., 1821, which contains the following clause.

"The advances, therefore, to be made by you on our behalf on shipments to our consignments either from funds belonging to us in your hands or by drawing and endorsing the shipper's draft must not exceed, henceforth, one-half of the 'true invoice.'"

As a compensation for this reduction of the advance to be made in the United States, J. & N. & R. Van Staphorst engaged, on the arrival of the shipments, to remit to the consignors the estimated value of the cargoes in bills on their house in the United States.

Delprat acknowledged the receipt of this letter on 17 April, 1821, and promised to conform to its directions.

The correspondence between the plaintiffs and defendants respecting Mr. Delprat's agency appears to have ceased on 12 May, 1820, when his credit with the house of the latter was annulled. At least no subsequent letter appears in the record until 9 July, 1822, when the plaintiffs announced to the defendants the sudden termination of their connection with Mr. Delprat, whose conduct, they said, has been so imprudent as to oblige them at the same time to protest

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several of his drafts. Their knowledge, they say, of the former intercourse between Le Roy Bayard & Co. and Mr. Delprat and of the great regard felt for him by those gentlemen induce them to state the chief reasons which compelled them to this measure. These are his irregularities in keeping his accounts and omission to furnish an account since 31 December, 1820, although the balance then due from him was fully \$7,837.54, being

"for the proceeds of gin consigned by us to him, for proceeds of drafts, issued by him on us, for our account, in order to employ the proceeds to make prudent advances with,"

&c.;

They then proceed to state that Mr. Delprat owed, at that date, upwards of 82,000 florins, against which he might be entitled to a credit of \$6,000. The account, they say, has accrued to this height in a great measure

"in consequence of shipments made to him for his account in full confidence of his making us, for the amount, remittances, which we till now have not received, though the goods were with him for many months."

The letter complains of the large advances made by Mr. Delprat on consignments notwithstanding their repeated remonstrances, and dwells on the high opinion they had entertained of him; "his integrity," they say, they "even now will not question." Thus, the letter proceeds,

"were matters situated when last Friday, contrary to anything we could expect or anticipate, we found ourselves drawn upon by Mr. Delprat, for 200, 300, and 500, issued, as he informs us, for the amount of purchases which he is making of articles not yet shipped, and on the other hand, 2d, 500, fl. 1,250, and 1,750, issued on us, as advances made to Mr. Krafft, already so much our debtor, on shipments which he made some long time ago, and which Mr. Delprat could clearly perceive, that taken at an average, did nothing diminish the balance due by him."

The letter proceeds to state in substance that they could choose only between the alternatives of allowing the debt due from Mr. Delprat to be swelled to a still larger amount and protesting his bills. They had chosen the latter, however it might pain their feelings. They express their regret to find, that among the drafts to be protested for nonacceptance, and perhaps afterwards for nonpayment, are several endorsed by the defendants, for whose honor, however, they had intervened.

This letter was received by the defendants on the 1 September, 1822. They immediately obtained from Mr. Delprat an order on the plaintiffs, to hold at their disposal all the proceeds of the goods shipped in his name, by the *Virgin* and other vessels, and all balances due to him. This order was enclosed to the

plaintiffs in a letter of 7 September, 1822, in which they say,

"We can, of course, only consider this order as applying to the balance that may possibly accrue to him upon the settlement of your account, and if any should accrue, we will thank you to take such legal steps, which you may deem necessary, as will place it with us, without fear of contention. His drafts, which you may have paid for our account, will probably furnish sufficient authority to enable you to do so."

