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to that ejection. The motion to award restitution, therefore, involved nothing further than the lot to which the party prayed to be restored; and as that is not of the value of \$2000, the court has no jurisdiction. The writ of error is to be dismissed.

Writ of error dismissed for want of jurisdiction; it not appearing that the value of the premises, in this suit, is \$2000.

*WILLIAM KONIG, an alien, Plaintiff below, v. WILLIAM BAYARD, [*250
WILLIAM BAYARD, jr., ROBERT BAYARD and JACOB LE ROY,
citizens of the state of New York.

Bills of exchange.—Payment supra protest.

A stranger to the drawer and indorser of a non-accepted bill of exchange may intervene *supra* protest, to pay the same for the honor of an indorser or drawer. p. 262.

It is no objection to this intervention, that it has been done, at the request, and under the guarantee, of the drawees of the bill, who had refused to accept or pay the same; the arrangements made by the payee of the dishonored bill, with the drawees, by which he was to be protected from loss, do not affect the liability of the party to the bill, for whose honor it has been paid. p. 262.

If A., at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra* protest, for the honor of the indorser, the party against whom suit is brought for the amount paid, may avail himself of every defence which he could have had, if the bill had been paid, *supra* protest, for the honor of the indorser, by the drawee, and suit brought for the same.¹ p. 262.

CERTIFICATE of Division from the Circuit Court for the Southern District of New York. This was an action of *assumpsit*, instituted in the circuit court of the United States for the southern circuit of New York, by William Konig, a merchant of Amsterdam, carrying on business under the firm of William Konig and Co., against the defendants, merchants in New York, trading under the firm of Le Roy, Bayard & Co.

The action was upon a foreign bill of exchange, and the declaration charged, that the same was drawn at Baltimore, on the 2d day of September 1822, by John C. Delprat, on N. & J. & R. Van Staphorst, of Amsterdam, in Holland, at sixty days sight, for 21,500 florins, in favor of the defendants, and made payable to them, or order. That the defendants, on the 4th of September, in the same year, indorsed the same to L. H. Huder, who indorsed it to Rougemont & Behrends, and that they, on the 25th of November 1822, presented the bill (the same being unaccepted and unpaid) to the drawees, for acceptance, by whom acceptance was refused, and the bill protested for non-acceptance; and that the plaintiff, on the same day, at Amsterdam, to prevent the bill from being sent back to the defendants, did, under that protest, and for the honor and account of the defendants, accept the bill, in writing, and gave notice thereof to the defendants. That the bill was, afterwards, and before payment, indorsed by Rougemont & Behrends to N. M. Rothschild, who indorsed it to M. Rothschild & Sons, who indorsed it to B. J. De Jongh & Fils; and the last indorsees, when the bill became due *and payable, viz., on the 25th of January 1823, at Amsterdam, presented it to the drawees for payment; that payment [*251

¹ See Phillips v. Im Thurn, 18 C. B. (N. S.) 694; s. c. 1 L. R., Exch., 463.

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was refused ; and the holders, being the last indorsees aforesaid, caused the bill to be protested for non-payment ; and the plaintiff, thereupon, upon the protest, and for the honor and account of the defendants, the first indorsers, paid the bill to B. J. De Jongh & Fils, together with 2000 guilders for the cost of the protest and other charges, and gave due notice thereof to the defendants.

The declaration also contained the usual money counts. Upon which, the general issue was pleaded ; and upon the trial of the cause, a verdict was taken for the plaintiff, for \$9852.78 ; subject to the opinion of the court on the following case ; with liberty to either party to turn the same into a special verdict, or bill of exceptions.

