ENGLAND.

WRIT OF ERROR FROM THE KING'S BENCH.

JOSHUA ROWE - - - *Plaintiff in Error.*

ISAAC YOUNG - - - *Defendant in Error.*

If a bill of exchange be "accepted, payable at the house "of P. & Co." it is a qualified acceptance restricting the place of payment, and the holder is bound to present the bill at that house for payment in order to charge the acceptor of the bill. If he brings an action upon the bill against the acceptor, he must in his declaration aver, and on the trial prove, that he made such presentment; and for want of such averment the declaration was held bad on demurrer.

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THE defendant in error was indorsee and holder of a bill of exchange, which the plaintiff in error, residing at Torpoint, had accepted, "*payable at Sir "John Perring & Co.'s bankers, London.*" The bill, when it became due, was not presented at that banking-house for payment. But Mr. Young, having failed to make such presentment, nevertheless brought an action against Mr. Rowe in the Court of King's Bench.

In the first count *, upon which the whole question, both technically and materially, turns, the

* Which was the only count in the declaration upon the bill of exchange; all the others were counts for money for goods sold and delivered, and upon an account stated.

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declaration set forth the words of the acceptance as above stated, with an innuendo or explanation, thus: "payable at, &c. *that is to say, at the house of cer-* "*tain persons using in trade, &c. the names, style,* "*and firm of Sir J. P. & Co. bankers, London.*"

In a subsequent part of the same count it was averred, that Rowe, "by reason of the premises, "and according to the custom of merchants, became "liable to pay the money specified in the bill accord- "ing to the tenor and effect of the bill, *and of his* "*acceptance.*" No allegation of a presentment at Sir John Perring & Co.'s for payment was contained in the first count. To this declaration, upon the ground of this omission in the first count, a demurrer was filed on behalf of Rowe, the defendant in the action*.

The Court of King's Bench overruled the demurrer upon argument, or rather upon the statement of it, and gave judgment for the plaintiff Young.

Against this judgment a writ of error was brought in the House of Lords, assigning for error the want of averment in the first count, that the bill was presented for payment at the house of Sir J. Perring. The case was twice argued † before the House at

* For thirty years before the argument of this case, the Court of King's Bench had been in the habit of holding an acceptance payable at a banker's to be a general acceptance.

† By the *Attorney-General* and Mr. *Wylde* for the plaintiff; and by Mr. *Holt*, for the defendant in error. The arguments are omitted on account of their length; and if it could have been done with propriety, in a work professing to be a record of important decisions in the House of Lords, the whole case would have been omitted, on account of the increased expense

very great length, and with much ability: first, in the ordinary course, and afterwards before the Judges, for the purpose of proposing to them questions of law, for the information of the House. After the second argument, the four following questions were propounded to the Judges:

1. Whether, in this case, the bill of exchange

which double reports of the same case inflict upon that part of the profession who are, or who conceive that they are, obliged to take both sets of reports. In ancient times, when business was less extensive, it was the practice of advocates to attend all the courts indiscriminately; and, having taken notes of what they heard in the course of their practice, to publish indiscriminately what they so collected. But of late years division of labour has been the consequence of increased business, and reporters, as well as advocates, usually confine themselves to a particular court. Formerly, reporters of cases in Chancery and the King's Bench made no scruple of reporting cases in the Common Pleas or Exchequer; but since the time when periodical reports of cases in the Common Pleas and Exchequer have been begun, and gentlemen have devoted themselves to attendance in those Courts for the purpose of reporting, no reporter in other courts interferes with the department which they have selected. The case now reported arose in the King's Bench, was removed by writ of error into Parliament, and appears in the ordinary reports of the Common Pleas. If this circumstance had furnished a sufficient reason to exclude a case so important in the principle of decision, so full of acute reasoning and deep research, comprising in the elaborate opinions, delivered by the Judges, so many valuable discussions on doctrines of law, and refined criticisms on points of pleading, not applicable merely to the case under consideration, but of universal application, from the pages of a work where the first inquiry would be made for such a case, it would have been, to the Editor most especially, a great relief to have been spared the unpalatable task of consideration whether such a case, under such circumstances, ought or ought not to be reported.

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mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring & Co.'s bankers, London, (that is to say) at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring & Co. bankers, London, the holder was bound to present it to that house for payment, and to aver in the declaration that the same was presented to that house for payment?

2. Whether, the said bill having been so accepted as aforesaid, such acceptance is in law to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring & Co. bankers, London; or, as a general acceptance, to pay the same with an additional engagement or direction for payment thereof at that house?

3. Whether, if *A.* draw a bill upon *B*, in favour of *C*, for 100 *l.* and *C*, without the previous authority or subsequent assent of *A*, take an acceptance of the bill for the whole of the 100 *l.* but an acceptance qualified as to the time or place of payment, *C.* could, notwithstanding his taking such acceptance, maintain an action upon the bill against *A.*?

4. Whether, if *A.* were debtor to *C.* in 100 *l.* previous to his so drawing upon *B*, in favour of *C*, to the amount of 100 *l.* *C.* could, upon *A.*'s refusing his assent to an acceptance qualified as mentioned in the above question, maintain an action upon the original debt against *A*, without delivering to *A.* the bill so accepted, in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100 *l.*?

There was a difference of opinion among the Judges, and they delivered successively the opinions which are printed in the Appendix to this Report. After the Judges had delivered their opinions, the *Lord Chancellor* and Lord *Redesdale* spoke to the following effect:

17th July.

Lord Chancellor:—The writ in this case was brought on a judgment in the Court of King's Bench, in an action of assumpsit. That action was commenced by special original in Easter Term, 1816. The declaration consisted of a count on a bill of exchange, two counts for goods sold and delivered, three money counts, and an account stated. The breach contains an averment of a special request of payment in the usual form. The error is limited to the first count of the declaration, and that count is thus expressed: "For that whereas one James "Meagher, on the 20th December 1815, at Gos- "port, to wit at London, in the parish of St. Mary- "le-bow, in the Ward of Cheap, according to the "usage and custom of merchants, from time imme- "morial used and approved of within this kingdom, "made and drew a certain bill of exchange in "writing, bearing date the same day and year afore- "said, and then and there directed that bill of ex- "change to the said Joshua, by the name and addi- "tion of Joshua Rowe, Esquire, Torpoint, and "thereby required the said Joshua, two months "after the date thereof, to pay to his the said "James's order 300 *l.* for value in account, and "then delivered the said bill of exchange to the "said Joshua, which bill of exchange he the said

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" Joshua afterwards, to wit, on the same day and " year aforesaid, at Gosport, that is to say, at London " aforesaid, in the parish and ward aforesaid, upon " sight thereof, accepted *according to the said usage* " *and custom of merchants, payable at Sir John* " *Perring & Co.'s bankers, London,* (that is to say,) " *at the house of certain persons using in trade* " *and commerce the names, style, and firm of Sir* " *J. Perring & Co. bankers, London*; and the said " James, to whose order the said sum of money in " the said bill of exchange specified was to be paid, " afterwards, to wit, on the same day and year afore- " said, at London aforesaid, in the same parish and " ward aforesaid, by his certain indorsement in " writing, made and indorsed on the said bill of " exchange, according to the usage and custom of " merchants, ordered and appointed the said sum " of money in the said bill of exchange mentioned, " to be paid to the said Isaac, and then and there " delivered the said bill of exchange so indorsed " to him the said Isaac, of which indorsement the " said Joshua afterwards, to wit, on the same day " and year aforesaid, at London aforesaid, in the " parish and ward aforesaid, had notice, by *reason* " *of which said premises, and according to the said* " *custom of merchants,* he the said Joshua then and " there became liable to pay the said Isaac the said " sum of money specified in the said bill, 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 " being so liable, he the said Joshua, in considera- " tion thereof, afterwards, to wit, on the same day

" and year aforesaid, at London aforesaid, in the " parish and ward aforesaid, undertook, and then " and there faithfully promised the said Isaac, to " pay him the said sum of money mentioned in the " said bill of exchange, 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.

To this count there was the following demurrer : " And the said Joshua, by John Wells Bozon, his " attorney, comes and defends the wrong and injury " when, &c. and says, that the said first count of the " said declaration, and the matters therein contained, " in manner and form as the same are above stated " and set forth, are not sufficient in law for the said " Isaac to have or maintain his aforesaid action thereof " against him the said Joshua, and that he the said " Joshua is not bound by the law of the land to " answer the same, and this he is ready to verify ; " wherefore, for want of a sufficient first count " of this said declaration in this behalf, the said " Joshua prays judgment, and that the said Isaac " may be barred for having or maintaining his afore- " said action thereof against him, &c. ; and the said " Joshua, according to the form of the statute in " such case made and provided, states and shows to " the Court here, the following causes of demurrer " to the said first count of the said declaration, that, " *although it is stated and alleged in and by the* " *said first count of the said declaration, that the* " *said bill was accepted by the said Joshua, and* " *made payable at Sir J. Perring & Co.'s bankers,* " *London, yet it is not alleged or stated in, nor can*

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" *it be collected from, the first count of the decla-* " *ration, that the said bill was ever presented or* " *shown for payment thereof,* either when it became " due and payable, or before or since, at the said Sir " J. Perring & Co.'s bankers, London aforesaid." Then there is a rejoinder and replication.

The demurrer afterwards came on for argument in the Court of King's Bench, when the Court gave judgment in favour of the defendant in error, that is, by their judgment they asserted that it was unnecessary to state and allege, (that is the substance of it,) in and by the first count of the declaration, that the bill was accepted by Joshua ; in fact, that it was not necessary it should be stated, or capable of being collected from the first count of the declaration, that the bill was ever presented or shown for payment thereof, either when it became due and payable, or before or since, at Sir J. Perring & Co.'s bankers, London.

The writ of error, therefore, raises this question : whether it was or not necessary in this first count of the declaration to allege, or state expressly, or to allege or state in substance and effect, so that it might be collected from the first count of the declaclaration, that the bill had been presented, and shown to the plaintiff in error, either when it became due and payable, or before that time, or since, at Sir J. Perring & Co.'s bankers, London? The question, stated in another way, may be thus : whether the acceptance, as set forth in this first count of the declaration, is to be considered a general acceptance, making the party accepting liable to pay every where, together with what in some cases is called an

expansion of the undertaking; and in other cases, an engagement or direction, in addition to the general unqualified acceptance to pay, (as the direction in this case to pay at Sir J. Perring & Co.'s) thrown in for the convenience of both parties, but which the holder of the bill is not bound to attend to, unless he chooses; or, on the other hand, whether this, from looking at the terms of the declaration, is what is in law called a qualified acceptance? Undoubtedly it is very fit this question should be brought to a final decision, because the state of the law, as actually administered in the Courts, is such, that it would be infinitely better to settle it in any way than to permit that sort of controversial state to exist any longer.

It has been correctly stated at the bar, that the Court of King's Bench has been of late years in the habit of holding this to be a general acceptance, with what they call an expansion, or a direction, or an engagement, which introduces not a qualified promise, but a sort of courtesy; a kind of accommodation between the parties, in addition to the effect of the general acceptance; which accommodation or courtesy, however, they decide that the holder of the bill is not at all bound to attend to. On the other hand, the Court of Common Pleas are in the habit of holding that this is a qualified acceptance; that the contract of the party is to pay at the place specified; and, as in matter of pleading, they deem it a qualified acceptance, the proof must accord with the declaration. They require the plaintiff to aver and prove the presentment at the place stipulated.

The principles of law, as applied to promissory

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notes and bills of exchange, are simple and uniform in common cases. But the Court of King's Bench has held, that if a man promise to pay at a particular place, by a promissory note, the Wellington Bank for instance, the demand must be made there; which presentment is itself in point of law a demand; and the reason alleged is, because the place standing in the body of the note is part of the written contract, and you must declare upon it as it is, and prove it as you declare; yet the same Court decides otherwise in the cases of bills accepted, payable at specified places; and the reason assigned for this is, because the place specified is not in the body of the bill. Some how or other it seems to have been assumed, that not being in the body of the bill it is not to be considered as being in the body of the acceptance: a conclusion which it is extremely difficult, I think, to adopt. If you can infuse qualifications of various kinds, which unquestionably you may, into the acceptance, notwithstanding the generality of the bill as drawn, it seems rather difficult to make out, that if in the acceptance there is a qualification clearly and sufficiently expressed as to place, that such a qualification cannot be introduced into the acceptance as well as any other qualification; qualification as to time, as to mode of payment, as to contingencies upon which you will pay, and various qualifications which will be found in the cases.

The decisions of the Court of King's Bench as to bills accepted, payable at a given place, cannot easily be reconciled with their decisions as to promissory notes, with similar qualifications; and it

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must, I think, be admitted that these decisions of the Court of King's Bench are not all consistent with each other. It may be represented as the opinion of that Court in judgment, that this species of acceptance is a general acceptance, with that kind of expansion, direction, or engagement, to which I have been alluding. The Court of Common Pleas hold a different doctrine. Upon a question where so many Judges of high professional character and great learning have differed, it is impossible to give an opinion without much diffidence; but it is my duty to state my opinion whatever it may be.

The first question is, whether this is a qualified acceptance? Upon that the twelve Judges have given their opinion, and a great majority of them are of opinion that it is a qualified acceptance. Some of the Judges have given an opinion that it is a general acceptance, with an expansion, direction, or engagement, for the convenience of one or other of the parties; that the acceptance in this case meant, that if the party chose to go to Sir John Perring & Co.'s he would probably there get payment of the bill.

The next question is this: supposing it to be a qualified acceptance, was it necessary to aver the presentment, and to support that averment by proof? Now, upon that question, a great majority of the learned Judges, including those who thought it was a qualified acceptance, say that it is not necessary to notice it as such in the declaration, or to prove presentment; but that it must be considered as matter of defence, and that the defendant must state that he was ready to pay at the place, and must bring the money into Court, and bar the action by proving

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the truth of that defence. A great majority of the Judges are of that opinion. Some of the Judges, (including one who has been most eminent in special pleading,) hold a different doctrine. They are of opinion that the plaintiff must declare upon the contract as it is, and make out his right to sue according to that contract. If that contract engages for payment at Sir John Perring & Co.'s he must make a demand at Sir John Perring & Co.'s, and he must state in his declaration that he has made such demand. The sum of their opinion is this, that the contract being upon a condition precedent, the plaintiff has no cause of action unless he has performed the condition; and further, unless he pleads and proves the performance.

I think I may venture to state, having with great pains read every case upon the subject, that a person may draw a bill of exchange as we are in the habit of drawing a promissory note, payable at a particular place. By the acceptance of such a bill, the acceptor promises to pay at that particular place, and the drawer binds himself to the same qualified contract, in default of payment by the acceptor. But it seems there is a great objection to the doctrine, that if a bill is drawn in general terms the acceptor may alter the contract by giving a special acceptance. The only material question appears to me to be, whether the acceptor has in fact accepted specially. I cannot imagine, that because the contract of *A.* the drawer is general, it is from thence to be reasoned, that I, the acceptor, having an option to undertake, or altogether refuse, the engagement, cannot qualify my acceptance. May I not say to

the holder of the bill, it is very true the drawer has drawn upon me, and expects me to make myself liable generally, but that is a liability which I do not choose to incur. If you will not take an acceptance at a specified time and place, which my convenience requires, I will not give you any acceptance. That an acceptor may qualify his acceptance is clearly established by cases including almost every species of qualification. If the qualification, as to place, cannot be introduced by the acceptor, it must be on account of some circumstance which belongs to place, and does not belong to time or mode of payment, or any other species of qualification whatever.

I am ready to express my full assent to the doctrine, that where a bill is drawn generally, considering that it is an address to the person who is to accept it generally, because it is drawn generally, it is the duty of the acceptor who intends to give a special acceptance, to accept in such terms that the nature of his contract may be seen in the terms he has used; that the acceptance may clearly appear to be qualified or special, which he insists is not general.

Then the first question in this case will arise upon the words, whether this is or is not a qualified acceptance. I really do not know how it is possible to say that this is not a qualified acceptance, I mean independently of the cases which have been decided. If a bill is drawn upon a person resident in London, and he accepts it according to the usage and custom of merchants, payable at his bankers in London, putting for the moment the usage of merchants, and the effect of decided authorities, out of the question,

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can any man read an acceptance in these terms, and say it is not only a contract to pay at Child's, where the funds would be deposited to pay it, but that it was a contract by virtue of which the holder of that bill might arrest the acceptor, and hold him to bail in any part of the world?

I cannot, after the maturest consideration, think that the words used do not clearly show that it was the intention of the party who gave this acceptance to come under an engagement which may be represented as a contract, to pay the bill at Sir J. Perring & Co.'s London, and not to be liable elsewhere.

Then it is said, that the word "accepted" forms the general engagement; and that the words "payable at Sir J. Perring & Co.'s" cannot qualify and cut down the general engagement; and cases are cited which maintain a distinction between words of qualification in the body of a note, and words of qualification in the margin, or at the foot of the note. There are such cases of distinction between words in the body of the instrument, which have been held to form part of the contract, and words at the foot, or in the margin, which have been considered and held to constitute only a memorandum. I do not mean to disturb those cases; but I do not understand how it is, that from those cases it is to be inferred, that when the acceptor, *uno flatu*, writes the words, "accepted payable at such a house," the word "accepted" is to be taken to express the whole of the acceptor's contract; and although the sentence is not complete till the whole is written, the latter words are not to be taken as part of it, but are

to be construed distinctly as a direction, expansion, or engagement.

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It appears to me that this is a qualified contract for payment at the place specified.

The *argumentum ab inconvenienti* has been strongly urged. The mode of reasoning was not quite analagous to the usual modes of reasoning in the courts below. Nor does the argument itself as presented rest on clear probabilities. The case is put in this way: Suppose a bill were drawn on each of the twelve Judges of England, just before they left town to proceed on their circuits, and they had accepted the bills payable at their respective bankers. If it be law that such an acceptance renders them liable to pay any where, the holders of those bills might, undoubtedly, if they pleased, arrest the Judges at their respective circuit-towns, a little to the inconvenience of the administration of justice. It is said no man would think of arresting the Judges. I hope nobody would think of arresting the Judges; but I can feel for mercantile men as well as for Judges. It is a hardship that men should be exposed to the inconvenience of unexpected demands, which are not regulated by their contracts, but by a construction given to their contracts, which they never intended, and have not expressed.

In this very case, (a circumstance which has been little considered) the acceptor lives at Torpoint. Is it a matter of no consequence to the acceptor living at Torpoint, and having his money in London, where the payment is demanded? At Torpoint, perhaps, he cannot pay, probably not without inconvenience. In London he has left a fund in the

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hands of his bankers, for the purpose of payment. Is it no matter of inconvenience that the holder may from caprice (we have heard of such things as men, through caprice, refusing a tender of Bank of England notes,) is it no evil to the acceptor that he should be obliged to bring his money from London, if he foresees that the holder of his acceptance will not demand his money in London, but personally from him the acceptor; or if he cannot foresee whether he will demand his money in London or not, is he to keep money in London, and to have money at Torpoint also, and even about his person, to answer the exigency of the demand, as it may happen to be made at the one place or the other, or wherever he may happen to be when the demand is made?

There is another consideration which does not appear to me to have been sufficiently weighed. If the acceptor promises to pay at his bankers in London, and the holder calls upon him in Northumberland, the payment is not the same. He presumes that the demand is to be made at the bankers in London, and the funds are deposited there. But if the acceptor is unexpectedly to meet the demand in a distant place, the cost of the exchange and remittance backwards and forwards must be added. Take the case of a gentleman leaving Calcutta and coming to reside in London. Upon his departure he gives a bill of exchange in Calcutta, to be paid there six months after he departs. He arrives in London, not bringing funds to pay that bill; he finds the bill sent home by another ship, and he is arrested the moment he lands. The sum which he pays here,

(if compelled,) is not the same which he had made preparation for paying, and would have paid in India. It appears, to me, therefore, that even with respect to the value of what is to be paid, there is a most essential difference in the contract.

Then, it is said, the admission of such special acceptances will be extremely inconvenient; and it was with a view to see what the balance of convenience and inconvenience would be, that the third and fourth questions were proposed to the Judges by order of the House. The objection urged is, that it may vary the right of the holder against the drawer and previous indorsers, unless he, the holder, gives notices, and does all the acts requisite to preserve their liability. The answer to that objection, as it seems to me, is plain: If once it be admitted that a man may by law accept specially, it is in consequence of the law that these difficulties arise. By deciding that no man shall accept specially a bil which is drawn generally, the difficulty is avoided. But if the law be, that although a bill is drawn generally, it may be accepted specially, it is the effect of the law to impose a duty upon the holder of giving notice to the drawer and previous indorsers, if he intends to keep alive their liability. That inconvenience certainly is not quite so large as if the acoeptor refused to accept at all.

Again, it is objected that the rule in question will create great difficulty as it regards the indorsee; that some indorsees become so before and some after acceptance: if he becomes an indorsee before, he may find a special acceptance when he expected to have a general acceptance. But when the bill is indorsed

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to him unaccepted, he does not know whether it will ever be accepted; and if he does not know that it will be ever accepted, he cannot tell whether it will be accepted generally or whether it will be accepted specially. He knows, therefore, at the time when he takes that bill by indorsement, that he is to look out for such an acceptor as he can find; perhaps no acceptor, but either a general acceptor or a special acceptor. What there is, in such a rule, inconsistent with law or convenience, I cannot discover.

This being a case in which the law is unsettled, we must resort to principle. If on principle a qualified acceptance may be given, the question is, whether the acceptance in this case is qualified? If it be an acceptance in which the contract of the party is to pay at Sir John Perring & Co.'s, then I state it to be, in pleading, a settled rule, that the plaintiff must declare according to the contract; he must aver all that the nature of that contract makes necessary. If so, how can it be said it is not to be shown by the demand in the declaration, but must be left to be brought forward by the defence? It appears to me that such a doctrine cannot be maintained.

With respect to the cases which have been cited of bonds, they differ altogether from a contract of this nature. Upon a bond the action is brought for the penalty. It must be, therefore, matter of defence to show that the sum due would have been paid at a particular place provided, for that will appear in the condition of the bond, when the defendant prays oyer of it. The defence consists in alleging performance of that part of the condition,

and that is an excuse for non-payment, so as to throw the costs on the plaintiff. These cases therefore have no application to cases of contract.

There is another set of cases in which it is said that if there is an antecedent debt the acceptance must be taken to be general. Between the acceptor and the holder there is no antecedent debt. There may be an antecedent debt between the drawer and the acceptor of the bill. I wish it could be asserted in all cases. Accommodation bills have ruined great numbers of men. With respect to the acceptor, it is not true that he must be antecedently the debtor. All the cases of qualified acceptance show the contrary. A man may accept to pay half the bill in money and half in goods. He may accept to pay out of the produce of a cargo consigned to him when that cargo shall arrive in England. In the case of a consignee his acceptance is almost universally qualified. Upon the expectation of cargoes coming from the West Indies, or other places, bills are accepted by consignees, payable in London *

In every view of this case, I must state it as my

* The Lord Chancellor, in the course of his speech, stated, that he did not profess to go through the whole case, or to notice all the arguments. The analogies, of rent payable on the premises, of awards directing money to be paid and received at a place, of bills and notes payable on demand, where no demand is held necessary, are omitted here. On the two first classes, see the arguments for the analogy, in the opinion of Bayley, J. and against it, in the opinion of Wood, B. *post.* in the Appendix. As to the latter case, where demand is part of the contract, yet proof of demand held unnecessary, see *Birks* v. *Trippett*, 1 Saund. 33, a.; and the opinion of Bayley, J. *quà supra.*

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opinion, (though with much diffidence, recollecting that I am obliged to differ in opinion from those whose judgments no man can respect more than I do) that this is a contract to pay at Sir John Perring & Co.'s even as the contract is stated in the first count of the declaration, and inasmuch as that count wants this indispensable averment of a presentment for payment, according to the contract; the consequence is, that this judgment must be reversed. I do not think the decision will much affect the commercial world, for it will be easy to adopt forms of words which leave no doubt what is meant. I am perfectly sure, that if there is any inconvenience arising from this proposed decision, those who do not wish to suffer the apprehended inconvenience have nothing to do but to use two or three words, which will guard them from it.

The question is, what is the law settled, or to be settled, upon the contract as set forth in the first count of this declaration? I have already stated in a few words what my opinion is, and I sincerely believe it to be founded in clear principles of law. At the same time, I cannot but recollect that I am differing from those whose opinions I greatly respect. I do it with reluctance: But my duty is to express my own opinion.

Lord Redesdale:—I most fully concur in the opinion expressed by my noble and learned friend *. It appears to me, that some of the learned Judges have totally forgotten acceptances for honour, which are not uncommon acceptances. If a person accepts, for the honour of the drawer, payable at a banker's

* The Lord Chancellor.

in London, all the reasoning, founded on the supposition that the acceptor was debtor to the drawer, vanishes; and I do not observe, that the learned Judges distinguished between the case of an acceptance for honour, and the common case of a bill drawn on the person to accept. It is impossible to say, that if these words were applied to an acceptance for honour, that any of the arguments founded on the supposed prior debt of the acceptor could be maintained.

Another part of the question which has been adverted to by the noble and learned Lord appears to me of infinite importance; I mean, the acceptance of a bill payable at a different place from the residence of the acceptor. This bill is accepted by a man resident at Torpoint, payable in London, at a certain banking-house. What is it that is asserted to be the effect of his acceptance? that he engages to have money both at Sir John Perring & Co.'s and at his own residence at Torpoint. If he accepted simply, he would engage only to have the money at Torpoint *; but, it is said, that because he accepts with this addition he engages to have the money at both places: this is making him engage for two things instead of one, and it seems to me that it

* *Quære*, Whether, under a general acceptance, he would not be generally liable; that is, in all places wherever he may happen to be resident when the bill becomes due, and is presented for payment. See *Rumball* v. *Ball*, 10 Mod. 38; and Bayley on Bills, 3d edition, 187. I was apprehensive that my note of this passage was incorrect; but, upon collation with other notes, it is confirmed. The expression intended, perhaps, was, that he *would have accepted payable at Torpoint*.

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must have been his intention to engage for only one, that is, a payment in London; because otherwise he would have engaged for a different thing than that which he engages for by a general acceptance. It is perfectly clear, that money paid at Torpoint and in London are two different things; and if he is liable to be called upon at both places, his liability is rendered more inconvenient.

If it be the true doctrine of law that presentment at a place specified in the acceptance is not necessary, such a doctrine might furnish the means of unfair and fraudulent advantage in dealings between mercantile people residing at different places. Take the case stated by the noble and learned Lord, of a bill accepted, payable in India. Suppose a person accepts a bill payable in India, and leaves funds for the purpose of answering that bill, which is made payable in six months. He comes to London, and there the bill is demanded of him; because his acceptance, according to the proposed doctrine, is general, and the words, "*payable at Culcutta*," do not qualify that acceptance; the consequence of that would be, that the holder of the bill would gain the whole expense of the remittance from India to England, and we know perfectly well that makes a very considerable difference. In a recent appeal*, argued before this House, it is a question whether, in an account of that description, the expense of remittance from India to England is or is not to be allowed; and it is part of the subject of appeal from the decision of the Court of Session in Scotland that

* *Graham* v. *Keble*, see *ante*, page 126.

the appellant has not been allowed the expense of that remittance *.

It appears to me, therefore, perfectly clear, that if it be law, that the acceptance of a bill payable at a specified place is not a conditional acceptance, it may be used for the purpose of gross fraud, to make the acceptor pay that which he did not mean to pay, a sum which the other parties to the contract never expected him to pay. Many cases might be put as to the West Indies, and other places which were alluded to by some of the learned Judges, and into which it is not necessary to enter.

If the words which have been added to this acceptance are to be taken as nothing in favour of the acceptor, how is it that they have any operation in favour of other parties? If they are not a condition annexed to the acceptance, how is it, that with respect to the drawer of the bill, for the purpose of making a demand against him, and with respect to the indorser, for the purpose of making a demand against him, the holder of the bill must show the the application to Perring & Co. in order to entitle him to bring his action?

It is said that this should be shown by plea. The majority of the Judges have been of opinion that it is a qualification of the acceptance, but that the defendant is to take advantage of it in pleading. To do that he is obliged to bring the money into Court; that is to say, he is to do the very thing which in the case of an acceptance in India, for instance, he

* By the judgment since given, the cost of remittance has been in part allowed.

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ought not to be obliged to do—he must bring the money from India to be enabled to do it; and therefore, the permitting him to take advantage of it, by way of pleading, bringing the money into Court, is not giving him the advantage for which he stipulated *.

Upon these grounds it appears to me that it is infinitely better to hold that these words amount

* *Quære* 1. Whether the defendant might not plead readiness, &c. and bring into Court the sum expressed in the bill, according to the rate of exchange, either at the time when the bill became due, or at the time of paying the money into Court. Suppose, for instance, a bill drawn upon a party resident in Ireland, for 1,300*l.* which he accepts, payable at Dublin; and afterwards, the acceptor, being in England, is sued for the amount. If, according to law, and the practice of the Court, he might plead that he was ready to pay at Dublin, &c. and pay into Court 1,200*l.* that being the supposed rate of exchange; the objection, so far, is obviated.

Quære 2. Whether, for the purpose of this argument, there is any difference between remittance and exchange, since the mode of remittance is by exchange. Or if there be any further incidental expenses, as a fair commission to the banker or merchant furnishing the bill, might, or might not, that also become the subject or part of a special plea; and the real value of the sum expressed in the bill, according to the rate of exchange, minus those incidental expenses, be paid into Court? If issue were taken upon such a plea, might not the proceeding be in a course similar to that which takes place in an action upon a bill returned protested from a foreign country? As in the cases of *Auriol* v. *Thomas*, 2 T. R. 52, upon a bill; and *Pollard* v. *Herries*, 3 B & P. 335, upon a note, viz. by assessment of a jury. See *Kearney* v. *King*, 1 B. & A. 301, as to the necessity of setting forth in the declaration, in what country, and currency, a bill is drawn, though it is not necessary to state the value of the currency. *Simmonds* v. *Parminter*, 1 Wils. 185, 1 B. P. C. 43.

to a qualification of the acceptance, imposing a precedent condition, which must be shown upon the record; for the purpose of setting forth truly the acceptance and the performance of that condition must also be averred. Those matters being set forth then, it appears to me that the party is bound to prove that which he has averred in the pleading, which goes to show that the party taking such acceptance has complied with the condition entered into between him and the other party. On these grounds I perfectly concur with the noble and learned Lord that this judgment should be reversed.