At the trial, John C. Delprat was examined as a witness. He deposes that the several bills of exchange on which this suit was instituted were drawn in his capacity as agent on account of and for the purpose of making advances on shipments consigned to the plaintiffs; and, except that in favor of J. P. Krafft, for 500, were accompanied by letters of advice. That during the whole period of his agency, he was in the habit of making shipments on his own account and of drawing for advances on the said shipments, precisely in the same manner as when they were made by others; that this was done with the full knowledge and approbation of the said N. & J. & R. Van Staphorst, who never found fault with him for doing so, but to encourage him to make such shipments, gave him credit for one-half the commission, upon the sales of the shipments, so made upon his own account. On his cross-examination, the witness stated that the bill for 500 in favor of Krafft was drawn for shipments by the *Edward*, *Jason*, and *May Flower*. He cannot say when the *Edward* sailed. The *Jason* had arrived, and the *May Flower* had sailed before the bill was drawn. Krafft was at that time indebted to the plaintiffs. The bill was issued to Krafft, but was returned to witness, who sent it to the defendants. The bills of lading, and the invoices, were not sent with it. The three bills of 27 May for 1,000 were drawn on account of shipments, in his own name, by the *Virgin*. She sailed about 30 July. They were not accompanied by invoices or bills of lading. The two bills of 12 and 18 June, for 1,000 and for 300, were drawn on tobacco, shipped by the *Henry*, belonging to the witness and to Mr. Krafft. The bill of lading and invoice did not accompany them. The three bills of 31 July were drawn on the shipments by the *Virgin*, generally. They were not accompanied by bills of lading or invoices. The defendants received a commission

for endorsing his bills on the plaintiffs.

In making the advances on shipments on his own account, he drew on the plaintiffs, sent his bills to the defendants, to whom they were charged, and then drew on the defendants, as the money was required, either on his own shipments or the shipments of others, which bills were credited to the

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defendants. He understands that all his transactions with the defendants, were carried by them into their general account with him. These transactions were not confined to his agency for the plaintiffs. He remains considerably indebted to them.

He was concerned in shipments with Mr. Krafft, and did a great deal of business with him, but did not consider himself as a general partner.

The connection between the plaintiffs and J. C. Delprat was formed by the agreement of 11 January, 1818. He was constituted their agent for purposes therein described, and received such powers as were deemed sufficient to enable him to perform the duties which devolved on him. That duty was to manage their mercantile interest in the United States, "consisting chiefly in the forming of new solid connections and procuring of consignments." To enable him to perform this duty, he was allowed the faculty to value on them direct, or payable in London, at no shorter date than sixty days sight, for such moneys as he should "employ, to make advances on the whole or part of cargoes of current articles," viz., to the amount of two-thirds of the invoice price, &c.;, it being understood that his letters of advice should be accompanied by the bills of lading and invoices of the goods on which the advances may have been made.

John C. Delprat, then, had no general authority to personate the plaintiffs in all respects whatever, but was an agent appointed for particular purposes, with limited powers calculated to subserve those purposes. To procure consignments it was indispensable that he should advance money to the consignors, and this money was to be raised by bills on the plaintiffs. But he was authorized to draw only for a special purpose and to a limited extent. Out of the limits assigned to him

he had no power. The plaintiffs not being, as a matter of course, the acceptors of every bill he might draw, must have performed some act in relation to the particular bills, which imposes on them, in law, the character of acceptors.

This point was considered by this Court in the case of *Coolidge v. Payson*.

Coolidge & Co. held the proceeds of a cargo claimed by Cornthwaite & Cary, whose claim depended on the decision of this Court of a case depending therein. Cornthwaite & Cary were desirous of drawing these funds out of the hands of Coolidge & Co., and offered a bond, with sureties, as an indemnity in the event of an unfavorable decision. Coolidge & Co., in a letter to Cornthwaite & Cary, state some formal objections to the bond, and add

"We shall write to our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams

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feels satisfied on this point, he will inform you, and in that case your draft for \$2,000 will be honored."

In answer to the letter addressed by Coolidge & Co. to Williams, on this subject, he declared his satisfaction with the bond as to form; declared his confidence that the last signer was able to meet the whole amount, himself; but that he could not speak certainly of the principals, not being well acquainted with their resources. He added, "under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the same day, Cornthwaite & Cary called on Williams, who stated the substance of the letter he had written and read a part of it. One of the firm of Payson & Co. also called on him and received the same information. Two days afterwards, Cornthwaite & Cary drew on Coolidge & Co. for \$2,000 and paid the bill to Payson & Co. who presented it to Coolidge & Co., by whom it was protested. Payson & Co. sued them as acceptors.