It was admitted, that the bill was drawn by John C. Delprat, in favor of defendants ; and that on the 18th day of October 1822, the defendants indorsed it, and transmitted it to Messrs. Rougemont & Behrends, at London ; and that afterwards, the bill was indorsed by Messrs. Rougemont & Behrends to N. M. Rothschild, who indorsed it to M. Rothschild & Sons, who indorsed it to B. J. De Jongh & Fils, as charged in the declaration. And in order to prove that the bill was duly protested for non-acceptance and non-payment, and that after the same was so protested for non-acceptance, the same was accepted, *supra* protest, by the plaintiff, for the honor and account of the defendants, the indorsers ; and that after the said bill was protested for non-payment, the same was paid, *supra* protest, by the plaintiff, for the honor and account of the defendants, the indorsers ; the plaintiff read in evidence the protest for non-acceptance and non-payment, which were admitted by the counsel of the defendants to be read in evidence for that purpose. The indorsements on the bill were :

Pay Mr. L. Huder, or order, value received, New York, 4th Sept. 1822 (Signed) LE ROY, BAYARD & Co. Pay to the order of Messrs. Rougemont & Behrends, of London, value in account, New York, 1st October 1822 (Signed) L. H. HUDER. Dec. 28, No. 279, presented for stamp at Amsterdam, 22d Nov. 1822. Received, with the augmentation, fl. 13.75 (Signed) ELVESTER.

The protest for non-acceptance stated, that on the application of the notary to the drawees, N. & J. & R. Van Staphorst, Amsterdam, they refused to accept the bill, stating, " that whereas, the drawer has quite wrongfully drawn his bill, we, therefore, cannot accept the same, and moreover regret, that in order to preserve our just rights against him (meaning *252] the *drawer), we cannot even interfere in behalf of those to whom this bill was passed."

The protest also stated the following "act of intervention : " And forthwith appeared and came forward those same gentlemen, Messrs. Wm. Konig & Co., who declared, that they were actually ready, on account, and for the honor of the firm of Messrs. Le Roy, Bayard & Co., as indorsers upon this same bill of exchange, to accept the said bill, and for the purpose of paying the amount thereof, on the day of its maturity ; and accordingly, the same gentlemen, Messrs. Wm. Konig & Co., in fact did, and have signed the same.

The protest for non-payment stated the same answer to have been given by the drawees, when payment of the bill was demanded, as made when acceptance was applied for, and also that, after the protest for non-payment,

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subsequently, the gentlemen, Messrs. Konig & Co., commission merchants, residing in this city, at the Cloveniers Burgwal, duly patented for the past year, as appears by their certificate, dated 24th June, No. 1333, to us the notaries exhibited, who, after having previously examined and read the afore-copied bill of exchange, as likewise this present protest, declared, that they, in consequence of their acceptance, under protest, should honor and pay this bill of exchange, and which, in fact, they have done, for the honor and on account of Messrs. Le Roy, Bayard & Co., as the first indorsers thereon, reserving, at the same time, their right against them, and all the others thereby interested.

The following letters were offered in evidence on the part of the defendants, and objected to on the part of the plaintiff; but the objection being overruled by the court, they were read in evidence as follows:

New York, 18th October 1822.

Messrs. ROUGEMONT & BEHREND, London.

Gentlemen:—We have now simply to request you to obtain acceptance of the inclosed draft; we do not wish it negotiated, until it should be first accepted, either for the honor of the drawer, or for ours as indorsers; we only wish that it may appear as having been sent to you for negotiation by the last indorser. It is drawn by the agent of the Amsterdam house, and as we inclose it as such, we wish it to be returned with the regular formality of law, should it not, contrary to our expectations, be accepted. With respect, we are, &c.

LE ROY, BAYARD & Co.

*It was admitted, that the above letter was not transmitted, nor the contents thereof communicated by Messrs. Rougemont & Behrends, to the plaintiff. [*253

Rougemont & Behrends to Messrs. William Konig & Co., Amsterdam.

London, 19th November 1822.

We beg you to have the inclosed accepted 1st of fl. 21,500, 60 days, on N. & J. & R. Van Staphorst, and hold the same to the disposal of the 2d, 3d and 4th. You will oblige me, by mentioning the day of acceptance, and, in case of refusal, you will have the bill protested. If accepted, please let us know the amount of stamp duties, &c.

The defendants also read in evidence the following extracts of letters from the plaintiff to Rougemont & Behrends.

Amsterdam, 22d November 1822.

Messrs. ROUGEMONT & BEHREND, London.

We had this pleasure, 19th instant, and are to-day in possession of your favor. The inclosed fl. 21,500, on N. & J. & R. Van Staphorst, will be presented for acceptance, and kept to the disposal of duplicate; for stamp duty we debit you in postage-account, which is fl. 14. 5s. Messrs. Van Staphorst have deferred the answer whether they will accept said bill till to-morrow. We cannot inform you of the result until Tuesday, and in case of refusal, will forward you the protest.

