I think Buchan is not answerable as he would have been if he had been acting strictly in the character of factor, and had not on the contrary been acting on principles which displaced the obligation, that would attach upon him by the general principles of law as applicable to factors.

But it was insisted also that the judgment should be affirmed with costs. I cannot, however, concur in that; for though the just demands against Buchan were less than the claims insisted upon by the other party, yet from the relation in which he stood with respect to the father, he ought to have kept accurate accounts always ready to be produced; and the contest has, in some measure, arisen from his failure in that duty. I propose therefore that the judgment be affirmed, but without costs.

Judgment *affirmed* accordingly.

June 2, July 2, 1817.

FACTOR NOT LIABLE, UNDER THE CIRCUMSTANCES OF THIS CASE, FOR RENTS LOST BY HIS NEGLECT TO ENFORCE PAYMENT BY ULTIMATE DILIGENCE.

Buchan not acting strictly in character of factor, and not liable in payment of the loss. Costs.

Judgment affirmed.

ENGLAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

DORAN—*Plaintiff in error.*
O'REILLY and others—*Defendants in error.*

March 7, 1817.

ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

Debt in K. B. and demand made in lawful money of Great Britain, founded upon a judgment of the supreme Court of Jamaica obtained in an action of assumpsit in that Court for so much Jamaica currency,—the declaration in K. B. stating that this amounted to so much in British money. Final judgment by default against the Defendant, and error brought in the Ex. Ch.; and there, the errors not being argued, judgment affirmed, and thereupon error in Dom. Proc. Held that

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

the demand being made in lawful money of Great Britain, and the Defendant below having suffered judgment to go against him by default, he had himself assessed the amount, and that there was no occasion to send the matter to a jury by writ of inquiry.

Count in the declaration for interest upon the forbearance of money on request: This is well laid, a promise to pay interest being implied.

Where errors are argued in Dom. Proc. without having been argued below, and judgment is affirmed, though the alleged errors may be well worthy of consideration, the House will make the plaintiff in error pay the costs of the proceedings there, as if the case had not been argued at all in that House.

Action of debt in K. B. upon a foreign judgment obtained in assumpsit.

THIS was an action in debt commenced by the Defendants in error in the Court of King's Bench in 1815, to recover from the Plaintiff in error the sum of 4934*l.* 11*s.* of sterling British money, due to them upon and by virtue of a certain judgment obtained by them against the Plaintiff in error in the supreme Court of Judicature in and for the Island of Jamaica, before the chief Judge and his associates Judges of that Court, in a suit for non-performance of certain promises and undertakings made by the said Plaintiff in error to the Defendants in error. The first and second counts in the declaration in the action in K. B. at Westminster, founding on the foreign judgment, were as follows:

Declaration.

"London (to wit). Thomas O'Reilly, George "Young, William Gordon, John Murphy, and "James Farrell, who have survived James Wester-"man May, their late partner now deceased, com-"plain of William Doran, who hath survived Da-"niel Robinson now deceased, being in the custody "of the marshal of the Marshalsea of our Lord "the now King, before the King himself, of a plea

" that he the said William Doran render to them
" the said Thomas, George, William Gordon, John,
" and James Farrell, the sum of fifty-four thousand
", pounds of lawful money of Great Britain, which
" he the said William Doran owes to, and unjustly
" detains from them. For that whereas the said
" Thomas, George, William Gordon, John, James
" Farrell, and James Westerman, heretofore and in
" the life-time of the said James Westerman, to wit,
" the first Monday in October, in the fifty-first year
" of the reign of our sovereign Lord the now King,
" and in the year of our Lord one thousand eight
" hundred and eleven, in a certain court of our said
" Lord the King, called a supreme Court of Judi-
" cature, held for our said sovereign Lord the King,
" at the town of Saint Jago de la Vega, in the
" county of Middlesex, in and for the island of Ja-
" maica, and within the jurisdiction of the said
" Court, to wit, at London, in the parish of Saint
" Mary-le-Bow, in the ward of Cheap, on the day
" and year aforesaid, before the Honourable John
" Lewis, Esquire, Chief Judge of the said Court,
" and his associates, then sitting Judges of the same
" Court, in a certain action in the said Court
" brought by the said Thomas, George, William
" Gordon, John, James Farrell, and James Wes-
" terman, against the said William Doran, and the
" said Daniel Robinson, for the non-performance of
" certain promises and undertakings by the said
" William Doran and Daniel, before that time made
" to the said Thomas, George, William Gordon,
" John, James Farrell, and James Westerman, by
" the consideration and judgment of the same Court
" recovered against the said William Doran and the

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

First count on foreign judgment.

