

McLemore v. Powell.

belonging to the Spanish claimants. Grondona, and the Africans, both spoke languages not understood by the witnesses; yet it could well be seen by them, that Grondona and the Africans knew and understood each other; and Mr. Richardson swears, that many of them appeared to know him very well, and that he claimed them as *part of the Africans originally [*554 put on board the Antelope by the Spanish owners. We think this evidence was sufficient, under the very peculiar circumstances of this case, reasonably to satisfy the mind of the identity of thirty-nine of the Africans as belonging to the Spanish claimants.

DECREE AND CERTIFICATE.—This cause came on, &c.: On consideration whereof, this court is of opinion, that there is no error in the decree of the circuit court so far as the same proceeds, and that it be affirmed; and upon the question on which the judges of the circuit court were divided in opinion, it is the opinion of this court, that all the Africans, not to be delivered to the Spanish claimants, ought to be decreed to be delivered to the United States, unconditionally, and without the precedent payment of expenses, to be by them disposed of according to law.

McLEMORE, Plaintiff in error, v. POWELL and others, Defendants in error.

Discharge of indorser.

An agreement between the creditor and principal debtor for delay, or otherwise changing the nature of the contract, to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties.

A mere agreement by the holder of a bill, with the drawer, for delay, without any consideration for it, and without any communication with or assent of the indorser, will not discharge the latter, after he has been fixed in his responsibility, by the refusal of the drawee, and due notice to himself.¹

ERROR to the Circuit Court of West Tennessee.

February 15th, 1827. This cause was argued by *White* and *Eaton*, for the plaintiff in error; and by *Webster* and *Bliss*, for the defendants in error.

*February 20th. STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the United [*555 States for the district of West Tennessee. The original action was *assumpsit*, brought by Powell, Fosters & Co., as holders of a bill of exchange, drawn by one Thomas Fletcher, in May 1819, at Nashville, upon Messrs. McNeil, Fisk & Rutherford, at New Orleans, payable to Thomas Read, or order, for \$2000, in sixty days after date, and by him indorsed to the defendant, John C. McLemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, McLemore, examined as a witness, and, among other things, testified, that, in the month of October following the dishonor of the bill, "one of the plaintiffs applied to him, at Nashville, for

¹ S. P. ROSS v. JONES, 22 WALL. 588.

McLemore v. Powell.

the money on the bill, and threatened to sue immediately, if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness he was going to Louisville, Kentucky, and would return by Nashville, about the expiration of that time, and would receive said payment. Since said time, the witness has never seen said plaintiff." The witness further testified, that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him, that the bill would be left with a Mr. Washington, at Nashville; that he expected he would himself be at that place, at the time agreed on, but that, if he did not come, he would give the instructions to Mr. Washington, by letter, what to do, if the witness did not pay at the expiration of the time agreed on. It did not appear, that any consideration was paid or stipulated for this delay; and no suit was commenced, until after this period had elapsed. The district judge instructed the jury, that if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four or five weeks, and that no premium or consideration was given or paid, or to be paid, by *556] Fletcher, the indorsers were not discharged, *that an agreement for giving day must be an obligatory contract for a consideration, which ties up the hands of the creditor, and disables him from suing, thereby affecting the interests and rights of the indorser; that the indorser has a right to require and demand of the creditor to bring a suit against the drawer, and if he has disabled himself from bringing a suit, by a contract for a consideration, he has thereby released the indorser; and that, if the jury were satisfied from the testimony, that time was given, for a valuable consideration paid, or to be paid, or that a new security was taken by the holder, the indorser was discharged and absolved from all the obligations of the indorsement. Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the court; and the present writ of error is brought for the purpose of ascertaining its illegal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to re-instate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties. The same reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence, by suit against the principal. Without expressing any opinion on this point, it is sufficient to say, that the error, if any, was favorable to the defendant, and therefore, it can form no subject of complaint on his part.