The court instructed the jury that if it was satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Cooledge & Co. to Cornthwaite & Cary, did declare, that he was satisfied with the bond referred to in that letter, and that the plaintiffs, on the faith and credit of the said declaration and also of the letter to Cornthwaite & Cary, did receive and take the bill in the declaration, they were entitled to recover in the action.

The jury found a verdict for the plaintiffs, the judgment on which was affirmed in this Court.

In this case, the drawee had written a letter to the drawer promising to honor his bill for \$2,000 if Mr. Williams should be satisfied with a bond of indemnity which had been placed in their possession. Mr. Williams declared his satisfaction with it, both to the drawer and holder of the bill, within two days after this declaration. In this case, the promise to accept was express, and applied to a particular bill, the precise amount of which was specified in the promise.

The court in its opinion reviews several decisions in England on this point, in all of which the promise to accept was express, and in some of which the court declared the opinion that the promise ought to be accompanied by circumstances which may induce a third person to take the bill. After reviewing these cases, this Court laid down the rule

"that a letter written within a reasonable time before or after the date of the 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 letter, a virtual acceptance, binding the person who makes the promise. "

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It cannot be alleged that these bills are brought within this rule. The plaintiffs therefore cannot be considered as acceptors of them.

But although the plaintiffs cannot be viewed as the acceptors of these bills, it does not follow necessarily that they can maintain the present action. To entitle them to

maintain it, the court must be satisfied that the payment is in fact what it professes to be -- a payment really for the honor of the endorsees. If the drawees, thus refusing to honor the bill and thus denying the authority of the drawer to draw upon them, were bound in good faith to accept or pay as drawees; they will not be permitted to change the relation in which they stand to the parties on the bills by a wrongful act. They can acquire no rights as the holders of bills, paid, *supra protest*; if they were bound to honor them in their character of drawees. The single and unmixed inquiry, therefore, on the second and third questions is whether the drawees were bound to accept or to pay these bills. And first, were they so bound because the bills were drawn in pursuance of the authority they had given to the drawer? This demands a more critical examination of the evidence than was required when considering the first question.

It is apparent from the contract of 11 January, 1818, that Mr. Delprat came to the United States as the agent of N. & J. & R. Van Staphorst, to manage their mercantile interest, "consisting chiefly informing new solid connections, and procuring of consignments," and also with commercial views of his own. The principal object of the contract is to define his authority, and to regulate his conduct as agent. He is allowed to draw on the plaintiffs for such moneys as he should employ in making advances on current articles, consigned to his principals, to the amount of two-thirds of the invoice price of articles laden in chartered vessels. He was still further restricted in his advances by orders received long before the bills in question were drawn, to one-half of the true invoice. Mr. Delprat's authority, then, to make advances, was limited at the date of this transaction to one-half the invoice price. One and perhaps the most usual mode of conducting business of this description is to draw in favor of the consignor or to endorse his bill. The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor, which was raised by the bill. In either case, however, drafts beyond one-half the invoice price of the consignments actually made, would exceed the authority given. Circumstances may exist which would impose on the principal the obligation to pay such drafts, but the question we are now considering relates only to the authority under which the bills were drawn. That authority

restricted the agent in the amount of his drafts, to one-half the invoice price of the articles actually consigned, and also required him to accompany his letters of advice, with bills of lading and invoices.

Were the bills in question drawn in conformity with powers and instructions thus limited?

The first bill on the list is for 500 pounds, drawn in favor of J. P. Krafft, on 23 May, 1822, and endorsed by him to the defendants. The letter of advice states this bill to be drawn on account of shipments by the *Edward*, *Jason*, and *May Flower*, as by letter of 21st, which is to be charged to account of P. Krafft. The letter of the 21st is not in the record.