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY—COSTS.

" said Daniel, the sum of five thousand six hundred " and seventy-five pounds two shillings and six " pence current money of Jamaica aforesaid, which " in and by the said Court was then and there ad- " judged to the said Thomas, George, William Gor- " don, John, James Farrell, and James Westerman, " for their damages which they had sustained in " that behalf, and also five pounds seven shillings of " like current money for their costs and charges by " them about their suit in that behalf expended to " the said Thomas, George, William Gordon, John, " James Farrell, and James Westerman, by the " Court there of their own assent adjudged; " whereof the said William Doran and Daniel were " convicted, which said judgment still remains in " the said Court in full force, not in any way re- " versed, annulled, paid off, or satisfied, to wit, at " London aforesaid, in the parish and ward aforesaid. " And the said Thomas, George, William Gordon, " John, and James Farrell, in fact say that neither " the said Thomas, George, William Gordon, John, " James Farrell, and James Westerman, or either " of them, in the life-time of the said James Wes- " terman, or the said Thomas, George, William " Gordon, John, and James Farrell, or either of " them, since the decease of the said James Wes- " terman, have as yet obtained any execution or sa- " tisfaction of and upon the said judgment so re- " covered as aforesaid; and that the said damages, " costs and charges so recovered as aforesaid, amount " in the whole to a large sum of money, to wit, to " the sum of five thousand pounds of lawful money " of Great Britain, to wit, at London aforesaid, in " the parish and ward aforesaid. Whereby and by

" reason of the said last mentioned sum of money " still being and remaining wholly unpaid, an ac- " tion hath accrued to the said Thomas, George, " William Gordon, John, and James Farrell, to " demand and have of and from the said William " Doran the said last mentioned sum of five thou- " sand pounds, parcel of the said sum above de- " manded. And whereas also the said Thomas, " George, William Gordon, John, James Farrell, " and James Westerman, heretofore and in the " life-time of the said James Westerman, to wit, " on the said first Monday in October, in the said " fifty-first year of the reign of our said sovereign " Lord the now King, and in the said year of our " Lord one thousand eight hundred and eleven, in " a certain Court of our said Lord the King, " called a supreme Court of Judicature, held for " our said sovereign Lord the King, at the said " town of Saint Jago de la Vega, in the county of " Middlesex, in and for the said island of Jamaica, " and within the jurisdiction of the said Court, to " wit, at London aforesaid, in the parish and ward " aforesaid, the day and year last aforesaid, before " the said Honourable John Lewis, Esquire, chief " Judge of the said Court, and his associates then " sitting Judges of the same Court, by the consi- " deration and judgment of the same Court, reco- " vered against the said William Doran, and the " said Daniel, the sum of five thousand six hun- " dred and seventy-five pounds two shillings and " six-pence of like current money of the said island " of Jamaica, which in and by the said Court was " then and there adjudged to the said Thomas, " George, William Gordon, John, James Farrell,

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

Second count on foreign judgment.

