*Coolidge *et al.* v. Payson *et al.*

Acceptance of bill.

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.[1]

Payson *v.* Coolidge, 2 Gallis. 233, affirmed.

Error to the Circuit Court for the district of Massachusetts. This cause was argued by *Swann*, for the plaintiff in error, and by *Winder*, for the defendant.

February 21st, 1817. Marshall, Ch. J., delivered the opinion of the court.—This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co., as the acceptors.

At the trial, the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury, without further proof of the indorsement; but the court determined, that it should go, with the affidavit, to the jury, who might be at liberty to infer from thence, that the indorsement was made by Randall. To this opinion, the counsel for the defendants *in the circuit court excepted, and this court is divided on the question, whether the exception ought to be sustained? [*67

On the trial, it appeared, that Coolidge & Co. held the proceeds of part of the cargo of the Hiram, claimed by Cornthwaite & Cary, which had been captured and libelled as lawful prize.[3] The cargo had been acquitted in the district and circuit courts, but from the sentence of acquittal, the captors had appealed to this court. Pending the appeal, Cornthwaite & Co. trans-

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S. 53. And see s. c. Id. 355; Chamberlain *v.* Williamson, 2 Id. 408; King *v.* Jones, 5 Taunt. 418; s. c. 1 Marsh. 107.[2]

By the Roman law, and the codes which have been derived from it, in case the vendee is evicted, he has a right to demand of the vendor, 1st. The restitution of the price. 2d. That of the fruits, or mesne profits, in case the vendee has been obliged to account for them to the owner. 3d. The costs and expenses incurred both in the suit on the warranty, and the prior suit of the owner, by whom the vendee has been evicted. 4th. Damages and interest, with the expenses legally incurred. Pothier, *De Vente*, Nos. 118, 123, 128, 130; Code Napoleon, liv. 3, tit. 6, art. 1630, *De la Vente*. The vendee has likewise a right to recover from the vendor, not only the value of all improvements made by the former, but also the increased value, if any, which the property may have acquired, independently of the acts of the purchaser. 1 Domat 77, § 15, 16; Pothier, *De la Vente*, Nos. 132, 133; Code Napoleon, liv. 3, tit. 6, art. 1633, 1634, *De la Vente;* Digest of the Civil Laws of Louisiana 355.

[1] Schimmelpennich *v.* Bayard, 1 Pet. 264; Boyce *v.* Edwards, 4 Id. 111; Wildes *v.* Savage, 1 Story 22; Cassel *v.* Dows, 1 Bl. C. C. 335; Ogden *v.* Gillingham, Bald. 38; Bayard *v.* Lathy, 2 McLean 462. And see McCullough *v.* Taylor, 1 W. N. C. 391; Allentown Bank *v.* Kimes, 35 Leg. Int. 298.

[2] Peters v. Bowman, 98 U. S. 59.

[3] See The Hiram, 8 Cranch 444.

mitted to Coolidge & Co., a bond of indemnity, executed at Baltimore, with scrolls in the place of seals, and drew on them for $2700. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co., and protested for non-acceptance. After its protest, Coolidge & Co. wrote to Cornthwaite & Cary, a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say, "This bond, conformable to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will, therefor, be necessary to satisfy us, that the scroll is usual and legal with you, instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for $2000 will be honored."

*68] On the same day, Coolidge & Co. addressed a letter *to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say, "You know the object of the bond, and of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which, we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?"

In his answer to this letter, Williams says, "I am assured, that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals, I cannot speak with so much confidence, not being well acquainted with their resources. 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 day on which this letter was written, Cornthwaite & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co., respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co., also called on him, to make the same inquiry, to whom he gave the same information, and also read from his letter-book the letter he had written. Two days after this, the bill in the declaration mentioned, was drawn by Cornthwaite & Cary,

*69] and paid to Payson & Co., in part of the protested bill of *$2700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted, that the plaintiffs were not entitled to a verdict; but the court instructed the jury, that if they were satisfied, that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co., to Cornthwaite & Cary, did declare, that he was satisfied with the bond referred to in that letter, as well with respect to its execution, as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co., to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action; and that it was no legal objection to such recovery, that the promise to accept the present bill was made to the drawers

thereof, previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co., in their letter to him. To this charge, the defendants excepted; a verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co., to Cornthwaite & Cary, contains no reference to their letter to Williams, *which might suggest the necessity of seeing that letter, or of obtaining information respecting its [*70 contents. They refer Cornthwaite & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co., to Cornthwaite & Cary, to know, that Williams was satisfied with the execution of the bond, and the sufficiency of the obligors, and had informed Coolidge & Co., that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance, to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans & Rose* v. *Van Mierop & Hopkins*, 3 Burr. 1663, the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet, in that case, after two arguments, and much consideration, the court of king's bench (all the judges being present and concurring in opinion) considered the promise to accept, as an acceptance. Between this case and that under the consideration *of the court, no essential distinction is [*71 perceived.