The shipment by the *Jason* had arrived, and the *May Flower* had sailed before the bill was drawn. Mr. Krafft was at the time indebted to N. & J. & R. Van Staphorst. The bill was returned by Krafft to Delprat and then endorsed by the defendants.

It does not appear, certainly, who remitted this bill, although the probability is that, as it was endorsed by the defendants not as purchasers, but for a commission, it was remitted by Delprat, to whom it was returned by Krafft, as is stated in Delprat's testimony, or by some person to whom Delprat sold it. It is true that he further states that after the bill was so returned, he sent it to the defendants, but this was no doubt done for the purpose of having it endorsed by the defendants in order to give it credit. Neither does it appear, from the evidence in the cause that Krafft accompanied the shipments on account of which this bill was drawn, by any letter of advice or otherwise, directing the proceeds thereof to be applied to the discharge of this bill, but on the contrary, the letter of advice addressed to the plaintiffs by Delprat directed the these circumstances, taken in connection with the additional one, that Delprat was concerned generally with Krafft in the shipments made to the plaintiffs, the Court is of opinion that there is no material difference between this bill and those drawn on account of shipments made by and in the

name of Delprat, which are now to be considered.

It has already been stated that Mr. Delprat was a merchant, trading on his own account, at the same time that he was the agent of N. & J. & R. Van Staphorst. His transactions in his two characters were as distinct from each other as if they had been the transactions of distinct persons. As an agent, he was bound to act "in conformity to the authority and instructions" of his principals. As a merchant, he was himself the principal, and acted in conformity with his own judgment. It would seem, then, that the contract must contain some very peculiar

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and unusual provisions, to place Mr. Delprat under the authority of the house in Amsterdam, whilst carrying on trade in the United States on his own account. Upon reference to the contract, we find a stipulation between the parties in the following words:

"The second undersigned [Delprat] binds himself to *procure* to no person or persons in this kingdom any consignments or commissions from *himself* or any other except to the first undersigned, but on the contrary, to use his utmost exertions toward the benefit of the mercantile house of the first undersigned, they being willing, on their side, to facilitate all such commercial operations as might benefit the second undersigned without their prejudice."

This article contains the only limitation on the entire independence of Mr. Delprat as a merchant. It is perhaps a necessary limitation, which was in part the price of his agency, and for which he finds a compensation in the profits of the business confided to him. This restriction does not change the character of his transactions as a merchant. His waiving the right to consign to any other house does not impress on his consignments to the Van Staphorsts, or on his bills drawn on those consignments, a character different from that which would have belonged to them, had his shipments been made from choice. He does not bind himself to make consignments to them, but not to make consignments to any other house in the Netherlands.

If any doubt could arise from this article, it would be produced by the peculiar manner in which it is expressed. Mr. Delprat binds himself to procure to no person in the Kingdom of the Netherlands any consignments or commissions, from himself or any other except to the Van Staphorsts. The singular application of the word "procure" to consignments made by Mr. Delprat himself may be connected with the succeeding article which authorizes him to draw bills, and may have some influence on its construction. In that article, the Van Staphorsts allow Mr. Delprat "the faculty to value on them direct, or payable in London," for such moneys as he shall employ to make advances on the whole, or part of cargoes, of current articles consigned to them, to the amount of two-thirds of the invoice price.

It may be said that as in the preceding article, consignments made by Delprat on his own account were considered as procured by him, and were placed on the same footing with consignments made by others, so in this, the express authority to draw bills, might embrace transactions of both descriptions. But we do not think that the inaccurate use of words in one article will justify a departure from the correct construction of a succeeding article, unless the same words are used or the

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bearing of the one on the other is such as to require that departure.

The same motives existed for restraining the agent from making, as from procuring consignments to any other house in the Netherlands. His utmost exertions were required for the benefit of his principals. The restriction, therefore, might be expressed in the same sentence, and a slight inaccuracy of language was the less to be regarded because it could produce no possible misunderstanding with respect to the extent of the prohibition.