Amsterdam, 26th of November 1822.

Messrs. ROUGEMONT & BEHREND, London.

We refer to our respects of the 22d instant. Messrs. N. & J. & R. Van Staphorst, after having deferred the acceptance of the bill, fl. 21,500, 60 days,

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till yesterday, now refuse to accept ; we had also the bill presented for non-acceptance, at the same time, honoring it for account of Le Roy, Bayard & Co., New York. The bill has also been accepted on the 25th of November, and will be due on the 24th of January next. We will keep it at the disposition of the 1st, 3d or 4th, or any copy authenticated by your indorsement.

They also also read in evidence the following letters from the plaintiff to the defendants.

Amsterdam, 26th of November 1822.

Messrs. LE ROY, BAYARD & Co., New York.

Gentlemen :—Having been charged by Messrs. Rougemont & Behrends, of London, to procure the acceptance of a second of exchange of bill of fl. 21,500, Mr. John C. Delprat, at Baltimore, of 2d September, to your order, on Messrs. N. & J. & R. Van Staphorst. These gentleman have refused to accept it, expressing their regret at being unable, on this occasion, even *254] to protect your signature, and save you heavy damages. *We have determined to offer it, on the assurance that this intervention would be agreeable to you, and we remit you annexed, in consequence, the protest for non-acceptance, and the act of intervention for the fl. 21,500, becoming due 24th January—accepted 25th November, for your account. At maturity, we will send you all the papers in order, and as it appears certain that Messrs. Van Staphorst will not pay the draft of Mr. Delprat, you can at present admit that you will leave it to reimburse us this intervention, with commission, expenses and interest. We renew, gentlemen, on this occasion, the offer of our services, desirous that it may be agreeable to you to require them.

Amsterdam, 28th January 1823.

Messrs. LE ROY, BAYARD & Co., New York.

Gentlemen :—We have the honor to confirm our letter of 26th of November, of which a triplicate is annexed, and to inform you that Messrs. N. & J. & R. Van Staphorst, having persisted in their refusal to pay the bill of exchange of fl. 21,500, of Mr. John C. Delprat, to your order, upon them, we have paid it, under protest, and act of intervention, for your honor. Accompanying this, you receive the papers, consisting of first draft, in first and second. 2. Protest of act of intervention. 3. Amount relative thereto. Will you, gentlemen, please to acknowledge the accuracy of this amount, on 24th January, fl. 21,647, and credit us the amount.

Amsterdam, 2d September 1823.

Messrs. LE ROY, BAYARD & Co., in New York.

Gentlemen :—On the 26th of November, past year, we informed you of our having intervened with acceptance, for your honor and account, as indorsers, a draft of fl. 21,500, John C. Delprat's draft, 60 ds. sight, Baltimore, 2d September, in your favor, protested for non-acceptance, against the said drawer, while on the 28th January, we had the honor to inform you that we had paid the above bill, by intervention, for your account ; handing you, at the same time, the original bill duly discharged, together with necessary protest and act of intervention. Since that time, we have only received your lines of the 31st January last, by which you thank us for the intervention made by us, but observe, that Messrs. N. & J. & R. Van Staphorst had,

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at the same time, informed you, that they had guarantied to us the reimbursement of that draft, for which reason you, refer us to these gentlemen. To our letter returning to you, duly discharged, and paid by us for your account, the afore-mentioned bill, you did not give us any reply. Messrs. N. & J. & R. Van Staphorst have only guarantied us, in case we should not be able to recover our *reimbursement from you, for whose account we interceded; and they are thus entitled to ask from us, that we [*255 enforce that payment from you, to which measure that guarantee obliges us, and the effect of which we cannot but maintain, so that, in order to obtain that payment which you owe us, we have now valued this day on you, at sixty days; \$3600, \$3400, \$1932.80, order Gulian Ludlow, Esq., at the exchange of 50 stg., fl. 22,332, being the exact amount of our intervention, together with interest and charges to this day, as per note annexed, which we recommend to your protection, and request you to honor in payment of the amount expended by us for your account. If you, against our expectation, refuse to pay this bill, we must inform you, that we have given our most strict and precise order immediately to enforce payment by force of law, to which purpose we must then demand from you the original bill paid, with protest, &c., which we request and authorize you, by the present, to deliver to Gulian Ludlow, Esq., of your city, whom we have empowered to give receipt for these documents; which are our property, till you have paid us for them. We are obliged to do this act of *devoir*; in order to obtain final reimbursement; while we hope and trust you cannot take this measure, necessary to us, in any evil light. We remain, very sincerely, gentlemen. Your most obedient servants,

WILLIAM KONIG & Co.