Judgment reversed.

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APPENDIX.

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1st Question;
1st branch.

BEST, J. The words "payable at Sir John Perring & Co. "bankers, London," qualify the general term "accepted," and render a presentment of the bill at the house of Sir J. P. & Co. necessary; (provided the acceptor had funds at that house on the day on which the bill became due, and Sir J. P. & Co. would have paid the bill;) but I do not think that it was necessary to aver in the declaration, that the bill was presented at that house for payment. If the acceptor would avail himself of the want of presentment of the bill at Sir John Perring's, he must plead to the action brought on it, that he had funds in the hands of Sir J. P. & Co. sufficient to take it up on the day when it became due, and that Sir J. P. & Co. would have paid it, had it been presented at their house; and he must pay the amount of the bill into Court.

The first point to be settled is, whether the terms used amount to such a qualified acceptance, as makes the bill payable *only* at the bankers? or whether they are to be considered merely as giving notice to the holder, that if he will call at the bankers, he may obtain payment without having the effect of compelling him to present the bill at the bankers? or imposing any other duty on him than what is required from the holder of a bill, by a general acceptance.

The holder of a general acceptance must present his bill at the residence or place of trade of the acceptor: the qualified acceptance produces no other effect than that of changing the place of presentment from the compting-house of the acceptor, to the house of the acceptor's banker.

The drawee of a bill may accept it specially; and such acceptance may narrow his responsibility below what it would have been if he had accepted the bill according to its tenor. Special acceptances are recognised by a long series of decisions; from which it appears, that the drawee of a bill may limit his responsibility by any conditions which his own circumstances, or the situation of the drawer's funds may render expedient.

In *Smith* v. *Abbot* *, it was holden that a drawee may accept payable, when certain goods consigned to him are sold; and in *Julian* v. *Shobrooke* †, when in cash from the cargo of the ship Thetis. In *Walker* v. *Atwood* ‡, a bill payable at sight was accepted, payable three months after acceptance, and this was held to be a good conditional acceptance. If the time of payment may be postponed, the place of payment may be changed. It is another question, whether the holder is bound to take such an acceptance, and whether, if he take it without giving notice to the drawer and indorsers, and obtaining their assent, he does not discharge them from all liability; but, if he does receive such an acceptance, he is bound by the terms of it, as between himself and the acceptor.

Are the words "accepted payable at Sir John Perring & Co.'s "bankers, London," sufficient to express a special acceptance, making the bill payable at that house? They all form one short sentence; the words "payable at" following immediately after the word "accepted," without any break; and as the word "accepted" raises an obligation in the writer to pay the bill when due, the words which follow "accepted" must be considered as confining the obligation to pay at the house of Sir J. P. & Co. What rule of construction allows us to say, that the first of several connected words is to be considered as forming the contract, and that the remaining words, although they seem to express a qualification of such contract, are to have no effect? With what justice can we hold a man to the obligatory part of the instrument which he has executed, and refuse him the advantage of the qualification which he has immediately annexed to it.

It has been said at the bar, that the acceptor is to be presumed to be the debtor of the drawer; that the debtor is liable to his creditor every where; that this liability cannot be narrowed, except by clear and express terms; and that the terms used by this acceptor are not sufficiently clear to narrow his responsibility. I deny that, under the circumstances in which the trade of the world is now conducted, a drawee is to be taken as the debtor of the drawer; but, if he is to be so taken, the drawing a bill for his debt, if it be accepted, restrains the

* Str. 1152. † 2 Wils. 9. ‡ 11 Mod. 190.

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1st Question.

drawer from claiming his debt at any other time or place (in the first instance) than when and where the bill is payable. Further, I insist, that the terms used in this acceptance are sufficiently clear to fix the place of payment of this bill at the house of the bankers.

It is well known to be the practice of the consignors of goods, to draw on the consignees for the expected proceeds of such goods as soon as the goods are sent. The bills so drawn are often presented before the goods get to the hands of the consignees, and generally before they are sold. The special acceptances, in some of the cases to which I have referred, were evidently made under these circumstances. In those cases, the drawee is no debtor of the drawer; nor can what is said as to the narrowing of a general liability down to a particular liability have any reference to them.

But, suppose the drawee to owe the drawer money, for which the former is liable to be proceeded against at any time and place, and without notice. When the one has drawn, and the other accepted, a bill, the general right to sue which the drawer befere had, is, in consideration of the acknowledgment of the debt, and the security given for it by the acceptance, restrained: and the drawer can have no action until the bill is arrived at maturity, and the drawee (if able to pay) has been requested to pay it. I know, as against an acceptor, it is not necessary to aver a prior presentment of the bill; but, although such averment and proof be not required, I cannot persuade myself, that you may arrest an acceptor who has been always ready to pay his bill, without any notice of the person, in whose hands it is. The opinion, that an acceptor may be sued at any time and place, and without any other demand than the writ, has arisen from inattention to the forms of pleading. I shall, presently, endeavour to explain this matter. I am aware, that there is great authority for this doctrine; but no authority, save that of your Lordships, will ever convince me, that it is part of the mercantile law of England. If this be the law, no merchant in the city of London can secure himself against arrests and the costs of vexatious actions. Having money constantly in his house equal to all that he has to pay, and even carrying a like sum with him wherever he goes, will not protect him. According to this doctrine, the debt may be

sworn to by the holder, previous to any application for payment, and the first demand be made bya sheriff's officer. The acceptor of a bill, seldom knows in whose hands it is, when it becomes due; the holder is, frequently, at a considerable distance from the place of payment, and sends his bill to an agent unknown to the acceptor. The acceptor cannot do what other debtors may do, namely, seek out his creditor, and tender him his debt. The law will not require impossibilities; and all that it is possible for an acceptor to do, is to be ready with his money at the time and place of payment.

As to the objection of want of precision in the terms used; let it be recollected, that this is a mercantile contract, and, that the loosest of all mercantile contracts is the acceptance of a bill of exchange. By the use of the single vague term "accepted," the drawee engages to pay the bill when it arrives at maturity: there is nothing like precision, nothing like a clear and unequivocal expression of obligation in this term, yet the acceptor is bound by it. Will you require more clearness and precision in the qualification, than in the contract to which it is annexed? But the words, however inartificial, are only capable of one meaning; nor would any man reading the bill, and not puzzled by the decisions of Westminster-Hall, think of putting any other construction upon them, than, that the payment which the acceptor binds himself to make, is to be made at the house of his bankers, *and no where else.* Suppose, instead of using the word "accepted," the drawee had written "when this bill becomes due, I undertake that it shall be paid at the house of Sir J. P.& Co., bankers;" could any man contend that, according to these words, he would have to be ready to pay it at any other place, than the house of Sir J. P. & Co.? The word "accepted" imports, that, when the bill becomes due, the acceptor undertakes that it shall be paid; surely, the words, "at Sir J. P. & Co.'s" must have the same meaning, when added to the word "accepted," as, when added to other words, meaning nothing more or less than is expressed by the word "accepted." It has been asked at the bar, how long the acceptor is to leave the amount of the bill in the hands of his banker? I answer, that he is never to remove it. By his special acceptance, he has charged that money with the payment of the bill at his bankers: he has, therefore, no power

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over the amount left at his banker's to pay it; it belongs to the holder of the bill, who may take it when he pleases. Should he not call for it within the time allowed to the holder of a banker's check to present the check at the banker's, and should the banker fail, the holder of the bill must lose his money: he would lose his money, if he took a check for his bill, and did not present such check in due time. It is decided in the case of *Saunderson* v. *Judge**, that a *memorandum* that a note would be paid at the house of Saunderson & Co. was an undertaking, that there should be cash there to pay the note; and an order on Saunderson & Co. to pay it. Such an acceptance as is stated in the question, is treated by all bankers as a draft on them, or order to pay the bill so accepted. A person who neglects to present such an acceptance on the day when it is due, must, therefore, subject himself to the same consequences, as one who keeps any other draft or a banker's check, beyond the day after that on which it was delivered to him, when the banker fails.

With respect to the cases of *Smith* v. *De la Fontaine* †, *Fenton* v. *Goundry* ‡, and the *nisi prius* decisions which followed those cases; I am far from saying, that the judgments of the Courts upon those cases were wrong; on the contrary, for the reasons which I shall presently offer, I should have concurred in those judgments, although not on the grounds stated by the judges who decided them. As to the *nisi prius* cases, I think it would have been much better for the law, if the crude opinions of judges at *nisi prius* had never been allowed to be quoted to those who are sitting in bank. Of *Smith* v. *De la Fontaine*, we have only a very short and very imperfect report; it does not appear that Lord Mansfield, or the court of K. B. looked at the acceptance as a written contract, and considered what was the true legal construction of it. They proceeded upon some supposed understanding of the mercantile world, and did not give themselves the trouble of coming to any understanding on the subject. Lord Ellenborough and the rest of the judges seem to have taken the same course in *Fenton* v. *Goundry*. Where a construction is to be put on a mer-

* 2 H. Bl. 509.

† Bayley on Bills of Exchange, 3d ed. p. 129. note *b*.

‡ 13 East, 459.

cantile contract, the Court do right to consider what has been the practice of merchants with reference to such a contract. But care must be taken to ascertain what the practice is; and I cannot think any court warranted by the opinion of one jury in pronouncing, that words which are incorporated in a contract form no part of it. It does not appear that any inquiry was ever made to learn the understanding of merchants on this subject, except by Lord Mansfield in *Smith* v. *De la Fontaine*.

Best, J. 1st Question;

As to the second branch of the first question; I am aware, that both the King's Bench and Common Pleas seem to agree, that, if the terms of an acceptance are obligatory on the holder to present the bill at the banker's, such presentment must be averred in the declaration. With the greatest respect for those who were Judges of the King's Bench, at the time when those cases were decided, I must say, much confusion seems to have prevailed amongst them on this subject. Lord Ellenborough, in his judgment in the action on the promissory note made payable at a particular place*, answers his own argument in *Fenton* v. *Goundry*: nor can I subscribe to the propriety of the distinction taken between the effect of the same words in a note and a bill. In an acceptance, the words form a part of the original contract of the acceptor, as much as they form part of the original contract of the maker in a note. In the Common Pleas, the question of pleading does not seem to have been much considered. It was scarcely put to that Court by the argument at the bar, that the question of want of presentment ought to have been made matter of defence. If presentment at the banker's be not a condition, the performance of which must precede the payment of the bill, there is no necessity for averring such presentment in the declaration. By a general acceptance, the acceptor undertakes to pay the bill in London; but it has never yet been thought, that before you can recover against the acceptor, you must show a presentment on the day the bill became due. I cannot distinguish between the time of payment and place of payment, or discover any other difference between a general acceptance and a special acceptance payable at a banker's, than that, in the former case, the acceptor undertakes to have the money to take up the bill at his house of busi-

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* *Sunderson* v. *Bowes*, 14 East, 500.

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ness, in the latter, at his banker's. If presentment on the day of payment, or at the place of payment, were conditions precedent, the holder, although prevented by causes which he could not controul, must lose his debt, if the bill were not presented on the day of payment, for the condition could not be performed on any subsequent day; and he must be subjected to the same loss, if the banker fails, for not presenting it at the house of such banker, although the acceptor had made no provision for its payment. Such a rule must work injustice, and, therefore, cannot be law. The acceptor, if he would avail himself of the non-presentment of the bill, must show by his plea, that he was ready at the time and place of payment to take it up, but that the holder did not attend; and must bring the amount of the bill into Court. On shewing that a tender of the amount of the bill was prevented by the default of the party to whom it should have been made, the want of tender will be excused. In all cases, a party is excused from doing what he otherwise ought to have done, by shewing that the other party prevented him from doing it. Arbitrators sometimes direct money to be paid on a particular day at Lincoln's-Inn hall; and rents, annuities, and other payments, are agreed to be paid at certain specified times and places. In actions for the non-payment of the money in such cases, it is not usual to aver in the declaration, that the plaintiff attended at the appointed time and place, in order to receive his money: and the early books of entries contain pleas, that the party to pay was at the place with his money, and that he who was to receive did not attend.

2d Question. Upon the second question, I submit, that such an acceptance is to be considered in law as a qualified acceptance, to pay the same at the house of Sir John Perring & Co. and not a general acceptance to pay the bill, with an additional engagement or direction for the payment of the same at that house. I have stated the grounds on which I have formed this opinion, in my answer to the first question.

3d Question. The third question, whether the taking it without the previous authority or subsequent assent of *A.* would prevent *C.* from maintaining an action against *A?* seems to me to depend on the nature of the qualification in the acceptance. A qualification which may prejudice the drawer, would discharge

him, if taken without his assent—such as an acceptance postponing the payment of the bill. An acceptance at a different town from that in which the bill was drawn, might have the effect of postponing payment, and also of preventing so early a notice of non-payment as might have been received from the town in which the bill was drawn. No line can be drawn limiting the distance from the place to which the bill is addressed, at which it might be made payable by the acceptance, beyond the town in which it is drawn. A qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer. But I can perceive no prejudice which can arise to the drawer from the holder taking an acceptance which changes the place of payment from the acceptor's counting-house to the house of his banker's, in the same town. I believe that bills so accepted are more easily discounted than those which are accepted generally; and the greatest part of the bills of men in trade are now accepted payable at a banker's. Whoever draws a bill now, knows that, most probably, it will be so accepted. To allow a drawer or holder to make any objection on account of such an acceptance, would be to indulge their caprice, or give them a pretence for calling for their debts before such debts are fairly due. I have considered an acceptance payable at a banker's as merely changing the place of payment from the acceptor's counting-house to the banker's; and not as narrowing a right to demand the money any where, or to sue the acceptor without demand or notice; because I cannot conceive that any such right exists. Bills of exchange are often addressed to a man at a particular house, from which I infer that they are to be presented for payment at such house; and that there he is to prepare himself to pay them. If addressed to him in London, the meaning is, not that the bill may be presented any where in London; but it is presumed that the situation of the acceptor's counting-house is too well known to render it necessary that it should be mentioned in the address of the bill. There is a case in Lord Raymond, in which Lord Holt is reported to have held, that, if a bill be accepted without mentioning the house at which it is to be paid, the holder is not obliged to receive it *; that

* *Mutford* v. *Walcot*, 1 Ld Raym. 575.

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learned judge could not have thought, that mentioning the house, narrowed the holder's right.

In answer to the fourth question, I submit, that if *A*, on receiving notice from *C*, that the bill was accepted with a qualification as to the time or place of payment, refuses his assent to such acceptance, *C.* may treat the bill as not accepted, and proceed on it against *A*, without delivering up the bill to *A*. If the drawer will not assent to the acceptance, which the person on whom he draws thinks proper to put to the bill, he cannot complain if proceeded against as the drawer of a bill which the drawee has refused to accept. The bill is necessary to maintain the action against the drawer; and, therefore, the holder must be allowed to retain possession of it. *A.* having previously given such a bill for a debt due from *A.* to *C.* the latter is not obliged to declare on the bill, but may bring his action for the original debt.

I hope that what I have stated as legal answers to the questions proposed, will be found to secure complete justice to all the parties to a bill, and to promote the convenience of those who are engaged in these negociations. By allowing acceptances to be made payable at their bankers, merchants are relieved from the risk attendant on keeping large sums of money in their own houses. By holding that such an acceptance does not make presentment at the banker's a condition precedent, a just debt cannot be lost through accident or the negligence of clerks in not presenting the bill at the proper time and place; nor is a holder obliged to incur the expense and trouble of a presentment, when he is certain that no provision is made for payment: whilst, on the other hand, by allowing the acceptor to plead his readiness to pay, and bring the money into Court, you prevent, by the penalty of costs, vexatious arrests and unnecessary actions. By allowing holders and drawers of bills to object to acceptances which may prejudice their right, but preventing either from refusing an acceptance, which, though not strictly according to the tenor of the bill, cannot possibly affect their interest, the rights of parties are secure, whilst their caprice is made to give way to the convenience of others.

The counsel, both of the plaintiff and the defendant, have enlarged upon the inconvenience to commercial men which is

likely to follow the establishment of what is contended for by the opposite party. There never was a case more free from apprehensions of this kind. Mercantile men only want certain rules upon these subjects. As soon as this House shall have declared what are the proper rules, all Judges will act upon them, and all mercantile men will regulate their transactions according to them. If the rule is established that the acceptor may by his acceptance make his bill payable only at his banker's, but that the words used by this acceptor are not sufficient to express such a qualified acceptance, future acceptors will use terms which express this qualification of their contract more clearly. If drawers apprehend that such an acceptance is likely to occasion a return of their bills as being refused acceptance, they will guard against this by requesting, in the body of their bills, the drawee to accept them payable either at his counting-house or his banker's. Every holder will then know, that he holds their bills subject to their being accepted either generally or specially, and will thus be prevented from returning them for want of a sufficient acceptance.

Best, J. 4th Question.

Richardson, J.*—This is the case of a bill of exchange, drawn by a person at Gosport, upon a person at Torpoint, requiring him, in general terms, to pay, at two months after date, a sum of money to the order of the drawer, which the drawee has accepted, payable at the house of trade of certain bankers in London. The question is, what effect does such an acceptance produce on the holder, as to the conduct to be pursued by him before he sues, and as to the averments to be inserted in his declaration, when he sues upon the bill? It has not been, and, I think, cannot be denied, that the drawee of a bill of exchange is at liberty to qualify his acceptance, as by annexing a condition, or by enlarging or diminishing the time of payment; and, as he may enlarge or diminish the time, so he may, by his acceptance, fix the place of payment; and, in all such cases, I think it follows, that, as he is no otherwise party to the bill than by his acceptance, the holder is bound to sue him according to his acceptance; for the acceptance is the only evidence of contract as to him. The time or place of payment

Richardson, J. 1st and 2d Questions.

* The statement of the record, and the four questions with which the learned Judge prefaced his observations, are omitted. The two first questions he consolidated.

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expressed in an acceptance is as much a part of the acceptor's contract, as the like expression of time or place in the body of a promissory note is part of the maker's contract; both, I think, are entitled to equal regard in ascertaining the rights of the parties. What then is the meaning of the terms of this acceptance, "Payable at Sir John Perring & Co.'s, bankers, London?" I think the meaning is the same, as if the aeceptor had said, "I undertake to pay this bill at the house of Sir John Perring & Co. bankers, London." I think that it is not a general acceptance with an additional engagement or direction as to the place of payment superadded, but, that it is to be considered in law as an acceptance to a certain extent qualified; and, that the legal extent of this qualification is the same as it is in other cases, where a man contracts to pay money at a particular place. It is material then to consider, what is the legal effect of a contract to pay money at a particular place? I apprehend it is this; that the debtor shall stand excused of damages and costs, if he is ready to pay the money at that place, according to his contract; but, that the debt is not lost to the creditor by an omission on his part to demand it there, except, perhaps, in cases where it can be shown that such omission has occasioned damage to the debtor. If so, it follows, that it is not necessary, on the part of the creditor suing for the debt, to aver in his declaration, that a demand was made at the place; but, that the defendant, by way of excuse against damages and costs, must show, that he was ready at the place to pay, but that no one was there on the part of the creditor to receive: and, for this purpose, he must plead a special plea in the nature of a plea of tender, and must bring the money into Court. Such, at least is the general rule, namely, that the money must be brought into Court: though I am not prepared to say that an exception might not arise, if the defendant, in any particular case, could show, that the money had since been lost by the neglect of the creditor to receive it at the time and place appointed. This, I apprehend, is the law in the case of covenants, and of bonds, with or without penalty, for payment of money at a particular place; and of rent, where a particular place of payment is expressed in the reservation; or, where it is not so expressed; in which latter case, the law makes it payable upon the land. I will mention some instances. In an

action of debt for 28 *l.* (*), the declaration stated, that the defendant, by his bill obligatory, sealed with his seal, at London, acknowledged himself to owe to the plaintiff 19 *l.* 16 *s.* of the money of Flanders, (parcel of the 28 *l.*), which 19 *l.* 16 *s.* were then and still are of the value of 14 *l.* of English money, to be paid to plaintiff in the Cold Mart then next following. Then followed an averment, that the Cold Mart was a certain fair held at London, in the parish and ward aforesaid, from the 10th August, 1501, to the 20th September next following. The declaration then sets out another bill obligatory, for other 19 *l.* 16 *s.* Flemish, equal to 14 *l.* English, to be paid at the Paske Mart, with similar averments; and concludes, "yet "the said defendant, although often requested, the said 39 *l.* "12 *s.* of Flemish money, nor the said 28 *l.* of English money, "has not paid to the plaintiff, but to pay the same to him has "hitherto refused, and still refuses." The defendant pleads, that the Cold Mart was a certain fair held at Bruges in Flanders, in parts beyond the seas, without the realm of England, from a certain day to a certain other day, and that the 19 *l.* 16 *s.* were worth only 60 *s.* of English money, and makes a similar averment as to the Paske Mart. He then avers, that he was at the said fairs, called the Cold Mart and the Paske Mart, ready to pay to the plaintiff 6 *l.* of English money, if he, the plaintiff, had been there, and willing to deliver to the defendant the said bills; and that neither the plaintiff, nor any one for him, was then there to receive the said 6 *l.*; and that he has always since been ready to pay, and brings the same into Court; and concludes with traversing, that the markets were held in London; and also traversing, that the 19 *l.* 16 *s.* Flemish, were worth 14 *l.* English. The replication avers that 19 *l.* 16 *s.* Flemish were of the value of 14 *l.* English; and concludes to the country. Whereupon a jury *de medietate linguæ* is awarded. In an action of debt (†), by the abbot of the monastery of *Holy Cross of W*, the declaration shows a demise of a manor and lands for a year, rendering 40 *l.* at *W.* aforesaid, at the four feasts of the year; that the defendant occupied for the year; and that the 40 *l.* is still in arrear to plaintiff, *per quod actio accrevit*; and concludes, without alleging

* Rast. 158. *b.*

† Rast. 175. *a.*

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a demand at *W.* that defendant has not paid, although often requested. The defendant pleads certain acquittances as to part, and levy by distress for the residue. The plaintiff replies *non est factum*, as to the acquittances, and denies the levy by distress. In an action of debt (*) against executors, the declaration states that the testator, by his bill obligatory, acknowledged to owe to plaintiff 17 *l.* 10 *s.* to be paid in three half years; that is to say, 6 *l.* 10 *s.* at Storebrich fair next, and the rest at other fairs, averring when the fairs were held, and concluding, without alleging demands at the fairs, that testator and executor have not paid, although often requested. The defendant pleads *ne unques* executor. The plaintiff replies. The defendant rejoins. The plaintiff there had a verdict, and judgment. To an action of debt for rent (†), the defendant pleads, that he, on the said day, &c., for the space of half an hour before sunset of the said day, was at the same common dining-hall of Thavies Inn, situate, &c. ready, and offered to pay the plaintiff the said 3 *l.* rent, which he was bound to pay on that day, according to the form and effect of the said indenture; and that neither the plaintiff, nor any one authorised by him, was then there to receive; that he has always since been ready to pay, and brings the money into Court. The replication states, that the plaintiff receives the money, and for damages, protesting to the readiness and offer to pay, replies a subsequent demand and refusal (not alleged to be at the place.) The rejoinder denies the demand. To an action of debt for rent (‡), the defendant pleads (after *oyer* of the writing) that he, on the day in the condition mentioned, for the space of an hour before sunset, and after, was at the said mansion-house in the said condition specified, ready to pay the said 40 *l.* according to the form and effect of the condition; and that neither the plaintiff, nor any one lawfully authorised by him, was then there to receive; *semper paratus*, and *profert in curiam*. The plaintiff replies, that he was there to receive, and traverses that the defendant was there ready to pay. The defendant rejoins, whereupon issue is joined. In

* Rast. 322. *b.*

† Thompson's Entries, 159, pl. 167. et seq.

‡ 2 Modus Intrandi, Pl. Gen. 234.

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Marshall v. *Wisdale* (*), to an action for 10 *l.* rent, the defendant pleads a tender of 9 *l.* and that he paid the other 1 *l.* for taxes. The plea was held bad, because he did not plead the tender at the place where the rent was agreed to be paid. The Court said, it could not properly be paid any where else. In *Crouch* v. *Fastolfe* (†), to an action of debt for rent, the defendant pleads, that he was at the place on the day, from before sunrise to sunset, ready to pay, and that the plaintiff, nor any one in her behalf, &c. was there to receive; *semper peratus*, and *profert*. It was held a good plea, though no tender was alleged. These precedents and authorities, with many others which may be found in our old books of pleadings, and especially in cases of rent, which the law makes payable upon the land, seem to me to be strong evidence of what the law is in cases of contract to pay money at a particular place; and to establish two propositions which may be considered as general rules, though, like other general rules, subject perhaps to exceptions under special circumstances. First, that a demand at the place is not a condition precedent to the creditor's right to sue for the money, nor, of course, necessary to be avered in his declaration. Secondly, that the defendant may excuse himself by pleading that he was ready to pay the money at the place appointed; but that, in such plea, he must show that he has always since been ready, and must bring the money into Court. The same law appears to me to be applicable to the acceptances of bills of exchange such as this acceptance is, which I consider to be a contract by the acceptor to pay the money at the place by him expressed. I am aware that this opinion is inconsistent, not only with the cases of *Callaghan* v. *Aylett* (‡), and *Gammon* v. *Schmoll* (§); but also with the opinions expressed by the Court of King's Bench in *Saunderson* v. *Bowes* (‖), and acted upon by the same Court in *Dickinson* v. *Bowes* (¶); and also acted upon by the Court of Exchequer Chamber in *Bowes* v. *Howe* in error (**). The two first mentioned cases, were cases of bills of exchange accepted, payable at a particular place; the three latter were cases of promissory notes, expressed in the body of

* Freeman, 148.
† Sir Tho. Ray. 418.
‡ 3 Taunt. 397.
§ 5 Taunt. 344.
‖ 14 East, 500.
¶ 16 East, 110.
** 5 Taunt. 30.

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them to be payable at a particular place; and, in all of them, a demand at that place was considered as a condition precedent to the holder's right to sue upon them. I have felt the weight of these authorities, and it has not been without much consideration that I have felt myself at liberty now to dissent from them. But, considering that the general question, upon which so much difference of opinion has prevailed, is now before this Court of ultimate resort for a final decision, which must operate as a general rule in all future cases, it is very important, that that rule should be founded on true principles, and as far as is consistent with such principles; that it may be practically convenient. For this reason I have ventured to inquire into the grounds of these decisions. In the cases which occurred in the Common Pleas, I do not find that the point on which my opinion is founded, (namely, that where money is to be paid, at a specified place, it is matter of defence, and that it is, therefore, incumbent on the defendant to show that he was ready at the place to pay,) was fully brought before the consideration of the Court: no authorities, at least, appear to have been cited in support of it. In the case of *Saunderson* v. *Bowes*, in the King's Bench, which was followed by the cases of *Dickinson* v. *Bowes*, and *Bowes* v. *Howe*, with deference, I think, that the Court fell into a mistake in supposing, as they seem to have done, that the rule requiring the defendant to show, by way of excuse, that he was ready with his money at the place appointed for payment, (which rule they admitted in the case of bond under penalty,) was confined to such cases where a penalty was to be excused, and where the defendant was called upon to plead the condition, of which he wished to avail himself. I humbly apprehend that there is no such distinction, and that I have shown by the precedents and authorities before cited, that the same rule equally applies to the cases of single bills, without penalty; and indeed, as I conceive, to all cases where the contract is to pay money at a particular place. It may be suggested that, if the doctrine, which I have ventured to express, be applicable to the acceptances of bills of exchange, it is extraordinary that no case has occurred, or, at least, that none has been cited, where such a plea has been pleaded by an acceptor. To this I should answer, that probably no case has occurred where an acceptor has been sued without a previous demand of the money, or

without such circumstances existing as evinced that he was not ready to pay. And this leads me to remark, (though I am aware that convenience alone is not a legitimate ground of decision, unless it be consistent with law) that to require the defendant to aver and prove readiness to pay in the few, if any, cases, where, notwithstanding his readiness, he may be vexatiously sued, rather than to require the plaintiff, in all cases, to aver and prove an unavailing demand, will, as I humbly conceive, be a more convenient as well as a more just rule for both parties, and more merciful to defendants themselves. For if, as the fact is, in almost every case of an action brought against the acceptor of a bill, the defendant has failed to pay from mere inability; to require proof of the previous demand, will only add the expense of one more witness, sometimes brought from a distant part of the kingdom, to the burden, which the defendant was before unable to bear: whereas, on the other hand, if an action, without previous demand, should ever vexatiously be brought against an acceptor, who was really ready with his money at the place appointed according to his contract, he, by pleading his readiness, and bringing his money into Court, may discharge himself from damages and costs, and the plaintiff will justly be punished for his vexation by the payment of costs.

I have one other observation only to make on this part of the case. It may be said, that unless the holder be bound to demand payment at the place appointed, he may demand it at some other place, where the acceptor is not prepared with funds. I answer, that if such a case should occur, I think the acceptor would be entitled to a reasonable time to draw his funds to that place. For this, the case of *Halsted* v. *Vauleyden* (*), is an authority, where (the defendant having by deed acknowledged that he owed to the plaintiff 111 *l.* and covenanted that the same should be paid by *C.* at Rotterdam, in Holland, on the first demand that should be made) it was held, on a special verdict, that the plaintiff might make his demand at Dort, which is ten miles from Rotterdam, or in England; but that in such case the defendant ought to have a reasonable time to pay, regard being had to the distance.

