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

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*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 accouut 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

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

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

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.[1] p. 290.

Certificate of Division from the Circuit Court for the Southern District of New York. 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 indorsed 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.

*265] The judges of the court below, having divided in opinion *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.

This cause was argued by *Ogden* and *Oakley*, for the plaintiffs ; and by *Webster* and *Ogden Hoffman*, for the defendants.

For the *plaintiffs*.—This action is upon bills of exchange, drawn by Delprat, and accepted *supra* protest, and paid by the plaintiffs, as they allege, for the honor of the defendants, who were the indorsers on the bills. It is admitted, that the plaintiffs, being drawees of the bills, could accept and pay in this form ; but it is claimed, that the bills were drawn under the arrangement between them and Delprat, and they were bound to accept them ; that arrangement being a promise so to do. This is the same question, as if the defendants in this suit had brought an action against the plaintiffs, on those bills, as accepted bills.

[1] Goodrich *v.* Thompson, 44 N. Y. 324 ; Talmage *v.* Nevins, 2 Sweeny 38 ; Armour *v.* Michigan Central Railroad Co.. 65 N. Y. 111.

Does the authority to draw, create a promise to accept? It is admitted, that the law of France is, that acceptance shall be on the face of the bill. The law of France is the law of Holland. We deny, that the contract between the plaintiffs is such a promise to accept, as that, even if all its provisions and conditions had been complied with, any third party could have taken advantage of it. *As it related to the parties themselves, it was a good promise, when Delprat conformed to the provisions of the arrangement; but strangers had no right to avail themselves of this. The promise in the contract was made to Delprat, and was not assignable, in its very nature. [*266

It is only when the promise points to some bill drawn, or to be drawn, with such minuteness and certainty as to sums, time and parties, as that it may be considered a complete transaction, and a finished agreement, that the promise can avail to the use of third parties; and then it does not so avail, as a promise to accept, but as an actual acceptance. There is no case of a *parol* promise to accept, being considered as an acceptance; and the doctrine has been already carried too far, so as to become the subject of regret. But there is no case which goes as far as the plaintiff claims in this. 3 Burr. 1663; 1 East 98; 4 Ibid. 57; *Wynne* v. *Raikes*, 5 Ibid. 54; *Coolidge* v. *Payson*, 2 Wheat. 66; Starkie 411. All those cases rest on the express promise to accept. *Goodrich* v. *Gordon*, 15 Johns. 6. Why, if the authority to draw was a promise to accept, say, there was also a promise to accept?

The case of *Coolidge* v. *Payson*, 12 Wheat. 66, before this court, settled all the principles relative to an obligation to accept; and this case does not come within the rules of law there established. The principles decided by the court in that case, were, in the language of the court: "Upon a review of the case, 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." The decision of the supreme court of New York, recognises the same principles. That case was:

Gordon was sending a sloop from New York to Savannah, during war. Hogan wrote a letter of instructions, viz., "should he be captured, ransom the vessel, as low as possible, not to exceed $2000, and your draft on me will be duly honored." He was captured, and drew the bill, for ransom, within the sum, and gave the letter, with the bill. Chief Justice THOMPSON says, "the testimony is full evidence that this letter, at all times, accompanied the bill; that the bill was drawn on the faith of it; and that it was on the faith of this letter, that the plaintiff, who was an indorser, took the bill from the first indorser; and it would be a gross want of faith, now, to disclaim the captain's authority."

The arrangements between the plaintiffs and Mr. Delprat *were personal to him, and could have no effect upon the transactions of others. They were to operate on the general business to be carried on between them, and their main object was, consignments to the plaintiffs. Mr. Delprat might purchase parts of cargoes, and they were willing to "facilitate" all such commercial operations of his, as "they could, without [*267

prejudice to themselves." Under this arrangement, Mr. Delprat purchased and shipped goods, drew for them, and the proceeds of the shipments were carried to his account, and the bills paid, and charged to him. The defendants were not parties in those transactions, and they stood as mere purchasers of the bills in the market. These transactions are similar to many others in the United States, and have never been considered as involving an obligation to accept the bills, of which a purchaser can take advantage. Such a responsibility, on the part of the drawees of a bill, would give to it a greater effect, when in the hands of the assignee, than it had, before the transfer.