But it is contended, that the authority in the case of *Pillans & Rose* v. *Van Mierop & Hopkins* is impaired by subsequent decisions.[1] In the case of *Pierson* v. *Dunlop*, Cowp. 571, the bill was drawn and presented, before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered, as on an acceptance, it is supposed, that the principles laid down by Lord MANSFIELD, in delivering his opinion, contradict those laid down in *Pillans & Rose* v. *Van Mierop & Hopkins*. His Lordship observes, "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." If the case of *Pillans & Rose* v. *Van Mierop & Hopkins* had been understood to lay down the broad principle, that a naked promise to accept amounts to an acceptance, the case of *Pierson* v. *Dunlop* certainly narrows that principle so far as to require additional circumstances, proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the

[1] Bank of Ireland *v.* Archer, 11 M. & W. 383.

drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Lord MANSFIELD *72] alludes, must be apparent on *the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord MANSFIELD, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances," &c. The answer must be "accompanied with circumstances;" but it is not said, that the answer must contain those circumstances. In the case of *Pierson* v. *Dunlop*, the answer did not contain those circumstances; they were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill, which a full confidence that it will be accepted can give it. A conditional promise becomes absolute, when the condition is performed.

In the case of *Mason* v. *Hunt*, Doug. 296, Lord MANSFIELD said, "there is no doubt, but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an abso- *73] lute promise to accept his bill, the drawee, or any other person *may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor." What is it that "the drawer, or any other person, may show upon the exchange?" It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglas are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans* v. *Van Mierop*, the credit was given before the promise was received, or the bill drawn; and in all cases, the person who receives such a bill, in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance, that the bill was taken for a pre-existing debt, has not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson and another* v. *Collins*, 1 East 98, Lord KENYON shows much dissatisfaction with the previous decisions on this subject; but it is not believed, that the judgment given in that case would, even in England, change the law as previously established. In the case of *Johnson* v. *74] **Collins*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was

a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended, that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, LE BLANC, J., lays down the rule, in the words used by Lord MANSFIELD, in the case of *Pierson* v. *Dunlop;* and Lord KENYON said, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clark and others* v. *Cock*, 4 East 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer, promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true, in the case of *Clark* v. *Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in **Pillans and* [*75
Rose v. *Van Mierop and Hopkins*, the letter was written before the bill was drawn. The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is, that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill, as by one written afterwards.

It is of much importance to merchants, that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion, 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. This is such a case. There is, therefore, no error in the judgment of the circuit court, and it is affirmed, with costs.

Judgment affirmed.(*a*)

(*a*) By the French law, the acceptance of a bill of exchange must be in writing, and signed by the party accepting it. Ordonnance de 1673, tit. 5, art. 2; Code de Commerce, liv. 3, tit. 8, art. 122. It appears by the discussions in the council of state, in drawing up the new Commercial Code, that no provision requiring the acceptance to be written on the bill itself was inserted, in order to avoid a mistaken inference which might be drawn from it, that the law meant to prohibit the acceptance of a bill by a letter promising to accept (*par lettre missive*). "*L'acceptation est ordinairement donné sur la lettre de change même; mais beaucoup d'auteurs etrangers, et surtout les docteurs Hollandais, Allemands, et Espagnols, pensent qu'elle peut aussi être donné par lettre missive. Cette opinion a été adoptée par le conseil d'état, et se trouve consacrée par *l article qui nous occupe. En effect d'un côté, il a evité de dire dans cet article* [*76
que l'acceptation serait donneé sur la lettre de change, de peur de paroître établir une règle absolue de laquelle on se serait fait une fin non-recevoir contre l'acceptation par lettres missives. D'un autre côté, le conseil a pensé que, puisque la loi n'exclut pas l'acceptation par lettre missive, on en concluroit naturellement qu'elle la permet." Esprit du Code de Commerce, par J. G. Locré, tom. 2, p. 89.