The following letter from N. & J. & R. Van Staphorst to the defendants, was also offered in evidence, and objected to on the part of the plaintiff, but the objection being overruled by the court, was read, as follows:

Amsterdam, 25th November 1822.

Messrs. LE ROY, BAYARD & Co., New York.

Gentlemen:—We confirm our last respects of 12th inst., and have since received your esteemed letters of the 4th and 5th ult., first of which accuses receipt of our sundry letter up to the 23d of July, inclusive. The draft advised in your esteemed favor of 5th ult., 60 days sight, No. 368, fl. 7000, favor John Telfair, meets due honor at representation, to the debit of your account. We have yesterday received letters from Mr. Delprat, dated 10th, 11th and 15th of October, of which we cannot fail to communicate in a few words the purport. It is such as we might expect; instead of attempting to clear up any of the distressing items alluded to in our letters to him, or to refute any of the arguments which founded our conduct, Mr. D. merely falls on our circulars, as he calls them (written at the time to only four of those who were owing us moneys at Baltimore, and of which *we annex copy in our defence), as [*256 having injured his credit; and further declaims against an answer, which he had been erroneously informed that we had given in the protest of one of his bills; further, Mr. Delprat chiefly writes, that he is very desirous to have his accounts closed, and sent up to him; so that, all items being properly brought therein, it may be approved by him, and our intercourse finally closed. We, of course, shall not be backward in comply-

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ing with that wish ; and, on correctness and justice, you will easily believe, that Mr. Delprat can safely calculate. When we wrote to you our last letters, and therein stated the amount drawn by Mr. Delprat, so much above anything that prudence or correctness warranted, we were, indeed, far from prepared for the appearance of a fresh draft from Mr. D., valued (as the French term it) *de but en blanc*, without any light being spread by the letter of advice being attached to it. Fl. 21,500—Baltimore, 2d September, at 60 ds. sight, in your favor. This draft, confirmed in no letter of Mr. Delprat, and dated at such an ominous time, was calculated to yield much matter to think on. If Mr. Delprat knew of the protests of his former drafts, to what ought this new flourish to serve ; if not, what was his intention by drawing such a large sum again, over and above all his former dispositions ; a valuation which, placing all possible folly and imprudence on our side, it could not yet possibly be thought that we should honor, without attempting to explain the matter. We have merely to express our regret at observing again your indorsement on the bill, and notwithstanding your silence in your last favor of 4th and 5th instant, with regard to former interventions, in fact rather disagreeable to us, and whatever might be the intentions of Mr. D., at drawing the bill, we were too much your friends, my dear sirs, not immediately to come forward on account of your signature ; but consulting our legal adviser on this so strange and surprising incident, we were sorry to find, that it was his positive opinion, that in this peculiar case, we ought not to value at all this draft, nor in the least manner to allow that such a draft might properly have been issued by the drawer, and thus that we ought not to consider it at all, nor to meddle with it in the least. So firm was our counsel in that idea, that he was completely against our intervening on behalf of any indorser, as being prejudicial to the system we ought to follow with regard to this bill ; but he thought that it was proper to note in the protest, our reason for non-acceptance and non-intervention. We were thus put in a disagreeable position ; as on the one side, we did not wish to act contrary to his advice, and to depart from a system which he thought necessary to us ; and on the other, we were fully determined, *257] at all events, not to suffer your signature to go back without being honored. In this predicament, we applied to our friends Messrs. Wm. Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of above bill ; which favor these gentlemen have not refused to us, so that, without our prejudice, and completely without yours, we have duly protected your interest. We are well persuaded, you would not wish us to have done any act which we might think detrimental to us, and we thus are confident, that you will duly appreciate our conduct in this truly awkward affair.