* 1 Rol Ab. 443, pl. 5, 20.

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Richardson, J. 3d Question.

In answering the third question proposed by your Lordships, I think it necessary to distinguish between a qualification as to time, and a qualification as to place. Any qualification as to time, whether the time of payment be thereby accelerated or retarded, which the holder permits to be introduced into an acceptance without the concurrence of the drawer, must, I think, have the effect of discharging the drawer. I think it must have such effect, because it necessarily varies, and must be intended to prejudice his situation, as to the time when he may be called upon to pay on the acceptor's default, and as to the time when he must resort to his remedy over against the acceptor. As to place, I think it is not every qualification of place which may be introduced into an acceptance, without the privity of the drawer, that will necessarily discharge the drawer; but to produce that effect, I think the qualification must be such as must vary, and may be intended to prejudice his situation. For instance, if a bill drawn upon a person in the Temple, be by him accepted, payable at the banking-house of Messrs. Child & Co. at Temple-bar, this, I think, would not have the effect of discharging the drawer. But, if such bill were accepted, payable at Dublin or Amsterdam, this, if taken without the privity of the drawer, would, I think, discharge him: because it would necessarily vary, and might reasonably be intended to prejudice his situation, as to the time when he could receive notice of the acceptor's default, and as to his remedy over against the acceptor. It may be difficult to lay down prospectively a precise rule, applicable to all cases, for defining the degree of distance from the residence of the drawer, at which he may be permitted by the holder to appoint, by his acceptance, the place of payment, without discharging the drawer. I should say, that to produce that effect, the distance must be such as would probably delay the drawer in his receipt of notice of the acceptor's default of payment, or throw some increased difficulty upon him in his remedy over against the acceptor.

4th Question.

In answer to the fourth question proposed by your Lordships, I think that in the case put, *C.* might maintain an action against *A*, upon the original debt, without first returning to *A.* the bill drawn by him, *C. having first cancelled the qualified acceptance* offered by *B*, to which *A.* is supposed to have refused

his consent. Such an acceptance, so offered by the drawee, but refused by the payee, because the drawer refuses his consent, is to be considered as no acceptance at all: the bill becomes a dishonoured bill, and consequently, the payee has an immediate remedy against the drawer, either upon the bill or upon the original debt.

Garrow, B.

Garrow, B. observing that it was well known in the mercantile world, that the Governor and Company of the Bank of England had determined to discount no bills which were not accepted, payable at a banker's, concurred with Best J. and Richardson J. in their opinions and reasons; and referred to them as containing his own views of the case.

Burrough, J.

1st Question.

Burrough, J.—In answer to the first question, I submit, that the usage and custom of merchants does not require that the drawee shall accept a bill of exchange in any given form. He may may accept it by parol, or in writing, he may except it generally; and, if he does so, he is, in the language of some of the cases, generally and universally liable: or, he may accept it specially; and then he is liable according to the tenor of the bill and his acceptance thereof. Whatever the acceptance may be, if an action be brought against the acceptor, the declaration must truly state the acceptance; for, the acceptance contains the terms on which he has agreed to the bill. I am of opinion, that the acceptance is a contract which must be construed, as all other contracts are, according to the intention of the party contracting, to be collected from the nature and words of the contract itself. The acceptance, if special, binds him *sub modo*, and not generally. There is neither hardship nor illegality in this. In the present case, the intention appears to me to have been to do away with the necessity and trouble of a personal application to the acceptor, upon the bill becoming due, and of his keeping money by him to pay it, and to substitute a much more convenient course in the first instance. No holder of a bill, when he goes to the banker's shop, expects to find the acceptor behind the compter: on the contrary, he knows he shall not find him there. On the face of this count, the bill is alleged to have been accepted according to the usage and custom of merchants: yet the doctrine of the case of *Smith* v. *De la Fontaine*, and other subsequent cases, is, that the acceptor, notwithstanding a special acceptance, is generally and universally liable. This is a doctrine

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to which I cannot subscribe. The effect of such doctrine is, that, notwithstanding a well-known place is pointed out where the money may be obtained, the holder shall be at liberty to arrest the acceptor the moment the bill becomes due, and to turn a special and qualified undertaking into a general one, having very different consequences. It seems, however, to be now conceded, that this doctrine cannot be supported. But, then, it is said, that this special qualified cceptance makes no difference as to the averments in the declaration, except as to the statement of the acceptance. As I understand the acceptance stated in this declaration, I am of opinion, first, that it imports that there is a fund in the hands of the banker to answer the amount of the bill; and, secondly, I say, that this acceptance means to impose and does impose on the holder an act to be done by him, namely, to present the bill at the bankers for payment: if payment is not made on application, the acceptor's contract is broken, and not till then. But the holder must state in his declaration the title to his action, which is, that the bill was presented and not paid, and so his cause of action has arisen against the acceptor.

The case of *Bishop* v. *Chitty* * in no way assists the case of the defendant in error. The underwriting of the order for the payment of the money in that case amounted to an acceptance, and it was declared on as such: the possession of the bill, with the order for payment of it, were, in my judgment, sufficient to throw on the plaintiff the burden of proof, that he had presented the order, and could not obtain payment of it. It was there holden by Lord Chief Justice Lee, to be the plaintiff's loss; for, he said, it was to all purposes a draft, which is always considered as actual payment when a reasonable time to receive it has elapsed. *Smith* v. *Abbott* † is an instance of a conditional or contingent acceptance, according to which it was incumbent on the plaintiff to state in his declaration, and to prove at the trial, that the contingency had happened. The acceptance was "to pay when goods consigned to him," (and for which the bill was drawn) "were sold." The Court held, that the acceptance was within the custom of merchants; and said, that the plaintiff might have

* Str. 1195.

† Str. 1152.

refused it. The Court said also, "it will affect trade, if "factors are not allowed to use this caution, when bills are "drawn before they have an opportunity to dispose of the "goods. A man, who is drawn upon at ten days sight, may "accept for thirty, though the other might protest the bill." So, in this case, I say, it will affect trade, if a man is, at all events, contrary to his intention, to be deemed to have accepted generally; or, if his acceptance in this form is to be so constructed, as to make him liable to be held to bail as soon as the bill becomes due. The fallacy, in this case, seems to me to consist in supposing, that the acceptor has engaged for a personal payment at the bankers. This appears to me to be contrary to the intention and the effect of the acceptance, to be collected from the words of it. Suppose the acceptance to have been in this form: "Accepted to be paid "by me, if, on application to Messrs. Perring & Co. my "bankers, when the bill becomes due, it shall not be paid by "them;" there is nothing in the usage and custom of merchants to show that such an acceptance would not have been good. But whether an acceptance be good or bad within the custom, if the party, who leaves the bill for acceptance, receives it back without objection, he must abide by it. If he cannot recover according to the custom, it is his own fault. The acceptor can only be liable to an indorsee on an acceptance within the custom. In my judgment, the acceptance in the case before the House is in effect such as I have supposed; that this was the intention of the party, I think there can be no doubt; the words of the acceptance appear to me to manifest it. In *Julian* v. *Shobrooke**, the defendant had accepted a bill on account of the ship Thetis, when in cash for the ship's cargo. It appears in the report of that case, that the acceptance was so stated in the declaration, and that the plaintiff averred in his declaration (as I think he was obliged to do) that, on the day when the bill became payable, the defendant was in cash for the said ship's cargo. This the plaintiff must have been bound to prove at the trial; because it was part of his case, and it consisted of matter in the affirmative. In the present case, the defendant in error must contend, that if the cause had gone to trial, on proof of the

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* 2 Wils. 9.

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acceptance, he would have established a *primâ facie* case; for he might have urged, on the plea of *non assumpsit*, that the objection (if any) was on the record. As this record is, the question arises on a special demurrer. I am of opinion, however, that the declaration is substantially defective. First, because a material averment is omitted, namely, the presentment of the bill for payment at the bankers, Sir John Perring & Co. which is matter in the affirmative, and, I think, that it lay on the plaintiff to aver it. Secondly, because the cases referred to in support of the assertion, that the answer was to come on the part of the defendant below, do not support that assertion. The cases supposed were covenant to pay money at a certain place on a certain day: (*ex gr.*) to pay to the plaintiff in an action of covenant 100*l.* on the 1st of August, at or in the common dining-hall of Lincoln's Inn. It is said, that, in a declaration on such a covenant, the plaintiff's breach is good, "that the defendant did not pay the money on the "day, at or in the common dining-hall aforesaid, but neglected "and refused so to do." I admit that this is so; but it is so, because the defendant covenants to do the act personally to the plaintiff at that place; and the breach is, that he did not do it at the day and place, but neglected and refused so to do. This is good in a declaration, which is to be certain to a certain intent in general; and it implies, that the plaintiff was there ready to receive,—the parties having agreed to time and place. If this acceptance had amounted to an engagement by the acceptor to pay personally at Sir John Perring & Co.'s, the case alluded to might have had some weight. But this acceptance is not so, nor, from the language of it, can it be taken to be so meant; but, as appears to me, the contrary was intended, viz. that Sir John Perring & Co. the bankers, were, in the first instance, to be looked to for the money; and that the acceptor was to be resorted to in case of non-payment by them.

I will now shortly advert to the cases more immediately applicable to the subject; and the weight of those cases appears to me to be in favour of the plaintiff in error. The first case, to which I have occasion to refer, is *Smith* v. *De la Fontaine* *. In that case, Lord Mansfield is reported to have

* Holt, N. P. C. 366. note.

held, that the words accompanying an acceptance "payable "at a particular place," or the words "payable at, &c." were not words restricting or qualifying the acceptor's liability, but rendering him generally and universally liable; and that it was not necessary to prove a demand at the particular place in an action against such acceptor. If this was meant of an acceptance, by which the acceptor personally engaged to pay at a particular place, I should feel no objection to the observation; but, if it was meant to apply to cases wherein the acceptance has no such import, I do not think it law. The next case was that of *Saunderson* v. *Judge* *, which does not affect the question in this cause. There the promissory note was in the ordinary form. It was made by one Sharp, and payable to Wilkinson, or order. At the foot of the note there was a memorandum, that he would pay it at the house of Saunderson & Co. The Court held, that this memorandum was no part of the note. If it was no part of the note, the holder, who was indorsee, was not privy to it: it did not bind him, because it was not transferred to him by the indorsement of the note. In *Parker* v. *Gordon* †, the bill of exchange was accepted as in the present case; and there the court of King's Bench, consisting of Lord Ellenborough, Justices Grose, Lawrence, and Le Blanc, (Lord Ellenborough having nonsuited the plaintiff,) on motion to set aside the nonsuit, held, that the plaintiff, the holder, was bound to present it at the bankers within banking hours. They must have considered it as part of the acceptance. If it was no part of the acceptor's contract, the holder could not have been bound so to present it; but, on the contrary, he should have applied to the acceptor himself for the money. The next case in order of time is *Lyon* v. *Sundius and Sheriff* ‡. The acceptance was of a bill of exchange, as here; Lord Ellenborough, in that case, appears to me to use expressions not warranted by law. He says, "how can you make three words, "at "Hankey & Co.'s," more than a memorandum? The answer appears to me to be, that they are more, for they are part of the acceptance. His Lordship then says, "the acceptor of a

* 2 H. Bl. 509. † 7 East, 385. ‡ 1 Campb. 423.

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"bill of exchange is liable universally;" the observation on this is, that he is so, if he accept generally, but not otherwise; for his obligation and the extent of it must depend on the acceptance itself. His Lordship then proceeds to say, "this "very point was brought before the Court some time ago, "when the judges were all of opinion, that such words form no "part of the contract, and did not require to be set out in the "declaration." If I thought this to have been an opinion deliberately formed by that excellent and able man, I should have hesitated before I declared myself persuaded that it is not tenable. It appears to me, that it cannot now be contended, that such words are no part of the contract of the acceptor. When his Lordship says, "this point was brought before the "Court some time ago," I presume he means to refer to the case of *Smith* v. *De la Fontaine*, in Lord Mansfield's time. That case was probably introductive of the confusion which has existed on this subject. The next case is *Ambrose* v. *Hopwood* *, where the Court of Common Pleas held, that in an action on an acceptance, like that in the present case, the declaration must aver, that it was presented at the place where the person, by whom it was made payable, resided. In a subsequent case † in this House, it was holden to be sufficient to allege the bill to have been presented to the persons themselves. Still the case of *Ambrose* v. *Hopwood* shows it to have been the opinion of the Court of Common Pleas, that the declaration must aver a presentment consonant to the acceptance; and the acceptance throughout is treated as a substantial part of the contract. In *Callaghan* v. *Aylett* ‡, the acceptance was nearly like the acceptance in this case. The bill was there accepted payable at Messrs. Ramsbottoms, bankers, London. The declaration alleged an acceptance generally. At the trial it was objected, that this was a variance; and that there was no proof of a presentment at the place. A verdict was taken for the plaintiff, and these points were reserved for the opinion of the Court. On argument, the Court of Common Pleas held, that this was a qualified acceptance, to which the holder (he having acquiesced in it) was obliged to conform, and directed

* 2 Taunt. 61.

† Huffam *v.* Ellis, 3 Taunt. 415.

‡ 3 Taunt. 397.

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a nonsuit. Then follows in order of time the case of *Fenton* v. *Goundry* *. In that case the acceptance was in this form, " payable at C. Sikes, Snaith & Co." And the bill was addressed to the defendant at " No. 54, Lower Shadwell, Wapping." It seems, that, in this case, the idea of the expansion of the promise to pay first arose. One would think, there had been a precedent independent general engagement, and that something expansive was added to it. The acceptance is one act: to call it an expansion of the promise, is, in substance, to make it a general engagement, and pleadable as such. It is the promise itself. It is one entire engagement; and the legal effect of it is, " I accept or agree to this bill, but you must go *first* to Sikes, Snaith & Co. for the money." This makes it a qualified or conditional engagement. In that case a learned person, who argued for the defendant, says, " where something " is to be done by both parties at the same time, the defendant, " who is sued for a breach of his part of the engagement, must " show, that he did all that lay upon him to do, and that the " plaintiff did not perform his part, which prevented the de- " fendant's performance †." I conceive the facts of that case do not warrant this observation; for the presentment is solely the act of the holder; and the payment is not to be made by the party himself, for no one expects to find the acceptor behind the banker's counter: therefore, there is nothing to be done by both parties at the same time; for the parties, from the nature of the engagement, are not to be present at the same time. This is an argument which probably had much weight; but I conceive that the foundation of it fails. In deciding the case, the Lord Chief Justice appears to have said ‡—" It has " become a frequent practice, in order to avoid the inconve- " nience to the holder of not having his bill honoured when he " calls for payment at the party's ordinary place of residence, " to intimate his other house of residence for the purpose, if I " may so express it, which is at his banker's, where he engages, " as it were, to be found at the usual hours of business." I am satisfied, that this observation is ill-founded. No one believes it to be the acceptor's place of residence, nor that he will be at all found there. The truth is, it is to avoid the inconvenience

* 13 East, 459. † 13 East, 465. ‡ 13 East, 469.

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of keeping funds in his own house, that he makes the bill, by his acceptance, payable by or at his bankers, which is not his house of residence, nor considered as such, but where he has cash or credit. It cannot but be observed, too, that there was floating in his Lordship's mind, a notion that the obligation to pay by the acceptor was general and universal: this is true of a general acceptance; but if it be urged as applicable to a special, qualified, or conditional acceptance, I cannot agree to it: for though the party who calls for the acceptance may refuse to take it if it be not general, yet, if he do accept it, and assent to its being special, he must pursue his remedy according to the terms of the contract itself: for an acceptance is as much a contract, as is a policy of assurance or a charter-party. Both the other learned Judges, in that case, appear to speak with considerable doubt on the subject; the Court hinted at a further consideration of the question, for judgment *nisi* only was given; but, as the reporter says, no further notice was taken of it. After this case, in *Gammon* v. *Schmoll* *, the Court of Common Pleas gave judgment on a question precisely similar to the present, on a full consideration of *Fenton* v. *Goundry*, and all the preceding decisions. That Court held, first, that the acceptance was a contract. Secondly, that the introduction in it of the words "payable at Batson's, London," qualified the contract; and that it was a condition precedent. Thirdly, that the holder must show, in pleading, that he has complied with it. One of the learned Judges †, who concurred in this opinion, observed, that the reasons given in *Fenton* v. *Goundry* show, that the Judges were very doubtful as to this point. The case of *Huffam* v. *Ellis* (which I have before alluded to) came before this House on error. The bill was accepted, payable at Kensington, Styan, and Adams'; and it was averred in a declaration by an indorsee against the drawer, that the bill was presented to the persons using the name, style, and firm of Kensington, Styan, and Adams. This House held, that this was a sufficient averment to satisfy the words "payable "at Kensington, Styan, and Adams." The case of *Bowes* v. *Howe* ‡, is a case of great weight. It was subsequent to all

* 5 Taunt. 344. S. C. 1 Marsh. 80.
† Chambre, J.
‡ 5 Taunt. 30.

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the cases on this subject, which have been brought before the courts, except *Gammon* v. *Schmoll*; and that was in the following year. *Bowes* v. *Howe* was an action by one, who held a promissory note by assignment or indorsement, against the makers. The note was made payable at Workington Bank. The declaration averred, that the plaintiffs in error (the makers of the note) became insolvent before the action, and wholly declined and refused to pay it at Workington Bank. The plaintiff below had judgment, which was reversed in the Exchequer Chamber. The Lord Chief Baron, Sir Archibald Macdonald, delivered the judgment of the Court. He held that the question was, whether the allegation in the declaration dispensed with the necessity of presenting the notes (for there were counts on many other notes) at Workington Bank? and that it was clear that a demand was necessary unless dispensed with; and that the allegation was not sufficient to enable the plaintiff below to maintain his action. The words "at Workington Bank," were in the body of the note; the words "payable at Sir John Perring & Co.'s" are, in the case before this House, in the body of the acceptance; and I am of opinion, that there is no solid distinction between that which is incorporated in a note, and that which is incorporated in an acceptance. It is proper to advert to the case of *Head* v. *Sewell**, which arose before Lord Chief Justice Gibbs at *nisi prius*. He held, in the case of such an acceptance as the present, that it was not necessary to prove a presentment at the place mentioned in the acceptance; and, following up the language of some of the cases, said, that the acceptor is generally and universally liable. It seems to me to be most strange, after the cases in his own Court, (one of which was not more than two years before) which were directly contrary to this opinion, that nothing further should have been done in this case of *Head* v. *Sewell*; that it should not have been brought before the Court. I am persuaded, that there must have been some circumstance in that case, which the reporter has not noticed. The case of *Richards* v. *Lord Milsington* †, need only be mentioned shortly. That was an action on a promissory note, before the same Chief Justice at *nisi prius*. His Lordship said, "the words 'payable at Bruce &

* Holt, N. P. C. 363. † Id. 364, note.

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"Co.'s" are not introduced in the body of the note, they are "only inserted in the margin." This case, therefore, has nothing to do with the subject. I have adverted to all the cases which appear to be applicable to the case before the House; and the result is, that I am of opinion, that the bill of exchange in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring & Co.'s bankers, London, the holder was bound to present it at that house, and to aver in his declaration that the same was presented at that house for payment.

2d Question.

As to the second question I am of opinion, that the acceptance is, in law, to be considered a qualified acceptance, that the bill shall be paid at the house of Sir John Perring & Co. bankers, London, and not as a general acceptance to pay the same, with an additional engagement or direction for the payment at that house. The acceptance is an entire contract; the holder, who receives it, must take it as it is, (if he does not dissent from it,) and it must be construed as it was meant, if the intention can be discovered, and the words are sufficient to effectuate it. I feel no doubt as to the intention, and can discover no legal ground to prevent its being carried into effect.

3d Question.

As to the third question proposed by your Lordships, I am of opinion that this must be considered, first, as to the time, secondly, as to the place. And first, as to the time; if *B.* accept a bill drawn on him at three months, and, by his acceptance, make it payable at four months, and thereby lengthen the time of payment, I think *C.* could not maintain an action against *A.*, if this be done without his previous authority, or subsequent assent. And if it was accepted payable at a shorter time than three months, without such authority or assent, I think the law is the same; because the drawer might be liable to be called on sooner for the money than by the terms of his bill he had a right to expect. Secondly, as to the place; the question, as it appears to me, is, whether the variation is material? A general acceptance would have an implied relation to the drawee's place of abode. If the drawee accept it payable at his bankers in the same place, I am of opinion, that would not be material, and that a drawee may, within the custom of merchants, well appoint another

place of payment, if no material inconvenience to the holder be thereby introduced.

In answer to the fourth question, I am of opinion, that, in the case comprehended in this question, *C.* the payee, could not maintain an action against *A.* the drawer, without delivering, or offering to deliver, up the bill to him; for, whilst the bill remains in *C.*'s hands, the drawer's remedy is suspended; and, when the drawer has the bill returned, it will appear that the drawee has not complied with the requisition in it, and the drawer is restored to his original situation. I do not think, that the debt owing from *B.* to *A.* in any way varies the case, as between *A.* and *C.*, for *C.* receives the bill from *A.*; and, until *C.* has agreed to an acceptance materially different from the terms required by the bill, the transaction rests between *A.* the drawer, and *C.* the payee.

Burrough, J. 4th Question.

HOLROYD, J.—As to the first question, I am of opinion, that, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring & Co. bankers, London, (that is to say, at the house of certain persons using in trade and commerce, the names, style, and firm of Sir John Perring & Co. bankers, London,) the holder was not bound to present it at that house for payment, and to aver in the declaration that the same was presented at that house for payment.

Holroyd, J. 1st Question.

As, in my way of considering the subject, the second question appears to me to be involved in the first, I shall state my opinions on the second question, before I give my reasons for either.

On the second question, I am of opinion, that the said bill, having been so accepted as aforesaid, such acceptance is in law to be considered not as a qualified acceptance, to pay the same at the said house of Sir John Perring & Co. bankers, London; but as a general acceptance to pay the same, with an additional engagement or direction for the payment thereof at that house. Though the allegation in the declaration has not treated the acceptance simply as a general acceptance, but has stated the place of payment as a part of it; yet, as the allegation is, that the defendant accepted the bill *according to the usage and custom of merchants*, payable at Sir John Perring & Co.'s,

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bankers, London, the first question appears to me to involve in it that which is proposed to us as the second question, namely, what is the effect of such acceptance *according to the usage and custom of merchants?* in like manner as if the allegation had been simply that of a general acceptance, and as if the question had arisen at the trial on the proof of an acceptance made payable at the place.

1st Question.

In considering the first question, therefore, which will also dispose of the second, I shall, in the first place, consider what is in law to be now deemed the effect of this acceptance, according to the usage and custom of merchants. If it be in law to be considered not as a qualified, but as a general acceptance, *according to the usage and custom of merchants*, with an additional engagement or direction for payment at the specified house, it will stand, then, in my opinion, as if a mere general acceptance were stated in the declaration; and in an action against the acceptor upon a mere general acceptance, although he may be ignorant in whose hands the bill is, and, consequently, know not to whom to go to pay it, yet the constant course of proceeding in such action has always been not to allege a presentment to the acceptor for payment, nor to prove it at the trial.

The history of the cases before that of *Callaghan* v. *Aylett*, and the grounds upon which those cases, as well as the case of *Fenton* v. *Goundry*, were decided, appear to me decisive upon the two questions. The doubts, which have arisen upon the effect of these acceptances, appear not to have been entertained until after that point had been decided as a point free from doubt, both by judges and jury, for a period of nearly twenty-six years; those decisions taking as their basis the generally received and known usage among merchants, as to the effect of these acceptances, both previous, and up to, and during all that period of time. The case of *Smith* v. *De la Fontaine*, according to the note which I have of the case, was decided in the year 1785, first upon a trial by jury before Lord Mansfield (to whom, Lord Ellenborough says, in *Fenton* v. *Goundry*, the law of bills of exchange was as familiar as to any judge who ever sat on the bench), and, afterwards, by the whole Court of King's Bench, who were so clearly of opinion, that the making of the acceptance to be payable at Messrs. Bid-

dulph, Cox and Co.'s, was for the convenience of the acceptor, and that there was no colour for the objection, that it was a special acceptance, and that the plaintiff ought to have proved an application at that house for payment in that action, which was an action against the acceptor; that the Court refused even a rule *nisi* to set aside the verdict for the plaintiff and enter a nonsuit. This continued to be acted upon as the law from thence till the year 1808, when the same point was determined by Lord Ellenborough in *Lyon* v. *Sundius*, which was a similar action on a like acceptance; Lord Ellenborough considering the point as settled and without doubt, and that the additional words were nothing more than a mere memorandum, the acceptor being liable universally: and so this continued, with the exception of *Callaghan* v. *Aylett*, which I shall notice presently, till *Fenton* v. *Goundry*, in Easter term 1811, when, on a demurrer to a count like the present, the Court of King's Bench decided, that the acceptance was to be considered in law as a general acceptance, with a mere intimation for convenience of the place designed for payment. Lord Ellenborough proceeds to decide the case upon the generally received opinion of the commercial world, as a matter quite clear of doubt, and upon what he had always understood to be the practice and doctrine concerning bills of exchange, since he had been familiar with them. The other judges of the Court, with the exception of Mr. Justice Le Blanc, who was absent from indisposition, also coincided with Lord Ellenborough in deciding upon the generally received opinion and practice which had long before prevailed. When the usage and custom of merchants respecting bills of exchange has been inquired into and ascertained, such usage and custom becomes matter of law, to be taken notice of as such by the judges; which is the reason why, though such usage and custom used formerly to be alleged in pleading as a fact, such allegation has for a long time been wholly discontinued.

Two cases, besides that of *Callaghan* v. *Aylett*, had indeed intervened, but they were both of them against the drawer, and appear to me to be not material to the present questions. One of them, *Parker* v. *Gordon* *, is in the King's Bench; the other, *Ambrose* v. *Hopwood* †, is in the Common Pleas.

* 7 East, 385.

† 2 Taunt. 61.

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The acceptances were similar to the present: the one was a determination, that, *in order to charge the drawer*, a presentment at the place out of the usual banking-house hours was insufficient: and the other, that a presentment to the bankers, without saying at that place, was insufficient for that purpose; and, in neither case, did there appear to have been any presentment to the acceptor himself, personally, at all.

The case above referred to, of *Callaghan* v. *Aylett**, was a case which was decided by the Court of Common Pleas, (Mansfield, C. J. being absent), in Hilary term 1811, so lately as the very term next before the decision in *Fenton* v. *Goundry*; but the cause had been tried before him, and a verdict had been given for the plaintiff, subject to the opinion of the Court as to the necessity of proving that the bill had been presented at the bankers for payment. As far as can be collected from both the reports of that case, the Court do not, on that occasion, appear to have had the case of *Smith* v. *De la Fontaine* laid before them; or to have considered, whether there was any known, established, declared, or generally received understanding or usage upon the subject among merchants. But they appear to have decided in that case entirely upon the dry construction and effect of the acceptance, as a mere engagement to pay the bill at a particular house named by the acceptor; treating it as a mere naked question of construction, arising from the words, independently of any inquiry as to the usage and custom among merchants respecting it. The case of *Gammon* v. *Schmoll* has, indeed, been since decided by the Court of Common Pleas, (Mansfield, C. J. being then also absent), in which that Court appear to have decided again, upon the mere construction of the words alone, that the acceptance contained a condition precedent.

2d Question.

In *now* considering the question, whether the acceptance in the present case be a general or a qualified acceptance, it appears to me, that, upon a question of this nature, it is an important inquiry and consideration, whether there was any, and what, generally received, declared, or known usage and custom among merchants; more especially, if any such had been ratified and confirmed in judicature by judges and jurors; and that alone appears to me to be in itself decisive of the

* 2 Campb. 549; S. C. 3 Taunt. 397.

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question, both upon the law and justice of the case. The parties thereto must, I think, be taken, in an instrument of a peculiarly commercial nature, both to have given and received this acceptance, (and consequently to have meant and understood it), according to such generally received, known, and declared understanding, and usage, and custom. After the decision of *Smith* v. *De la Fontaine*, both by the jury and the Court, especially when confirmed afterwards by *Lyon* v. *Sundius*, in the year 1808, it must, I think, be deemed, that there had been, upon the subject, both before, and up to, and during that period, and until the determination of *Callaghan* v. *Aylett*, a generally received and known opinion, and usage, and custom among merchants, by which those acceptances were meant and taken as general acceptances, with a mere intimation of a place for payment; and not as qualified acceptances, which might be refused: an opinion, usage, and custom ratified and confirmed by those judicial determinations; and continually acted upon, both before and during that period, by the constant reception of all such acceptances, without any instance being brought forward of the refusal of any, as being a qualified acceptance. In a question, therefore, as to the effect of such an acceptance, (which is, really, only a question, what the parties meant and understood by the acceptance, which the one had given and the other had received,) it must, as it appears to me, be taken, that the one of them meant, and that the other understood him to mean, by the acceptance so given and received, nothing but what was the generally received understanding upon the subject, of persons most generally giving and receiving such mercantile instruments, namely, merchants; especially when that had been inquired into, ascertained, determined, declared, and confirmed by judicial decisions.

But even if this supposed generally received understanding, usage, and custom, is to be considered as unascertained and uncertain, and that the effect of this acceptance is, for its construction, to be taken from itself alone; still I cannot but think, that it is to be deemed only as a general acceptance to pay, with an additional engagement or direction for the payment at the specified house. In this view of the question, the legal principles and rules of construction, as well as the nature

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of an acceptance in itself, appear to me to be most material to be attended to.