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

" and James Westerman, for their damages which " they had sustained by reason of the non-perform- " ance of a certain promise and assumption then " lately made by the said William Doran, and Da- " niel, to the said Thomas, George, William Gor- " don, John, James Farrell, and James Wester- " man, and also five pounds seven shillings of like " current money, for their costs and charges by " them about their suit in that behalf expended to " them the said Thomas, George, William Gordon, " John, James Farrell, and James Westerman, by " the Court there of their own assent adjudged, " whereof the said William Doran, and Daniel were " convicted, which said last mentioned judgment " still remains in the said Court in full force, not " in any way reversed, annulled, paid off, or satis- " fied, to wit, at London aforesaid, in the parish " and ward aforesaid; and the said Thomas, George, " William Gordon, John, and James Farrell, in " fact, further say, that neither the said Thomas, " George, William Gordon, John, James Farrell, " and James Westerman, or either of them, in the " life-time of the said James Westerman, or the " said Thomas, George, William Gordon, John, and " James Farrell, or either of them, since the decease " of the said James Westerman, have as yet ob- " tained any execution or satisfaction of and upon " the said last mentioned judgment so recovered as " last aforesaid, and that the said last mentioned " damages, costs, and charges, so recovered as last " aforesaid, amount in the whole to a large sum of " money, to wit, to the sum of five thousand " pounds of like lawful money, to wit, at London " aforesaid, in the parish and ward aforesaid, where-

" by and by reason of the said last mentioned sum
" of five thousand pounds still being and remaining
" wholly unpaid, an action hath accrued to the said
" Thomas, George, William Gordon, John, and
" James Farrell, to demand and have of and from
" the said William Doran the said last mentioned
" sum of five thousand pounds further parcel of the
" said sum above demanded."

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

Then followed counts for goods sold and delivered, money borrowed, money paid, money had and received, interest, and on an account stated. The count for interest was in these terms: " And where-
" as also the said William Doran, afterwards, and
" after the death of the said James Westerman, to
" wit, on the first day of October in the year of
" our Lord one thousand eight hundred and fifteen,
" at London aforesaid, in the parish and ward afore-
" said, was indebted to the said Thomas, George,
" William Gordon, John, and James Farrell, in the
" further sum of two thousand pounds, of like law-
" ful money for money before that time and then
" due and payable from the said William Doran to
" the said Thomas, George, William Gordon, John,
" and James Farrell, for interest upon and for the
" forbearance of divers other large sums of money,
" before then due and owing from the said William
" Doran and Daniel, during the life of the said
" Daniel, and the said William Doran, since the
" death of the said Daniel, to the said Thomas,
" George, William Gordon, John, James Farrell,
" and James Westerman, in the life-time of the
" said James Westerman, and to the said Thomas,
" George, William Gordon, John, and James Far-
" rell, since the death of the said James Wester-

Count for interest.

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" man, and by the said Thomas, George, William " Gordon, John, James Farrell, and James Wes- " terman, in the life-time of the said James Wes- " terman, and since his death, by the said Thomas, " George, William Gordon, John, and James Far- " rell, forborne to the said William Doran and the " said Daniel in his life-time, and to the said Wil- " liam Doran, since the death of the said Daniel, " at their special instance and request for divers " long spaces of time, before then elapsed, and to " be paid by the said William Doran, to the said " Thomas, George, William Gordon, John, and " James Farrell, when he the said William Doran " should be thereunto afterwards requested; where- " by, and by reason of the said last mentioned sum " of money being and remaining wholly unpaid, an " action hath accrued to the said Thomas, George, " William Gordon, John, and James Farrell, to de- " mand and have of and from the said William " Doran the said last mentioned sum of money, fur- " ther parcel of the said sum above demanded."

Defendant makes default, and final judgment signed.

The Plaintiff in error having suffered judgment to go against him by default, final judgment was signed on the 11th January, 1816, for the debt demanded, and 22*l.* damages and costs. Upon this

Error in Exch. Ch.

a writ of error was brought in the Exchequer Chamber, where, general errors only having been assigned and not argued, the judgment was affirmed on the 13th November, 1816. The Plaintiff in error then

Error in Dom. Proc.

brought a writ of error returnable before the Lords in Parliament, which, with a transcript of the record, was brought up on 28th January, 1817; and the Plaintiff assigned the general error, and a special error not insisted upon. The House took the cause

for hearing out of its course, as it usually does where it is apprehended that the writ of error is brought merely for delay, and the agents having been ordered to attend, and asked whether they were ready to proceed to hearing, and it having been stated on the part of the Plaintiff, that he had additional errors to assign, and a short day having been appointed for assigning the errors, the hearing was fixed for the 7th March, 1817. The errors, as stated in the case for the Plaintiff in error signed by Mr. Richardson, were these:

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

Errors.