The defendants also read in evidence the following letter from them to the plaintiff :—

New York, January 31st, 1823.

Messrs. WM. KONIG & Co., in Amsterdam.

Gentlemen :—We are favored with your letters of the 26th November, apprising us that Messrs. Rougemont & Behrends, of London, had sent you for acceptance, a draft for fl. 21,500, drawn at Baltimore, by Mr. John C.

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Delprat, in our favor, at 60 days sight, upon Messrs. N. & J. & R. Van Staphorst, that these gentlemen had refused the acceptance, and that you had intervened for our honor as indorsers; that you had no reason to believe that it would, at maturity, be paid by the drawees, and that you would thus be called upon to discharge it. Messrs. N. & J. & R. Van Staphorst inform us, under the date of the 25th of November, that they had informed you of the whole case (in relation to this draft) and had requested you, under their guarantee, to intervene. It remains, therefore, but for us to thank you for the honor which you purposed doing us, and to refer you to Messrs. N. & J. & R. Van Staphorst for a release from the responsibility assumed under their guarantee, and for them. We have the honor to be, gentlemen, your humble servants,

LE ROY, BAYARD & Co.

It was admitted, that the said bill for fl. 21,500, was drawn several days after the date of it. That the same was drawn by the said John C. Delprat, on his own account, generally, and not on any shipment; and that the said bill was drawn, after the said J. C. Delprat heard from the defendants, that his bills on Messrs. N. & J. & R. Van Staphorst had been protested. That the said J. C. Delprat sent to the defendants an order on Messrs. N. & J. & R. Van Staphorst, dated 4th September 1822 (a copy of which order is hereunto annexed), and that the said bill was sent therewith to the defendants; that there *were other dealings between the defendants and [*258 the said John C. Delprat, besides those growing out of the agency of the said John C. Delprat for the Messrs. N. & J. & R. Van Staphorst; that the defendants, in the course of those dealings, during the summer of 1822, loaned to the said John C. Delprat, a large sum of money on his own account, which loans were carried by them into their general account with the said John C. Delprat; and that the said bill was given to the defendants, by the said John C. Delprat, to repay them for the said advances to him, so far as the same would go.

Baltimore, Sept. 4th, 1822.

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

Gentlemen:—You will please hold all balances due to me by you; all the proceeds of goods, sold or unsold, shipped in my name, per Virgin and other vessels, to the order and for the use of Messrs. Le Roy, Bayard & Co., and for which this letter will be your sufficient authority. I remain, with esteem, your obedient servant,

JOHN C. DELPRAT.

The judges of the circuit court divided in opinion upon the following points, which were certified to this court: 1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted. 2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill, upon which the suit was brought, for the honor of the defendants; and is entitled to receive the amount thereof, with charges and interest. The first point was waived by the counsel for the plaintiff; and the whole argument was directed to the second point.

The cause was argued by *Webster* and *Ogden Hoffman*, for the plaintiff; and by *D. B. Ogden* and *Oakley*, for the defendants.

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For the *plaintiff*.—The contents of the letter of instruction from Van Staphorst to J. C. Delprat, not having been communicated to the plaintiff, ought not to affect him in any manner. Any stranger has a right to intervene in case of the non-acceptance, or non-payment, of a bill of exchange. This is an established usage in commercial operations, and contributes essentially to their safety and certainty. To the drawer and indorsers, it saves the damages on the bill, which would be payable on its return, and prevents other heavy expenses.

The guarantee of the drawees, in favor of the plaintiff, was an arrangement exclusively between the parties ; and the defendants have no right to look to it in the transaction. *On the part of Van Staphorst, there *259] was no obligation to give the guarantee, and it was an act for the eventual protection of the plaintiff, in case of the inability of the defendants to repay the amount of the bill ; and was not given under any supposition of the liability of the drawees to accept or pay the bill. If either the plaintiff or the Van Staphorst, could pay the bill separately, both might pay jointly. The person who pays for the honor of another, may look to all the parties to the bill, as well as to the person for whose honor he pays it. The payment of a protested bill for the honor of another, is only a mode of becoming the holder, and although against the will of the parties to it, they thus become debtors to the payer.