The third article might not be intended to prescribe the same rules for the conduct of Mr. Delprat, as a merchant, and as the agent of the Van Staphorsts. As a merchant, he had a right to draw on effects placed in their hands, independent of contract. The usage of trade allows such drafts to be made on a shipment; and the

consigned must pay the bills, if the shipment places funds in his hands to pay them. But as agent, his line of conduct was to be prescribed by contract. We must, therefore, consult the language of the agreement, in order to determine whether it provides for the future connection between the parties, further than as regards their characters as principal and agent.

The faculty given to Mr. Delprat, by the third article, to value on the Van Staphorsts, is, "for such moneys as he should employ to *make advances* " on articles consigned to them. Money laid out in the purchase of articles on his own account, cannot, with any propriety of language, be denominated money employed in *making advances* on articles consigned to him. The distinction between money *advanced* on articles consigned, and money employed in purchases, although the articles may be purchased for the purpose of being consigned, is obvious. Money *advanced* is always to another, never to the individual making the advance. This language shows, we think, incontestably that the article was drawn with a sole view to bills drawn by Mr. Delprat, as agent, not on his own account as a merchant.

A subsequent part of the article gives additional support to this construction. Mr. Delprat is to draw for two-thirds of the invoice price of the article, and is himself the judge of the price which may be inserted in the invoice. This power might be safely confided to him, in making advances to others, but might not be trusted to him in his own case. The case shows the Van Staphorsts to have been men of extreme caution. Their letter to Le Roy Bayard & Co., enclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It is not probable that they

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would have given him an express authority to draw on his own account on invoices to be priced by himself.

But the language of the article applies, we think, entirely to his bills drawn as agent, not to those drawn as a merchant transacting business for himself.

When examined as a witness, Mr. Delprat says that during the whole period of his agency, he was in the habit of making shipments on his own account to the said house in Amsterdam, and of drawing for advances on account of the said shipments so made, precisely in the same manner as when the shipments were made by others, and this was done with the full knowledge of N. & J. & R. Van Staphorst, who never found fault with him for doing so, but in order to encourage him to make such shipments, gave him credit for one-half the commission upon the sales of the shipments, so made on his own account.

The Van Staphorsts were commission merchants desirous of extending their business. No doubt can be entertained of their willingness to receive consignments from Mr. Delprat, as well as from others. But this does not prove that the power given him as their agent to make advances to others was intended to regulate the intercourse between them as merchants. That intercourse was regulated by the general principles of mercantile law, and the contract between the parties does not show that either was dissatisfied with those principles or wished to vary them.

This question refers, we presume, to the authority given by the contract of 11 January, 1818. The first article describes the objects which were committed to Mr. Delprat by the Van Staphorsts. These were the management "of their mercantile interest in the United States, consisting chiefly in the forming new solid connections, and procuring of consignments."

The second article restrains the right Mr. Delprat might otherwise have exercised of consigning to other houses in the Netherlands.

The third authorizes him to draw bills on his principals, for the purposes of his agency, under such limitations as they deemed it prudent to prescribe.

This contract, we think, does not contemplate bills drawn by Mr. Delprat on his own account as a merchant. The bills mentioned in the declaration, which were drawn in favor of the defendants, and endorsed by them, do not come within the authority given by the contract. No instructions from the plaintiffs, extending this

authority appear in the record.

The third question comprehends the whole matter in controversy, and has been partly answered in answering the preceding questions. It asks whether the plaintiffs were bound

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to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

The opinion has been already expressed that the bill drawn on 23 May, 1822, for 500 sterling in favor of J. P. Krafft is not distinguishable from those which were drawn by Mr. Delprat to enable him to purchase articles on his own account which were shipped to the plaintiffs. In making these shipments and in drawing these bills, Mr. Delprat acted for himself as an independent merchant. The relation between him and the plaintiffs was that of consignor and consignee. The obligation of the plaintiffs to accept and pay his bills depended essentially on the state of their accounts. So far as the information furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters 19 July and 10 September, 1822, which were given in evidence by the defendants, they state him to be then their debtor, and it is not shown that this debt has been discharged. The plaintiffs therefore were not bound to accept and pay these drafts unless they have acted in such a manner as to give the holders of the bills a right to count on their being paid.

