June 13, 1816.

TITHES.—MODUS.—RANKNESS.—ISSUE.—EVIDENCE.—NEW TRIAL.

Order refusing the new trial *affirmed.*

care that your Lordships' decision, if it should rest on this point, should not prejudice the other points in the cause.

Appeal dismissed, and the order complained of *affirmed.*

Agent for Appellants, VANDERZEE,
Agent for Respondent, FORSTER, COOKE, and FRERE.

ENGLAND.

ERROR, FROM THE COURT OF KING'S BENCH.

BENSON—*Plaintiff in Error.*
WHITE—*Defendant in Error.*

May 17, 1816.

BILL OF EXCHANGE.—ERROR.

ACTION by indorsee of a bill of exchange against the acceptor.—Declaration states in first count, that payment was demanded at the place where the bill was made payable, without averring that payment was *refused;* and, after other counts, declaration states in conclusion, that the acceptor had not paid any of the sums in the declaration mentioned. Judgment entered up generally on the whole of the declaration, and error brought for want of averment in the first count of a *refusal* to pay. Held to be no error in this case, and Judgment *affirmed.*—(Vid. Butterworth v. Le Despenser, 3 Maule. Sel. 150.)

Action.

THIS was an action brought in the Court of King's Bench by the Defendant in error, as indorsee of a bill of exchange, for the sum of 500*l.*, to recover

against the Plaintiff in error, as the acceptor thereof, the amount of the said Bill of Exchange.

Declaration.

The first count of the declaration stated, that one John Thompson, on January 1, 1814, drew the bill in question on the Plaintiff in error, payable nine months after date, to the order of the drawer; that the Plaintiff in error accepted the bill, payable at the house of *Butler Brothers, Esq. Broad-Street, London.* It then averred that John Thompson, the drawer, indorsed the bill to the Defendant in error, and delivered the same so indorsed to the Defendant in error, and that, by reason of the premises, and by force of the usage and custom of merchants, the Plaintiff in error became liable to pay to the Defendant in error the money in the said bill specified, according to the tenor and effect of the said bill of exchange, and of *his said acceptance thereof*, and of the said indorsement so made thereon as aforesaid, and a promise to pay the same according to the tenor and effect of said bill of exchange, *and of his said acceptance thereof*, and of the said indorsement thereon as aforesaid. It then averred that afterwards, and when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the fourth of April, in the year aforesaid, the said bill of exchange, so accepted and indorsed as aforesaid, was shown and presented for payment at the place where the same was made payable as foresaid, and payment thereof was then and there *demanded*, without averring that payment was *refused*, according to the tenor and effect of the said bill of exchange, and of the said acceptance thereof, and of the said indorsement so made

May 17, 1816.

BILL OF EXCHANGE.—ERROR.

thereon as aforesaid. And, after other counts, the conclusion of the declaration stated, that the Plaintiff in error had not paid any of the sums of money in the declaration mentioned.

Judgment.

The Defendant in error obtained, and entered up, a general judgment on the whole declaration. On this judgment the Plaintiff in error brought his writ of error, and assigned, in addition to the common

Errors.

errors, the following special errors:—1st, That it was stated and alleged that the bill of exchange, in the first count mentioned, was, by and according to the tenor of the acceptance thereof, made payable at a particular place, namely, the house or shop of Butler Brothers, Esq. in Broad Street; and yet it is not averred that payment thereof was ever refused at the said house or shop of the said Butler Brothers, or by the said Butler Brothers, or by the Plaintiff in error. 2dly, That when a bill of exchange is accepted payable at a particular place, the acceptor cannot by law be sued or made liable, unless such bill be presented at the place where it is made payable, and payment thereof be refused at such place; yet that it was stated in the first count that the bill of exchange therein mentioned was accepted payable at a particular place, and that the same was indorsed to the Defendant in error, after such acceptance, whereby he must by law be deemed to have adopted such qualified acceptance, and bound himself to the terms thereof; yet it was not stated that payment of the bill was ever refused at the place where it was made payable. 3dly, That where a previous demand and a previous refusal are necessary before a complete cause of action can accrue, a

mere demand without a refusal cannot by law give or create a cause of action; and although, in order to afford and give a complete cause of action against the Plaintiff in error, in respect of the said bill of exchange, a refusal of payment of the said bill of exchange at the place where the same was made payable was essential, there was no averment that the bill of exchange in question was refused payment at the place where it was made payable, or by the persons to whom it was made payable, or by the Plaintiff in error.—The Defendant in error replied that there was no error.

May 17, 1816.

BILL OF EXCHANGE.—ERROR.

Mr. Barrow for Plaintiff in error; *Mr. Foljambe* for Defendant in error.

The reasons given for reversing the judgment were these:—

1st, That although a person is not bound to receive a bill of exchange, accepted payable at a particular place, or by particular persons, other than the drawee of such bill; yet if he does so receive it, he adopts such special acceptance as part of the contract, and is bound by all the consequences of such special acceptance; and that the Defendant in error having taken the bill in question with such special acceptance was bound by it.

Reasons for reversing the judgment.

2dly, That the drawee of a bill of exchange is not bound to accept it generally: he may restrict his acceptance; and by accepting it payable at the house or shop of a particular person or particular persons, he refuses to accept it generally, so as to make himself liable to pay it anywhere, but engrafts

May 17, 1816.