Let us consider the nature of an acceptance in itself. The bill is brought merely for acceptance, that is to say, for a declared assent, that the acceptor will pay it according to the usage and custom of merchants. A mere declared assent by the drawee to pay, or any thing amounting thereto, is, in law, an acceptance. By the first word, "accepted," which is the thing which the very bringing of the bill requires the drawee to do, and which the drawer has a right to expect that the drawee will do, if he has effects in hand, which his acceptance of the bill implies:—I say, by the very first word, "accepted," the drawee has declared his assent to pay the bill; and, as I think, to pay it in such manner as the drawer has required, unless that which is added so qualifies this assent, as to be inconsistent with an assent to pay it as required. If it be not thus inconsistent upon the face of it, the holder is not to suppose that it was meant to do away or alter the effect of what the acceptor had before written and signified; and, if the acceptor did so mean, he should have so expressed himself, or should have stated, that he would not accept the bill as required, (that is, to pay it according to the usage and custom of merchants,) but that, though he would not so accept it, he would engage to pay it at such a particular place, if the holder would take that engagement.

The words of the acceptance are those of the drawee only, and not of the drawer or of the holder, and are to be taken, although according to the intent, yet where that is not sufficiently ascertained, most strongly against the person using those words. The maxim of law, *verba fortius accipiuntur contra proferentem*, and Lord Bacon's observations thereon, appear to me very applicable to this case, supposing this to be considered as a mere question of construction. He says that this rule "is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and, secondly, because it makes an end of many questions and doubts about the construction of words; for, if the labour were only to pick out the intention of the parties, every judge would

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have a several sense; whereas this rule doth give them a sway to take the law *more certainly* one way *." This rule, I think, requires the drawee, especially where it is to defeat in any degree the rightful expectations of the drawer, that the bill shall be unqualifiedly accepted as he has drawn it; and where the drawee has, in the first instance, declared his assent to pay it, if he meant to qualify or do it away, or alter it in the whole, or in part, or to clog that which is yet absolute, with any condition not beneficial either to the drawer or to the bill-holder, this rule, in my opinion, requires the drawee, in such case, to use, in addition, such words as clearly and unequivocally express or show such qualification, alteration, or condition. If the acceptance in question be considered as qualified, it must be by construing it, as if the drawee had inserted, what he has omitted, the word " only;" and what, if he so meant, the rules of construction, I think, require that he should have stated. The words " payable at Sir John Perring & Co.'s, bankers, " London," may mean, either that the bill *may* be paid there, or an intimation that it *will* be paid there, (that is, if the holder bring it there); or it may be intended as an obligation binding also upon the holder, that it *shall* be paid there, and there only. But if the writer had meant the last, I think that, in order to bind the holder to consider that he did so mean, he should so have expressed himself.

Holroyd, J. 2d Question.

For these reasons, I am of opinion, that the acceptance in question, so as aforesaid alleged in the declaration, is to be considered, not as a qualified, but as a general acceptance to pay, with an additional engagement or direction for the payment thereof at the specified house; and, consequently, that the holder was not bound to present it at that house for payment, and to aver, in the declaration, that the same was presented at that house for payment.

1st and 2d Questions.

But supposing that this acceptance be to be considered as a qualified acceptance to pay the bill at the specified house, still the first question proposed to us involves a further question; for it would not, in my opinion, from thence follow, that the holder was bound to present it at that house for payment, and aver in the declaration that it was so presented; for I still

* Reg. 3.

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think, that the holder would not, even in that case, be by law bound so to present it, or so to aver in the declaration.

The acceptance, even taking it to be a qualified acceptance, is still, I think, an undertaking to pay the bill at a particular time and place, absolutely and at all events, and not subject to any *expressed* or implied condition, which must previously be performed by the holder. Upon a promise or undertaking, either to pay a bill of exchange or money, or to do any other particular act, whether at a particular time and place or not, the very non-feasance alone is a breach of the contract, and the promisee need do no more in support of his action for such breach than to prove the promise: the non-feasance being a negative, the feasance, or that which in law is an excuse for it, is matter purely of defence, and the *onus probandi* thereof lies upon the defendant. The person, therefore, so promising or undertaking, in order to defend himself, must either establish, that he has done the thing according to his engagement, or he must excuse his non-performance. It is not sufficient for a defendant, in his excuse, to say, that the plaintiff was not present at the time and place to demand and receive the money; but he must, in order to defend himself, allege and prove, that he did all in his power towards the performance, and that his not doing more was owing to the refusal or default of the plaintiff. He must establish either a tender and refusal, or that he, the defendant, was ready at the time and place to pay, but that the plaintiff did not come, nor was present to receive. The circumstances excusing the non-performance, and throwing the fault on the plaintiff, are matters in defence. This appears, I think, by Lord Hobart's opinion in *Baker* v. *Spain* *, and by the resolution of the Court of Common Pleas, there cited, in *Bushby*'s case, as to the payment of rent, which is payable on the land. So Littleton says †, "Also upon such case of feoff-"ment in mortgage, a question hath been demanded, in what "place the feoffor is bound to tender the money to the feoffee at "the day appointed, &c.? And some have said upon the land so "holden in mortgage, because the condition is depending upon "the land. And they have said, that if the feoffor be upon the "land there ready to pay the money to the feoffee at the day set, "and the feoffee be not then there, then the feoffor is quit and

* Hob. 8. † Litt. s. 340.

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" excused of the payment of the money; for that no default is in " him. But it seemeth to some that the law is contrary, and " that default is in him, for he is bound to seek the feoffee if he " be then in any other place within the realm of England." The difference of opinion, there, was upon this point; *viz.* whether the mortgage-money was to be paid at a particular place, *viz.* upon the land, or not; but, in either case, whether it was to be *there* paid or not, the feoffor, who was to pay the money, was bound to do all in his power towards his performance, before he could be excused for his non-performance. *If no time be fixed* for the performance, then indeed the obligor, who is to pay the money at a particular place, is to do more (and this doctrine should be remembered when the case of *Sanderson* v. *Bowes* comes to be considered); he must, according to Co. Litt.*, " give the obligee notice, that, on such a day, at the " place limited, he will pay the money, and then the obligee " must attend there to receive it; for, if the obligor then and " there tender the money, he shall save the penalty of the bond " for ever." Lord Coke then adds, " The same law it is, if a " man make a feoffment in fee upon condition, if the feoffor, at " any time during his life, pay to the feoffee 20 *l.* at such a place " certain, that then, &c. In this case the feoffor must give notice " to the feoffee when he will pay it; for without such notice as " is aforesaid the tender will not be sufficient." In both these cases, therefore, in order to save the bond or feoffment, the obligor and feoffor must attend and be ready with the money at the place, though the obligee or feoffee be absent; for the tender of which he there speaks is a tender (or rather what he calls a tender), though the obligee or feoffee be absent; for he is speaking of a tender, which would not be an excuse without such notice; which is, therefore, a tender by the one in the absence of the other; and he immediately adds, " but in both these cases, if at any time the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money." The forms of declaring, not only upon awards, but upon other instruments for the non-payment of money at a particular place, are confirmatory of this doctrine. In Rastell's Entries are three precedents; two in debt on bills obligatory for money to be paid at particular marts or fairs†, and the other for rent, payable at

* 211, a. † Ante, in the opinion of Richardson, J. pp. 427, 428.

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a particular place on particular feasts*. The declarations did not contain any allegation of presenting the bills for payment or any demand of the money at the marts, fairs, or place; but to one of those declarations, one upon some of the bills obligatory payable at different marts or fairs, the defendant pleaded that he was at the fairs ready to pay the plaintiff, if the plaintiff had been there, and would have delivered to him the bills aforesaid; and that neither the plaintiff, nor any for him, was then there to receive the same, with an allegation that he has been always since ready to pay, and a *profert* of the money into court. A bill of exchange, in an action against the acceptor, stands, I think, upon the same footing as a bill obligatory, or any other engagement for the payment of money, so far as regards the necessity of alleging in the declaration, or of proving at the trial, a presentment of the bill, or a demand of the money. In an action against the acceptor, where he accepts generally, such allegation is never made, nor such proof required or given: though such a presentment is, no doubt, usually made *in fact* in such cases, before the action is brought, yet the nature of the instrument itself (*viz.* a bill of exchange) has not rendered such an allegation or proof necessary, except where the action is brought to charge the *drawer* or indorser. The nature of the instrument, therefore, cannot, as it seems to me, make such allegation or proof more necessary where the acceptor adds a place for payment, than in other cases where the obligor or promiser adds a place for payment.

In either case, such allegation or proof is, I think, not requisite on the part of the plaintiff; but, if the defendant, or his bankers, or any one for him, had his money ready at the time and place, and would have paid it if the bill had been then and there presented for payment, it is matter of defence, and may be pleaded by him; which removes, I think, the hardship and mischief which, it is supposed, may result from not requiring an allegation and proof of presentment for payment at the specified place to be made and given by the plaintiff. Independently of the question of general or qualified acceptance, Lord Ellenborough and my brother Bayley, in *Fenton* v. *Goundry*, both of them acceded to and confirmed this reasoning, as will be seen

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in 13 East *. Their opinions, in that case, upon this point, appear to me to be material in showing, that the case of *Sanderson* v. *Bowes*, which was determined by the same judges very shortly afterwards, was determined on grounds not at all inconsistent with their opinions in their decision in *Fenton* v. *Goundry*. My brother Bayley, too, upon another occasion, at Nisi Prius, in Hilary term, 1809, in *Wild* v. *Rennards* †, held the same doctrine, that if a promissory note is made payable at a particular place, in an action *against the maker*, there is no necessity of proving that it was presented there for payment; and, in Michaelmas term 1810, in *Nicholls* v. *Bowes* ‡, Lord Ellenborough held the same. But it is said that the decision in *Sanderson* v. *Bowes* §, in Michaelmas term 1811, by the Court of King's Bench, and the decision of *Bowes* v. *Howe* ||, in Trinity term 1813, by the Court of Exchequer chamber, which is founded thereon, are inconsistent with this doctrine. The above precedents in *Rastell* were not known, or, at least, not brought forward in either of those two cases; and, if those two cases were not distinguishable from the present, but were so much in point as, at first, they may appear, it might be for consideration whether those cases were not still open to a revision, like the decisions which for a time prevailed in favour of actions upon legacies, and of actions against femes covert with separate maintenances. But, when those two cases come to be looked at and considered, they are, it appears to me, very distinguishable from the present, and also from *Fenton* v. *Goundry*, on this very point. In the present case, and in *Fenton* v. *Goundry*, the instrument declared on, a bill of exchange, was payable *at a certain time*. In *Sanderson* v. *Bowes*, and in *Bowes* v. *Howe*, the instrument declared on (a promissory note) was *not payable at a particular time*, but generally, entirely at the pleasure of the holder of the note, and so Lord Ellenborough observes ¶, where he distinguishes *Sanderson* v. *Bowes* from cases where money was to be paid, or something to be done *at a particular time*, as well as place. The cases of *Sanderson* v. *Bowes*, and *Bowes* v. *Howe*, were both cases of promissory notes of the Workington bank, payable on

* 470 and 472.
† 1 Camp. 425. note.
‡ 2 Camp. 498.
§ 14 East, 500.
|| 5 Taunt. 30.
¶ 14 East, 504.

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demand to bearer at the Workington bank. The notes being made payable to bearer, not at any specific time, but merely *on his, the bearer's demand*, the promisers could not comply with the above-mentioned rule laid down in Co. Litt.*, of giving notice when they would pay the money at their bank, as they could not know who the bearer was *till* the money was *demanded*. Nor was it to be paid but *upon demand*, which might, therefore, be deemed a condition precedent, quite consistently with my reasoning, and also, with Lord Ellenborough's and my brother Bayley's, as applicable to cases where the money was to be paid at a time and place certain; and, if the demand thus became in those two cases a condition precedent, the place as well as time of the demand must necessarily form a part of that condition, and may require to be averred, as it was in those two cases decided.

For these reasons, therefore, I think, even if the acceptance, as stated in the first count, be to be considered as a qualified acceptance, that the holder was not, in the present case, bound to present it at the house for payment, or aver in the declaration that the same was so presented.

3d Question.

In answer to the third question proposed by your Lordships, I think, that if *A.* draw a bill upon *B.* in favour of *C.* for 100*l.* and *C.* without the previous authority or subsequent assent of *A.* take an acceptance for the bill for the whole of the 100*l.*, but an acceptance qualified as to the time or place of payment, *C.* could not maintain an action *upon the bill* against *A.*

In the case put by this question, the drawer has a right, I think, or at least may be considered as having reason to expect, either that his bill, if accepted, will be accepted to be paid in such manner as he has required, that is to say, according to the tenor and effect of the bill, and the usage and custom of merchants; or, that due notice will be given by the person taking the bill from him, according to such usage and custom, in case the bill be not so accepted. He *may* be injured, if the bill be not so accepted as he has required (*primâ facie*, at least, it is, I think, to be so considered); and, in default of such acceptance, he has a right, I think, to due notice of such default, in order that he may take such steps as he may think proper to

* Co. Litt. 211. a.

avert such possible injury. The holder may either receive or refuse a qualified acceptance. If he refuse, he must give due notice; and, if the bill be a foreign one, he must also protest it, in order to charge the drawer. If he do not refuse, but do receive the qualified acceptance, in that case, by assenting to the qualifications imposed by the acceptor in varying the time and place, he becomes party to a fresh and different contract with the acceptor, to which the drawer was neither party nor privy: the contract is an entirely new one, assuming a new shape; the bill is converted into and becomes a different or new bill, having a different tenor and effect from the old one, *viz.* such as the qualifications of the acceptance, either as to time or place, have ingrafted into it. *C.* by taking a different security, *viz.* this qualified acceptance, instead of having the one which the drawer had a right, or had reason to expect, and which *C.* was to require should be given him, has, I think, no right to maintain an action against the drawer upon this bill, the nature and effect of which has been altered by his having taken this qualified acceptance of it. In *Boehm* v. *Garcias* *, (sittings after Michaelmas term 1807,) it was held by Lord Ellenborough, that the drawee has no right to vary the acceptance from the terms of the bill, unless they be unequivocally and unambiguously the same; and, therefore, where an action was brought against the drawer on a bill drawn at Lisbon, payable in *effectivè*, and not in *Vals reals*, where the drawees offered to accept it, payable in *Vals denaros*, (another sort of currency, which was refused,) Lord Ellenborough held, that the plaintiff had a right to refuse this acceptance, though the defendant proposed to show, that *Vals denaros* were sufficient to answer what was meant by *effectivè*; and wherever the holder may refuse the acceptance by reason of its being qualified, (as he may, I think, wherever the same is qualified, either as to time or place,) he cannot, I think, if he take the acceptance, sue the drawer upon the bill.

Holroyd, J. 3d Question.

In answer to the fourth question proposed by your Lordships, I think, that if *A.* was debtor to *C.* in 100 *l.* previous to his so drawing upon *B.* in favour of *C.* to the amount of 100 *l.*, *C.* could, upon *A.*'s refusing his assent to an acceptance, qualified as mentioned in the third question, maintain an action upon the

4th Question.

* 1 Campb. 425, note.

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Holroyd, J. 4th Question.

the original debt against *A.* without delivering to *A.* the bill so accepted; in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100*l.*

The bill itself, having been dishonoured, has become no satisfaction for the original debt; the right of action upon the original debt, therefore, remains: and though, if *A.* pay or tender to *C.* the original debt, with the expenses, &c. incurred upon the dishonoured bill, he will be entitled to have that bill delivered up again to him; yet, until *A.* has so done, the right to the bill, as it appears to me, which was given by him to *C.* as a security for, or in order to discharge that debt, remains in *C.* who may, I think, bring an action, either upon the original debt, or upon the bill; or may bring an action, including both those causes of action, in case they be of such a nature as to be capable of being joined together in one action. The original debt is not extinguished, but the right of action upon it remains, or is revived by reason of the dishonour of the bill; and *C.* I think, has a right to retain the bill, which was given to him as a security, or for the discharge of his debt, and to use it either as a ground of action in itself, or as a medium of proof for establishing his original debt: and the circumstance of *B.*'s being also indebted to *A.* in a like sum of 100*l.* appears to me to make no difference as to *C.*'s rights of action; for *A.* only by doing what by law he is bound to do, (namely, by payment of his debt, &c. to *C.*) may entitle himself to the possession of the bill, and thereby avoid any injury, which he may, otherwise, sustain by the want of it in seeking his remedy against *B.* for the recovery of that debt.

Park, J. 1st Question.

PARK, J. With respect to the first question, as the bill of exchange is alleged to have been accepted according to the usage and custom of merchants, payable at a particular banker's in London, I am of opinion that the holder was bound to present it at that house for payment; and to aver in his declaration that the same was presented at that house for payment.

To come to that conclusion, it appears to me to be only necessary to consider who the parties to the contract are; and what contract the defendant on this record has entered into. The plaintiff, or the payee, it is true, originally took a bill drawn upon the defendant generally: but when the defendant had that bill presented to him for acceptance, he said by his

acceptance, I do not choose to enter into this general engagement, for my avocations may, at the time when the bill shall become due, call upon me to be in some distant part of the kingdom; and, therefore, both for your convenience and mine, I will specially accept it, payable at a particular banker's, or where my strong box or money is; and there you shall go for your money, and not follow and arrest me at a place where I have none: this is the defendant's contract. I admit that the holder might refuse to take such an acceptance; but, having taken it, can he enforce the contract against the contractor, without showing that the contractor has not complied with his own conditional acceptance? May not the acceptor justly say, if the holder should attempt to enforce it contrary to the acceptor's engagement, *non hæc in fœdera veni?* I think he may; for, that the acceptor has a right to make a special acceptance, differing from that which the drawer had wished to impose upon him, as to time, place, or amount, is admitted by those who argue for the defendant in error. This has ever been considered as law from the time of Marius, who wrote in the sixteenth century on bills of exchange *. The law upon these points, both as to the right of the drawee to make a special acceptance, and, as to the right of the holder to refuse it, is well stated, as your Lordships will find it, in *Petit* v. *Benson* †, If, then, the drawee may refuse to enter into any other than a special acceptance, when he has made it, and it is received by the holder, surely, it becomes as much the original contract of the acceptor as if he had written a promise to pay on certain conditions; or had promised to pay at a certain banker's, and no where else. The true sense of the case seems to be, and the principle is, that, whenever the place, at which the contractor is to perform it, forms a part of his express contract, and the duty is not merely collateral to it, it is necessary both to aver and prove a failure on that precise point on the part of the defendant. Thus, in 1 Rolle's Abridgment ‡, it is said, "If a place of payment is limited by the condition, the party is not bound to pay in any other place." Here, the duty is created by the instrument itself, with certain limits and qualifications.

* Mar. p. 17. 4th ed.

† Comb. 452.

‡ Tit. Condition, p. 444. l. 7. and p. 445. l. 52.

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No duty to be perfected by the acceptor arose anterior to the very instrument itself; and the acceptor can only be answerable to the extent of his engagement, by his qualified acceptance.

If we were to speak of the convenience of this or that practice, there can be no question that it would be most convenient that the presentment of the bill at the place where it is made payable should be deemed a condition precedent; for it would be very inconvenient that acceptors, such as the original defendant, should be made liable to answer every where, when it is notorious that they have made provision at a particular place, where alone they engage to pay. There is no antecedent duty as against the defendant, save that arising on the bill; and, therefore, the instrument or bill must be looked at for the purpose of seeing what the duty is.

This case has not been fitly compared to the case of bonds; for there the penalty creates the debt, and the party is liable upon it, but is to discharge himself from the penalty by bringing himself within the terms of the condition: that, therefore, must be matter of defence. But where a suit is in *assumpsit* upon a contract, the plaintiff must show that he has done every thing which lay upon him to do, in order to bring himself within the contract, and entitle him to sue upon it. Now here, by the terms of this acceptance, a promise is made by the acceptor to pay at Perring & Co.'s; the plaintiff, who sues, then must bring himself within those terms, by showing that he made a demand at the place where the defendant said he would pay; and he cannot be made liable beyond the extent of his contract. Where a defendant contracts generally to pay a sum of money, he is liable to a creditor every where; but, where a person binds himself to pay at a particular place, he is not liable at any other place, till default be made at the particular place. For, otherwise, suppose a bill drawn upon one just before going the circuit (and this case is put by one of the most learned judges who ever adorned the Court of Common Pleas, I mean Mr. Justice Chambre *), which will fall due during the absence of such drawee; such a person living in chambers leaves no servant on his departure, excepting, perhaps, a laundress; what can be done in such a case, except to deposit the money with

* In Gammon *v.* Schmoll, 5 Taunt. 350.

a banker, and make the bill payable at that banker's? Otherwise such person would be liable to be arrested at any place in the course of his journey, where he might have no money, which, indeed, he would be the less likely to have after making provision at his banker's. I agree with that learned judge, that it is a great convenience to the public to maintain these special acceptances.

But, it is said at the bar, if you can show that you had your money at your banker's, you would have a complete defence. Is it, then, no vexation to be causelessly arrested? Is a lawsuit no vexation? Is it nothing to be 20 *l.* or 30 *l.* out of pocket, though you gain your cause? And this evil is only met by the trifling inconvenience of an obligation on the plaintiff to call a witness to prove a presentment. Indeed, if we speak of inconvenience, it is all the other way; for, instead of the trifling inconvenience arising to a holder from the necessity of calling one witness to prove a presentment, every banker must, if the other view of the case be adopted, keep a number of clerks to go daily to all parts of the town, for the purpose of receiving payment of bills. So greatly was this inconvenience felt, that the Bank of England will not discount any bill that is not payable at a banker's.

But we have been told at the bar that the weight of authority is against the plaintiff in error. Let us examine the cases, and see whether the decisions in the Court of King's Bench, and one or two at *nisi prius*, before Lord Chief Justice Gibbs, carry with them the same weight of reason as those decided by the Court of Common Pleas sitting in bank; or, whether the Court of King's Bench has, in this respect, been consistent with itself.

The first case is *Smith* v. *De la Fontaine*, of which there is a short note in my brother Bayley's Treatise on Bills of Exchange*: however, a more full account is given of it in a note to Mr. Holt's *nisi prius* cases†, which is taken from a manuscript of my brother Holroyd; and there seems no doubt, that in 1785 Lord Mansfield at *nisi prius*, and the Court of King's Bench afterwards, decided, that words similar to those here used were not words restricting or qualifying the acceptor's

* p. 129, note b. 3d ed.

† p. 366.

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liability, but rendering him liable generally; and that it was not necessary to prove a demand at the particular place in an action against the acceptor. But how has this been followed up? *Lyon* v. *Sundius* * is a mere *nisi prius* opinion, before the decisions of either *Callaghan* v. *Aylett*, or *Fenton* v. *Goundry*. Then came the case of *Fenton* v. *Goundry* †, in which the Court undoubtedly held that doctrine which is now under discussion; and which treated an acceptance like the present not as a conditional acceptance, but as a mere expansion of the promise to pay. But how is that consistent with the doctrine laid down in *Parker* v. *Gordon* ‡, by two of the Judges §, who were parties to the decision of *Fenton* v. *Goundry*? *Parker* v. *Gordon* was an action against the drawer; and I, therefore, do not quote the case as an authority, except to show that such words as these were considered as a special acceptance. "If a party "(says Lord Ellenborough in the last-mentioned case) choose to "take an acceptance at an appointed place, it is to be presumed "that he will inform himself of the proper time for receiving pay-"ment at such place, and he must apply accordingly." And, in *Elford* v. *Teed* ||, his Lordship says that the case of *Parker* v. *Gordon* was conformable with the doctrine which he had usually held. Lawrence, J. says, in *Parker* v. *Gordon*, "The party "might have refused to take the *special acceptance*; but if he "choose to take the acceptance in that manner, *payable at the* "*banker's*, does he not agree to take it payable at the usual "banking hours?" And Le Blanc, J. says, in the same case, "If a party will take an acceptance, payable at a banker's, he "must present it at a proper time, according to the known "method of conducting the banking business; otherwise the "greatest inconveniences to trade would ensue."

Two very modern cases have been quoted to your Lordships to show that Lord Chief Justice Gibbs concurred with the decision of the Court of King's Bench in *Fenton* v. *Goundry*; namely, the cases of *Head* v. *Sewell*, and *Richards* v. Lord *Milsington* ¶. I will speak of *Head* v. *Sewell* first. It is sufficient to observe, that it was only a *nisi prius* case: next, it is so singular a case, that either the note is incorrect, or the

* 1 Cambp. 422.
† 13 East.
‡ 7 East, 385.
§ Lord Ellenborough, C. J. & Grose, J.
|| 1 M. & S. 28.
¶ Holt, N. P. C. 363.

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opinion of the Lord Chief Justice is not delivered with that very learned person's usual accuracy and precision. For, in the year 1816, he begins his observations by saying, that after thirty-five years experience he had never known the objection to prevail, and therefore could not admit the necessity of the proof. What? had he not known of the case of *Callaghan* v. *Aylett*, decided in 1811, five years before, in the Common Pleas, by Mr. Justice Heath, Mr. Justice Lawrence, and Mr. Justice Chambre, as eminent persons as ever sat on that bench; and which case, in consequence of its having been much opposed the following term in *Fenton* v. *Goundry*, made them the common talk in Westminster Hall? Had he not heard of the case of *Gammon* v. *Schmoll*, then quoted to him, and decided two years before, in the very same Court by his then colleagues, Mr. Justice Heath, Mr. Justice Chambre, and the very learned person who afterwards succeeded him in the Chief Justiceship, in both of which cases the objection prevailed? And then again, though his Lordship is stated to have said, that he never knew the objection prevail, he concludes by saying he knows there are conflicting cases. The other case of *Richards* v. Lord *Milsington* he decides that he may preserve his own consistency in a former case of *Price* v. *Mitchell* *: but, upon looking at that case, it will be found a mere memorandum at the foot of a note, which never was held to be a condition, but a mere *memorandum* or direction. I, therefore, do not consider these cases as adding much weight to the authority of the King's Bench.

But I find the King's Bench, in *Sanderson* v. *Bowes* †, which was confirmed by an unanimous judgment in the Exchequer chamber ‡, deciding diametrically opposite to the case of *Fenton* v. *Goundry*: and every word of the judgment of that great and eminent judge Lord Ellenborough is, in my mind, conclusive in favour of the plaintiff in error. Agreeing, as I do, with the learned editor of the Treatise on Bills of Exchange §, that it is difficult to reconcile in principle with the case of *Sanderson* v. *Bowes*, that of *Fenton* v. *Goundry*; and *Sanderson* v. *Bowes*, being the last in decision, ratified by the decision of the twelve Judges of England, and most agreeable to good sense, reason, and convenience, I think that it ought to prevail. The only

* 4 Camp. 200.
† 14 East, 500.
‡ Bowes *v.* Howe, 5 Taunt. 30.
§ Bayley on Bills, 185, note 1. 3d ed.

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difference between *Sanderson* v. *Bowes*, and this case is, that *Sanderson* v. *Bowes* was an action against the maker of a promissory note; this case is against the acceptor of a bill of exchange; but I need not inform your Lordships, that the Courts in Westminster Hall have long thought the analogy between notes and bills so strong, that the rules established as to one ought also to prevail as to the other; *Heylyn* v. *Adamson* *, *Brown* v. *Harraden* †, fully prove this position. Then let us read the case of *Sanderson* v. *Bowes*; and if "bill" be read for "note," is not every word of Lord Ellenborough's luminous reasoning decisive of the present question? In that case the Court of King's Bench held presentment at the banking-house necessary. *Bowes* v. *Howe* ‡ contains the affirmance of this proposition, though there was a reversal upon another point in that particular cause. And, in conformity to that opinion, Lord Ellenborough, in a subsequent case of *Roche* v. *Campbell* §, held, that it was a fatal variance in a declaration not to state that the note was payable at a particular place where the note was so payable. And his Lordship's language is peculiarly emphatical and applicable to this case; for he says, "This declaration represents the promissory note as containing an "absolute and unqualified promise to pay the money. But, "by the instrument produced, the maker only promises to pay "upon the specific condition that the payment is demanded at "a particular place. We have lately held (alluding to *Sanderson* v. *Bowes*) that where the place of the payment is "mentioned in the body of the note it forms a material part of "the instrument." So, here, the acceptor only undertakes to pay upon the specific condition that the payment is demanded at a particular place: this, and no other, is the contract of the acceptor.

Having thus shown the inconsistency of these decisions, and that *Sanderson* v. *Bowes* has not only had the judgment of the King's Bench in favour of that opinion, which I presume to deliver, but the confirmation, as to this point, of the whole Exchequer Chamber; can I hesitate in saying, that the strong current of authority is in favour of the plaintiff in error, when I add, the authority of Judges Heath, Lawrence, and Chambre,

* 2 Burr. 669.
4 T. R. 148.

† 5 Taunt. 30.

‡ 3 Camp. 247.

in *Callaghan* v. *Aylett*, declaring that, doubtless, there may be a qualified acceptance of a bill which a holder is not bound to receive, but, that if he acquiesce in it, he must conform to the terms of the acceptance; and the further authority of Judges Heath, Chambre, and Dallas, in *Gammon* v. *Schmoll*. Mr. Justice Heath *, treats it as a condition precedent, which must be shown to be performed. The reasoning of Mr. Justice Chambre does not seem to have been sufficiently adverted to; and nobody will deny his ability as a lawyer, and his great skill as a pleader. That learned Judge says, "I think the case is "clear, upon rules of plain common sense and understanding, "without going into all the cases. A man is not bound to re- "ceive a limited and qualified acceptance; he may refuse it, "and resort to the drawer; but, if he do receive it, he must "conform to the terms of it."—"What is the meaning of these "words, *accepted, payable at?* They have a meaning: they "impose a condition; and the person receiving such an accept- "ance must comply with the condition, and in pleading must "show his compliance. It would greatly circumscribe the ne- "gociation of bills of exchange if this were not so; for they "would, instead of being of general accommodation, be re- "strained in their use to such persons in trade as have a fixed "place of business." I have already endeavoured to show your Lordships that the inconvenience to holders of bills and to bankers would become ruinous by the number of clerks which they must employ, if such an acceptance is to be held to make the acceptor universally liable.