There is no usage making the authority to draw an acceptance. There is no case in which it has been ever so held; and it is inconsistent with the negotiable nature of bills. The question, therefore, which has been raised, is met in its most imposing form, with an answer in the affirmative; when acting under such an arrangement as that between the plaintiffs and Mr. Delprat, could the plaintiffs take the goods shipped to them, and refuse to pay to a third person, the bills drawn upon those goods? It is considered they could; such is the mercantile law, and it cannot be otherwise.

Bills of exchange are purchased on the faith of the names upon them, and not under an expectation that there is a collateral obligation to pay them, on the part of the drawee. There is always an expectation, that the bills will be paid: but this expectation does not constitute a legal right against the drawee. In reference to the present bills, it appears from the testimony, that the defendants actually charged Mr. Delprat a commission for indorsing them, without which, they could not have been advantageously negotiated.

It is said, that the shipments were made in trust to pay these bills, and that the plaintiffs could not take the property free from the trust. Let this be so; but who can enforce the trust? Certainly, not the assignees, as the trust is not assignable. To the drawer only, would the parties, under such circumstances, be answerable. The agreement made by the plaintiffs and Delprat, was never performed by him, in any case; and thus, the danger is manifested, of giving to a stranger rights which Delprat would not have had himself. No lien existed on the goods, by which the payment of the
*268] bills could have been *enforced; no such lien has ever been supposed to exist; all liens require possession in the party or his agent. The goods in this case went to Holland; the bills were sent to England; where is the possession to maintain the lien?

If the bills had been drawn upon particular shipments, and the invoices and bills of lading of the goods had been delivered with the bills, the plaintiffs being so advised, by Delprat; then, they must have opened a particular account with the party holding the bills, and have paid them out of the shipments. As to the suggestion of an equitable lien on the goods, for the payment of those bills, it cannot be contended, that the holder of the bills could follow the goods and enforce it. The law of Russia gives a party a right to follow goods, until he is paid, but this is not the law here. The policy of the English law, and that of all commercial countries, is, that the paper is disconnected with the property. It is well-settled law, that where goods are carried, under a permission to draw, the bills of lading being remitted, fixes the property in the consignee, against the creditors of the

consignor, although they get the goods. 1 Bos. & Pul. 563 ; 3 Chitty 550. If A. sends goods to B., and directs him to pay the proceeds to C., this creates no lien in favor of C. 1 Stark. 123, 143 ; 14 East 558 ; Chitty 550.

Mr. Delprat was not the agent of the plaintiffs, under the contract, to draw the bills. He stood in no other relation to them, than that of a corresponding merchant, with like powers. He did not draw the bills as agent ; they were said to be on his own account, nor did he pretend to bind the plaintiffs, by his acts, as his principals. Bayley on Bills 156, 164 ; 3 T. R. 757 ; Chitty on Bills 31. Agency may be inferred from analogous acts, but they must be of that character. There is no proof that similar bills were ever paid by the plaintiffs. The plaintiffs sent to the defendants their contract with Mr. Delprat, to show that they had granted him the credit. In their letter to the defendants, they do not say anything about the authority to draw ; in reference to the credit, they desired the defendants to supervise the transactions of Delprat ; in reference to any bills he might draw, they would take care of themselves, by refusing to accept them.

There is an answer to all the allegations, as to lien, and to an alleged liability to accept. The bills, it is manifest, were not taken on the credit of the drawees.

