ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

WILLIAM EYRE - - - - *Plaintiff in Error.*

THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND - - - - *Defendants in Error.*

In actions upon bills of exchange, containing counts in contract upon the bills, and a separate count for interest, not expressed to be by contract, but apparently sounding in damages, if the plaintiff obtain interlocutory judgment upon demurrer to the replication, it is not necessary that the damages should be assessed by a jury. The Court, on motion of course, may refer it to the Master to compute, or without reference may itself compute the damages in respect of interest; and the plaintiff may enter up judgment, upon the respective counts in contract and for interest, without *remittitur* as to the excess of the aggregate sums laid in those counts beyond the sum of principal and interest computed, and for which he enters up judgment.

1819.

EYRE *v.* BANK OF ENGLAND.

THIS was an action brought in the Court of King's Bench by the defendants in error, against the plaintiff in error, upon two bills of exchange. The declaration consisted of seven counts: the first, on a bill of exchange for the sum of 973 *l.* 4 *s.*; the second, on a bill of exchange for the sum of 1,278 *l.* 13 *s.* 6 *d.*; the third count was *indebitatus assumpsit* for 2,500 *l.* for money lent and advanced; the fourth, *indebitatus assumpsit* for 2,500 *l.* for money

paid, laid out and expended; the fifth, *indebitatus assumpsit* for 2,500 *l.* for money had and received; the sixth, *indebitatus assumpsit* for 300 *l.* for interest; and the last, *indebitatus assumpsit* for 2,500 *l.* for money due on the balance of an account stated. The defendants in error obtained interlocutory judgment in the Court below, on demurrer to the replication; and after an assessment made under a reference to the Master by order of the Court below, and without the intervention of a jury, entered up judgment, on the first, second and sixth counts, for the sum of 2,299 *l.* 9 *s.* 3 *d.* damages, and 56 *l.* 0 *s.* 9 *d.* costs, remitting all damages on the third, fourth, fifth and last counts of the declaration. Against this judgment a writ of error was brought upon the following grounds; first, that the different sums claimed by the two first and sixth counts of the declaration, upon which the judgment was taken, amounted to the sum of 2,551 *l.* 17 *s.* 6 *d.* whereas the judgment was only taken for 2,299 *l.* 9 *s.* 3 *d.* leaving a sum of 252 *l.* 8 *s.* 3 *d.* parcel of the several sums claimed by the said two first and sixth counts of the said declaration, without any adjudication whatever; whereas the defendants in error (the plaintiffs in the Court below) ought either to have taken judgment for the whole of the sums mentioned in the three counts upon which they have taken judgment, or have entered a *remittitur* as to the balance, as they have done as to the third, fourth, fifth and last counts of the declaration, or have released such balance: so that if this judgment be not erroneous, there is nothing to prevent the defendants in error from bringing a new action for

1819.

EYRE v. BANK OF ENGLAND.

the sum of 252 *l.* 8 *s.* 3 *d.* and subjecting the plaintiff in error to the costs of such new action. Secondly, that as the sixth count of the declaration is not founded upon any written instrument or express contract, but sounds in damages only, such damages ought to have been assessed by a jury, and that the Court below had no authority to assess the same without the consent of the plaintiff in error, the defendant in the Court below.

For the Plaintiff in error, *Mr. Denman.*

Every judgment given in a court of law ought to be final and conclusive between the parties, as to all matters which appear to be in dispute, and claimed by the party suing in the action in which such judgment is given; but the judgment given in this case in the Court below is not final and conclusive as to the matters which appear, by the pleadings in this cause, to have been in dispute between the parties in this suit; but on the contrary, a sum of 252 *l.* 8 *s.* 3 *d.* which appears to have formed part of the matters in dispute between the parties in this cause, remains undisposed of by the judgment.

Although the Court below might have assessed damages on the two first counts of the declaration, they being and appearing to be upon contract by written instruments, and for the payment of specific sums of money, it had no power to assess damages of its own authority, and without the intervention of a jury, upon the count of the declaration which sounds entirely in damages.