Park, J.
1st Question.

On these authorities, and upon the principles of common sense and understanding, I am of opinion, on the first question, that the holder was bound to present this bill at Sir John Perring's house for payment, and to aver that it was so presented.

As to the second question, *viz.* whether such an acceptance is to be considered in law as a qualified acceptance, I answer, that the whole of my reasoning, with which I have troubled your Lordships, is founded upon the affirmative of that proposition. All the text writers upon bills of exchange are clear on this point. I take it, that any acceptance varying from

2d Question.

* In Gammon v. Schmoll, 5 Taunt. 353.

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the absolute tenor of that which the drawer expected by the language which he used in drawing the bill, either in the sum, the time, the place, or the mode of payment, is a conditional acceptance, which the holder is not bound to receive: but, if he do, the acceptor is liable for no more than he has undertaken. This doctrine of qualified acceptance, as *to part* of the money, is spoken of in Marius*, and in Molloy†. So, in the latter book, a partial acceptance as to time is mentioned‡. This is confirmed in Beawes's *Lex Mercatoria*§, and by Mr. Justice Bayley ||. It was treated as a qualified acceptance in *Sanderson* v. *Bowes*; and by Mr. Justice Lawrence, in *Parker* v. *Gordon*; and again in *Callaghan* v. *Aylett*, and *Gammon* v. *Schmoll*, in the Common Pleas; I therefore feel no difficulty in stating to your Lordships, that I conceive this to be a conditional acceptance.

3d Question. The third question, in my view of the case, is not of difficult solution. Marius supposes ¶, that if the holder take from the acceptor an acceptance, even for a *part* only of the money drawn for, he may do so, provided he protests and gives notice to the drawer, and the bill is not thereby void; nor, according to what he says in page 21, does it prevent the holder from having recourse against the drawer. This is stated in the case of so *material* a change as a defalcation of part of the sum drawn for. But to the case put by your Lordships, I answer, that, if the qualification, either as to time or place, works neither injury nor inconvenience to the drawer, the holder is not prevented (in case of non-payment) from his remedy against the drawer, because he has taken such qualified acceptance. In the case out of which this question arises it neither produces the one nor the other: but it is a custom productive of great convenience to every one concerned in trade, and without which qualification bills of exchange are not discountable.

4th Question. As to the fourth question, I am of opinion, that *C.* could not maintain his action for the original debt against *A.* the drawer, without delivering up to him the bill so accepted. Because, having once accepted such bill in lieu of and in satisfaction of his debt, he cannot recover for the original debt without relin-

* pp. 17, 21.
† b. 2. ch. 10. s. 21.
‡ Id. s. 28.
§ p. 481. 4th ed. fol.
|| Bayley on Bills, pp. 85, 86. 3d ed.
¶ p. 17.

quishing the supposed security; which, being an acceptance by *B*, (whom the question supposes to be indebted to the drawer,) will amount, at all events, to an acknowledgment of the debt. For, although it is not always true that the drawee is a debtor of the drawer, yet, perhaps, when the drawee accepts, it is *primâ facie* evidence of a debt. The case of *Kearslake* v. *Morgan* *, where it was held, that to an action for goods sold and delivered, it was a good plea to say that the defendant had indorsed to the plaintiff a promissory note, payable to him, the defendant, "for and on account of" the said debt, is not inapplicable to this question, to show that *C.* could not maintain an action for his original debt while he held in his hands a bill given to him by the defendant to that amount. I, therefore, answer to the fourth question, in the negative.

Park, J. 4th Question.

BAYLEY, J. In answer to the first question, I submit that the effect of such an acceptance is this, that to entitle the holder to sue the drawer or indorser, it casts an obligation upon him to present the bill at Sir John Perring & Co.'s for payment, and to aver in his declaration, that the same was so presented; but that, as against the acceptor himself, the holder is not bound so to present it; that he is under no obligation to aver any such presentment in his declaration; and that the only consequence of his neglect to present is this, that the acceptor may set up any loss he has sustained thereby as matter of defence. This question is raised upon a demurrer to the plaintiff's declaration. The point, therefore, is not whether a neglect to present may not, even as against an acceptor, in some cases, constitute a defence, but whether the presentment is or is not an essential part of the plaintiff's title. A presentment is a demand at the place of payment, and to determine this point, the rules which the law has laid down as to cases in which a demand is or is not necessary, must be considered. One of these rules I take to be this, that where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement, without any previous demand; and that a tender or readiness to pay must come by way of defence from the defendant; but that if he engage to pay upon demand what was not his debt, what he is

Bayley, J. 1st Question.

* 5 T. R. 513.

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under no obligation to pay, what but for such engagement he would never be liable to pay to any one, a demand is essential, and part of the plaintiff's title. If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration, nor proved upon the trial. And what is the reason? Because the note is considered as given for what is to be considered the party's own debt. In common actions of assumpsit the promise is always stated to be to pay when thereto afterwards requested; yet a special request is never stated or proved; and the distinction in this respect is correctly taken in *Birks* v. *Trippet* *. That case was *assumpsit* on a promise to pay 40*l.* upon request, if the defendant did not perform an award between him and the plaintiff; the defendant pleaded a bad plea, to which there was a demurrer: and then Saunders, for the defendant, objected, that the plaintiff had not laid any request of the penalty of 40*l.* "For the declaration is, that the defendant promised to pay upon request, if "he did not perform the award; and the request is material, for "he took a difference between a mere duty and a collateral sum. "For where a mere duty is promised to be paid upon request, "as if, in consideration of all monies lent to the defendant, he "promised to pay them again upon request, no actual request is "necessary, but the bringing of the action is a sufficient request; "but otherwise it is upon a promise to pay a collateral sum upon "request; for there an actual request ought to be made before "the action brought. Now here the promise of payment of 40*l.* "upon request is collateral, and is a penalty, and not a precedent "duty, and therefore there ought to have been a request before "the action brought;" and of that opinion was the whole Court, and judgment was given for the defendant. There are many other cases † to the same effect, but the principle is so well established that it is unnecessary to cite them. Another rule upon the subject of demands I take to be this: that the fixing a special time and place for payment will not make an actual demand at that time and place necessary, as part of the plaintiff's title in a case, in which, otherwise, the demand would not be necessary; but that in that case also a tender or readiness to pay at the time and place is matter of defence, and of defence

* 1 Saund. 33. a.

† See 1 Wms.'s Saund. 33. a. note 2.

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only. An award directs money to be paid at a given time and place. In an action on such award, does the declaration allege any demand at that time or place? certainly not. Upon an application *inde* for an attachment, is not the attachment constantly granted, though personal demand was not made at the time or place; and though attendance at the time or place is not stated? In *assumpsit* on the award the declaration would be, that the defendant promised to perform the award, and that the award directed payment at a given time and place: in substance, therefore, (incorporating the promise and the award together,) it is a promise to pay what is properly a debt of the defendant's at a given time and place; and yet the declaration never states either attendance by the plaintiff at the place, or a demand by the plaintiff at the place: the utmost which it states is, that the defendant did not pay at the time or place, or at any other time or place. To debt on bond, the defendant, after oyer of the condition of the bond, which was the performance of an award, pleaded no award made. The plaintiff replied an award made directing the defendant to pay the plaintiff 66*l.* at his house at Seven Oaks, on the 22d October, between the hours of ten and twelve; but that the defendant did not pay the 66*l.* which he ought to have paid on that day, according to the form and effect of the award *. There are three precedents to this effect in Mr. Caldwell's book upon Awards †, the first in assumpsit, the other two in debt: and there are many similar precedents in other books. The first stated, that an action had been brought to recover a balance of account; that the cause was referred; that each party undertook to the other to perform the award: and that the award was, that the defendants should pay *l.* being the balance of account due from the defendants, at the office of *L.* and *M.*, situated in, &c. between ten and twelve A. M. on, &c. Whereof defendants had notice; yet they did not pay the plaintiffs the said sum, or any part thereof, on, &c. at the said office of *L.* and *M.*, or elsewhere, or at any other time whatever; although defendants afterwards, *viz.* on, &c. at, &c. were required by plaintiffs so to pay the same. The second stated, that differences had arisen, and were referred; that the arbitrator

* Lutw. 558.

† pp. 318. 322, 323.

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awarded; that on a balance of all accounts between the parties, there was due and owing from defendant to plaintiff 61 *l.* 10 *s.* which he directed to be paid on the 10th of June, between eleven and one, at the house of one *G. H.* plaintiff's attorney, whereof defendant had notice; yet defendant did not pay the same, or any part thereof, at the time and place appointed for the payment thereof as aforesaid; nor hath he since paid the same, but hath wholly failed, and made default, whereby an action hath accrued, &c.—Now, upon what principle do these declarations omit to state attendance at the place, or demand at the place? Clearly upon this, that the money awarded to be paid became a debt from the defendant; that he was under a general obligation to pay, and not confined to time or place; and that, therefore, attendance at time and place was not part of the plaintiff's title; but readiness to pay at time and place was matter only of defence. Mr. Caldwell, indeed *, lays it down, that where the money is to be paid at a certain time and place, the plaintiff must aver that he attended there at the time appointed, and remained until the period within which payment was to be made; but this position is evidently founded on a mistaken notion of the case of *Phillips* v. *Knightly* †: there, according to Fitzgibbon, the plaintiff was, upon receiving the money, to give the defendant a covenant of indemnity; there were, therefore, to be two concurrent acts; *viz.* the payment of the money, and giving of the covenant; and the plaintiff could not sue for money without showing a readiness on his part to give the covenant, which he had not done. This case, therefore, is not at variance with the established precedents, and I have only noticed it, that a mistake in a useful book may be corrected. Another class of cases which I will mention, are cases of rents. Rent is reserved in some cases generally, and then the proper place for the payment, the place appointed by law, is the land out of which it issues. In some cases it is expressly made payable at some other place: and yet, in either case, is there a precedent either in debt on the *reddendum*, or in covenant, of an averment that the plaintiff was at the time and place to demand it? The declaration in such cases is always general, that on such a day so much of the said rent became due and in

* p. 194.

† Fitzg. 53. 1 Barnard. 84.

arrear, and that defendant, although often requested, had not paid. So, in covenant upon a mortgage deed to pay the mortgage-money on a given day, in Lincoln's-Inn Hall, or in any other place; or in debt upon a single bill to pay money for a past consideration, at a given place, the declaration never alleges attendance or demand by the plaintiff, but merely alleges non-payment by the defendant. Now, what can be the principle of all these cases? What but this, that the money to be paid is a debt from the defendant; that it is due generally and universally; that it will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive; that it is matter of defence on the part of the defendant to show that he was in attendance to pay, but that the plaintiff was not in readiness to receive; and that defence will, generally speaking, be in bar of damages only, not in bar of the debt, and must be accompanied with a bringing of the debt into court. The instances in which this is made matter of defence will throw light upon the point. Most of those instances occur in demands for rent; but no distinction in principle can be drawn between cases of rent, and cases of other debts. I will mention some of these cases.—Lease for years, rendering 10*l.** yearly at Easter, and for performing of covenants, each bound in 20*l.* Non-payment of rent at Easter, and therefore the 20*l.* claimed. Plea, ready to pay at the day on the land, and no one attended to receive; and the plea was held good. In *Kidwelly* v. *Brand*†, rent of land at Lomer was reserved, payable at Hide: and the question was, whether the landlord could re-enter for non-payment of rent without demand; it was adjudged (though there are cases since to the contrary) that he might: the reason given is, that the rent being made payable at a place off the land, it lost its character of rent, and became like a sum in gross, and then it was the tenant's duty to offer it, not the landlord's to demand; "Lessee ought to offer it for his own indemnity, as the obligor ought upon an obligation, or as the grantor of an annuity ought to offer the annuity at the day, to excuse himself of damages." *Buskin* v. *Edwards*‡ corrects that case, by showing, that a

* 22 H. 6. 57. Pl. 7.

† Plowd. 69. Dyer, 68. a.

‡ Cro. El. 415. 535.

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payment due from a tenant still remained a rent, though made payable at the Royal Exchange in London. The propriety of what is said in Plowden, in case it had been a sum in gross, is not questioned. The inference, then, to be fairly drawn from the case in Plowden, corrected as it is by the case in Croke Elizabeth, is this, that if a sum in gross be made payable at a certain time and place, and the sum is properly a debt from the person who is to pay it, it is his duty to attend at the time and place, and offer it; but it is not the duty of the person who is to receive it to demand it; and yet the offer is essential to protect him, not against payment of the sum itself, (which, as being due, ought to be paid) but against damages.

In Brooke's Abridgment * is this position:—"In debt for rent, tender on the land and refusal of plaintiff is no plea, for he shall answer to the *debet*; but the contrary in avowry; for there is to be a return, and there ought not to have been distress if tender was made." Now what is the meaning of this passage? evidently this, that in debt it is no plea in bar of the action; it is a bar of damages only, not of the debt: and, therefore, he must answer to the *debet* by bringing the money into the court upon the tender, which in the case of a plea in bar to an avowry he need not do. *Brownlow* v. *Hewley* † is an authority to show that, upon a plea of tender on the land at the day in an action of debt, the rent must be brought into court; and *Horne* v. *Lewin* ‡ to show, that upon a plea in bar to an avowry it need not be brought into court. In *Osborn* v. *Beversham* §, in debt for rent, the plea was readiness at time and place, and ever since, and profert of the money. To this plea there was a demurrer, grounded on two objections. 1st, *Non obtulit*, for when time and place are certain, *semper paratus* without an *obtulit* is no plea. 2d, It is pleaded in bar generally; it should have been in bar of damages only; and the Court thought both objections good. *Levinz* makes a query on the first ground, because the rent is demandable, (*i. e.* Plaintiff should have demanded it,) "otherwise," says he, "of a sum in gross, which is payable without demand." In *Crouch* v. *Fastolfe* ‖ cited yesterday, by my brother Richardson, to debt

* Dette, pl. 216.

† 1 Lord Raym. 82.

‡ Id. 639. Salk. 583.

§ 1 Vent. 322. 3 Keb. 800. 2 Lev. 209.

‖ S. T. Raym. 418.

for rent, there was a plea of attendance at the day and place; that the defendant was ready to pay; and that no one came to receive. To this plea there was a demurrer, because tender was not alleged; but it was resolved to be well enough, and adjudged for the defendant. A precedent of such a plea is in Thompson's Entries*; however, in *Horne* v. *Lewin*† a *paratus* without an *obtulit* was held insufficient. It is immaterial to the point which I am considering, whether there ought to be a tender or not, and quite sufficient for my view of the subject, if with a tender it would be a bar of damages. Now what are the legal conclusions which I draw, and the legal positions which I consider as resulting from the authorities with which I have troubled your Lordships? They are these, that, if a man, in respect of any debt which he owes, engage to pay it upon demand, or engage to pay at a given time and place, it is not a necessary part of the plaintiff's title to make such demand, or attend at such time and place; that he is not bound in his declaration to state any such demand or attendance; that a neglect to demand or attend will not bar his right to the debt, and enable the defendant to keep it; but that the defendant may show readiness on his part to exonerate himself from any damages.

I now come to apply these principles to bills of exchange. The acceptor is, by the law and custom of merchants, considered as the principal debtor; the drawer and indorser as sureties only, liable on his default, and not otherwise. His engagement is general, that he will pay; that of the drawer and indorsers is conditional, namely, that if due diligence be used, they will pay, if the acceptor does not. The engagement of the acceptor is, either that he has effects in hand, or that he is secure of having them by the time the bill becomes due. In the language of the Lord Chief Justice Eyre, "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports that the acceptor is a debtor to the drawer, or at least has effects of the drawer's in his hands." The acceptor, therefore, has, or ought to have, in his hands, or under his control, the fund by which payment ought to be

* Lib. Placit. 150. † Lord Raym. 644.

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made; and it is his duty so to apply it. The drawer or indorsers have no control over the fund, and consequently no duty with respect to it. This difference of situation and character between the drawer and indorsers and acceptors, has produced a settled distinction in the manner of suing them. The action against drawer and indorser invariably shows that due diligence has been used; the action against the acceptor invariably omits it. In an action against the drawer and indorsers the declaration invariably avers presentment of the bill, its dishonour, and notice thereof to the defendant. In an action against the acceptor no such averments are made. Every bill is to be properly presented for payment; and in an action thereon against the drawer or indorser, a presentment according to the usage and custom of merchant must be averred and proved. In an action thereon against the acceptor, presentment (generally speaking) need not be averred or proved. This is clear, settled, undisputed law. Not that in practice such presentment is likely to be omitted: the risk of losing the responsibility of the drawer and indorsers generally secures it: but if there were to be an omission, that is no reason why the acceptor, who has, or ought to have, funds to discharge it, should keep those funds to himself, or should refuse so to apply them.

If a bill be addressed to *A.* in Bedford-square, and he accept it generally, in an action against the drawer or indorser presentment must be alleged and proved: in an action against *A.* presentment need not be alleged or proved. If *A.* have changed his residence, and accepted it payable at his new abode, does this make any difference?—presentment need not be averred in the one case—need it be averred in the other? If the necessity exist, there must be some reason for it. What is that reason? Though I am putting the case where the bill is still payable at the party's own house, and this is the case where the biil is made payable at a banker's, does this make any difference; does it vary the character or situation of the acceptor, so as to put him in the situation of a surety only instead of a principal, and if due diligence be not used, exonerate him from all liability, and enable him to keep the money to himself? The form of the acceptance in this case is material. The declaration states it thus: "Which bill of ex-

change, he the said Joshua accepted, according to the said usage and custom of merchants, payable at Sir John Perring & Co.'s, bankers, London; that is to say, at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring & Co,. bankers, London." By whom the bill is to be paid at Sir John Perring & Co.'s, whether by the defendant, or by Sir John Perring & Co., the acceptance does not state; whether Sir John Perring & Co. were bankers for the defendant is not stated. In the first place, it is not in a form to require Sir John Perring & Co. to pledge their credit for the payment of the bill; it is at most only an authority to them to pay; and, unless Sir John Perring & Co. choose to make themselves responsible, they can never be sued for the money. Why it is to be paid there; whether, because Sir John Perring & Co. were the defendant's bankers, or because he was an inmate or member of that house, is not stated. I will take it, however, for granted, for the sake of argument, that it is made payable there, because Sir John Perring & Co. were the defendant's bankers. Sir John Perring & Co. then, are to be agents for the defendants in this transaction. Will making the bill payable at an agent's change the situation of the acceptor, and make it incumbent on the holder, in an action against the acceptor, to aver and prove presentment at such agent's, when they would not be bound to aver or prove presentment at the acceptors? That such presentment will generally be made there can be no doubt, because, otherwise, the security of the drawer and indorsers will be lost; but though presentment is in fact made, there may be cases in which the party may fail in proving it. The party presenting the bill may remove out of the reach of the holder, or may die. Is it right, or is it law, that because the holder fails in that link of evidence he is to lose his debt? Before the necessity of such averment is established I wish to draw your Lordships attention to the consequence. If the effect of such an acceptance be to make this averment and proof essential, it follows, that the holder has a right to object to this burthen, and reject the acceptance. Right to reject is admitted in *Bishop* v. *Chitty*, *Callaghan* v. *Aylett*, and in *Gammon* v. *Schmoll* *. Will this

* Per Chambre and Dallas, Js.

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produce no confusion in the course of trade, when this mode of acceptance prevails to such an extent as it does? The bill is generally left for acceptance at the house of the drawee by a clerk, and called for on the next morning. Suppose a party leaves a bill drawn on the drawee generally, at the house of the drawee, and that on calling for it he finds it accepted, payable at a banker's; if this mode of acceptance cast an additional burthen on him, he may take away the bill, strike out the acceptance, treat it as dishonoured, protest it, if it be a foreign bill, and at once commence actions upon it against all the parties. It may be said that this has never yet been done, and that the apprehension is chimerical. But why has it not been done? Because it has been, for a series of years, the rooted understanding in commerce, that an acceptance at a banker's throws no additional burthen upon the holder; but that it is merely an intimation that there the acceptor would be ready to pay it: once establish, that such an acceptance is conditional, and that the burthen of proving presentment at the banker's is thrown on the holder, and from that moment every such acceptance must be rejected. What will the drawer and indorser say? They will say, "If you take such an acceptance you do it at your peril; and we are discharged." The acceptor has no right by the acceptance which he takes to cast a burthen upon them. They are entitled to expect that if any acceptance is taken, it shall be such an acceptance as does not make such additional averment and proof essential. Taking such an acceptance, then, if it has the effect contended for, would discharge them, unless they had immediate notice of such acceptance, and assented thereto. It may be said, that notice then may be given to them; but will your Lordships come to a decision which imposes on the holder the necessity of giving notice to all the parties to the bill? If I were to state, that there are daily in London one hundred such acceptances given, I should speak far within the truth. If these acceptances be conditional, notice ought to be daily sent by the post to the drawer and indorsers of each bill, not that the bill is dishonoured, but that it is accepted payable at a banker's. The fact that no such notice is given, notwithstanding the prevalence of such acceptances, and the perfect acquiescence therein, shows stronger even than positive authorities what

has been the understanding, usage, and castom of the mercantile world concerning them; and, bills of exchange being mercantile instruments in daily occurrence, if they have received a mercantile construction, the construction put on them by the mercantile world ought to be their construction in a court of law.

I have troubled your Lordships so much at length on the principles which, in my view, govern this case, that I shall address the house but shortly on the decisions. The point came first before the Court (as far as we can learn from printed reports) in *Smith* v. *De la Fontaine:* that case was tried before Lord Mansfield, in 1785, and from that time to the year 1806 the question does not appear to have been agitated. Then came *Callaghan* v. *Aylett*, in 1811, in which the decision was adverse to that of *Smith* v. *De la Fontaine*. The case of *Callaghan* v. *Aylett* was in the same year followed by that of *Fenton* v. *Goundry*; and I will only excuse the Court of King's Bench for coming to a decision on that case, (adverse as it was to the decision in *Callaghan* v. *Aylett*) at the moment, because Lord Ellenborough (and that learned person, while at the bar, had most extensive experience in cases of bills of exchange) laid the foundation of his judgment in *Fenton* v. *Goundry* on the invariable usage, to which he adverted in energetic language: on that ground only the Court of King's Bench did not take time to consider in that case.

The case of *Fenton* v. *Goundry* was followed by that of *Gammon* v. *Schmoll*, which I will only notice on account of the case of inconvenience there put by Chambre, J., and to the case put by him I will add one or two other supposed cases. A bill is brought to me for acceptance just as I am setting off for the circuit; I tell the holder that I am going to be absent from town, and that I can only accept the bill payable at my bankers: he refuses this acceptance, on the ground that it will give him additional trouble and inconvenience; and the bill is consequently dishonoured. Suppose the case of a bill drawn in the West Indies, on a merchant in England, who accepts it payable at a banker's: the merchant finding the bill not debited to him, supposes there may have been some neglect on the part of the holder, but finds the bill protested for non-acceptance; that the person who presented it for accept-

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ance was a notary; that the acceptance has been struck out, and the bill returned to the drawer in the West Indies; and that the holder has recovered 20 per cent., or whatever difference may have been occasioned by the existing rate of exchange beyond the nominal amount of the bill.

Many of the principles now insisted on may seem at variance, I admit, with the decision in *Sanderson* v. *Bowes*, and the other cases on promissory notes. I could distinguish those cases from *Fenton* v. *Goundry*; for in the latter case, the acceptance payable at the place was no part of the original conformation of the bill itself; but, in the former cases, the words restrictive of the payment were incorporated in the original form of the instrument. But I do not wish to answer those cases on these grounds; for I am free to confess that I doubt the propriety of those decisions, although I was myself a party to them; and I think it more manly to say, that I consider my opinions in those cases erroneously formed, than to attempt to distinguish those cases from *Fenton* v. *Goundry*, by the use of nice and subtle differences. I hope, therefore, that the case of *Sanderson* v. *Bowes* will not be followed as a precedent; for, as far as I can judge, the principles for which I have been contending apply to promissory notes as well as bills of exchange. The case of *Bishop* v. *Chitty* *, proceeded partly, and I think, principally, on the ground that there was actual *laches* on the part of the holder, and *laches* which prejudiced the acceptor. In that case, the acceptance was, "Messrs. Caswell and Mount, pay this bill when due, for Thomas Chitty;" it was, therefore, in a form entitling the holder to call upon Caswell and Mount to pledge their responsibility for the payment of the bill. In the case before the Court the holder has no right to call upon Sir John Perring & Co. to pledge their responsibility for payment; nor can they be sued if they refuse to pay it: there is no privity between them and the holder: this principle is established in the case of *Williams* v. *Everett* †. In *Bishop* v. *Chitty*, the bill fell due on the 2d of January, and Caswell and Mount paid till the 19th of that month, and the bill was not presented till the 21st: Lee, C. J. held, that it was the loss of the plaintiff; for this acceptance was in the nature of a draft,

* Str. 1195. † 14 East, 582.

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which is always considered as actual payment, when a reasonable time to receive it is elapsed. The form, therefore, of the acceptance in that case, which was in the nature of a draft on Caswell and Mount, and the neglect of the holder to call to receive it, distinguish it from the case before the Court. In *Sebag* v. *Abitbol* *, a bill was accepted, payable three months after date, at a banker's in London: the bill, by reason of its being mislaid, was not presented for payment, but the acceptor was some months afterwards informed of its being mislaid, and it was held he was not discharged; and the drawer was allowed to set it off in an action brought against him by the acceptor, although the banker, at whose house the bill was payable, had failed about four months after such information was given, and though the acceptor had at all times, up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. For these reasons, considering that the money payable by a bill becomes by the acceptance the debt of the acceptor; that he is looked upon as the immediate debtor; that, by making his acceptance payable at his banker's, without putting it in a form to pledge his banker's liability, he only specifies a place, where he by himself, or his agent, will be ready to pay; considering, that he may have no funds in his banker's hands, or has full power to withdraw them; that much trouble and inconvenience, and confusion, may result from holding that this is a conditional and restrictive acceptance; and, that every inconvenience will be sufficiently obviated by holding, that neglect by the holder will be matter of defence to the extent to which such neglect causes loss, I submit in answer to the first question, that, as against the acceptor, the holder of this bill was not bound to present it at Sir John Perring's for payment, nor to aver such presentment in his declaration.

2d Question.

On the second question proposed for the consideration of the Judges, I shall content myself with saying, that, for the reasons which I have already stated, I am of opinion, that, as against the acceptor, such acceptance is a general acceptance, with an engagement or direction that payment may be obtained at the banking-house, with this addition only, that, if the ac-

* 4 M. & S. 464.

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ceptor should be able to prove, that by any neglect in the holder in not duly presenting, he had sustained any loss, he should be relieved to the extent of such loss.

Bayley, J. 3d Question.

In answer to the third question, I submit, that a distinction is to be taken between an acceptance qualified as to time, and an acceptance qualified as to place. If *C.* take from *B.* an acceptance qualified as to time, giving *B.* a longer time for payment of the bill than the bill itself specifies, I consider it as quite clear that *C.* could not sue *A.* upon the bill. The holder of a bill has no right to give the drawer time. If he do, he does it at his peril. *English* v. *Darley* * establishes, that indulgence to the acceptor *after the bill is dishonoured*, discharges the drawer and indorsers; and there are many other cases to the same effect: if so, indulgence to him before the bill is due must have the same effect. An acceptance qualified as to place, will, or will not, take away from *C.* the right to maintain an action against *A.* upon the bill, according as such acceptance does, or does not, throw upon *A.* an additional burthen, or cast upon him any prejudice. If the bill be payable at a place where the drawee lives, his house is *primâ facie* the place at which it is to be paid, but the usage of merchants warrants the drawer in naming any other house *at the same place* for payment. If the drawee has no house at the place where the bill is made payable, the holder has a right to require from him an acceptance specifying some house in particular in that place, for its presentment. This doctrine is laid down by *Holt*, C. J. in the case cited by my brother *Holroyd* †. But, if naming a particular house casts upon the drawer any new burthen or prejudice, the holder, by allowing such house to be named, has done, as to him, what he was not warranted in doing, and the drawer is discharged. The question then is, Does the qualification as to place cast on the holder a new burthen or prejudice? and, if it oblige him to prove at his peril, in an action against the acceptor, what upon a general acceptance he would not be bound to prove, it does cast upon him a new burthen.

4th Question.

In answer to the fourth question, I am of opinion, that *C.* would not be at liberty to maintain an action against *A.* on his

* 2 B. & P. 61.

† Lord Raym. 575.

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original debt, without delivering to *A.* the bill so aceepted; because *A.* has, by the bill offered to *C.* a credit upon *B.* and *C.* has consented to that credit; and *C.* has no right to double payment from *A.* and *B.* *Kearslake* v. *Morgan* * is an authority in point, to show, that if a debtor pay his creditor by a note or bill, which the creditor takes on account of his debt, such taking of a bill will be an answer to an action brought by the creditor against his debtor for that debt, unless the creditor gives up such bill.

Bayley, J. 4th Question.

Wood, B. In answer to the first question, I am of opinion, that the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, "payable at Sir John Perring and Co. bankers, London," that is to say, at the house of certain persons using in trade and commerce the name, style, and firm of Sir John Perring and Co. bankers London, the holder was bound to present it at that house for payment, and to aver in his declaration that the same was presented at that house for payment.

Wood, B. 1st Question.