Oakley, for the defendants.—The mercantile house of the plaintiffs, at Amsterdam, were desirous to extend their business in the United States ; and they employed Mr. Delprat, giving him authority to draw upon them, according to particular directions, and with a credit of *$40,000, with the defendants. He acted under this arrangement for four years, [*269 and then failed ; and the question is, who shall sustain the loss arising in the course of his transactions, out of bills drawn by him, upon the plaintiffs. The business between Mr. Delprat and the plaintiffs, was not confined to the contract, nor were his acts in conformity to it ; and yet the plaintiffs went on, without communicating to the defendants ; who were deeply connected with them in mercantile business, and who had been particularly invited to an agency in their arrangements with Mr. Delprat ; that their confidence in Mr. Deprat, their agent, had diminished, or they proposed to withdraw the agency from him. They suddenly break off the relations between them and Mr. Delprat, and refuse to pay bills, drawn on property which had been shipped to them, and which were to provide for the payment of the bills ; taking the funds, the proceeds of the goods, to the credit of their general balance, arising out of their several transactions ; and they then pay the bills, *supra* protest, for the honor of the defendants, who were indorsers on their bills. Can this be done? can they take the goods, and not pay the bills ?

Had the plaintiffs a right to accept the bills *supra* protest, for the honor of the defendants? He who gives an acceptance for the honor of a party, must do it before he accepts generally, "or any ways engages or obliges himself thereto." 1 Lex Merc. (Malynes); Marius, Advice concerning Bills of Exchange, 30, 31. In 1 Ld. Raym. 88, Lord Holt says, "an acceptor for honor of drawer, is, when a stranger, having no effects of drawer, accepts out of respect to the drawer." The principle there is, that there can be no acceptance *supra* protest, for the honor of any party, when the acceptor is

under any obligation, legal or equitable, as it respects that party, to accept generally. This results from the nature of acceptance *supra* protest.

The rules of law are—1. An acceptor *supra* protest, may demand a recompense, for the credit given him, for whose honor he accepts, Beawes's Lex. Merc. pl. 44 ; and if he redraws, his bill ought to be readily complied with, besides a grateful acknowledgment of the favor. 2. Where a bill is paid *supra* protest, the payee may redraw, with addition of commission, and it ought, in gratitude, to be punctually complied with. Ibid. pl. 63, 64. Such acceptance must, therefore, be gratuitous, with a just motive ; and without connection with, or reference to the interests of, the acceptor. To examine this case, according to these principles :

*270] 1. As between the plaintiffs and the defendants, were those *bills such as should be considered as accepted bills ; or bills which the plaintiffs were "in any ways obliged to accept?" They were ; because they were drawn by Mr. Delprat : 1st. In pursuance of his written authority. 2d. If not in pursuance of a general authority, this authority was to be inferred from the general course of business. An authority to draw a bill, is virtually an acceptance of the bill, drawn in conformity to it. 9 Mass. 11 ; 2 Wheat. 72 ; 2 Gallis. 238.

2. A promise to accept a bill, is an acceptance, if the holder has taken the bill on the faith of the promise ; although the bill is for a pre-existent debt, or whether the promise be before or after the bill is drawn. This is also the law, although the promise be obtained from the drawee fraudulently.

3. A general authority to draw bills, is equivalent to an acceptance of all bills drawn ; or to a promise to accept all.

The facts in this case, were : By the agreement of January 11th, 1818, between the plaintiffs and Mr. Delprat, he was their agent : 1. To form commercial connections. 2. To promote consignments. 3. To act as directed in the agreement. As the plaintiffs' agent, Mr. Delprat was bound : 1st. To act for no other persons in procuring consignments, either from himself or from others. 2d. To use his utmost efforts for the benefit of the plaintiffs. The plaintiffs were bound : 1. To faciliate Mr. Delprat's commercial operations, without prejudice to themselves. The objects of this agreement were, to procure consignments, and that Mr. Delprat should act as the commercial agent of the plaintiffs, generally ; and the means of accomplishing them, were to draw bills, to make advances on cargoes, and for which he was also to use the credit opened with the defendants. To the consignments, there was no limit ; and of course, they could go beyond the credit. From a view of all the letters between the parties, and the evidence, it is manifest, that Mr. Delprat acted as the general agent of the plaintiffs ; to draw bills for advances on consignments, independent of the credit of $40,000, and after it was revoked. 2. That the plaintiffs paid such bills without regard to the balance of accounts with him, down to July 1822 ; 3. That the plaintiffs never set up the objection, that the bills were drawn without authority, until October 1822.