The common law and the law-merchant, as part of the common law, presumes a general standing request to be made by the drawer and indorsers of an unpaid bill, to every friend, to prevent the dishonor of the bill, and the burden of heavy damages in consequence of this. If acceptor *supra* protest, for the honor of an indorser, pays the bill, he may sue the indorser, as he is to be considered as an indorser paying full value for the bill. 1 Esp. 112 ; Chitty on Bills 441.

For the *defendants*.—This mode of proceeding, by the intervention of a third person, prevents and disables the defendants from proving that the Van Staphorst were bound to accept, and ought to have paid the bill. This action is not upon the bill strictly, but it is for money paid for the use of the defendants, by one who was an entire stranger to them, and had not right to intervene. A suit cannot be brought upon the bill, because, by its payment, it is extinct. The plaintiff interfered, not for the honor of the drawer or indorser, but for that of the drawees. Laying aside his agency, he undertakes to pay the bill, at the request of the drawees, and they are liable to him, and have stipulated for his protection.

The general rule of law is, that no man can constitute himself the creditor of another, without his consent, express or implied. 6 T. R. 310 ; 1 Beawes's Lex Merc. 63-4. The only exception to this rule is, the case of acceptance of a bill, *supra* protest. The reasons for this rule are : 1. The law implies consent of the party for whose honor acceptance is made, from the nature of the favor conferred ; being gratuitous, and incurring hazard, for the purpose of rendering a service, an acceptor, *supra* protest, may demand recompense for the credit given, from him for whose benefit acceptance is made. And in case he redraws *on such person, his bill ought *260] to be promptly complied with, besides a grateful acknowledgment

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of the favor. Beawes's Lex Merc. pl. 44, 63, 64. Thus it appears, that the motive of the acceptor must be such as to entitle him to gratitude.

2. The consideration in the implied contract, in this case, cannot be solely the benefit conferred on the indorser; as voluntary services may be rendered in all other cases, and no contract will be implied. Can there be an acceptance for the honor of an indorser, under the guarantee of a third person? 1. It confers no honor. 2. Gives no credit. 3. It is not gratuitous or voluntary. 4. It is not founded on a consideration, which can alone lay the foundation of such a contract. Can there be an acceptance for the honor of the payee or indorser, under a guarantee of the drawee of the bill?

3. The drawee cannot do indirectly, what he cannot do directly. The law is settled, that, if the drawee has accepted, *supra* protest, for want of advice of effects, and before the bill is payable, he receives effects, he is bound to discharge the indorser, and advise him that he will pay the bill. 1 Beawes's Lex Merc. 109. Thus, if the Van Staphorst had accepted, *supra* protest, for the honor of the defendants, and had afterwards received remittances from Delprat, they could not have paid the bill, *supra* protest, for the honor of the defendants; and by the acceptance, under guarantee, it is intended to deprive the defendants of the benefit of these principles of law.

An acceptor for the honor of the drawer, must do it, before he accepts generally, "or any ways engages or obliges himself thereto." Marius, Ex. 30, 31; Malynes, Lex Merc. vol. 1. By parity of reasoning, a person under any obligation to pay, cannot pay a bill, *supra* protest, for the honor of another. 1 Ld. Raym. 88. The consequence of such proceedings might be, that, under a secret guarantee, the drawee might avoid the fulfilment of his obligation to pay the bill. Another objection is, that the indorser has imposed upon him a contract, without his knowledge or consent, and thus the law will not permit, under circumstances exposing him to injury. The party affected by this intervention, cannot have the same defence, or the means of the same defence, against a stranger, as against the drawee, as the guarantee may be, and is, generally, secret. The evidence in this case shows, that the defendants did not desire to have the bill paid by any one but the drawees. Rougemont & Behrends, of London, were the agents of the defendants, and they write to the Van Staphorst, that the holders of the *bill desire that it may be protested, if not paid. The plaintiff, there-fore, knew, that it was not the desire of the defendants to save the [*261 bill from dishonor. The plaintiff was the agent of the defendants, to have the bill accepted, if not honored. This is shown by the letter of 19th November 1822. He could not, therefore, interfere to pay the bill; it was against the nature of his agency.