It is clear, that the drawee of a bill of exchange, if he choose to accept it, may do it generally, or may make a special or qualified acceptance. The holder may refuse to take a special or qualified acceptance; but, if he do take it, he is bound by it, as that constitutes the contract between him and the acceptor. There are many cases which might be cited to prove this position, but I will only trouble your Lordships with one. In *Petit* v. *Benson* †, a bill was drawn upon the defendant, who accepted it by indorsement, in this manner, "I do accept this bill, to be paid half in money and half in bills;" and the question was, whether there could be a qualification of an acceptance, for it was alleged that his writing upon the bill was sufficient to charge him with the whole sum: so that the question here must have been, whether the words "to be paid half in money and half in bills" would not be rejected, and the acceptance stand as a general acceptance? "But 'twas proved by divers merchants, that the custom among them was quite otherwise; and that *there might be* a qualification of an acceptance; for he that may refuse the bill totally, may accept it in part.

* 5 T. R. 513.

† Comb. 452.

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But he to whom the bill is due may refuse such acceptance, and protest it, so as to charge the first drawer; and, though there be an acceptance, yet, after that, he hath the same liberty of charging the first drawer as he before had:" that is, although there be an acceptance written, if he refuses to take it, he may strike it out and charge the first drawer. It is observable that the case says, the custom was proved by several merchants: at that time, it was usual to set out the custom of merchants in the declaration, and to prove it by witnesses, which accounts for the words "'twas proved by divers mercaants;" but it was afterwards, in the same reign *, held, that the court was bound to take judicial notice of the law-merchant; and, therefore, it is not usual now to set out the custom, but to allege that, according to the custom of merchants, such an one drew a bill, and such an one, according to the custom of merchants, accepted, &c.

* W. 3.

As there may be a qualified acceptance, is the acceptance in question a qualified acceptance? What makes a qualified acceptance? Why, the words used by the party in his acceptance. Do the words "payable at Sir John Perring and Co's bankers, London," mean nothing? Are they mere surplusage? If so, then this bill ought to have been presented for payment at Torpoint. To make such constructions would, I conceive, be contrary to the usage of merchants, and the plain sense and meaning of words. Acceptance imports a promise; and the acceptance in question is a promise to pay at a particular place, that is to say, at a banker's in London. An acceptance is an *actual promise* to pay, [per Curiam, in *Mitford* v. *Walcot* †.] There are two conflicting decisions of the Courts of King's Bench and Common Bench upon the point in question, *viz.* the case of *Fenton* v. *Goundry*, in K. B. and the case of *Gammon* v. *Schmoll*, determined by the Court of C. B. On those cases I will not trouble your Lordships with my comments: but I must observe, that there is a very material case of *Sanderson* v. *Bowes*, which, though my brother Bayley does not seem *now* to think so, I hold to be good law. In that case, a promissory note was made payable at a banking-house, and the Court held presentment at the banking-house

† 12 Mod. 410.

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a condition precedent to the maintenance of the action. I cannot distinguish the case in question, in principle, from this of *Sanderson* v. *Bowes*, where the defendant *promised to pay at the banking-house* at *Workington*, to one R. Nelson, or bearer. The Court of King's Bench on demurrer, held, *that it was necessary to present* the note for payment at the banking-house at Workington, which seems to me to be contrary to the former decision of that court in the case of *Fenton* v. *Goundry*, which was the case of a bill of exchange accepted payable at a particular banker's (like the acceptance in this case). The distinction which the Court of K. B. took, was, that the acceptance was no part of the original conformation of the bill itself, but that the words in the note, (in *Sanderson* v. *Bowes*) restrictive of payment at the place named, were incorporated *in the original form of the instrument* which alone created the contract and duty of the party. Try this case by that principle; what alone creates the contract and duty of the acceptor? Why his acceptance. There is no antecedent debt due from the acceptor to the holder. What is incorporated in the original form of the acceptance? The place of payment. It is true, that acceptance is a subsequent act to the first conformation of the bill: it is a subsequent contract between the acceptor and holder; but, it is the only contract which there is *between* them. It is, in point of law, a promise of the acceptor to pay the bill at a specific place. The declaration states, and incorporates in the acceptance as there stated, the very words "payable at Sir John Perring and Co's, bankers," and the promise alleged is to pay according to his said acceptance. The plaintiff by his declaration does not reject these words as surplusage, but considers them as forming part of the acceptance. Suppose, instead of a note, a bill had been drawn on Bowes and Co. and they had accepted it payable at their banking-house at *Workington*, and subscribed the acceptance, can it be contended, that, in one case, the holder is bound to present at the place, and, in the other, not? I say, therefore, as was said in *Sanderson* v. *Bowes*, that a demand by the holder of payment of the bill at the specific place was a condition precedent, in order to give himself a title to receive the money.

As to the second branch of the first question, viz. Whether the plaintiff is bound to aver in the declaration, that the bill was

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presented at the house of Perring & Co. for payment? I take it to be a condition precedent that it should be presented for payment at the appointed place; and, if so, without doubt, the plaintiff cannot maintain his action without averring performance of that condition precedent, and so the court of King's Bench held in *Sanderson* v. *Bowes*. It is not necessary, as between the holder and acceptor, that the holder should aver presentment on the day when the bill becomes due; because the acceptor is liable at all times afterwards, whenever it shall be presented at the appointed place. His liability is not confined to any day; his liability is to pay any time after the bill becomes due, if presented at the appointed place. The presentment on a particular day can only be material to charge the drawer. It has been argued, that presentment need not be averred, but, that it is matter of defence. I think, that it may be matter of defence although not averred; and that, at the trial, the plaintiff ought to be called on to prove it; otherwise, after verdict, it might be presumed that it had been proved to be presented according to the acceptance. If a bill directs the payment at a certain place, it ought to be paid there without other demand than at the place, though the acceptor lives at a place remote *. The place where a bill is to be paid is so important, that, if it be directed to a person generally, and he will not accept it to be paid at a certain place, the holder may protest it. If a bill be accepted at Amsterdam, and no house named where the payment is to be, the party need not to acquiesce in it, but may protest the bill; but, if he will acquiesce, it is well enough †. Then, according to the doctrine contended for, although the law requires a place of payment to be named, yet, when it is named, you are not obliged to resort to it for payment. The mischief to the commercial world, and to all who have any concern with bills, would be very great, if the holder were not bound to present for payment at the appointed place; but, on the contrary, might, at once, without any presentment, bring an action against the acceptor. The acceptor would have no means of avoiding an action (and, perhaps, an arrest); for his acceptance may have been in circulation, and may be in the hands of persons

* Com. Dig. tit. Merchant, 200. † 12 Mod. 410. *Mitford* v. *Walcot*.

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of whom he knows nothing: so that he cannot tell to whom to send or tender his money, or how he is to get discharged; and the first notice which he has of who the holder is may be by an action. Common sense and common justice, and the convenience of mankind, all concur in telling one, that a man, who has agreed to take an acceptance payable at a specified place, should be bound to have recourse to that place for payment before he can sue the acceptor. It has been argued, that the defendant should not have demurred, but should have pleaded that he was ready to pay at the appointed place, but nobody came to receive payment. That, I conceive, was not necessary; because the first act to be done (which is a condition precedent) is the presentment of the bill for payment at the appointed place; and the plaintiff must show that to maintain his action; and so was the determination in *Sanderson* v. *Bowes*. But, considering the presentment and payment to be concurrent acts, the party who brings the action (not he who defends it) must show that he has done what is necessary on his part to maintain that action, namely, that he has been ready with his bill to present, and thereon to receive payment at the appointed place. In answer to the arguments raised from forms of pleading, I say, that the defendant may avail himself of this objection in different shapes; 1st, as in this case, by demurrer; 2dly, he may plead the general issue, and, for want of proof of presentment, apply for a nonsuit; or, 3dly, he may plead specially, that he was ready at the appointed place to pay, and that no presentment was made, or, generally, that the bill was never presented at the appointed place. It has been argued, that presentment for payment need not be averred, and that it never is averred in a declaration against the acceptor; and I agree, that, where the acceptance is general, it is so; and the reason is this, because the acceptor is always liable; his acceptance operates as a promise to pay, not only at the time when the bill is due, but at all times afterwards when requested, or on demand; and the bringing the action is in law a request or demand. But, where place is of the essence of the contract, as in the case in question, though it be not necessary, to aver presentment at the day, it is necessary to aver presentment at the place on some day before bringing the action. One who is indebted promiseth

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to pay it upon request: in an action upon the case upon that promise, the party needs not to express the assumpsit with the request, it *being an old debt*; but otherwise it is, where there is such a promise *without any duty precedent* *. In debt or detinue, the very bringing of the action and demand of the writ is a demand and request †. Acceptance after the time of payment elapsed, and a promise then to pay according to the tenor of the bill, is good, and amounts to a promise to pay the money generally ‡. Arguments have been drawn from forms of pleading in actions on bonds or obligations and other actions in debt, and it is contended that it lies on the defendant to plead either a tender, or that he was ready to pay and bring the money into court. These rules are not applicable to this case: this is not an action of debt or *indebitatus assumpsit* on an antecedent debt. It is well established, that an action of debt will not lie on the acceptance of a bill of exchange; it is an action on the custom of merchants for damages only, without any antecedent debt. As to debt on bonds or obligations, they create an immediate debt, and the defendant must show that he has done all that was necessary on his part to perform the condition, and that it was the fault of the obligee that it was not completed. But, when the plaintiff brings an action for a demand dependent on a condition precedent on his part to be performed, there he must aver performance to maintain the action, as in *Sanderson* v. *Bowes*.

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2d Question. In answer to the second question, I am of opinion, that this bill having been so accepted as aforesaid, such acceptance is, in law, to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring & Co. bankers, *only*; and, that it is *not* a general acceptance to pay the same with an additional engagement or direction for the payment thereof at that house, for the following reasons: It is the custom of merchants and opulent persons to keep their monies at bankers, and to accept bills to be paid at their bankers, that they may not be under the necessity of keeping money at their own houses, or intrusting money to their servants in their absence to take up acceptances, or of carrying money about

* 4 Leon. 2. Pulmant's ease.

† Per Jones, J. Godb. 403. *Hern* and *Stub's* case.

‡ 1 Salk. 129 *Mitford* v. *Wallicot*.

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their persons to answer such acceptances, if demands should be made upon them personally. Such special acceptances are conveniences to both holder and acceptor. But this object, so far as respects the acceptor, would be totally frustrated, if, at the election of the holder, he, the holder, could reject the appointment of the place of payment in the acceptance as mere surplusage, and demand payment wherever he pleased. What authority is there either in law or common sense to say, that a promise (and an acceptance is a promise) to pay at a particular appointed place by name, is to be expanded (for that I think is the phrase) into a promise to pay in every corner of the kingdom where the acceptor may happen to be, as well as at the particular appointed place. The acceptor is under no previous obligation to pay; he owes no debt to the holder prior to his acceptance; his acceptance is the only thing which constitutes the compact between him and the holder. The expression of one particular place, according to a well-known maxim, is the exclusion of any other. There is no law or custom of merchants to justify such an *expansion*, or rather, I should say, *expulsion* of mens words and meanings. I remember cases of this sort. A person has given a promissory note payable at a particular time, and has *signed* it; and, after he has signed it so that he has *completed* the instrument, he has put upon the side or bottom of the note a memorandum of a particular place where it will be paid. In such a case the particular place is no part of the note, and does not control its general operation: it is no variance in a declaration to omit such a memorandum: it may, perhaps, amount to evidence of an additional engagement that it shall be paid at that place. But, here, the acceptance is only one single continued sentence, at the end of which, probably, stands the signature of the acceptor.

3d Question.

In answer to the third question, I am of opinion, that, if *A.* draw a bill on *B.* in favour of *C.* for 100*l.* and *C.* without the previous authority or subsequent assent of *A.* take an acceptance of the bill for the whole of the 100*l.* but an acceptance qualified as to the time or place of payment, *C.* could, notwithstanding such acceptance, maintain an action upon the bill against *A.* unless the qualification as to time or place produces a damage or injury to *A.* for the following reasons: If the

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holder, without such previous authority or subsequent assent of *A.* the drawer, enlarge the time of payment by the acceptor, that may injure the drawer and operate to discharge him: or, if he take an acceptance payable at a distant place, so that, if the bill be dishonoured, notice cannot be given to the drawer so soon as it might if the acceptance had been general, that may injure the drawer and discharge him as for want of due notice. But, in the case of a bill drawn on a person in *London*, and accepted payable at a banker's in *London*, I should think such special acceptance would not operate to discharge the drawer, if due notice was given to the drawer of the non-payment, because in such a case the special acceptance does the drawer no injury.

4th Question. In answer to the fourth question proposed by your Lordships, I am of opinion, that if *A.* were debtor to *C.* in 100*l.* previous to his so drawing upon *B.* in favour of *C.* to the amount of 100*l.* *C.* could not, upon *A.*'s refusing his assent to an acceptance, qualified as mentioned in the above question, maintain an action upon the original debt against *A.* without delivering to *A.* the bill so accepted; in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100*l.* Lest I should have mistaken this question, I will take the liberty of offering some reasons or explanations. If *C.* take the draft of *A.* upon *B.*, for a debt due from *A.* to *C.*, *C.* is bound to use his endeavour to get it accepted and paid; and, if it be not honoured, is bound to return it to *A.* in due time, and to deliver it up to *A.*, and, that being done, it is the same, then, as if no bill or draft had been given; and *C.* may then maintain his action against *A.* for his original debt. If the bill have been left for acceptance, and *B.* have written a qualified acceptance upon it, which *C.* does not choose to take, he should inform *B.* that he will not take an acceptance so qualified, and require a general acceptance; and if that be refused he should strike out what was written, and return the bill to *A.* as an unaccepted bill, in which case *C.* may resort to his original debt against *A.* If *C.* without *A.*'s previous authority or subsequent assent, accepts and assents to *B.*'s acceptance, so qualified as to time or place as materially to alter the condition of the drawer, in that case he can only resort to *B.*; the acceptor, according to the terms of his acceptance, and *A.* will be dis-

charged from his debt to *C.*, for which he gave the bill; and *B.* will be discharged, as against *A.* from his original debt, for which he gave his acceptance, and can only be sued on his special acceptance.

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GRAHAM, B. The general question is, whether the words of this acceptance form a condition precedent, and constitute a qualified acceptance, or a general acceptance with an additional engagement or direction for payment at the house mentioned. If these words do constitute a condition precedent, it was necessary before action brought to demand payment at the place mentioned, and to aver in the declaration that the plaintiff had so done. When a man accepts a bill, it is the most solemn, because it is the most public recognition of the drawer's right to demand the amount of it from him. The acceptance is an obligation to pay all over the world, and the question is whether, generally speaking, in the intention of the acceptor and the understanding of the holder, the words "payable at Sir *J. Perring* and Co's," contract this general obligation to an engagement that the acceptor will pay the drawer there, and no where else, (as some seem to think), or, at least, not till it be proved that a demand was made there in vain. In my apprehension such an acceptance is no qualification of the general liability of the acceptor. It is a substitution of the banker's for the person and abode of the acceptor, for mutual convenience; and means only to charge the drawer and indorser *in transitu*, that the holder, instead of calling upon the acceptor, should make his demand at the banker's. No demand is necessary against the acceptor; he is liable without demand; but, to charge the drawer, you must prove a demand on the acceptor, or on the person whom he has identified with himself for that purpose. The question, then, will be, does a man mean to impose a condition, or to suggest, for mutual convenience, a place, where, with least trouble to both, the money may be had? But this question, of daily occurrence, simple as it may seem, and of easy solution to some, is rendered complicated and difficult by great and conflicting authorities.

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As to the balance of authority, I think it cannot be doubted, from the case of *Smith* v. *De la Fontaine*, in 1785, what Lord Mansfield's opinion was. His great experience and knowledge

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of mercantile transactions and high character carry with them strong evidence of the prevailing opinion. *Saunderson* and others v. *Judge* *, in 1795, was an action on a promissory note (and, for the present, I make no distinction between notes and bills) against the indorser. Sharp, the maker, promised to pay to Wilkinson or order; and, at the foot of the note, there was a memorandum, that he would pay it at the house of Saunderson and Co. with whom he had a cash-account. Wilkinson indorsed to Judge, he to Sanders and Co. and they to Saunderson and Co. Sharp, before the note became due, absconded, and Saunderson wrote by the post to Judge, giving him notice of the non-payment. The declaration was in the general form, without stating the memorandum, or any thing tantamount to an application to the plaintiffs. At the trial, the plaintiffs were nonsuited, as they had not proved an actual demand on the maker; and the language of the court, consisting of Eyre, C. J. Heath, Buller, and Rooke, judges, after the argument upon the motion for a new trial, forms the foundation of my opinion. They said, "It was no part of the contract that the note should be paid at the house of Saunderson and Co.; and therefore that was not necessary to be stated in the declaration: the maker merely appointed the house of his banker as the place where he was to be called upon for payment. It is not necessary that a demand should be personal; it is sufficient if it is made at the house of the maker, and it is the same thing in effect if it be made at the place where he appoints; and as the demand was to be made at the house of the plaintiffs themselves it was sufficient for them to turn to their books." But, it may be said, this was the case of a detached memorandum. I will say a few words on the subject of the supposed difference between such a memorandum at the bottom of a note, and an acceptance of a bill of exchange payable at a particular place. The case of *Lyon* v. *Sundius* †, was an action by the indorsee of a bill of exchange against the acceptor; the declaration stated only a general acceptance. It was precisely this case, the acceptance being "payable at Messrs. Hankey and Co's." The very same objection was taken by Mr. Park; and I am free

* 2 H. B. 509.

† 1 Campb. 423.

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to say, that the words of Lord Ellenborough carry conviction to my mind, and form the foundation of my opinion. "How can you make the words *payable at Hankey and Co's* more than a mere memorandum? The acceptor of a bill of exchange is liable universally. This very point was brought before the court some time ago," (alluding probably to *Saunderson* v. *Judge*, of which Mr. Park said he had some impression on his mind), "when," says Lord Ellenborough, "the judges were all of opinion that such words formed no part of the contract, and did not require to be set out in the declaration." It is difficult to believe, I had almost said impossible, that the case should have rested there, if that had not been the opinion of all the Judges of the King's Bench; and, as proof, in the very next year (1809), at the Hilary term sittings, Mr. Justice Bayley held, in the case of a promissory note*, that in an action against the maker there was no necessity to prove that it was presented where payable. These authorities are followed by the decision in *Fenton* v. *Goundry*, on the fullest consideration of *Callaghan* v. *Aylet*, then lately determined in the Common Pleas. I cannot help adding the two decisions at *Nisi Prius* of Lord Chief Justice Gibbs†; these, together with the common form of declarations, make a weight of authority which it is difficult to counterpoise.

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But it is said, in order to diminish the weight of these authorities, that the Court of King's Bench have not always been consistent. And first, it is said, that in *Parker* v. *Gordon* ‖, they have recognized the propriety of an application at the place of payment. But that was an action against the drawer; and it is universally true, that to charge the drawer you must prove a demand on, and refusal by, the acceptor or his substitute. If, therefore, he says, "I accept, payable at my banker's," he says, "it is there I am to be called upon for payment; that is my house; there it is where I am to be found, and I authorize you to consider me as personally present there for the purpose of payment:" and, if so, the holder may be presumed to know the banking hours. And if the holder were not bound to this, he must have gone, as Lord Ellenborough

* *Wild* v. *Rennards*, 1 Campb. 425. n.

† *Head* v. *Sewell*, *Richards* v. *Milsington*, Holt, N. P. C. 363, 364.

‡ 7 East, 386.

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says *, "a step farther, and proved a demand on the acceptor, for otherwise no demand is made on the acceptor. Secondly, it is said, that they have impaired, if not contradicted, the case of *Fenton* v. *Goundry*, by that of *Sanderson* v. *Bowes*: this argument or assertion is founded on the supposed perfect analogy between bills of exchange and promissory notes. I perfectly agree, that in some cases place may be essential, and may be rendered so by the terms and occasion of the acceptance. A case may be put of a man, who remitting all his property to England, and taking his departure from India, accepts a bill for 5000 *l.* at six months payable in London: he loses his passage: it could never be said in such a case that the acceptor engaged to pay in India, or at the Cape of Good Hope, on his way home. The case of bankers issuing notes payable at their banks, as in *Sanderson* v. *Bowes*, may be one of these cases; but I deny the alleged analogy between bills of exchange and promissory notes. The maker of a promissory note may express his own terms. He is, as it were, drawer and acceptor; the note must be taken as he issues it. But in the case of bills of exchange the drawer has a right to an unqualified acceptance, and an indorser *in transitu* is entitled to the same right. If these acceptances were construed as special, and as qualifying the general liability of the acceptor, who is bound to pay, it would hurt the credit of bills. The acceptor is the person whose credit principally supports the bill; he is considered as always liable; but if an accidental or careless omission to call at the place appointed destroy the acceptance of the bill, the confidence attached to the acceptance is gone, and the credit depends on the punctual observance of the terms of the condition. The proof of a demand and refusal is not easy; and in many cases might fail, or be brought in doubt by contradictory evidence. The case of *Fenton* v. *Goundry*, then, can hardly be said to be impugned by that of *Sanderson* v. *Bowes*. At all events, the latter case may be considered as wanting the weight of the former; but it is sufficient to distinguish them by the difference of the subject-matter of each case. It is, thirdly, said this is an order on the banker; I grant, that it is an authority to the banker to pay, and in

* In *Parker* v. *Gordon*, 7 East, 386.

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effect, an order; but we must not by refinement stagger prevailing notions. If it be an order on the banker, *Bishop* v. *Chitty* is a dangerous precedent: no man of business ever thought that such a note or memorandum converted the bill of exchange into an order on the banker; and, that by not calling at the banker's he lost the benefit of his acceptance, and took the credit of the banker in the place of the acceptor. As to the cases in the Common Pleas, I shall not oppose to the case of *Ambrose* v. *Hopwood* *, that of *Huffam* v. *Ellis* †, in the King's Bench, and House of Lords; in the latter, the declaration followed the case in the Common Pleas, and the words, according to the tenor, might include the house. In *Callaghan* v. *Aylett*, and *Gammon* v. *Schmoll*, is to be found the great counterpoise to the authority of the Court of King's Bench; but, I must say, that the reasons given are not such as belonged to the authority of the judges, who are reported to have given them. In *Callaghan* v. *Aylett*, Mr. Justice Heath says, "there can be no difference in this respect between an action against the drawer, and an action against the acceptor." But, there is this difference, when the acceptor accepts "payable at the house," he means to limit his ubiquity, by saying that he is to be found there for the purpose of payment; and if the holder do not seek him there, he makes default in calling on the acceptor. If, without such direction, the holder omit to call at the house of the acceptor, he cannot, on account of that omission, charge the drawer or indorsers: but it is too much to say, that by that omission he discharges the acceptor, who is at all times liable, though no demand of payment was ever made, even at his house. Mr. Justice Heath avoids the authority of *Saunderson* v. *Judge*, by saying, that there "it "was a memorandum at the foot of the note, not a part of the "instrument." That leads to nice, I had almost said, frivolous, distinctions; for, according to that doctrine, if I say, "I ac- "cept *R. G.*" and add at the foot of the bill, "payable at "Messrs. G. & Co." it is a mere memorandum; but if I say, "I accept, payable at Messrs. G. & Co." it is embodied in my acceptance, and forms a condition precedent. Does it make

* 2 Taunt. 61.

† M. 51 G. 3. K. B. See Bayley on Bills, 98. n. 1. 3d ed.

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a difference, that in one case the acceptance is all in one tenor, as "I accept, R. G. payable at my bankers," and that in the other I write, "I accept, R. G.," and underneath, "payable "at my banker's?" A man, whether he accepts in the former or latter form, means the same thing; for when he writes the words "payable, &c." he is usually determined in what place to write, by the room or vacancy on the paper. Are the minds of men in business to be harassed with such untenable and insuperable distinctions? In *Gammon* v. *Schmoll*, Mr. Justice Chambre puts the case of a bill drawn upon a judge just going the circuit. I dare say it has happened to him, as it has happened to me. But can it be supposed that any man of character, on such or like occasion, would make his bill so payable if he had not cash or credit at his banker's? And who would refuse to call at the banker's? No holder in his senses would forbear to follow the directions of the acceptor, because it is undoubtedly done for his convenience; no man in his senses would refuse an application to the banker of the judge where he would be sure of his money, for the gratification of coming down to Exeter for the sake of arresting him: but if it turn out that an acceptance payable at a particular place is a mere shift, or act of roguery, it would be idle, and, in some instances (as in directions to obscure corners and streets,) almost impossible to attempt to find out a sneaking lodger in a garret to satisfy this indispensable condition. What holder, or what attorney, would arrest a man of credit under such circumstances, or would disgrace a Judge? Such acceptances will always give credit to bills; and the practice will continue, though your Lordships should decide that they do not *qualify* the general liability of an acceptor; and perhaps the mercantile world will thank your Lordships for not imposing upon them the knowledge of precedent conditions, or a speculation, as to the different positions on a note, by the occupation of which the words "payable at, &c." become either a mere memorandum, or a condition precedent. But cases might be put of vexation; these may all be met by way of defence. It is said, (1 Rolle's Abridgment, 444) and I take it to be law, "If the condition "of an obligation be to pay 10*l.* at a given day at S., he (the "obligor) is not bound to pay in any other place;" and "so in "that case the obligee is not bound to receive it in any other

"place;" and so Coke, Littleton, 211; "For if the obligor "then (that is, when by notice the obligor has fixed the place) "and there tenders the money, he shall save the penalty of the "bond for ever." But he saves only the penalty and costs; he must pay the debt. An acceptance is, by the custom of merchants, a debt; though, independently of that custom, neither debt nor assumpsit would lie for want of consideration. But in all these cases the fulfilment of the condition comes by way of defence. The obligee is not bound in the outset to state his demand at the place; the defendant must plead his performance of the condition, and, proving it, he is quit of the damages and penalty; but he must bring the money into court. Place may, undoubtedly, be essential; and here both obligor and obligee understand each other that so it is to be considered.

Graham, B. 1st and 2d Questions.

In answer to the third question, I am of opinion, that if the holder of a bill for acceptance take an acceptance, varying in time or place of payment, where place creates inconvenience, and obstructs or impedes the circulation of the bill, or, when new terms or conditions are introduced, he makes it his own. This is obvious in the case of enlargement of time. So, if the acceptance be payable at Paris, Dublin, or Edinburgh, where the place is evidently made a condition of the payment; in such a case, I think that the drawer would be discharged.

3d Question.

In answer to the fourth question, I am of opinion, that if, in the case put, *C.* take an acceptance, materially qualified as to time or place, and *A.* dissent, and *C.* still keep the bill, he makes it his own, and cannot sue *A.* on his original debt: but if *C.* give timely notice to *A.* and immediately offer to return the bill to *A.* I think his original cause of action would remain.

4th Question.

Once settle the uniformity of practice, and the evil is over. But, according to the law as laid down by the court of King's Bench, you have a plain simple declaration and proof. According to the law laid down by the court of Common Pleas you have a new form of declaration, and a proof which, in many instances, may be difficult, and may lead to controversy and contradiction.

RICHARDS, C. B., as to the first question, was of opinion that the holder of the bill was not bound to present it at Sir John Perring's & Co. for payment, nor to aver presentment there.

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As to the second, that the acceptance of the bill in question was not a qualified acceptance, constituting an undertaking to pay the bill at the house of Sir J. P. & Co., but a general acceptance, constituting an undertaking to pay the same every where, with an additional engagement or direction for the payment thereof at that house.

3d Question.

As to the third, that if the payee *C.* were, without the previous authority or subsequent assent of the drawer *A.* to take an acceptance qualified as to time or place, by taking such an acceptance he would discharge the drawer *A.*

4th Question.

At to the fourth, that if *A.* were to refuse his assent to such a qualified acceptance, *C.* having received the bill for the debt of 100*l.* due from *A.* could not sue *A.* for the debt till he had re-delivered the bill to *A.*

Dallas, C. J.

DALLAS, C. J. With respect to the first question, I am of

1st Question.

opinion that the holder was bound to present the bill at the banking house of Sir J. P. & Co., and so to aver in the declaration.

2d Question.

As to the second question, I think that the bill, having been so accepted, is, in law, to be considered as a conditional acceptance, and not as a general acceptance to pay, with an additional engagement or direction for payment at the house mentioned. And as the case which has given occasion to your Lordships questions has arisen from contradictory decisions in the courts below, and as, in the recent cases, all that could be found of former decision has been brought under the consideration of the respective courts, and their disagreement in opinion has still continued, and continues, (as appears from the answers hitherto given,) it is obvious that the present is a case which can very little depend upon mere authorities; the authorities have, however, been already fully referred to, and my reasons will therefore chiefly and shortly be given upon general grounds. And,-first, I admit the presumption of law to be, (though in the present state of commerce the fact is frequently otherwise,) that the drawing a bill of exchange pre-supposes an antecedent debt, and the acceptance is an admission that such a debt is due. And so considered, it is, no doubt, clear, that the debtor may be called upon to pay without reference to time or place. But if, in the bill itself, the drawer were to name a particular place for payment, instead of such place

being specified in the acceptance only, such bill would be a bill qualified as to payment both with respect to time and place. And the acceptance being according to the tenor of the bill, the acceptor, as to payment, would be bound accordingly. This, I am aware, would be the act of the drawer himself, and therefore not falling within part of the reasoning, as it applies to the acceptor, a distinction to which I shall hereafter advert more fully. It is, I apprehend, equally clear, that by a bill drawn generally, the drawer transfers his rights against the drawee, as modified by the bill, to the extent of the bill; and that the drawer may enter into any contract with the payee, which the drawer might have done with the drawee before such transfer made, not affecting thereby, in substance, the rights of the drawee. I assume, therefore, for the present, that if the bill had purported to be an order to pay at the house of Perring & Co., and the acceptor had accepted such bill, he would not have been bound to pay elsewhere till application for payment there had been made and failed. I shall endeavour to show hereafter, that what the drawer may do by the bill, as between him and the drawee, may be done by the acceptance, as between the acceptor and the payee. To take, first, the case of the drawer of the bill: he may draw it in any form which he thinks fit, provided the form be such as is warranted by the usage of merchants, without which it will not be a bill of exchange; but it will scarcely be contended, that drawing it restrictive as to place of payment would be a violation of such usage. A bill general and absolute, in the first instance, drawn and accepted generally, operates according to the terms of the bill; and the bill itself need only to be looked to, the acceptance referring to and not varying from the bill. But to a bill so drawn, the drawee may refuse acceptance; and he may propose to accept conditionally, the payee being at liberty to receive or refuse such conditional acceptance; if he refuse, he must go back to the drawer, who will have his remedy against the drawee, and in this, the first and most simple view of the subject, the bill itself is at an end.