The case, then, resolves itself into this question, whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is a discharge of the latter, after he has been fixed in his responsibility, by the refusal of the drawee, and due notice to himself. And we are all of opinion, that it does

McLemore v. Powell.

not. We admit the doctrine, that although the indorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing *the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But [557 in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case, the jury have found, that there was no consideration for the promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord ELDON, in *English v. Darley*, 2 Bos. & Pul. 61, that "as long as the holder is passive, all his remedies remain;" and we add, that he is not bound to active diligence. But if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill, for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present question. In *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652, where the action was by indorsees against the drawer of a bill, it appeared, that after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account, from the indorser; and to an application from the acceptor, stating, that it was probable he should be able to pay at a future period, they returned for answer, that they would not press him. The court held it no discharge; and Lord Chief Justice EYRE, in delivering the opinion of the court, said, that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it was clear, the drawer would have been discharged, for it would be giving a new credit to the acceptor. But that, after protest for non-payment, *and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue [558 the acceptor. He might forbear to sue him. The same doctrine was held in *Arundel Bank v. Goble*, reported in a note to Chitty on Bills. (Chitty 379, note c, ed. 1821.) There, the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended, that this was a discharge of the drawer; but the court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding that interest should be paid by the acceptor, made no difference. So, in *Badnall v. Samuel*, 3 Price (Exch.) 521, in a suit by the holder against a prior indorser of a bill of exchange, it was held, that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place, during the negotiation, because there was no

United States v. Barker.

binding contract which precluded the plaintiffs from suing the acceptor at any time.¹

Upon authority, therefore, we are of opinion, that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice, is founded upon the notion, that the stipulation for delay suspends the present rights and remedies of the holder. The judgment of the court below is, therefore, affirmed, with costs.

Judgment affirmed.

*559] *UNITED STATES v. PRISCILLA BARKER, Administratrix of ABRAHAM BARKER, deceased.

Discharge of indorser of bill.

Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between private individuals.²

Where the United States were the holders of certain bills of exchange, and their agent in New York was directed, by a letter from the secretary of the treasury, dated Washington, December 7th, 1814, to give notice of non-acceptance to the drawer and indorsers, residing in New York, and notice was given to the indorser on the 12th of the same month, the mail which left the 8th, having arrived at New York, at 35 minutes past 10 o'clock, A. M., on the 10th: *Held*, that the indorser was discharged, by the negligence of the holders.

So also, where the United States were the holders of other bills, and their agent in New York was directed, by a letter from the secretary of the treasury, dated Washington, May 8th, 1815, to give notice of non-payment to the drawer and indorsers, residing in New York, and notice was given to the indorser on the 12th of the same month, the mail which left Washington on the 8th, having reached New York early on the morning of the 11th: *Held*, that the indorser was discharged, by the negligence of the holders.

United States v. Barker, 4 W. C. C. 464, affirmed.

ERROR to the Circuit Court for the Eastern District of Pennsylvania. This was an action of *assumpsit*, brought in the court below, by the United States, against the personal representative of A. Barker, deceased, the indorser of several bills of exchange, drawn in the year 1814, by J. Barker, in New York, on different houses of trade in England. Among the bills, two were protested for non-acceptance, and two for non-acceptance and non-payment.

It appeared in evidence, at the trial, that the agent of the United States treasury, in New York, where the bills were drawn, and where the drawer and indorsers resided, received a letter from the secretary of the treasury, dated Washington, December 7th, 1814, requesting him to notify the *560] drawer and indorsers of the non-acceptance of the first set of bills, and that notice was accordingly given to them on the 12th of December. It was further proved that the mail which left Washington on the 8th of the same month, arrived at New York, at 35 minutes past 10 o'clock, A. M., on the 10th. It was also proved, that the said agent received a letter from the secretary of the treasury, dated at Washington, May 8th, 1815, direct-

¹ And see *Sterling v. Marietta and Susquehanna Trading Co.*, 11 S. & R. 179.

² *United States v. Bank of the Metropolis*, 15 Pet. 377.