BILL OF EXCHANGE.—ERROR.

upon it as a condition, precedent to his being called upon to pay it, that it shall be presented for payment at the place where it is so made payable, and be refused payment at such place, or by the persons by whom it is made payable. And the person taking a bill with such special acceptance is bound to present it for payment at the place where it is so made payable, and to aver and prove that he had done so, and that payment was refused before he can sue the acceptor.

3dly, That the practice of accepting bills payable at a banking-house, or at some particular place, or by some persons other than the drawees, has of late years become almost universal. That it is a great convenience to both holder and acceptor: to the holder, because, by having a bill made payable at a house of business, he is certain of finding some person who will give him an answer whether the bill be paid or not, without being under the necessity of calling frequently; and to the acceptor, because it facilitates the keeping accounts, and if he should have occasion to leave his residence, his acceptance may be paid in his absence.

4thly, That in cases of such special acceptances it is almost uniformly the fact that they are made payable by the acceptors' bankers or agents, and that consequently there must be a refusal by such bankers or agents to pay the bill, before the acceptor can be called upon. The averment that a demand was made does not necessarily imply a refusal. The party may not wait to receive an answer. Suppose the case, which very frequently happens,

that a man has nearly or entirely overdrawn his account at his bankers', and a bill accepted by him, and made payable at such bankers', is presented for payment, some time must be allowed for the cash clerk to consult the principals whether they will honour the acceptance. But the person presenting the bill does not think proper to wait. In this case there would be a demand, but no refusal; because the bankers might think proper, notwithstanding the acceptors' account was overdrawn, to give him further credit. And yet such a case would come entirely within the averments of the present declaration, which merely avers a demand, but no refusal. Again, payment of the bill might be demanded of a person who had no authority to give an answer. It would leave it in the power of a malevolent man to blast the credit of a merchant by merely demanding payment without waiting for an answer. And as the Plaintiff is not bound to prove more than he states in pleading, the party under the declaration in this count need only prove the demand, and it opens a door to fraud, by allowing a person to swear only to the latter.

5thly, Because it would be a most serious grievance, if the acceptor of a bill of exchange, who has accepted it payable at a particular place, and on the faith of its being presented for payment, when due, at such place, should have left funds at that particular place to pay it, and may have left his residence on business, might be arrested, at any place, at any distance from home, and at a time when he might not have any funds about him to take up such bill.

May 17, 1816.

BILL OF EXCHANGE.—ERROR.

6thly, Because, where a party is only liable on the default of another, there must be an actual default by a refusal by that other person to do the act required, before the party can be called upon to make good such default; but it does not appear that there was any default by Butler Brothers, at whose house the bill in question was made payable. And the Plaintiff in error was not liable to be sued, unless there was a refusal to pay the bill in question, by or at the house of Butler Brothers.

Reasons for affirming the judgment. Vid. Butterworth v. Le Despenser, 3 Maul. Sel. 150.

It was not thought necessary to hear the Defendant in error's counsel, but the reasons given in the case for affirming the judgment were these:—

1st, That the first count of the said declaration does state and aver that, at the time when the bill of exchange became due and payable, it was shown and presented for payment at the place at which the same was made payable, and payment thereof was then and there demanded according to the tenor and effect of the said bill of exchange, and of the acceptance thereof and the indorsement thereon; and the conclusion of the said declaration states that the said Plaintiff in error hath not paid any of the sums of money in the said declaration mentioned, and consequently that he has not paid the bill according to his promise and undertaking.

2dly, That it is not necessary to aver that any refusal to pay the bill was made by the persons at whose house or shop the same was made payable, because the acceptance of the Plaintiff in error did not impose upon such persons any legal obligation to pay the said bill; and that the tenor of the acceptance is not that the persons at whose house or

shop the bill was made payable would pay the same, but that the Plaintiff in error would himself pay the amount of the bill at that house or shop.

May 17, 1816. BILL OF EXCHANGE.—ERROR.

Judgment *affirmed*, with 134*l.* costs.

May 17, 1816. Judgment.

Agent for Plaintiff in error, BARROW.
Agents for Defendant in error, WHITE and DOWNES.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HIGGINS—*Appellant.*
LIVINGSTONE and others—*Respondents.*

CERTAIN of the trustees under an act of parliament for making a road, the fund provided by the act being neither sufficient nor available for the object until the completion of the road, raise money on their personal credit to carry on the work, and afterwards bring an action against the other trustees who had attended any of the meetings for payment of an equal proportion each of the whole expense of the road, or at least for a proportion of the expense authorized at the meeting or meetings which they attended. Held at first by the Court of Session that the mere fact of presence at meetings did constitute a *primâ facie* ground of personal liability, and that the *onus* lay on the Defenders to show, if they could, facts and circumstances exempting them from that personal liability. But on an appeal to, and a remit by, the House of Lords, held that the mere fact of presence at meetings did not constitute a *primâ facie* ground of personal liability, and that the *onus* lay upon the Pursuers to show acts beyond mere attendance done by the Defenders to render them personally liable; and there-

April 4, 1814. July 1, 1816. ROAD TRUSTEES.—PERSONAL LIABILITY.