Suppose, however, the case of a partial and qualified or conditional acceptance; and that an acceptance may be such in many respects has been admitted by all the learned Judges in succession: indeed the very questions put by your Lordships

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recognize the distinction, and adapt themselves to it. What, then, is meant by conditional acceptance, or in what respects may an acceptance be conditional? It may be so as to time, as to sum, as to place, as to mode of payment. It will be sufficient to refer to the authorities which have been cited as to each of these shortly, and one will be sufficient under each head; and I mention them, not because the point itself is doubtful, but for what is said in each case. And, first, as to amount. A foreign bill was drawn upon the defendant, and he accepted it to pay 100 *l.* part thereof; he was sued on the acceptance, and on demurrer, insisted *that a partial acceptance was not good within the custom of merchants*; but the Court held otherwise, and judgment was given for the plaintiff*. Next as to time. A bill was drawn, and no time fixed for its payment; it was presented on the 18th of April, and accepted payable the 8th of September; this being stated in the declaration, the defendant demurred, and insisted, that as no time was prescribed for payment the bill was payable at sight, and that a promise to pay two or three months after sight was not an acceptance within the custom of merchants; but the Court held that it was an acceptance within the custom, and the demurrer was over-ruled†. Thirdly, as to place. On this point also there are numerous authorities; but as it is in this respect that the present controversy has arisen, I assume only, at present, that this also may be conditional, reserving myself to examine the authorities and doctrine hereafter. Lastly, as to mode of payment. A bill was accepted, to be paid, half in money, and half in bills, and the question was, whether there could be a qualification of an acceptance? And it was proved by divers merchants that there might be, for that he who might refuse the bill totally, might accept it in part; but that the holder was not bound to acquiesce in such acceptance; *Petit* v. *Benson*‡. If, then, there may be a conditional acceptance as to sum, as to time, and as to mode of payment, such acceptance, as to these, qualifying the liability to pay, it is difficult to conceive why there should be any difference as to place, at least as between the acceptor and the payee so taking the conditional accept-

* *Wegerstoffe* v. *Keene*, Str. 214.
† *Walker* v. *Attwood*, 11 Mod. 190.
‡ Comb. 452.

ance; nor do I conceive, speaking with deference to other opinions, that there is any distinction which, upon principle, can be supported. Losing sight of place, however, for the moment, let the effect of a conditional acceptance be examined in the other respects already mentioned. And first as to amount; he who takes an acceptance for less than the sum expressed in the bill cannot claim from the acceptor more; though, as to the drawer, how it may affect him will form matter of distinct consideration. So, as to time, the holder is likewise bound by the terms under which he has consented to take the acceptanee: and why? Because, on the one hand, the payee not being bound to take an acceptance, except according to the tenor of the bill; and, on the other hand, the acceptor being only bound to accept as he may choose to accept, when the acceptance varies from the tenor of the bill, and the payee, notwithstanding, takes such acceptance, he consents to take the bill according to the tenor of the acceptance, and not according to the tenor of the bill.

So, it is as to sum, as to time, as to mode of payment; in each of which cases the acceptance, it is admitted, forms the contract between the immediate partics. Is there, then, any difference in this respect, as to place, and as to place only? In the argument at the bar, (and herein the case seems to me now narrowed to a single point,) it has not been disputed that there may be a conditional acceptance as to place, restrictive of payment, and making presentment necessary at such place, provided it be by words of express and unequivocal import; but it is denied that to make a bill payable at one place is an exclusion of others; and in *Fenton* v. *Goundry*, I observe, Mr. Justice Holroyd, who there argued against the restricted liability, seems to have taken the same distinction. "The case "has been argued (he said) as if the terms of the acceptance "had been payable at Sikes & Co's. *only*," not contending, that if so drawn the payment would not have been restricted; and Lord Ellenborough is made immediately to observe, "Is it more "than an expansion of the promise?" An observation, which his Lordship could not have made, if by the word *only* the promise had been, in terms, restricted; and, in the same way, in the case of *Gammon* v. *Schmoll*, in the Court of Common Pleas, it was not denied at the bar, that if the acceptance had

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been at the place named, and not elsewhere, in such case the acceptance would have been clearly qualified, and conditional and restricted as to place. And so, yesterday, it was admitted by my brother Holroyd, and so, to-day, it is admitted by my Lord Chief Baron. The question, therefore, in this view of the subject, comes round to be merely a question of construction, namely, what do the words of acceptance import in the particular instance? and are they conditional as to place of payment or not? There are no technical words, by which, generally speaking, a condition must be created; and, whether it be a condition precedent, a concurrent act, or a mutual promise, must be collected from the intention of the parties, reference being had to the words made use of, and the subject-matter in question. And so again, it has been admitted by both the learned Judges to whom I have last referred. "Intention (said my brother Holroyd, in express terms) is that "which ought to govern." Now conditional or qualified, as opposed to absolute, I can only say imports some qualification or restriction of that, which would be otherwise unconditional. This is self-evident, it will be agreed, when the condition is established; but so to state it, it is said, is but begging the question, or leaving it at least where it was before, the question being, whether the words operate by way of condition, and not upon the effect of the condition when established. Still, however, I can only say, the very departure from generality of expression to me, imports some modification of that generality; and, if simple and absolute acceptance have a clear and simple operation, and will bind a party to pay wherever his acceptance may be presented, it seems to me but reasonable to intend, that when he accepts, payable at a particular place, he means to exclude, in the first instance, a liability to demand in any other place. And, looking to intention, and taking as admitted, that it ought to govern, I cannot permit myself to doubt, that the words made use of in this instance are, in fairness of construction, just as clear as if express words of restriction had been introduced. The maxim referred to from Lord Bacon, by my brother Holroyd, (I speak it with deference) appears to me too technical as applied to such an instrument as a bill of exchange; nor would it govern in another view; for in a promissory note it is agreed that express words of restriction are not necessary;

words of appointment and specification being of themselves sufficient. In none of these is the word "*only*" to be found, nor any words beyond those which belong to this particular case; and yet the rule of construction, as mere construction, must, in each instance, be the same. I think this upon the mere ground of the words themselves, but I think so, still more strongly, on the sense and reason of the thing. I will, first, put the case of a bill accepted payable in a town different from that in which the abode of the acceptor may be, as for instance, and to avoid extreme cases, a bill accepted in Birmingham payable in London; and I will further suppose it to be a bill according to the original simplicity of such transactions, that is, for an antecedent debt from the acceptor to the drawer of the bill. By his acceptance payable in London the acceptor promises to have a fund in London when the bill shall be presented; he may have sufficient to pay the bill, but not beyond it, and yet, according to the argument which would reject the words of specification as words of limitation, he must have that which he may not possess, that is, a double sum or sums, one forthcoming in London, and another in Birmingham, to take his chance as to the place where, in fact, the bill may be presented when due; or be left exposed to an arrest, as the immediate consequence of non-payment. I am aware, it may said that such would be his situation under the original debt to the drawer, and that such would continue to be his situation under a general acceptance; but it is for the express purpose of guarding against this, and on other grounds of personal and commercial convenience, to which I shall presently advert, that the practice has obtained of partial and qualified acceptance as to place, and to which, as between the immediate parties, I do not see any possible objection. It has been very properly said, in one of the cases cited at the bar, the convenience of the thing is generally in support of such qualification; most persons keep their money at their banker's, and make all their payments there; there, they or their appointed agents for this purpose are to be found, and there, if any where, is the fund out of which the payment is to be made. To this it may be added, that the very prevalence of the practice proves the convenience; and though I will admit, that mere concurrence is not to make the law, yet, in all commercial transactions it is

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greatly to be regarded, as the footing and foundation on whi c men deal together; and the course of such dealing, as between merchants, is often that which of itself constitutes the law. It is scarcely necessary to refer to the stronger cases of a bill accepted in London, payable in Dublin or Edinburgh, or a bill accepted in the West Indies, payable in London. And suppose that, in this latter case, the party accepting has remitted to his correspondent in London the produce of his plantation, for the express purpose of meeting the bill, will it be said that notwithstanding he may still be arrested in the West Indies, because for the original debt he was liable to be arrested any where? And yet the argument which treats as of no effect specification of place of payment stops nothing short of this extent. Nor do I see, in any one respect, where the line is to be drawn, or the distinction to be made. If, then, it would be so in the instance of a bill accepted in one town payable in another, or in one country payable in another, let the case be considered of a bill, the parties living in the same place, and accepted payable at a particular banking-house. It is scarcely necessary to say, that to the holder it can be no inconvenience to present it there; but on the other hand, I admit it would be scarcely any inconvenience to the acceptor to have it presented at his counting-house, or place of abode; for, even if it were an absolute acceptance, it would still, according to all probability, be paid by a draft on his banker, the acceptance on the bill only operating as such order; but, even in this view, it weighs something, though possibly not much, that this would be to subject the payment of a bill to a double instead of a single operation, namely, the having two places to apply to instead of one; and, though this would be an inconvenience imposed upon the holder by himself, still that which is not in the natural course of dealing raises a presumption that such departure from it was not meant. And what would be thought of the conduct of a holder, who, having a bill payable at a banker's, instead of going there should go to the house of the acceptor merely to get his draft for the bill, or should further insist on a specific payment in money or bank-notes?

To wind up, therefore, what I have to observe upon this part of the subject, on the reason and fitness of the thing, on principles of justice and mercantile convenience, and from the

very nature of such transactions, I think a particular place of payment being part of the acceptance of the bill, imposes upon the holder, because he is the willing holder of such acceptance, the necessity of presenting it, in the first instance, there; and leaves the acceptor only liable to pay, where he has provided and fixed a fund for payment, and has consented to pay, in order that he may not be called upon to pay where he has no such fund, nor given any such consent. Nor can I quit this part of the subject without adding, that I do not see a possible inconvenience which can result from so deciding; for the holder need not take a bill so accepted; and where the remedy is so obvious, and it turns simply on such a point, except that confusion in this respect has crept into the subject by disagreement in the decisions of courts of law, and that it is fit the law should be settled and uniform, the question seems to me hardly worthy of the attention which it has excited, and the consideration which it has undergone.

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Deeming, then, presentment at the appointed place to be a condition precedent, I will only further say, that I think it necessary that such presentment should be averred and proved; and, that non-presentment and having funds ought not to come by way of defence, as, in the case of promissory notes, has been decided by all the courts in *Westminster-hall*, and from which, notwithstanding what I have heard this day, I do not myself feel disposed to dissent. Presentment, according to Lord Ellenborough's opinion in *Sanderson* v. *Bowes*, at the appointed place, is a condition precedent; and for want of such an averment the declaration is bad. The argument, therefore, as to this point, resolves itself into the question, whether condition precedent or not? For, admit it to be so, then, in this respect, there is no difference between the two courts, and the cases of promissory notes apply to bills of exchange; while, on the other hand, if it be not a condition precedent, it is of course not necessary to be averred.

Quitting now the general ground, I come next to the analogies which result from other cases mentioned, if not of the same, yet of a similar description. And first as to promissory notes. It is scarcely necessary to advert to what has been said as to the similarity, or the distinction between promissory notes and bills of exchange. In some respects, undoubtedly, they are

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different, in others it may almost be said they run into each other. A bill has, indeed, generally, three parties, the drawer, the drawee, (if accepting, becoming the acceptor,) and the payee; but there may be only two parties, as where a person draws a bill on another payable to his own order, and this, in legal operation, is rather a promissory note than a bill. It is usual, however, to declare on it as a bill; not admitting the identity of drawer and payee; and, if accepted, the defendant may be charged in one count as the drawer, in another as indorser, and in the third, as the maker of a promissory note. If forbear to allude to the cases which turned upon the distinction in the address of the note between "at" and "to," in one of which it was said by Lord Ellenborough *.—"This is properly declared on as a bill of exchange, though it might have been treated as a promissory note at the option of the holder;" and, in another of which †, it was observed by Lord Chief Justice Gibbs, "It would be difficult to say, in most cases, that what is law, as regards bills of exchange, is not law as it respects promissory notes:" but paramount in point of application is what was said by Lord Mansfield in *Heylyn* v. *Adamson* ‡ and which has been so often mentioned that I shall content myself with merely referring to it.

Such, then, being the similarity, and, in some instances, the identity, of promissory notes and bills of exchange, let it be seen what has been determined with respect to promissory notes; premising only, that here, at least, there is no clashing of authorities: for though the decisions in the King's Bench, as far as respects promissory notes, are denied to have application to bills of exchange, the decisions in the Common Pleas, as to bills of exchange, of necessity include promissory notes; and so far, then, as concerns promissory notes, there is no difference of opinion whatever. What then has been decided respecting promissory notes? In this, the decisions of the two courts agree; namely, that a promissory note, containing in the body of it a promise to pay at a particular place, requires a demand of payment there, in order to give the holder a cause of action if it be not paid. Now on what grounds of reasoning do such

* In *Shuttleworth* v. *Stevens*, 1 Campb. 407.

† *Richards* v. *Milsington*, Holt, N. P. C. 364. n.

‡ Burr. 669.

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decisions stand? To take one case of the many,—In *Sanderson* v. *Bowes*, it is said by Lord Ellenborough, "An action on a note will not lie unless the plaintiff has demanded payment at the appointed place. And I cannot but say that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient that the makers of notes of this description should be liable to answer them every where, when it is notorious that they have made provision for them at a particular place, where only they engage to pay them;"—and, having thus stated the ground of convenience, his lordship added,—"then if the request at the place be a condition precedent, it should have been averred, and for want of such an averment the declaration is bad." Apply this doctrine to bills of exchange.—If convenience require that the makers of promissory notes should be liable only where they have expressly made provision to pay, how is it possible, in this respect, to distinguish promissory notes from bills of exchange? Is not the convenience precisely the same in the one case as in the other?—and being the same, how is it to depend on the form of the instrument? Call it what you will, or make it what you may, it is in payment, in each instance, that the transaction is to end; and the note or bill is the means, and nothing more, by which payment is to be procured; as far, therefore, as to a particular place of payment being pointed out, or a specific place of deposit being established, the reasoning applicable to each is precisely the same; and it seems to me impossible to distinguish between the two. An expression of Lord Ellenborough's has, however, been much observed upon, namely, "that a specification of place is but an expansion of the promise to pay." It will not be supposed that I mean to follow any of the verbal or critical remarks which have been made in this respect, at the bar, or in the courts below. Whatever peculiarity of expression might, at times, belong to this noble and very eminent person, it was, generally speaking, a peculiarity of force adapted to his peculiar vigour and energy of thought. But to the substance of the expression as authority it will be necessary to advert, in order to see how it has been understood and explained by those who have applied it in support of the doctrine of non-restricted acceptance. In *Gammon* v. *Schmoll*, the leading counsel at the bar, who was to support

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the doctrine of universal liability, explained it in this way: "every general acceptor has a double liability; he is in default, first, if the bill is presented to him personally, wherever he may be, and he does not pay it; secondly, he is in default if it be presented at his place of abode, and not paid: to these, by a qualified acceptance, he adds the obligation to pay it if it be produced at the place," that is, the place specified. He must be prepared "with *triple* funds to pay the bill, as well where his person is, as where his abode is, and also, at the particular place mentioned: this is what Lord Ellenborough means by an expansion of the promise." This is a complication of expansibility which seems to me a strange departure from simplicity of proceeding; and, for myself, I can only say, I would not so understand it, if I could understand it to any other effect; but it is impossible to deny, whatever might be intended by the mode of expression itself, that in sum and substance it does amount to this. But whether every man who accepts a bill of exchange, by his acceptance at a specific place undertakes to pay at every other place if required, and to have a triple instead of a double or a single fund to the amount of the bill accepted; or whether he makes his own situation worse, by making that of the holder, in one respect at least, better, that is, by pointing out to him a definite place of payment, instead of leaving him to search where he, the acceptor, is to be found, when the bill becomes due, it is not for me to pronounce, but for your Lordships to consider. Or why, again, this should be in the case of a bill of exchange and not of a promissory note, is that which I am not able to understand.

I now come to that, which it is said, however, makes the distinction between bills of exchange and promissory notes, so as to make the reasoning as to the latter inapplicable to the former. And this distinction is said to consist in the form and nature of the respective instruments. First, then, as to the *form*. In a promissory note, it is said, the words are incorporated in the very body of the instrument, which creates the contract and duty of the party; whereas, in a bill of exchange, they are no part of the bill itself, but distinct as acceptance, and collateral to it. A promissory note is merely the promise of the maker; the acceptance of a bill of exchange is a compliance with the order of the drawer. To a promissory note

there are but two parties; to a bill of exchange there are three, and the drawer has rights as well as the acceptor and payee. And to this I agree. But here again, at least, as between the acceptor and the payee, there is no distinction: in each instance a debt must be pre-supposed, and in each it is an undertaking to pay. It is said, that in the case of a promissory note the instrument creates the contract; and, no doubt, it does, that is, the contract to pay in the particular manner, but not the antecedent debt; the obligation to pay existed anterior to the note; and though, in the case of a bill of exchange, the debt had also pre-existence, the precise obligation to pay is created by the acceptance, and, be it promissory note, or be it bill accepted, it is, in each instance, but a promise to pay; and, without such promise the bill itself, as to the acceptor, would be a mere nullity.

3d Question.

To advert, however, to the situation of the drawer, and this brings me to the third question. And, first, with respect to time: in this the learned judges all agree that giving time will discharge the drawer. Extending the time mentioned in the bill would be giving more time than the drawer has said by the bill he chooses to give, which, as against the drawer, the payee can have no right to do; and, taking an acceptance at a shorter date, if, in case of non-payment, it would give an immediate action against the drawer, would thereby make him liable sooner than he undertook to be; he being liable only in case of non-payment by the acceptor, and this at the end of the stipulated time. I need scarcely add, it would be the same as to place, if place, from its nature, should resolve itself into time. It remains, therefore, only to consider place as unconnected with and independent of time. And, so considered, it may, or it may not, be material to the drawer. Suppose all the parties to live in the same town, whether the bill be accepted at the counting-house, or at the banking-house, can make no real difference to the drawer; in other cases, from distance, it might be material; but, at all events, I think, that if it put the drawer under greater difficulties than he otherwise would be under in point of proof of proper presentment, if bringing an action himself, it is a difficulty which I hold the payee has no right to impose upon the drawer, whose rights should remain unaltered, as ascertained by the

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bill: whether those rights were altered or not would depend on the particular case. Perhaps, however, it would be more reasonable and convenient than making it depend on situation in each particular case, which might generate innumerable questions and give rise to great uncertainty, to hold, at once, the drawer discharged, the payee having taken such acceptance without notice, and thus acting at his own peril; and thus all inconvenience would be guarded against, by making it necessary to give notice to the drawer.

4th Question.

With respect to the last question, I am of opinion, that under the circumstances stated, *C.* could not maintain an action against *A.* without delivering up the bill, and this for the reasons given by several of the learned Judges, and which I do not feel it necessary to repeat.

In the above observations, I may appear to have built much on the decisions as to promissory notes; but it has been said these decisions themselves, perhaps, in point of law ought not to have taken place. To this I can only answer—first, that it is impossible for me to doubt of the validity of these decisions, numerous as they are, recognized and confirmed as they have been by every court, and never, in a single instance, having till this day been drawn into doubt by even a single Judge. If the law so settled is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand: but, *here*, disclaiming even those decisions as decisions, and recognizing only the principle on which they proceed, I say, that, if the case of a promissory note were to occur *now* for the first time, it ought to be decided as those cases have been decided; and further, that without deriving authority from the decisions as such, the principles on which they have proceeded, and ought still to *rest*, apply equally, in my judgment, to bills of exchange. On the whole, therefore, my opinion is formed, as to bills of exchange, even without reference to the decisions as to promissory notes, and still less have I referred to the cases of promissory notes for the purpose of proving the decisions of the Court of King's Bench inconsistent each with the other, but for the purpose of respectfully adopting the decisions of that Court where they agree with the decisions of the other Courts, and thus affording principles decisive, in point of law, of the same question as to bills of exchange. And here, with-

out repeating what has been said by other Judges in answer to the cases put of actions in debt on bond, or demand of rent, I will only further say, that these do not appear to me to be cases analogous to bills of exchange, which depend on peculiar and appropriate grounds of commercial law, altogether distinct and different, and which, it must be agreed, the custom and usage of merchants is to decide. And this leads me to the only point on which (independent of the different opinion entertained by several of the learned Judges, and of the very able reasons by which their judgments have been supported) I am bound to say I feel some degree of difficulty; and that is, as to what has been said of the understanding and usage of merchants with respect to the question under consideration. If qualified acceptances as to place have hitherto circulated on a settled and general understanding, that place does not operate by way of limitation as to payment; as far as concerns the first question, which points to the usage of merchants, I am bound to admit, that I ought to have answered differently; and, further, that if so, the greatest part of my observations fall to the ground. Looking, also, to the second question, the consequence would, I apprehend, be the same, that is, as to the legal effect; for a bill of exchange, being altogether the creature of mercantile usage, recognized, however, by the law, such usage would constitute the law as applicable to such an instrument: it is not to be overlooked, that it has been asserted by high authority, that, in circulation and practice, supported by mercantile opinion and understanding, a conditional acceptance does not operate as I conceive it to do. Not meaning to doubt that such information has been given; still, if the decision is to turn on this single ground, I could wish the fact in some way or other to be regularly ascertained. I will take the law from the learned Judges, whose office it is to expound the law; but, if the law is to depend upon fact, and fact on testimony, I desire, if possible, to have testimony through the regular channel. This creates a difficulty with me, subject to which, I will only in conclusion add, that, for the reasons which I have given, I adhere to the answer, which I have humbly presumed to submit.

Dallas, C. J.

ABBOTT, C. J.—In answer to the first and second questions, I think the defendant in error was not bound, in order to entitle himself to sue the plaintiff in error, who is the acceptor of the

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bill in question, to present the bill for payment at the banking-house of Sir John Perring and Co. nor to aver in his declaration that the bill had been so presented; for, I think, the acceptance is not to be considered in law as a qualified acceptance to pay the bill at the house of Sir John Perring & Co.; but, as a general acceptance to pay the same, with an additional direction to the holder to call for payment at that house, instead of calling at the house of the acceptor, as he would otherwise do.

These two questions appear to me to depend entirely upon the meaning and import of the words " payable at Sir John " Perring & Co.'s, bankers." There can be no doubt that the drawee may qualify, because he may refuse his acceptance. The question is, whether he is to be considered as having done so by this expression? I conceive that the true meaning and import of all phrases is to be sought in usage, rather than in a strict and literal interpretation of the words of the phrase; and, that in mercantile instruments the usage of trade and commerce is that to which we are to resort. There are many words and phrases in all languages, of which the meaning varies with the subject and occasion to which they are applied. I shall take leave to postpone the delivery of the grounds of my opinion on these two questions until after I have stated my opinion on the third question, and the reasons of that opinion.

3d Question. I understand the expression " take an acceptance," as used in this third question, to mean consent to such an acceptance; and, so understanding it, I am of opinion that *C.* could not, in the case proposed, maintain an action upon the bill against *A.* upon the refusal of payment by the acceptor. There is not, I apprehend, any doubt or difference of opinion upon so much of this question as supposes an acceptance qualified as to time: and, in my humble opinion, a qualification as to the place of payment has the same effect as a qualification as to the time of payment.

I conceive, that in estimation of law all bills are to be considered as drawn for value, if not actually in the hands of the drawee at the time of drawing, (which seems to have been usually the case in the infancy of those instruments) at least intended by the drawer, and expected by the drawee to be placed in the hands of the latter before the maturity of the bill.

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And a person who draws a bill under such circumstances may be permitted to elect for himself the time and place of payment; because, if the drawee should refuse to pay according to such election, he would be able to sue him for the sum which constitutes the value of the bill, either immediately, if the value has been previously received, or so soon as it shall be received, according to the intention upon which the bill is drawn. By an intention to place value in the hands of the drawer, I mean an intention to place it in the course of some mercantile transaction between the parties, such as the consignment of merchandise in pursuance of orders of the drawee, constituting the relation of seller and buyer; or a consignment for sale on account of the consignor, constituting the relation of principal and factor or agent; and not a mere promise to provide for the bill at maturity, by the transmission of money or other bills for that special purpose. The latter practice has indeed prevailed to a great extent in modern times, and bills of exchange have become rather instruments for raising money, or postponing payment of debts by a fictitious credit, than instruments of real mercantile transactions. But notwithstanding such practice, I apprehend they are to be considered in courts of law as founded upon real and mercantile transactions, according to their primitive object and use; because, if they are to be considered as founded upon other transactions, or to be governed by other principles, they will cease to be according to the usage and custom of merchants, upon which usage and custom alone their validity in the law of England depends; and which is referred to in every declaration in an action upon a bill of exchange; and if the drawer of a bill has a right to elect in this manner the time and place of payment, I think it cannot be competent to any holder of the bill to substitute a new election of his own, and to assent to any variation in these particulars, without the consent of the drawer, either precedent or subsequent. The holder cannot consent to an enlarged time of payment, because, in the interval, the drawee may fail, and he cannot be allowed to enforce the drawer to prolong the credit beyond the period that he himself may have chosen, nor can he consent to abridge the time; because by so doing he will obtain an earlier recourse against the drawer than the drawer intended to give. A bill of exchange is ordinarily ad-

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dressed to the drawee at his usual place of trade or residence, and it is to such a bill that I understand the question to refer; this address, however, is intended only as a direction to the payee or holder as to the place where the drawee may be found, in order that the bill may be presented to him for acceptance and payment, and not as a designation of a precise or definite house or place of payment. And, consequently, a general acceptance of the bill leaves the bill according to its original tenor, and does not add any designation of the place of payment. Any introduction, therefore, of a definite and precise place of payment, at which alone the presentment is to be made, is a departure from the generality of the bill; and the holder who consents to take such an acceptance, does, by that act, consent to narrow what the drawer had left at large, and to fix a single place for the demand of that money, which, but for such his act, would be demandable by the drawer, or for his use, anywhere and everywhere. To such a limitation, I humbly conceive that the drawer has a right to object: and, consequently, to say to the holder, that by so doing he has taken the drawee for his own special debtor; in exclusion of the drawer, or, in common speech, he has made the bill his own. I am aware, that upon a refusal to pay at the designated place the acceptor of the bill becomes a debtor generally; but then, in order to enforce that general obligation, either the person who seeks to enforce it must prove the refusal, or at least (and which, in my opinion, is the more correct view of such a case) the party against whom the general obligation is sought to be enforced, may, by way of defence, allege and prove that he was ready with the money at the day and place appointed, and has at all times since been ready with it. I am aware also, that in the case supposed by this third question, which is the case of a bill made payable to a person named therein, the drawer cannot sue the acceptor upon the bill, without averring and proving a presentment for payment by the holder to the acceptor, and a refusal of payment by the latter; and I am sensible, that in many instances it may be a matter of entire indifference to the drawer, whether he shall prove a presentment for payment at the place specially designated by the acceptance, or at the place of abode or usual business of the drawee, to whom he has addressed his bill. But though this may be a matter of indifference in many cases, it

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will not be so in all; if we suppose the drawee to live in some street or square in London or Westminster, and to designate another place of payment in some other street or square, in either of those cities the proof of a presentment at the place dssignated may be as easy as the proof of a presentment at the place of residence or business: but if we suppose the drawee to live at London, and to designate Salisbury or Exeter as the place of payment, or *vice versâ*, the proof may not be so easy to the drawer, who may have connections in one of those cities, furnishing an opportunity of finding the witness who made the presentment, and no such connections in the other: for there is frequently no sort of connection between the drawer and ultimate holder of a bill; the latter is often a person wholly unknown to the drawer. This difference may be considered generally as varying, and increasing or diminishing, with the distance of the places, though not by that circumstance alone; and if the effect of such a qualified acceptance be made to depend upon the convenience or inconvenience to the drawer in the particular case, a door will be opened to an infinity of questions which cannot be answered but by reference to the distance of the places, accompanied also with an inquiry into the particular circumstances and connections of the drawer in respect of the places. And I apprehend, my Lords, that a rule of law, liable to such questions in practice, ought not to be established without an absolute necessity, especially in mercantile cases, which, above all others, require to be governed by plain, prompt, and easy rules. My opinion, however, upon this question, is founded less upon consideration of particular convenience, than upon the general principle to which I have before alluded; namely, that the drawer has a right to have from the drawee, considered as his debtor in the way that I have mentioned, a general and unqualified acknowledgment of his debt, and promise of payment; and that no assignee of his demand can, without his assent, permit any limit or qualification at the dictation of the drawee, or by consent between those two persons. All that I have thus urged in relation to bills addressed generally to the drawee at his place of abode or business, will, I apprehend, apply with increased force to bills which, by their original form and tenor, require the payment to be made at some particular place designated therein;

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because, in these cases, an acceptance substituting another and different place of payment will be a manifest departure from the declared intention of the drawer. There is another class or form of bills of exchange not noticed in the questions, but to which I advert, because I conceive the considerations belonging to it deserve attention: I mean, bills made payable to the order of the drawer, or which is the same in effect, to the drawer or his order. If a bill so drawn be indorsed to another without value, the indorsee becomes a mere agent of the drawer, and, of course, can never sue him upon the bill. If indorsed for value, either in the first, or any subsequent instance, the rights of the holder against the drawer do not differ from those arising on a bill drawn in favour of a person therein named. But the remedy of the drawer, to whom such a bill may be returned for nonpayment against the acceptor, is, in some respects, different; the drawer of such a bill may, in this event, sue the acceptor by a special declaration, setting forth the indorsement and return of the bill, and thereby entitle himself to recover, in addition to the principal sum, the expense of exchange and re-exchange paid by him to the indorsee, which is the usual mode in the case of foreign bills: and, if he sue in this form, he must allege and prove a presentment and protest for nonpayment. But the drawer may strike out his indorsement, and treat the bill as having remained continually in his own hands unassigned, which is the usual practice in the case of inland bills; and, in such an action, I apprehend it is not necessary to aver or prove a presentment for payment, the bill being accepted generally. I take this to be law; because, in all the numerous actions which have been brought upon bills of this description I have never known a presentment for payment actually proved at the trial: nor the want of such proof, or of the averment, ever made a ground of objection in any stage of the proceedings. In the case of such a bill, therefore, it is obvious, that if the indorsee take an acceptance, qualified as to the place of payment, so as to render the proof of a presentment at that place decessary to the maintenance of an action by the drawer against the acceptor, he will thereby cast an additional burthen upon the drawer, if the latter can be compelled to take up the bill; and I conceive the law will

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not allow him to do this. I have expressed my sentiments thus at length upon the third question, because my opinion upon the first and second questions, to which I now revert, depends very mainly upon the opinion which I entertain on the third question.