For the Defendants in error, *Mr. James Parke* and *Mr. Winter.*

The count for interest may be by contract, for any thing that appears in the declaration. The question is, whether the Court below has the power to assess damages for interest without inquiry by a jury? That they have such power generally, appears by many authorities; inquiry is only to inform the conscience of the Court. The plaintiff in error *confounds the power with the practice* of the Court. In *Holdipp* v. *Otway*, 2 Saund. 106, it was decided to be the course of the King's Bench, in an *action of debt*, where the plaintiff has judgment by default or confession, to tax the damages for the detention of the debt, as well as the costs, and that interest may be included in the damages. In the note to that case by Serjeant *Williams*, the subsequent authorities are collected; and upon the ground of those authorities the practice has been established. The last case was in the Exchequer Chamber, 4 Term Rep. 148, *Gould* v. *Hammersley*. Upon interlocutory judgments, the Court will grant an order of reference to the Master to compute interest, in cases similar to the present.

In reply:

The defendants in error might have had damages for interest; they need not have taken judgment on the count for interest, or they might have entered a *remittitur* on that count.

During the argument the Chancellor expressed some doubts as to the practice, and put the following

1819.

EYRE *v.* BANK OF ENGLAND.

case: Suppose the declaration had consisted of one count for 100*l.* for interest only *, and after *non assumpsit* pleaded, there had been judgment by default, could the damages in such case have been assessed by the officer of the Court? The counsel for the defendant in error answered, that in such case the Court might refer it to the officer to compute the interest.

On the 8th of July 1819 the judgment of the King's Bench was affirmed, without observation.

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* See the dictum in the Anon. case, 1 *Ventr.* 330. (cited *post.* 599.) which seems to warrant the doubt expressed by the Lord Chancellor, unless the practice can be sustained upon something less assailable than the extensive authority of ancient precedents. The certainty of the demand is the criterion suggested by that case. Upon the ground (as stated in the report), the Court in that case observed, that the damages being uncertain, could not be set in a court of equity, *but by a jury*; and as to their own powers to assess damages on judgment by default, they took a distinction between actions of *debt*, where the *demand is certain*, and actions of trespass or upon the case, where the matter lies *wholly in damages.* In the former case they said the Court had such power, but not in the latter.

If, therefore, the action, in the case put by the Lord Chancellor, can be said to lie wholly (*i. e.* substantially) in damages, the Court, according to the authority of this precedent, has no power to assess the damages. If it is in a technical sense only nominally, and not substantially, that the action is said to lie in damages, being in fact in the nature of an action of debt (*in deb. assumpsit*) for a sum certain, or which becomes certain by mere computation, then the power of the Court is founded upon the certainty of the demand, as contradistinguished from a demand which lies wholly in damages.

The first ground assigned for error was but slightly noticed in the argument for the plaintiff in error, and the counsel for the defendants in error merely asserted that there could be no *remittitur*.

The principal and interest, for which judgment is entered up, exceed the amount of the sums laid in the two first counts. If, therefore, the damages for interest could not be taken under the general breach, at the close of the declaration, (which was not suggested in argument,) and if the Court had no power to assess damages on the count for interest, the course, it seems, would have been to enter a *nolle prosequi* upon the count for interest, and a remittitur of all damages assessed beyond the amount laid in the two first counts*. But the Court having power to assess damages on the count for interest, then it is similar to the common case, where the jury give less than the damages laid in the declaration, in which case no *remittitur* is ever entered for the excess. It is only in cases where the jury give larger damages than the plaintiff has claimed by his count, that a remittitur is required, as † where damages were laid at 10 *l.* in the declaration, and the verdict was for 13 *l.* the judgment was reversed: But the Court said, that if the plaintiff had released the excess of damages beyond the sum laid in the declaration, and entered up judgment accordingly, that would have been good ‡. So where several damages were assessed against the defendants, it was held in judgment that the plaintiff might enter a remittitur, or take judgment *de melioribus damnis*, which operates as an election of the greater and waiver of the lesser damages §.

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* Tidd's Prac. 589; 2 Smith's Rep. 46-7 in notis.

† *Percival* v. *Spencer*, Yelv. 45. The jury may give less damages than laid in the declaration, but not more. Dict. of Lutwyche, in *Fairly* v. *Roche*, Lutw. 274.

‡ *John and Robinson* v. *Dodworth*, Cro. Car. 192, and *Salin* v. *Long*, 1 Wils. 30.

§ See also *Wray* v. *Lister*, 2 Stra. 1100.

1819.

EYRE *v.* BANK OF ENGLAND.