It is contended, that the agency of Mr. Delprat for the plaintiffs, appears : 1. By the written agreements of the parties. 2. By the relative situation of himself and the plaintiffs, he being a commercial agent to procure consignments, by making advances by drafts on the plaintiffs. 3. In the course

of the business, *and the long habit of the plaintiffs in paying the drafts drawn by him. The authority of an agent may by shown: 1. By his written power; or, in the absence of that, by himself. 2. From the relative situation of the parties. 3. From the habits and course of dealing between the parties. 4. From the recognition of the acts of the agent, by the principal, or similar acts. The evidence establishes the agency of Mr. Delprat, for the plaintiffs, upon all these principles. As to the bill for 1000*l.*, of July 31st, 1822: 1st. It was paid before it was due: it was drawn at 60 days; presented on the 14th September, and paid on the 1st October following. 2d. There can be no payment *supra* protest, until a demand and refusal of payment regularly made. This refusal cannot be until the bill falls due. Chitty on Bills 318.

Had the plaintiffs a right to pay those bills, *supra* protest? 1. In case of acceptance *supra* protest for honor of the indorser, the bill must be presented for payment, and duly protested. Chitty 313. 2. If the drawee has accepted *supra* protest, for want of funds or effects, and afterwards receives effects, he is bound to discharge the indorser, and to advise him that he will pay. Beawes's Lex Merc. 109. Thus, there may be an obligation to pay, when there was none to accept. As to the bills of July 31st, 1822, for 1000*l.* and 5000 guilders, they were drawn on shipments by the Virginia. The plaintiffs were so advised; the consignment of the property was received by the plaintiffs, after protest for non-acceptance, and before the bills were paid. They were, therefore, bound to pay those bills out of the proceeds of those shipments. The plaintiffs cannot take this property, and apply it to their general account with Mr. Delprat, refusing to pay the bills drawn on advances on the very property. The shipments, when they were advised of the facts, were received by them, subject to an equitable lien, in favor of the holders of their bills; and they have a right to their application to the payment of the bills.

As to the bills paid before the arrival of the ships. 1. Payment, *supra* protest, is evidence of money paid to the use of the defendants. It is an equitable action, and admits of any equitable defence. Can it be sustained, after effects to pay the bills have come into the hands of the plaintiffs? Does not the receipt of the proceeds of the property, reimburse the plaintiffs in the payment? Equity will frequently give a party relief, in effect amounting to a lien, though not in possession of the goods, to have his demand satisfied out of the proceeds of the goods, in preference *to any other party. Chitty's Commercial and Maritime Law, 550–1. [*272 The defendants ask the application of this principle to the bills upon which this suit has been instituted.

Ogden, on the same side.—This action is to oblige the defendants to pay the amount of bills paid for their honor, and which they say should have been paid by the drawees. The plaintiffs received the property, against which the bills were drawn; and the question is, whether property could be received, and the bills drawn upon it be left unprotected? The consignee of property is nothing more than a trustee, to receive the property, and appropriate the proceeds to the use of the consignee, and he must conform to the directions of the consignor. In this case, the bills of exchange drawn by Mr. Delprat, were the direction as to the appropriation of those funds.

It is no answer to this, to say, that the consignor is a debtor to the consignee; and that upon the principle, that a consignee can pay his general balance out of goods which come into his hands, the plaintiffs would make use of the funds, for their own purposes. They could not get possession of the property, but by a wrongful act; as they had not a right to receive it on any other terms, but those prescribed by the shipper. Those bills, or the letters of advice, state, that they were drawn for advances on goods shipped.

1. May not the drawees of the bills be considered as assignees of this property, bound to appropriate the proceeds to the payment of the bills? This would be the case in equity. In New York, the point has been decided. If the consignee takes goods, he takes them subject to the lien on them. The evidence shows, that Mr. Delprat was the agent of the plaintiffs, engaged in making shipments to them, against which he drew bills, similar to those on which this suit is brought; and that between January and July 1822, he shipped goods to the plaintiff to a very large amount, upon which bills were drawn, and which were accepted by the plaintiffs, and were paid. Mr. Delprat was the general agent of the plaintiffs. Paley on Agency 2; 1 Wash. 19; 11 Mass. 55.