Such is the law of France on this subject. That of England is fully analyzed in the above opinion. In the tribunals of our own country, the first case which occurs

on the subject, is that of M'Kim *v.* Smith, 1 Hall's Law Journal 486, in which the doctrine of the above opinion is fully recognised. The next is that of M'Evers *v.* Mason, 10 Johns. 207, in which a more limited application of the principle may seem to be indicated. But upon an inspection of that case, it will be found, that the supreme court of New York declined expressing any opinion upon the question, whether a promise to accept a bill, not *in esse*, would amount to an acceptance, and whether an indorsee could avail himself of such promise, and maintain an action on a bill against the drawee. The supreme court of Massachusetts also, in the case of Wilson *v.* Clements, 3 Mass. 1, avoided a determination of the question, whether a promise to accept before the bill was drawn, amounted to an acceptance, because the bill was not drawn in due season, after the promise was made. But the above decision in the text may be considered as settling the law of the country on this subject.[1]

[1] See Steman *v.* Harrison, 42 Penn. St. 49; Spaulding *v.* Andrews, 48 Id. 411. The rule is otherwise as to a non-existing bill, subsequently drawn, payable after sight, and not after date. In such case, an action will not lie upon a prior promise to accept. Wildes *v.* Savage, 1 Story 22. This distinction was considered by Chief Justice Sharswood, when President Judge of the District Court of Philadelphia, in the case of Carson *v.* Peacock, in June 1862, in the following opinion:

Sharswood, P. J.—This was an action on a bill of exchange, by the indorsee against the acceptor. On producing a draft of A. Stowell on defendants, payable one day after sight, plaintiff was allowed to prove, under exception, that defendants had written a letter to the drawer, instructing him to draw at one day's sight, and that the letter was shown to plaintiff, and upon the faith of it, he bought the bill for full value. The point reserved is, whether an action can be maintained upon a promise to accept a non-existing bill, payable after sight?

It may certainly be now considered as the settled law in this country, that a letter written within a reasonable time before the date of a bill, intelligibly describing it, and promising to accept it, is, if shown to one who takes it on the credit of the letter, a virtual acceptance. Byles on Bills 146 n., and cases there cited. This course of decisions was under the lead of the supreme court of the United States in Payson *v.* Coolidge, 2 Wheat. 66, which undoubtedly so held, upon the authority of Pillans *v.* Van Mierop, 3 Burr. 1663, C. J. Marshall taking great pains to show, that subsequent cases in England, though they introduced an important qualification into the doctrine of that case, and though opinions were expressed, strongly regretting the rule, yet that it had not been overruled. With this view, he examines and comments upon Pierson *v.* Dunlop, Cowp. 571; Mason *v.* Hunt, Doug. 296; Johnson *v.* Collins, 1 East 98; Clarke *v.* Cock, 4 East 57. Coolidge *v.* Payson was decided in 1817, and one year before Mill *v.* Prest, 1 Holt 181, had expressly affirmed the law to be, in the words of Chief Justice Gibbs, that "a promise to accept, not communicated to the person who takes the bill, does not amount to an acceptance. But if a person be thereby induced to take a bill, he gains a right equivalent to an actual acceptance, against the party who has given the promise to accept." However, in the case of Wildes *v.* Savage, 1 Story 22, the opinions of Sir Frederick Pollock and Mr. Hill, very eminent English lawyers, were taken under commission, and found to be full and direct to the point, that such was not then the law in England. Judge Story remarks, in his opinion, that there is no pretence to say, that, up to that very hour, there had been any formal decision in Westminster Hall against it. This was in 1839. Certain it is, that the latest English elementary writers intimate no doubt upon the subject. Still, however, it is true, that it has been lamented on all hands, that such virtual acceptance should have ever been established, and we ought not to push the doctrine one inch beyond its present limits. The case of Wildes *v.* Savage, 1 Story 22, and Russel *v.* Wiggin, 2 Id. 213, have expressly determined, that a promise to accept a non-existing bill, payable after sight, is not within the rule. The reason which he gives is a very refined one, and therefore, not satisfactory to my mind.

If a promise to pay a non-existing bill, payable after date, inures as an actual acceptance, when the bill comes to be subsequently dated, it is hard to see, why, in the case of a bill payable after sight, it should not likewise so inure, when the bill comes to be subsequently seen. Sight and acceptance are not synonymous terms. The better ground is, what courts have often done before, to yield to the authority of a decided case, but not to follow it out to all its strict consequences. For these reasons, we discharge this rule, and enter judgment for the defendants on the reserved point.