" The Plaintiff in error humbly conceives that
" the declaration and judgment in this case will
" appear erroneous to your Lordships.

" He contends that the action of assumpsit is in
" its form and nature an action of tort, though
" founded upon contract—and that damages given
" for a tortious breach of promise cannot be con-
" verted into a debt by the judgment of any court of
" foreign judicature; that the judgment in an action
" of assumpsit given by such court of foreign judica-
" ture, is indeed good *primâ facie* evidence of the
" breach of the promises and undertakings therein
" complained of, but that it is no evidence of any
" debt subsisting between the parties to such action,
" nor of the amount of the same.

" Also, that debt cannot be maintained for the
" value of foreign money, or for other demand,
" which in its nature is wholly uncertain in amount,
" and can only be ascertained by the finding of a
" jury.

" Also, that if debt can be maintained for a de-
" mand which in its nature is wholly uncertain in
" its amount, judgment ought not to be entered up

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" for such amount as the Plaintiff may choose to " suggest, nor ought it to be final in the first in- " stance, but a writ of inquiry ought previously to " issue to ascertain the amount, and judgment " should be entered up accordingly.

" Also, that by the law of the land interest is " not demandable on the forbearance of money " though forborne on request, without a special " contract for the same; and that such contract, or " the grounds from which it may be implied, ought " to appear upon the face of the declaration.

" Also, that the manner in which money becomes " due and owing ought to appear on the face of the " declaration, that the Court may be enabled to " judge whether interest be demandable for the " forbearance of the same; and that it is too gene- " ral and altogether uncertain to state that money is " due and payable for interest upon, and for the " forbearance of money due and owing, without " stating on what account."

Mr. Richardson (for Plaintiff in error). One of the errors, and it goes to the whole record, is, that a general judgment ought not to have been entered up till a writ of inquiry had been issued to ascertain the amount of the sum due. The proceedings in the Courts, in actions of debt, have varied. Formerly it was necessary to state the contract with precision, and the exact sum; and if there was a variance between the sum laid in the declaration and the sum really due, the Plaintiff failed altogether. There was no occasion at that time for the inquiry. But ever since the case of *Aylett v. Lowe*, 2 Blac. R. 1221, any sum may be recovered not

Writ of inquiry.

Vid. also Emery v. Fell,

exceeding the sum claimed, and so it was held also in *M'Quillin v. Cox*, 1 H. B. 249. It was then no longer necessary to state the exact sum, and the amount became as indefinite in debt as in assumpsit. This alteration, making the sum really due as indefinite in debt as in assumpsit, was attended however with this inconvenience, that the amount must be assessed at the trial; and in a judgment by default, or upon demurrer, an inquiry is necessary. There are cases where a writ of inquiry has been directed in debt; *Blackmore v. Flemyng*, 7 T. R. 446.: and there is no decision that it is unnecessary.

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2 T. R. 28.—Bonafous v. Walker, ib. 126.—Lord v. Houston, 11 East. 62.

Another objection is, that the cause of action in the foreign Court is assumpsit, and the judgment of a foreign Court in such an action is not a sufficient ground for an action of debt in this country. In *Walker v. Witter*, 1 Doug. 1; the ground of action in the foreign Court was itself *debt*.

Judgment in foreign Court.

Another objection is, that the recovery is in foreign money, and the Court cannot, without evidence, kown the amount in British money. There is a difference in the practice of the Courts with respect to foreign and British money, and foreign and inland bills of exchange. With respect to British money and inland bills of exchange, where the amount is simply a matter of computation, the Court refers it to the Master, to calculate and ascertain the amount of the sum due. But with respect to foreign bills and foreign money the Courts direct a writ of inquiry; *Maunsell v. Massareene* (*Lord*), 5 T. R. 87. Such was the course adopted in early times also, in regard to foreign money, as appears from *Bagshaw v. Playn*, Cro. El. 536; where it was held to be error that no inquiry was executed,

Foreign money.