It is said, an authority to draw, is not an agreement to accept. What else is it, but an implied promise to accept? In *Coolidge* v. *Payson*, 7 Wheat. 66, this court has decided the point as to a particular bill; these are bills of a particular class. It is not necessary, that the bill shall express to be drawn as agent, to bind the principal; the contrary practice is universal, and it was the practice not to draw the bills of those parties in that form. If it shall be said, that Mr. Delprat had authority *to draw *273] bills, under particular agreement, and that those bills were not drawn in conformity with that agreement; the answer is, that the letter of the plaintiffs, announcing their refusal to accept the bills, does not state the refusal to have been on that ground. It has been decided, that if underwriters refuse an abandonment, for reasons assigned, they cannot, afterwards, on the trial, allege other reasons for not paying the loss. The objections made by the plaintiffs to the bills, were, that accounts were not kept and settled by Mr. Delprat; and that a balance was due to them for their shipments; not because of mal-agency. The facts of the case show that those bills were drawn in conformity with instructions.

But even if they had not, still the principals were bound. The law is so settled, even if the agent violates instructions. 2 Kent's Com. 484. Another point in this case, which is in favor of the defendants, rests on the particular situation of the two houses of trade, formed by the parties to this cause. Whatever may be the law as between strangers, the attempt made by the plaintiffs to throw those bills on the defendants, is a violation of the good faith which had always existed between them. Between them, the highest confidence existed. The defendants were agents for a large amount of the stocks of the United States, held by persons in Holland, and which were under the care of the plaintiffs; and they had large transaction for mutual benefit. In 1818, Mr. Delprat was appointed, by plaintiffs, their commercial agent, and was recommended to the particular care of the defendants, who were asked to "facilitate his operations." The agreement with Mr. Delprat was inclosed to the defendants, for the purpose of showing to

them the nature of his agency, and informing them of his powers, and of the credit they had given to him. The defendants were to render such services, as would enable Mr. Delprat to execute the purposes of the contract. Thus were the defendants brought into a close connection with Mr. Delprat, for the purpose of promoting the designs and interests of the plaintiffs; and those bills, believed by them to be drawn in the regular course of the transactions, authorized by the relations between Mr. Delprat and the plaintiffs, were indorsed to "facilitate the operations" of Mr. Delprat, supposed to be beneficial to all parties.

It is said, that the plaintiffs were, by the contract entered into by them with Mr. Delprat, to have nothing to do with the drawing of bills. They did not so construe the agreement, nor did the plaintiffs so consider it. The construction of commercial agreements is best made by the understanding of the parties to them, and the *use made of the same. The evi- [*274
dence shows, that the construction which was assumed as proper, by the defendants, and upon which they acted, in indorsing those bills, had been frequently affirmed, in the course of former transactions by the plaintiffs.

Marshall, Ch. J., delivered the opinion of the court.—This action was brought on nine bills of exchange, drawn by John C. Delprat, on the plaintiffs, and indorsed by the defendants, a list of which follows:—

Baltimore,	May 23, 1822,	500*l.*,	favor of J. P. Craft.
"	" 27, "	200,	favor of defendants.
"	" " "	300	"
"	" " "	500	"
"	June 12 "	1000	"
"	" 18 "	300	"
"	July 31 "	1000	"
"	" " "	10,000*fr.*	"
"	" " "	5000	"

These bills were regularly protested for non-acceptance and non-payment; but were accepted and paid, *supra* protest, by the drawees, for the honor of the defendants, the indorsers. 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 of 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 plaintiff, *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 the 11th January 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy :

The undersigned N. & J. & R. Van Staphorst, merchants, in this city,
*275] and John C. Delprat, of Philadelphia, present the *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. & J. & R. V. Staphorst), 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 the 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 afore-mentioned 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 inclose and forward, or cause to be inclosed 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 indorsed, 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, 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
*276] be renewed *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 per cent. commission, to be earned by the first undersigned on the consignments to be procured, and further one per cent. 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 per cent. commission of those goods; and finally, that the second undersigned is promised an allowance for traveling, and other expenses, the sum of $2000, 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 annullation 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 unhoped for and wholly unexpected case of any differences taking place between the undersigned, respecting the fulfilment of any *of the articles above [*277
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 renunciating to all law measure 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, 11th 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:—

Amsterdam, 21st Jan. 1818.