MARSHALL, Ch. J., delivered the opinion of the court:—The suit was brought in the court of the United States, for the second circuit and district of New York, on a bill of exchange, drawn by John C. Delprat, of Baltimore, on Messrs. N. & J. & R. Van Staphorst, of Amsterdam, in favor of Le Roy, Bayard & Co., of New York, and indorsed by them. The bill was regularly presented and protested, after which it was accepted and paid by the plaintiff, for the honor of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the court on a case stated by the

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parties. The judges of the circuit court were divided in opinion, on the following points : 1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted? 2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants ; and is entitled to recover the amount, with charges and interest ? The first question is understood to be waived. It is a question which was decided by the court, at the trial, and could not arise after the verdict, unless a motion had been made for a new trial.

The second requires an examination of the case stated by counsel. The bill was transmitted by Le Roy, Bayard & Co., to Messrs. Rougemont & Behrends, of London, to have it presented for acceptance, who inclosed it to the plaintiff, in a letter, from which the following is an extract : " We beg you to have the inclosed accepted ; 1st, of fl. 21,500, 60 days, on N. & J. & R. Van Staphorst, and hold the same to the disposal of 2d, 3d and 4th. You will oblige me by mentioning the day of acceptance, and in case of refusal, you will have the bill protested." The plaintiff gave immediate notice of the dishonor of the bill, and of their intervention for the honor of the defendants.

Messrs. N. & J. & R. Van Staphorst addressed a letter to the defendants, dated the 26th of November 1822, giving notice that the bill was dishonored ; the drawer having no right *to draw, and that they were *262] advised by counsel not to interpose, in their own names, for the honor of the defendants. The letter adds, " In this predicament, we applied to our friends, William Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of the above bill ; which favor these gentlemen have not refused to us ; so that, without our prejudice, and completely without yours, we have duly protected your interest." The defendants also gave in evidence, a letter from the plaintiff, stating that he had intervened, at the request of N. & J. & R. Van Staphorst, and under their guarantee ; but that they required him to proceed against the defendants, as preliminary to the performance of that guarantee.

It was admitted, that the bill was drawn by J. C. Delprat, on his own account, and not on any shipment for a debt due from him to the defendants, for advances previously made to him ; and that he had given to the defendants an order on N. & J. & R. Van Staphorst, for all balances due from them to him. It is not alleged, that the drawees had any funds of the drawer in their hands.

The plaintiff in this case must be considered as the agent of N. & J. & R. Van Staphorst, and as having paid the bill at their instance ; all parties concur in stating this fact. The Van Staphorsts adopted this circuitous course, instead of interposing directly in their own names, under the advice of counsel. They, however, immediately stated the transaction in its genuine colors, to the defendants. It is impossible to doubt, that a person may thus intervene, through an agent, if it be his will to do so. The suspicion which might be excited by proceeding, unnecessarily, in this circuitous manner, cannot affect a transaction, which was immediately communicated, with all its circumstances, to the persons in whose behalf the intervention had been

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made ; unless those persons were exposed to some inconvenience, to which they would not have been exposed, had the interposition been direct. This is not the case, in the present instance, since it cannot be doubted, that the defendants might have availed themselves of every defence in this action, of which they could have availed themselves, had N. & J. & R. Van Staphorst been plaintiffs. The case shows plainly, that the bill was not drawn on funds, and that the drawees were not bound to accept or pay it. No reason, therefore, can be assigned, why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and indorsers.

*THIS case 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, that the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount, with charges and interest ; which is ordered to be certified to the said circuit court.¹ [*263]

*GERRIT SCHIMMELPENNICH, and JAN ADRIAN TOE LEAR, aliens, v. WILLIAM BAYARD, JUN., ROBERT BAYARD and JACOB LE ROY, citizens of the state of New York. [*264]

Bills of exchange.—Promise to accept.—Right to draw.—Authority of agent.

In this case, the court confirm 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.² p. 283.

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. p. 285.

A bill of exchange was drawn against shipments made to the drawees, but no letter of advice was written by the shipper, to the assignees of the property, and drawees of the bill, ordering the proceeds of the shipments 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. p. 286.

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. p. 288.

It is believed to be a general rule, that an agent, with limited power, 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

¹ For further proceedings in this case, see 2 Paine 251.

² See notes to *Coolidge v. Payson*, 2 Wheat. 66.