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as the value of Flemish money was not known to the Court. (*Lord Eldon*, C. Did the Plaintiff there claim in Flemish money?) He claimed 47*l.* Flemish money, amounting to 40*l.* English. (*Lord Eldon*, C. What did the Defendant plead?) He pleaded *plene administravit*, which is not to the present purpose; but the judgment was set aside. (*Lord Eldon*, C. The Court will ascertain the amount by its own officer now.) No, not in questions as to foreign money and foreign bills of exchange; nor in any case except where the amount is a matter of mere calculation. In *Cuming v. Monro*, 5 T. R. 87. a case of proclamation money of an American State, the Court would not send it to the Master to fix the value of foreign money, but directed an inquiry; and thus the Court acted in *Maunsell v. Massareene*, in the same page, so that the distinction was supported by the modern as well as the ancient cases. In *Rands v. Peck*, Cro. Jac. 617. which was an action of debt, for that the Defendant owed to the Plaintiff 600 guilders *monetæ Poloniæ*, and that the value was 220*l.* *legalis monetæ Angliæ*, &c., the Jury found that the value was 220*l.* English, the value not being otherwise known to the Judges.

Interest.

Then with respect to the count for interest, no contract is shown; and *debt* does not lie for interest on the forbearance of money on request. It must be founded on contract in some way or other, and no such thing appears here. In *Seaman v. Dee*, 1 Vent. 198. it was decided on the authority of Lord Hale, that interest could not be recovered in debt, unless upon contract, and that the proceeding must be by assumpsit and damages. I am

aware that some doubt has been thrown on that doctrine, by what Lord Kenyon said in *Herries v. Jameson*, 5 T. R. 553.: but it was not overruled in that case, nor was it necessary there that it should be overruled. March 7, 1817.

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The result of the whole then is, that in actions of debt, the amount of the sum really due is as indefinite as in assumpsit; that there exists the same reason for directing an inquiry in debt as in assumpsit; that the Court ascertains the amount by reference to the Master only in cases where it is a matter of mere computation; that all the reasons which apply to cases of tort and assumpsit apply to cases of debt, and that the same inquiry ought to have been directed, at least with respect to the foreign money counts, as to which the proposition is supported, not merely by the reason of the thing, but also by decided cases.

Mr. Littledale (for Defendant in error). There is no case in which a writ of inquiry has been directed in an action of debt, where the demand has been in lawful money of Great Britain; and *Mr. Richardson* himself in *Taylor v. Capper*, 14 East. 442. admitted that he had not been able to find any instance of it. He relied on two cases, *Bagshaw v. Playn*, Cro. El. 536. and *Rands v. Peck*, Cro. Jac. 617. But in the former the demand was in Flemish money, and as the judgment must be for Flemish money, it was thought that a writ of inquiry should have been directed to ascertain the value. But even in actions for foreign money it has not been thought necessary always to direct an inquiry. In a case cited in *Bagshaw v. Playn*, where debt was brought

Inquiry.

Foreign money.

Davidgs v. Wychalls.

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ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

for 20*l.* English, and the Plaintiff declared on 22*l.* Portuguese, value 20*l.* English, the judgment for 20*l.* was held right without an inquiry. As to the case of *Rands v. Peck*, in Cro. Jac. 617, the demand there was in Polish money; and as the judgment must be for Polish money, the value was found by a jury. In *Draper v. Rastall*, Cro. Jac. 88, referred to in *Rands v. Peck*, the action was for 39*l.* for that the Plaintiff had sold to the Defendant three northern clothes for 66*l.* *monetæ Flandriæ*, amounting, *tempore emptionis*, to 39*l.* *Angliæ*; and, on motion in arrest of judgment, for that the demand ought to have been for 66*l.* Flemish, according to the contract, it was held that the demand in English money was well made, and, if made contrary to the truth, the Defendant might have pleaded in abatement; and that, as it was admitted on the record that so much was due in British money, no further inquiry was necessary. So that the distinction is whether the demand is or is not made in British money: and the demand, in these cases, may be well made in British money; for, even in the common action of assumpsit, *Harrington v. Macmorris*, 5 Taunt. 228. it was held to be no variance that the allegation was a loan in British money, and the proof a loan in foreign.