The second point was argued, and *apparently* decided upon the authority of *Holdipp* v. *Otway*, and the precedents cited in the note to that case by the late learned editor of Saunders. But the jurisdiction asserted in that case and the notes, is much larger than required for the decision of the case now reported, and extends far beyond the modern practice of the Courts. According to that case and the notes, the Court has unlimited power in actions of *trespass* and *assumpsit*, as well as covenant and debt, where judgment is taken upon demurrer, by default, confession, &c. to assess the damages, with the assent of the plaintiff, if they think fit. The writ of inquiry is said to be merely gratuitous, to inform the conscience of the Court, and the Judges may dispense with that information, from pre-knowledge or other cause, or at discretion. This doctrine is rested upon ancient authorities, which if now to be considered as law, warrant the proposition to the full extent in which it is stated, and other authorities are not wanting to carry the doctrine to the extreme of uncontrolled jurisdiction, as to the power of assessing damages without the interference of a jury in all actions where the defendant does not take issue on the facts and conclude to the country, and in cases of assault, mayhem and trespass, of increasing and abridging damages after a verdict.

In the argument for the defendant in error, the practice of the Courts is said to be *confounded with their power.* The proposition is a little obscure; but it may be conjectured from the authorities cited in the argument, that it was intended to intimate, that the powers of the Courts are much more extensive than might be supposed, from the limits within which the Judges have in practice bounded their jurisdiction. It is therefore highly material to ascertain the boundaries of these dormant powers, as they are supposed to exist upon the authority of ancient precedents. If the cases cited in the note to *Holdipp* v. *Otway*, as suggested by the argument, are

authorities for the power as distinguished from the practice, then in trespass for breaking and entering a dwelling-house, accompanied with circumstances of great aggravation *, where judgment passes by default, or confession, or upon demurrer, the Courts have power to assess the damages; and if they have such power in trespass, there seems to be no reason why the power should not be universal.

The law of England, where it is not regulated by statute, stands upon the decisions of the Courts; and it is a point of the highest consequence to the subject, to be able to distinguish, among ancient precedents, which have the force and authority of law, and which have fallen into abeyance by disuse.

The practice of the Courts is adapted to the convenience of suitors, and is perfectly understood. But it is suggested that there is a latent undefined power, not to be confounded with, and therefore not controlled or abrogated by this practice. If such a power exists, it may be exercised. It is therefore expedient for those who are concerned in the administration of justice, to inform themselves as to the extent of this impending power, and the authorities upon which it rests.

In *Holdipp* v. *Otway*, an action of debt was brought upon a bill obligatory. Error was assigned, that the Court had taxed damages, on occasion of the *detention of the debt*; but it was decided, that upon a judgment in *debt* by default, such damages might be so taxed with the assent of the plaintiff. The cases cited by the learned editor are, *Bruce* v. *Rawlins*, 3 Wils. 61, 62, which contains the dict. of Wilmot, C. J. on judgment by default *in trespass for breaking*, &c.; *Hewitt* v. *Mantell*, 2 Wils. 372–4. dict. of same Judge *upon assumpsit*; *Thelluson* v. *Fletcher*, Doug. 316, dict. of Buller, J. as to actions upon *covenant* for payment of a sum *certain*; *Blackmore* v. *Fleming*, 7 T. R. 446–7, where in an action of debt, Lawrence, J.

* See *Bruce* v. *Rawlins*, 3 Wils. 61, 62, post. 591.

said it was at the option of the plaintiff to refer it to the Prothonotary to tax interest by way of damages, or to have a writ of inquiry of damages; *Roe* v. *Apsley*, 1 Sid. 442; where upon a judgment of debt, after some doubts raised by the Chief Justice, an order was made in the Court of Common Pleas, referring it to the Secondary without a writ of inquiry to tax damages; 11 H. 7. 5, 6; Bro. Default, 105; 1 Roll. Abr. 571–3; *Ognell's case*, 3 Leon. 213; and in actions on the case upon promissory notes, where judgment passed by default, *Rashleigh* v. *Salmon*, 1 H. Blac. 252; *Andrews* v. *Blake*, Ib. 529; *Longman* v. *Fenn*, Ib. 541; and *Shepherd* v. *Charter*, 4 T. R. 575, where the same practice prevailed.