Messrs. Le Roy, Bayard & Co., New York. (Confidential.)

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 inclosed 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 fore-mentioned 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.

*278] *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 afore-mentioned, 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 afore-mentioned 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 line of 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 co-operation 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.

(Indorsed)—Confidential. Amsterdam, 21st of January 1818. N. & J. & R. Van Staphorst. Received, March 19th. Answered, 24th do.

*This letter was answered by Le Roy, Bayard & Co., in the following terms: [*279

PRIVATE.

New York, 24th of March 1818.

Messrs. N. & J. & R. Van Staphorst, Amsterdam.

Gentlemen:—We have the honor of replying to your esteemed favor of 21st of 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 dollars, 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 instrusted 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 the 24th 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
*280] are well acquainted with), you allow him then, the same credit, *which you do to all persons from whom you take bills, in 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 the 24th of 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 the 12th of 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 the 6th February 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 indorsing 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 the 17th of 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 the 12th of May 1820, when his credit with the house of the latter was annulled. At least, no subsequent letter appears in the record, until the 9th of July 1822, when the plaintiffs announced to the defendants, the sudden termination of their connection with Mr. Delprat ; whose conduct, they said, had been so imprudent as to oblige them, at the same time, to protest *several of his
*281] 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 the 31st of December 1820, although the balance then due from him was fully $7837.54, 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 $6000. 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*l.*, 300*l.*, and 500*l*; 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*l.*, fl. 1250 and 1750, 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 not 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 non-acceptance, and perhaps, afterwards, for non-payment, are several indorsed by the defendants, for whose honor, however, they had intervened.

This letter was received by the defendants, on the 1st day of September 1822. The 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 inclosed to the *plaintiffs in a letter of the 7th September 1822, in which they say, "We can of course only consider this [*282 order as applying to the balance that may possibly accrue to him, upon the settlement of your account; and if any shall 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*l.*, 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*l.* 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 the 27th of May, for 1000*l.*, were drawn on account of shipments, in his own name, by the Virgin; she sailed about the 30th July; they were not accompanied by invoices or bills of lading. The two bills of the 12th and 18th June, for 1000*l.*, and for 300*l.*, 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 the 31st of 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 indorsing 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
*283] credited to the *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 the 11th 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 and others* v. *Payson and others*. 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 *feels satisfied on this point, [*284
he will inform you; and in that case, your draft for $2000 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 $2000, 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 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; 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 $2000, 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 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." *It cannot be alleged, that these bills are [*285

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 indorsers. 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 the 11th of 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 in forming 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 indorse 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.

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Were the bills in question drawn in conformity with powers and instructions thus limited? The first bill on the list is for 500*l.*, drawn in favor of J. P. Krafft, on the 23d of May 1822, and indorsed 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 indorsed by the defendants. It does not appear, certainly, who remitted this bill; although the probability is, that, as it was indorsed 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 indorsed 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 bill to be charged to the account of Krafft, generally. Under 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 different 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 *and unusual provisions, to [*287
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 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." 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 suceeding
*288] article; unless the same words are used, or the *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., inclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It is not probable, that they *would have given him an express authority [*289 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 acconnt. 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 on the 11th of 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 indorsed 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 question. It asks, whether the plaintiffs were bound *to accept and pay the bills in [*290 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 the 23d of May 1822, for 500*l.* 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. Deprat 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 informa-

tion furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters of 19th July and 10th 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 correspondence between the plaintiffs and defendants, we find several letters written during the continuance of Mr. Delprat's credit with the latter, which show the determination of the former not to approve of advances beyond that credit. In their letter of the 24th of June 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which
*291] they are well acquainted with, that they (the *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 flowing 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 the 11th 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 3000*l.* 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, but 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 for purchase of his drafts, was neither wished nor contemplated by you." And in their letter of the 7th of September 1822, inclosing 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 the 24th 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 *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. [*292

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 of 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.