What then is the principle with respect to the directing of writs of inquiry? In 5 Com. Dig. *Debt*, (A.) 8. it is stated that *Debt* may be brought for a *quantum meruit* with an allegation that the worth is so much: *Vaux v. Mainwarring*, Fort. 197.; *Bloome v. Wilson*, Jones (Sir T.), 184. So that it has been the practice to bring debt on a *quantum meruit* with an allegation that the worth

was so much; and how is it that it was not thought of to direct a writ of inquiry for a jury to ascertain how much was due? The truth is, that a writ of that description is not necessarily directed in any case. It is merely an inquest of office to inform the conscience of the Court, for the judges themselves may assess the damages: 1 Roll. Abr. 571—573, *et ib cit. Ley v. Folliot (Lord)*; Brookes' Abr. *Damages*, pl. 54—194. There are an infinite variety of cases in the old books where this language, that the justices may assess the damages, is held; and it has been also held in more modern cases, as in *Holdipp v. Otway*, 2 Saund. 106. I am aware that the case is not directly in point, and I mention it only with reference to the language. And, even so late as the early part of his present Majesty's reign, Wilmot, Ch. J. said in *Bruce v. Rawlins*, 3 Wils. 61, 62. that the judges might assess the damages. That is the principle on which the Court refers it to the Master to ascertain the sum due, because the judges may take the matter out of the hands of a jury when they please. *Mr. Richardson* says that they direct an inquiry to ascertain the value of foreign money. They usually do, but they may refer that too to the Master if they think proper. The reason why the Court directed an inquiry in the case of *Cuming v. Monro*, 5 T. R. 87. was, that the proclamation money being at one time of no value at all, the Court wished to ascertain its value at another time. But all this goes to the discretion of the Court; and the doctrine, that the value of foreign money ought always to be ascertained by a jury, is contrary to the whole current of authority.

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Vide Bruce v. Rawlins, 3 Wils. 61, 62.

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Foreign judgment.

Slade's case. Coke, R. vol. 2. p. 93. Oct. Ed.

Consideration.

Vid. Plaistow v. Van Uxem, 1 Doug. 5 n.

Interest.

As to the objection that *debt* cannot be maintained on a foreign judgment in assumpsit, the case of *Walker v. Witter*, 1 Doug. 1. is an authority for me on that point. But then it was said, the action in the foreign Court there was itself *debt*. What does it signify whether it was debt or assumpsit? The forms of the declarations are nearly the same, and Buller, J. says, in *Walker v. Witter*, that the old cases show that wherever indebitatus assumpsit is maintainable, debt is also: and he quotes *Slade's* case, Co. R. Neither is it necessary that the consideration of the foreign judgment should appear, though it does appear upon our declaration.

With respect to the count for interest, *Mr. Richardson* says, that a special contract ought to have been averred. But that is not necessary. It may be expressed or implied, and the practice is to state the matter as it really is, and it is sufficient if it appears that there is a contract. The forbearance of money is considered in the usury acts as a contract for interest, and the forbearance creates a contract. Hale's doctrine in *Seaman v. Dee*, 1 Vent. 198. would go the length of establishing that interest could never be recovered as such, but only by way of damages: and Lord Kenyon says, in *Herries v. Jameson*, 5 T. R. 553. that the reasons given for the doctrine go rather the other way.

The judgment therefore, I submit, ought to be affirmed on the whole declaration, or at least on some of the counts.

Mr. Richardson (in reply). I do not deny that debt may be maintained for any sum that may be liquidated; and, if the Plaintiff over-values, the