It is believed to be a general rule that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal is bound to know the extent of his authority. Yet if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given; he could not be permitted to avail himself of the imposition and to protest bills the drawing of which his conduct had sanctioned. But the

defendants in this cause cannot allege that they have been deceived. They were the intimate correspondents of the plaintiffs, from whom they received a copy of the contract. The letter which transmitted it requests their friendly supervision of the conduct of Mr. Delprat, and desires them not to pay the money for which the plaintiffs had given him a credit with them, in case of "a moral certainty" that it would not be employed for the purposes of his agency. In the course of the correspondence between the plaintiffs and defendants, we find several letters written during the continuance of Mr. Delprat's credit with the latter, which shows the determination of the former not to approve of advances beyond that credit. In their letter of 24 June, 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which they are well acquainted with, that they (the

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defendants), allow him the same credit that they do other persons, from whom they take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued. They add,

"This is not the effect of any want of confidence in our agent, but merely profluing from our invariable rule to limit and circumscribe the credits we allow."

The letters from the defendants show a perfect understanding, on their part, of the terms on which Mr. Delprat's bills were to be taken. On 11 May, 1819, announcing that he had filled his credit, they say:

"In addition to it, he has expressed an anxiety that we should negotiate his drafts on you, payable in London, for about 3,000 sterling, or that we should take his drafts on Amsterdam for a similar value. The personal regard which we bear for Mr. Delprat would have induced us promptly to accede to his request had not the restriction laid upon us of not permitting him to exceed out for a few hundred dollars the credit you give him, and the total absence of any indication from you of a wish for us to interfere in his pecuniary arrangements in any other than the mode marked by the credit led us to believe that our negotiations or purchase of his

drafts was neither wished nor contemplated by you."

And in their letter of 7 September, 1822, enclosing the order of Mr. Delprat on the plaintiffs for any balances belonging to him in their hands; so far from complaining of the protest of the bills, they say "We can, of course, only consider this order as applying to the balance that may possibly accrue to him, upon the settlement of your account."

Messrs. Le Roy Bayard & Co. then, were not deceived by the plaintiffs. Unfortunately for themselves, they placed too much confidence in Mr. Delprat. They took his bills, as they were cautioned to do, in the letter of 24 June, 1819, "in the persuasion of their solidity, and of the reality of the transaction on which they were issued." If in this they were mistaken, the responsibility and the loss are their own. The 4th and 5th questions have been waived by the parties, and do not properly arise in the case. They are on exceptions taken in the trial of the cause, which could not be brought before the court after verdict, but on a motion for a new trial, which was not made.

The 6th question, whether a judgment can be rendered on the verdict of the jury, has been answered so far as this Court can answer it. We do not understand it as referring to the amount of the verdict, for on that the circuit court alone can decide. If it is intended to repeat in another form the question whether the plaintiffs can maintain their action as

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the holders of bills accepted and paid *supra protest* for the honor of the drawers, it is already answered.

The decision of a majority of this Court on the points on which the judges of the circuit court were divided will be certified in conformity with the foregoing opinion.

This cause came on to be heard, on a certificate of division of opinion of the judges of the Circuit Court of the United States for the Southern District of New York and on the points on which the said judges were divided in opinion, and was

argued by counsel, on consideration whereof this Court is of opinion:

1st. That the authority to John C. Delprat to draw on the plaintiffs, did not amount to an acceptance of the bills.

2d and 3d. That the bills mentioned in the declaration were drawn by the said Delprat not under the authority of the plaintiffs, but on his own account, and the plaintiffs were not bound to accept and pay them unless funds of the drawer came to their hands.

4th and 5th. These questions are understood to be waived, and do not appear to arise in the case.

6th. The 6th question is decided by the answer to the 2d and 3d so far as respects the right of the plaintiffs to maintain their action. On the quantum of damages this Court can give no opinion.

All which is ordered to be certified to the Court of the United States for the Second Circuit and District of New York.

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