I consider an acceptance qualified as to the place of payment to be followed by the consequences that I have mentioned, where the holder consents to receive it; and, if I am right in this, then the holder must of necessity have a right to refuse such an acceptance, because he cannot be compelled to take an acceptance which may deprive him of his recourse against the drawer; and this seems to have been the opinion of those learned judges, who, in the decided cases to which your Lordships have been referred, considered an acceptance like the present to be a qualified acceptance. If, then, the holder may refuse such acceptance, or if, consenting to take it, he loses his recourse against the drawer, I must say, I am entirely at a loss to discover how it can have happened, that in no one of the thousands and tens of thousands of bills which have been accepted in this form in England, in the course of the last thirty years, any holder of the bill has ever refused to take such an acceptance, or any drawer contended that he was discharged by the holder's consent to take it. I say, that neither of those things has happened, because I have never heard of them either in or out of a court of justice. Upon this consideration, I am satisfied, that according to the usage and custom of merchants, these words, "payable at, &c." are not understood to furnish a qualification, or to import that the acceptor will cause payment to be made, if the holder will present the bill at the place appointed, but not elsewhere, or otherwise. And I am particularly desirous to seek the meaning of these words in the usage of merchants at the Exchange, rather than in Westminster Hall; because a difference of opinion as to their meaning has for some time prevailed, not only among the judges now present, but also among some of those revered persons who are now no more. I must, however, add, that the words themselves are not apt words of condition or exclusion; and that if their meaning be doubtful, they are to be interpreted most strongly against the person using them, that is, the acceptor; and the most strong inter-

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pretation against him is that which excludes, and not that which admits the qualification. Much was argued by the learned counsel for the plaintiff in error, as to the inconvenience which may ensue from the interpretation which I put upon these words; especially in the case of a gentleman or a lawyer, who should be suddenly called upon for payment at a distant place, after having provided and left funds in the hands of his banker to discharge his acceptance. But this supposed inconvenience appears to me to rest almost wholly in suggestion and imagination. If a bill addressed to a person at his place of abode be accepted generally, I apprehend the holder may, if he will be perverse or foolish enough to do so, take out a writ against the acceptor, as soon as the bill becomes due, without calling at his house for payment, in like manner as any other person may do who is a creditor for goods sold for the ordinary supply of a family; so that the supposed inconvenience is equal in both forms of acceptance, but in practice it can rarely happen in either; because the holder who neglects to present his bill, loses his recourse against the drawer, which no prudent man will choose to do. And, if an acceptance in the form of the present, mentioning a banking-house, is to be deemed a qualified acceptance, I apprehend the same interpretation must be given to the words, if a house of any other description be mentioned, such as the house of any agent or friend, or even the house or place of business of the drawee, if he happen to have two, and the bill be directed to one of them, or if he about to change his place of trade or residence before the bill will become due; or, if the bill be addressed to him at his only place of residence or business, without the addition of his place of abode, as "to *A. B.* merchant, London." There is also another ground upon which, it seems to me, as at present advised, that I might answer the first question in the negative; and that is this: Admitting a place of payment to be specially designated by the acceptance, I apprehend that the money is nevertheless due generally from the acceptor; and that in an action against him, his readiness to pay at the place appointed should be advanced by him as matter of defence by a special plea averring that fact, and bringing the money into court for the plaintiff's use, as in the common case of a plea of tender.

(unless indeed he can excuse himself by showing that the money has been lost by the intermediate failure of his banker, which is a point of so much doubt that I hope to be excused from giving an opinion upon it at present); and, according to the ordinary rules of pleading, a plaintiff need not allege any matter the want whereof furnishes a ground of special defence only, and not a general answer to his demand, or general defeasance of his right, unless it be the case of a condition precedent, the effect whereof is to postpone the demand until the matter of the condition be performed; and I have already observed that the words "payable at the house of Sir J. P. and Co." do not appear to me to be proper words of condition. But I hope to be excused from expressing myself with confidence upon this point, by reason of the difficulty there may be in drawing an effectual distinction between the designation of a place of payment in the acceptance, and the designation thereof in the body of the bill itself, or in the body of a promissory note payable upon demand to the bearer, as was the case of *Sanderson* v. *Bowes*, and one or two others which have been cited; and in which it was decided, that a presentment of the note at the place therein designated was a condition precedent to a right of action for the money. If the like question shall ever arise again, I shall consider it with the utmost deference and respect to the great learning and talents by which those decisions were pronounced, though at present I am not entirely satisfied, that, even in the case of such a note, a readiness to pay at the appointed place is not properly matter of defence alone. It is, I hope, sufficient for me to say at present, that the words of the instrument now in question are not precisely the same, and that they are found in an instrument of a different character, namely, in a bill of exchange; wherein a time certain is appointed for the payment, and of which, as before observed, I think the acceptance must be considered as given in pursuance of an antecedent duty to the drawer, assignable by the custom of merchants, and not as creating a new duty in itself, which, in the case of *Sanderson* v. *Bowes*, the promissory note was considered to do.

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In answer to the fourth question, I am of opinion that an action could not be maintained under the circumstances therein mentioned; or, rather, that the delivery of the bill by the

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drawer to the payee, such bill still remaining in his hands, or outstanding, would furnish a defence to the action according to the case of *Kearslake* v. *Morgan* *; because, if the drawer could be compelled to pay the original debt under circumstances furnishing a right of action against his drawee, and thereby taking *his* funds out of the hands of the drawee, he might, in the result, be found to pay the amount twice; directly by himself, and indirectly through the medium of his drawee. I shall be understood to speak of a case wherein the holder had consented to take the qualified acceptance. I have clearly intimated that in my opinion he may refuse to do so; and if he does refuse, he may, in my opinion, treat the bill as dishonoured, and sue the drawer upon it.

* 5 T. R. 513.

IN the discussion of the foregoing case three principal questions were made:

1. Whether the modern theory of law is to rest upon the ancient practice as to the acceptance of bills of exchange, according to which the acceptor was antecedently a debtor, or person having in his hands the funds of the drawer: or whether the extensive practice now established in commerce, of drawing bills, to which the acceptor lends his name and credit for the accommodation of the drawer, has altered the theory of law as it is supposed to have existed formerly; and accordingly, whether the acceptor becomes a debtor by and upon the terms of his acceptance only, as a contract then first made by him, without reference to any antecedent debt or debts.

2d. What is the true construction of the contract in this particular case:

3. Whether an action of debt will lie upon such contract or acceptance:

The two first questions have been satisfactorily investigated in the proceedings before the House of Lords in this case.

As to the last question, it was touched slightly, but passed without discussion. It is a question, in an abstract view, seemingly of little importance, but as connected with a consideration of the general principles of commercial jurisprudence, as involving a controversy upon the technical rules of pleading, on which the issue of suits, and the fate of suitors, are made to depend, and peculiarly as exhibiting one among many examples of the progressive change of legal opinions, it is a question well deserving a more studious investigation than the opportunities of the editor will afford*.

* This Note was printed three years ago, (Dec. 1820,) at the end of a pamphlet, containing a short report of the case now reported at length. The editor having in that note invited the aid of persons better qualified to discuss the question, the invitation has been accepted, without reference to the previous labours of the editor, by a gentleman who has published "An Analysis of the case of *Rowe* v. *Young*." At the end of that analysis (sect. 3, p. 64), the author discusses this same question, whether debt will lie upon a bill of exchange. To that discussion the editor refers the Profession, that it may be seen in what manner and degree the original argument is amplified, improved, or varied by a different assortment of the authorities and topics of discussion.

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To form a satisfactory opinion, it is material, in the first place, to consider accurately the early cases upon bills of exchange and promissory notes, and to examine the grounds and reasons of each decision. Upon such a review, it will appear that it is little more than a century since it was the solemn decision of an English Court of Justice, that no person but an actual merchant* could draw a bill of exchange. When this notion was removed by more liberal decisions†, it seems to have been doubted whether an action of debt, or *indebitatus assumpsit*, could lie against any of the parties to, and whether, on the bill or note. Yet in some of the cases it is suggested, that *indebitatus assumpsit* may be maintained on the bill or note as a contract between the privies to it, or in their names, and that the bill or note may be offered in evidence‡. Afterwards it was held in some cases that debt§, in others that *indeb.* ‖ *assumpsit*, would lie against the maker of a note (or drawer of a bill), where it was expressed to be for value received. But still the great technical objections prevailed as between the drawer or maker, and payee, where value received was not expressed upon the face of the bill or note; and as between all other parties for a supposed want of privity of contract.

At last, when the extension of commerce impressed upon the Courts the necessity of weighing the convenience of mankind against technicalities, which grew out of an obsolete state of society, and rested, but with much inconsistency of decision, upon grounds which no longer existed; when the custom of merchants, which is the foundation and substance of the law of commerce, began to be considered as a branch of the law of nations—a part of the law of England, and, as such, to be

* Lutwyche's Reports, 891, 1585.

† Carth. 82; 2 Ventr. 292; Comberb. 152; 1 Shower, 125; 12 Mod. 336. 380; Salk. 125.

‡ *Brown* v. *London*, 1 Freeman, 14; *Welch* v. *Craig*, 1 Mod. 285; 1 Vent. 152; Stra. 680; 8 Mod. 373; Salk. 125; 12 Mod. 37. In many of these early cases it does not appear by or against whom the action is brought.

§ Morgan's Prec. 458; *Rumball* v. *Ball*, 10 Mod. 38; and *Bishop* v. *Young*, 2 Bos. & Pul. 78.

‖ *Hodges* v. *Steward*, Skinner, 346; 12 Mod. 345; *Clarke* v. *Martin*, Lord Raym. 758; 12 Mod. 380; 2 Vent. 292.

recognized in our courts of justice*; it was held and decided, without much hesitation, that an action of *indebitatus assumpsit* for money lent†, or for money paid, had, and received, by defendant to the use of plaintiff, might be maintained by the indorsee against the acceptor‡ or the indorser§, and even by the bearer of a lost cash-note, which he fairly purchased, against the giver¶. And, in the cases of bills and notes, that actions of *indebitatus assumpsit* were maintainable although the bills or notes were not expressed to be for value received**, although not a shilling had passed between plaintiff and defendant††, and no evidence was given that the defendant had received value in the case of a bill‡‡.

To ascertain what are the circumstances in which an action of debt may be maintained, what is the definition and rule prescribed by the text-writers, is the second object of inquiry §§.

It is reported in one case to have been held that *indebitatus assumpsit* will lie in no case but where debt lies||||. But the matter is accurately defined in a book of great authority, where¶¶ it is said, that "debt lies upon every express and implied*** contract to pay a sum certain." A bill of exchange, within the very terms of this definition and rule, is a request and undertaking††† by the drawer; and when accepted, a contract by the acceptor for the payment of a sum certain

* See the argument of Judge Buller, in *Master* v. *Miller*, 4 Term Rep. 343, and *Pillan* v. *Mierop*, Burr. Rep.; *Tatlock* v. *Harris*, 3 T. R. and the several cases of bills drawn payable to the order of fictitious payees. See *Gibson* v. *Minet*, 1 H. Blac. 569; and *Gibson* v. *Hunter*, 6. B. P. C. with the note prefixed.

† Lord Raym. 758; 12 Mod. 380; Burr. Rep. 1525; see also 6 T. R. 123; *Kessebower* v. *Tims*, B. R. Pasch. 22 Geo. 3.

‡ *Tatlock* v. *Harris*.

§ *Kessebower* v. *Tims*.

¶ *Grant* v. *Vaughan*.

** *White* v. *Ledwick*, Bayley on Bills, 16.

†† *Ward* v. *Evans*, 2 Lord Raym. 930.

‡‡ *Vere* v. *Lewis*, 3 T. R. 182.

§§ See this point of the argument discussed in the note to *Eyre* v. *The Bank of England*, ante, vol. 1, p. 606.

|||| *Hard's* case, Salk. 23; and *quære*, Whether the terms of the proposition are not convertible?

¶¶ Com. Dig. tit. Debt, A. 8.

*** Ibid. A. 9.

††† *Collis* v. *Emett*, II. Black. 321.

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absolutely, in money only * and in specie †. It is a mercantile contract entered into by the acceptor, and not as a mere guarantee. On this ground a distinction is made between the original acceptor of a bill, and a second acceptor, to guarantee the credit of the first, which has been held to be a collateral undertaking that the bill shall be paid, and requires a special declaration ‡.

That *the acceptance is an express*, or at least *an implied, contract by the acceptor, to pay a sum certain*, is assumed by all the Judges and the Lord Chancellor in their arguments § upon the case now reported, and may be proved, if requisite, by a multitude of preceding authorities. The question as to privity of contract, or the communication of the rights and benefit of the contract between the original and adopted parties to a bill of exchange, must also depend upon the principles of commercial law, as applicable to instruments of a negotiable nature. It is almost, if not altogether, identical with the question, whether the acceptor incurs an assignable debt by his acceptance, or what is the nature of his contract. In theory, a bill of exchange is an assignment to the payee of a debt due from the acceptor to the drawer. The acceptance imports either that the acceptor is a debtor, or that he holds effects of the drawer ||. Acceptance of a bill imports, and is *primâ facie* evidence, that the acceptor has effects of the drawer in his hands ¶ ; it is an admission of effects. The acceptor by his acceptance gives faith to the bill ; and the holder, giving credit to the fact, pays the value on receiving the bill **. Giving a bill is an assignment ††, or appropriation ‡‡ of so much property, which becomes money had and received to the use of the holder.

* *Martin* v. *Chantry*, Stra. 1271 ; Bayley on Bills, p. 4.

† Anon. Bull. N. Pri. 172.

‡ *Jackson* v. *Hudson*, 2 Camp. N. P. C. 44.

§ See the arguments *passim*, and p. 37, the opinion of Wood, B.

|| Dict. of Eyre, C. B. in *Gibson* v. *Minet*, 1 H. Blac. p. 602. It may be accepted for honour, but the law in that case implies the same obligation.

¶ *Master* v. *Miller*, 4 T. R. 339.

** Burr. Rep. 1675, (*qy.*) per Aston, J.

†† *Grant* v. *Vaughan*, Burr. per Yates, J.

‡‡ *Tatlock* v. *Harris*, 3 T. R. 182.

The act of drawing a bill implies an undertaking to the payee, and every other person to whom the bill may afterwards be transferred, that the drawee will undertake in writing (or bind himself by a promise) to pay, and will pay, when due, the sum, &c.* The acceptance is evidence in an action by the holder against the acceptor, that he has received value † from the drawer.

Such are the doctrines of law as to the obligation of the acceptor, and the relation between him and the holder considered as payee; doctrines promulgated by judges of various learning, and the highest celebrity in municipal as well as commercial jurisprudence. Upon equal authority is founded the doctrine as to the relation of other parties in a bill of exchange. Every indorser is in contemplation of law a new drawer ‡. And as between indorsee and indorser, though neither of them are actual parties to the original contract, and the whole transaction amounts to no more than money or other consideration passing from the one, and the writing a name by the other, yet this constitutes a mercantile privity, which is recognized by municipal courts, and becomes the foundatian of the remedies which they administer in favour of the indorsee against the indorser §, as well as the acceptor and drawer of the bill. The action in such cases may be either upon the bill as negotiable by the custom of merchants, or an *indebitatus assumpsit* (which is in the nature of an action of debt) ||, for money lent, &c., and the bill, with its acceptance or indorsement, may be given in evidence. But essentially, in both cases, the custom of merchants is the true principle of the remedy and foundation of the action. The distinction sounds more in name than in substance ¶. For upon what ground but the custom of merchants can the bill be offered in evidence of money paid as between

* Bayley on Bills, p. 24. † *Vere* v. *Lewis.*

‡ *Smallwood* v. *Vernon*, Stra. Rep. 478; see Bayley on Bills, 47.

§ *Kesseboxer* v. *Tims, quà suprà.* || Vide ante, p. 519, note ||||.

¶ It was upon a question of this kind that Lord Chief Justice Holt fell into a dispute with the mercantile interest in the City; as to the manner of declaring upon a promissory note before the statute of Anne, as upon a specialty by the custom of merchants, which he said was mere obstinacy, as there was so easy a method by *indeb. assumpsit* for money lent. See 2 Lord Raym. 758, and Burr. 1525, post. p. 525.

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indorsee and indorser, or acceptor. If there is other evidence of a consideration, the proof of the bill is superflous.

How far the rigid maxims of municipal law have bent to the necessities of human intercourse appears by the doctrine, no longer disputed, that a bill of exchange, although it be a mere *chose in action*, yet the common mercantile transfer of it by writing a name, or even by simple delivery, is sufficient to vest the *legal* as well as the equitable interest in the indorsee or deliveree, and entitles him to sue thereon in his own name *.

This principle of decision has been extended beyond the cases of negotiable instruments. For where a *respondentia* bond had been given, on which the obligee had made a special indorsement to facilitate assignment, upon an action by an assignee of the bond, De Grey, C. J. held, that " the defendant had pro- " mised to pay any person who should become entitled to the " money ;" and there was a verdict for the plaintiff †.

Upon the strength of these authorities an opinion might, perhaps, without presumption, be hazarded ; that all the parties, original and derivative, to the negotiable mercantile instrument called a bill of exchange, are equally, by creation or by adoption, parties to the contract which is, expressly as to some, and by implication at least as to all, for the payment of a sum certain.

If so, the circumstances here concur, which, according to the definition ‡ of Chief Baron Comyns, are requisite to support an action of debt.

It is indeed stated, in a subsequent head of the Digest, that " debt will *not* § lie against the acceptor of a bill of exchange." But this doctrine seems to be contradicted by the principle of the rule before stated, and is asserted upon the authority of a case || which was decided in the infancy of commerce, at a time when it was supposed, and seriously adjudged, that no person but an actual merchant ¶ could draw a bill of ex-

* See Chitty on Bills, p. 6.

† *Fenner* v. *Mears*, Black. Rep. 1272. As to the authority of this case, see the observations of Lord Kenyon, in *Johnson* v. *Collings*, 1 East, 98.

‡ Com. Dig. *quà sup.*

§ Id. ibid. B.

|| Anon. Hardres, 485.

¶ Lutw. 891, 1585.

change—when it was held, that the bill must import to be for value received; that *indebitatus assumpsit* would not lie against the acceptor, and that the acceptor was liable only as a surety, and not as a principal debtor.

The revolution which has now taken place in judicial opinions, and the liberal doctrines upon this subject, which are now become settled principles of law, and applied daily in practice, seem to confirm the supposition, that there is, according to the law-merchant, which is a part of the law of England, an implied privity of contract between all the parties to a bill, primitive and derivative, or adoptive *.

In all cases of the transfer of negotiable instruments the question seems to be, whether the instrument itself is not by the law-merchant *primâ facie* or presumptive evidence of a consideration passing from hand to hand as the bill passes, but liable to be rebutted by evidence on the general issue, or special plea, that the holder gave no consideration.

An abstract of some of the principal cases cited in the foregoing note are here subjoined, with observations upon some later authorities which appear to bear upon the question of privity.

In Anon. Hardr. 485, held, that the payee cannot maintain debt against the acceptor, and it was said in that case, that the promises of the acceptor no more create a *duty* than a promise by a stranger to pay, &c. if the creditor will forbear. Upon the clear distinction between the acceptor of a bill, and a mere guarantee, see *Jackson* v. *Hudson*, 2 Camp. 447.

In *Welch* v. *Craig*, Stra. 680. 8 Mod. 373, held, that debt will not lie upon a note. But it does not appear who was the defendant in the action.

In Morgan's Precedents, 458, is an entry of a declaration in debt by administratrix of payee of note against the maker.

In *Rumball* v. *Ball*, 10 Mod. 38, action of debt brought on a note, by payee against maker, and held good.

In *Brown* v. *London*, 1 Freeman, 14; 1 Mod. 285; 1 Ventr. 152, held that indeb. assumpsit would not lie against the acceptor of a bill; but Twisden, J. doubted. The ground of this decision is

* See *Simmons* v. *Parminter*, 1 Wils. 185; Co. Litt. 172.

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said in Lev. 298, to have been, because the custom was not set out in the count.

In Skinner, 346, it is said that *indeb. assumpsit* (or debt, *qu.*) will only lie against the drawer upon a bill importing to have been given for value received.

In Salk. 23, it was held that *indeb. assumpsit* will lie in no case but where debt lies: That *indeb. assumpsit* (and therefore, *semb.* debt *) lies against the drawer, though not against the acceptor, of a bill of exchange. The reason for this decision is given in Skinner, 346, namely, " for the apparent consideration." See *Vere* v. *Lewis*, *infra*.

In Salk. 125, and 12 Mod. 37, it is given as general doctrine, that indeb. ass. will not lie on a bill of exchange, as it is said, " for want of consideration, as it is but evidence of a promise " to pay, which is but a *nudum pactum*." But it is to be observed, that the action was by the indorsee against the drawer, and in the last resolution of the judges, as given both in Salkeld and 12 Mod. it is said, that " the action should have been special on the bill, or a general indeb. ass. for money received to his (the indorsee's) use. See *Carter* v. *Palmer*, 12 Mod. 380, a case before the statute of Anne, where, upon a motion in arrest of judgment, a declaration upon a note on the custom, &c. as if it had been a bill, was held bad. But Holt, C. J. said, it might have been taken as evidence of money lent. In *Nicholson* v. *Sedgwick*, Ld. Raym. 180, the action (and verdict for plaintiff) being upon a note payable to bearer, the judgment was arrested on the ground of want of privity; but it was said the plaintiff might have maintained the action in the name of the payee, or if it had been payable to order, the (immediate) indorsee might have brought an action against the maker. And it was said to have been resolved in *Hodges* v. *Steward*, that the indorsement to the bearer binds the party who immediately indorses to him. In 12 Mod. 345, it is held that the first indorser (payee) striking out the names of all the indorsees of a bill, purporting to have been for value received, may maintain *indeb. assumpsit* against the drawer. In that action, Holt, C. J. is reported to have said, the action will lie, for the bill was given as a security for money lent, and without

* Vide ante, p. 519, note ||||.

doubt it was a debt; and the court, it is said, resolved it was a plain debt, and that one might bring debt, or indeb. ass. upon a bill of exchange, because it is in the nature of a security.

In 12 Mod. 380; and in Burr. Rep. 1525, it is laid down as indisputable, that indeb. ass. for money lent will lie upon a note. See also *Smith* v. *Kendall*, 6 T. R. 123. In *Clerke* v. *Martin*, Ld. Raym. 758, the action being upon a note payable to plaintiff or order; one count of the declaration was upon indeb. ass. for money lent, and another upon the custom, as on a bill of exchange. The defendant pleaded non assumpsit, and the jury gave a general verdict for the plaintiff with entire damages. Upon motion in arrest of judgment, Holt, C. J. was "*totis* "*viribus* against the action." He said, "that such actions "were innovations upon the common-law:" That "it was a "new sort of specialty invented in Lombard-street, which "attempted, in these matters of bills of exchange, to give laws "to Westminster Hall: That the continuing to declare upon "these notes on the custom of merchants proceeded from ob-"stinacy, as he had expressed his opinion against them, and "since there was so easy a method, as to declare upon a "general indeb. ass. for money lent. But as the damages "were given generally, it could not be intended that they were "given on the count of indeb. ass." And judgment was accordingly arrested.

So in *Grant* v. *Vaughan*, Burr. 1516, it was held that an action for money had and received may be maintained by the bearer against the giver of a cash-note upon a banker, made payable "to ship Fortune, or bearer."

In *Tatlock* v. *Harris*, 3 T. R. 174, the indorsee of a bill recovered against the acceptor upon counts for money had and received, and money paid.

In *Vere* v. *Lewis*, 3 T. R. 182, the indorsee of a bill recovered upon the money-counts against the acceptor, although there was no evidence that he had received value for the bill. The Court said *the acceptance was evidence that he had received value from the drawers.*

In *Kessebower* v. *Tims*, B. R. Pasch. 22 G. 3, it was held that the indorsee of a note might maintain indeb. ass. for money lent against the indorser.

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In *Bishop* v. *Young*, 2 B. & P. 78, (a decision by the present Lord Chancellor, when C. J. of the C. P.) an action of debt by the payee against the maker of a promissory note, expressed to be for value received, was upon demurrer held maintainable. What the decision might have been as between other parties, the Chief Justice said he would not express.

The case of *Barlow* v. *Bishop*, 1 East, 432, has been supposed (Chitty, 470,) to establish a rule, that the plaintiff can in no case recover under the money-counts, unless money has actually been received by the party sued, and for the use of the plaintiff. But in that case the plaintiff had received the note by indorsement from a married woman, and he had therefore no title or interest in the note; which could be no evidence for him of any thing.

If, (as Lord Kenyon observed in that case,) the indorsement had "been in the name of the *husband, it might have been* "*available*" as a note indorsed, or *as evidencé of a consideration to the maker*. But the indorsement being in her own name (as the Judge observed) "it was impossible to say that she could pass away the interest of her husband by it;" or, (it might be added,) that the plaintiff could make use of that which belonged to another, as evidence of a demand made by him against the defendant, who might have been sued a second time upon the same demand by the husband, when he had recovered possession of the note. It is indeed observed by the C. J. as reported at the end of the case, "that the plaintiff could not "recover on the money counts, as no money passed between "the parties." But if the maker of a negotiable note incurs the same responsibility to the holder as the acceptor of a bill, *quære*, how this extrajudicial dictum is reconcileable with the decision in *Vere* v. *Lewis*, ante, p. 525?

In *Waynam* v. *Bend*, 1 Camp. 174, the action was by an indorsee against the maker of a promissory note, made payable to *T. or bearer*. An indorsement being stated in the declaration. Lord Ellenborough said, that though unnecessary, yet as an indorsement was stated in the count, on the note, it must be proved; and that the plaintiff could not recover on the money-counts, as he was not *an original party*

to the bill, and there was no evidence of any value received by the defendant from him; but a witness being afterwards found to prove the indorsement, there was a verdict for the plaintiff on the count on the note. This case, it must be observed, contains no more than a *dictum* at *nisi prius*, and that the note was made payable to bearer; in which case the courts, as in actions brought upon bankers cheques and cash-notes, for obvious reasons, and upon the same principle, require proof of a consideration paid by the holder. At the end of the case of *Waynam* v. *Bend*, three authorities, on the point in question, are cited in a note subjoined by the reporter; *Johnson* v. *Collings*, 1 East, 98; *Whitewell* v. *Bennett*, 3 B. & P. 559; *Houle* v. *Baxter*, 3 East, 177; but without any remarks upon the case, or the application of the authorities.

In *Johnson* v. *Collings* the decision was, that a promise to accept a bill before it was drawn was not in law an acceptance. And as it could not support the count on the acceptance of the bill, so being no acceptance it could be no evidence in support of the general counts for money had, &c. Lord Kenyon merely said, as to the other counts, that there was no evidence to support them.

In *Whitewell* v. *Bennett*, the bill produced in evidence varied from that stated in the declaration. A banker's check had been given for the amount by the acceptor to the payee post dated, for the purpose of preventing the receipt of the money, until it should be ascertained, whether a bill of the drawer, in the hands of the acceptor, would be paid. The presumption of law in support of the money-counts arising from the acceptance of the bill, was rebutted by the circumstance of post dating the check, by a conversation which took place at the time of the acceptance, and other circumstances; and it was expressly found by the verdict that the defendant, at the time when he accepted the bill, had no effects in his hands.

In *Houle* v. *Baxter*, 3 East, 177, a bill being made payable to the order of the drawer, and indorsed by him, the plaintiff, in order to give additional credit to the bill, without the privity of the defendant, the acceptor, indorsed it upon the request of the drawer, and re-delivered it to him. The defendant having become bankrupt before the bill became due, and the plaintiff being obliged to pay the amount to the in-

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dorsee, the Court held, that he was *not a surety*, because he incurred no liability at the request of the defendant, and as his demand was upon the bill, which he might have proved under the commission, it was discharged by the certificate. The question turned wholly upon the nature of the collateral contract upon the bill itself, whether considered as a mercantile instrument, or as evidence of money paid and received. If the plaintiff could have been considered as a party to the instrument, according to the custom of the merchants, the demand was barred by the certificate.

Since the decision of this case on appeal, an act has been passed (1 & 2 Geo. IV. c. 78), reciting, that the practice and understanding among merchants was contrary to this decision; and enacting, that an acceptance made payable at a banker's, without further expression, shall be deemed a general acceptance; but if it is expressed to be payable at a banker's, or other place *only*, that it shall be deemed a qualified acceptance, and the acceptor shall not be liable to pay the bill, except in default of payment on demand at the banker's or other place.