Jury may mitigate. *Mr. Littledale* says, that in some cases of foreign money the Court did not think it necessary to direct a writ of inquiry; but then there was an averment that so much was due in British money. The ground therefore was, that the Court knew the value, and did not want the assistance of a Jury. It is clear that a writ of inquiry may be directed in an action of debt, and it has been done in modern cases, as in *Blackmore v. Flemyng*, 7 T. R. 446.; and it has been held that it may be done in action of debt on specialty, in order to ascertain the interest, so that there is express authority that the writ may issue in actions of debt. As to the case of *Draper v. Rastall*, Cro. Jac. 88. a Jury intervened there, and the sum due was found in a formal way. But *Mr. Littledale* finds *dicta* in the ancient books that the Judges may themselves assess the damages. But that is only in cases of *mayhem*, and there the Court may fix the damages, *super visum corporis*. That however rests on a different principle from that upon which other cases depend. There are *dicta* also confining the discretion of the Judges to matters of mere computation. The observation of Wilmot, Ch. J. was a mere *obiter dictum*. As to the question of interest, it is true that the usury act states the forbearance of money as a consideration for interest: but it is not called a contract, and there is no case where it has been so called. It does not appear that the law always supposes that the forbearance of money due imports a contract to pay interest; and the authority of Hale in *Seaman v. Dee*, 1 Vent. 198. has not been over-ruled.

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12 Anne, st. 2. cap. 16.

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Judgment. March 7, 1817.

Lord Eldon (C.) Although errors are brought before your Lordships, without having been argued in the Courts below, if there is error the Plaintiff in error is entitled to your Lordships' judgment. At the same time I repeat, not however stating it as at all reflecting upon either of the two most learned persons who have argued the case here, that this House always takes that circumstance into consideration, not so as to influence its judgment with respect to the case itself, but with reference to our practice as to costs. For if a party suffers his cause to pass without argument through the Courts below —and the question here was well worthy of their attention—and assigns his errors only two or three days before the cause is brought to hearing in this House, he must, by our practice, pay the costs of the proceedings here.

Where errors are argued in Dom. Proc. without having been argued below, and the judgment is affirmed, though the alleged errors should be well worthy of consideration, the plaintiff in error pays the whole costs of the proceedings in D. P. as if the case had not been argued there at all.

With respect to the case itself my opinion is, that, ably as the errors have been argued on the part of the Plaintiff in error, they have not been established. I think the demand was made in lawful money of Great Britain, and that the defendant below himself assessed the amount, and there was no occasion to send the matter to a jury. And as to the point of interest, I think that sufficiently laid in the declaration to imply a promise to pay, and that, on that point also the Defendant in error is entitled to your Lordships' judgment. I propose, therefore, that we should give judgment, as if the case had not been argued in this House at all, that is, to give the Defendant in error his costs of the proceedings here.

The demand made in lawful money of Great Britain, and Defendant below had himself assessed the damages, and no occasion to send the matter to a jury. Interest.

Judgment *affirmed*, with 140*l.* costs.

Judgment at the same time affirmed in another cause (not argued) of the same nature, relating to the same subject, and between the same parties, with 140*l.* costs.

March 7, 1817.

ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

BAYNE—*Appellant.*
FERGUSON and KYD—*Respondents.*

B., F., and K. become copartners in a joint adventure in land. A third person (Lord L.), for whom K. is factor, is anxious to purchase a part of the copartnership land called Hilton, at 19,441*l.*, and applies to certain monied relations to furnish him with the means of effecting the purchase. B. is aware of the anxiety of Lord L. to purchase Hilton, but K. does not communicate to B. the steps taken by Lord L. with that view. F. (K. concurring) persuades B. to agree to offer the lot to Lord L. at 19,000*l.*, in order to bring him to a decision; and B. and F. offer it at that price to K., who accepts it for himself without any objection made by his co-partners, B. however, understanding the offer and acceptance to be for Lord L. Lord L. does not accept the offer at that time, and K. sells the lot at 19,000*l.* to F. without any communication with B.—F. sells pieces of the lot to M. and Lord L., without any interference by B., and then sells the remainder to Lord L. at a price which makes up for the whole lot the sum of 22,311*l.*, instead of 19,000*l.* B. brings his action for a share of the increased profits, alleging that his consent to offer the lot at 19,000*l.* was obtained by fraud and concealment, on the part of his co-partners, for the purpose of excluding him from his share of these profits. F. examined on oath, states that he did not consider himself legally bound to allow K. to participate in the profits, but that he had a feeling of honour on the subject, K. having promised, in case F. should be obliged to sell the lot at a loss, to bear a part of that loss. Judgment below for the Defenders, affirmed above, but without costs.

March 24, 26; June 23, 1817.

CO-PARTNERS.—CONCEALMENT.—FRAUD.