These are the cases cited in the note upon *Holdipp* v. *Otway*, and they seem to be confirmed by *dicta* and practice in other cases.

In the case of Sir *Francis Goodwin* v. *Welsh and Over*, Yelv. 151, upon a declaration *in trespass for goods taken*, concluding for damages, *non sum informatus* pleaded, and judgment for plaintiff, the damages were assessed by a jury upon writs of inquiry; and upon motion to prevent filing the writ, because the property in the goods was not proved on the inquiry, the Court held that the value only was material to be proved, according to the requisition of the writ; and they added, *that they themselves as Judges*, if they so pleased in these cases, *might assess damages without directing any writ of inquiry*, for the writ issued only *quia nescita quæ damna*; *but if the Judges will trouble themselves with the assessment of damages, they have the power to do so.*

So in actions of debt on a judgment, and for damages *pro detentione debiti*, the jury *or the Court* assess interest on the sum recovered by the first judgment, up to the time of the judgment in the new action; as in equity it is computed to the time when it is supposed the Master's report will be confirmed.

In *Mallory* v. *Jennings*, Fitzg. 162. it was held that

the omission of a writ of inquiry after judgment by default, was cured by the statute for the amendment of the law 4 Anne, c. 16. s. 2. See also the Year Books, 14 H. 4. 9; 3 H. 6. 29; 19 H. 6. 10; *Green* v. *Hearne*, 3 T. R. 301; 2 Stra. 1145; *Dufroy* v. *Johnson*, 7 T. R. 473.

According to these authorities, consisting of decisions as to the action of debt, and the dicta of Judges in cases of trespass and other actions, the power of the Courts, as distinguished from their practice, appears to extend to actions of assumpsit and *trespass*, as well as debt for a sum certain.

In *Bruce* v. *Rawlins*, (which is one of the cases cited in the note to *Holdipp* v. *Otway*), the action was for a violent trespass committed by custom-house officers, who wantonly entered the house of the plaintiff, broke open his boxes and drawers, and caused great alarm to his wife and family. After a verdict upon a writ of inquiry, application was made by the defendant for a new writ. Upon that occasion, Wilmot, C. J. said, "This is an inquest of office to inform the conscience of the Court, who, if they please, may themselves assess the damages."

If this *dictum* is not to be questioned, the power must be still further distinguished from the practice; for by other cases, not cited in the note to *Holdipp* v. *Otway*, nor in the argument of the case now reported, but of equal efficacy in point of authority as precedents, the jurisdiction is extended to almost every species of civil action; and if the authority of old cases will justify the exercise of such a power, similar authorities might warrant the exercise of powers by the Courts to diminish or increase damages after a writ of inquiry executed, and even after a verdict given by a jury upon trial of an issue.

The early reports furnish many precedents to show that damages assessed upon a writ of inquiry may be increased or abridged at the pleasure of the Court. Two reasons are given—First, "For that as the Justices might

1819.

EYRE *v.* BANK OF ENGLAND.

have awarded damages without the writ of inquiry, the inquisition thereupon is nothing more than an inquest of office for their information."—Secondly, Because an action of attaint does not lie against the jury on account of the damages assessed upon a writ of inquiry. 14 H. 4. 9; 3 H. 6. 29; Bro. Abr. Dam. pl. 7; 19 H. 6. 10.

Upon the same principles it was held, that if the plea be sent to be tried in a foreign county, damages might be increased by the Court, because the jury there have not full knowledge of the fact. 1 Rol. 572. l. 50. So in account, 10 H. 6. 24 b. and in debt upon obligation, 1 Roll. Abr. 572. l. 50. It was held also, 1 Rol. 573. l. 5, that where the Court may assess damages without a writ of inquiry, they may increase them after a writ of inquiry, upon demurrer, or judgment by default, or upon the view of any Justice of the Court in *pais*, 1 Roll. 572. l. 22; and where they can increase, they may mitigate damages. 1 Roll. 572. l. 25, 28; 573. l. 7.

These doctrines, and most of the examples of the power of the Court to increase and diminish damages, are collected and stated by C. B. Comyns, in his Digest, tit. *Damages*, as existing law. In other sections of the same title (Damages, E. 1 & 2) he states the law (so far as appears, upon his own authority or experience,) with this distinction:—"In all cases where the issue is tried by a jury, and damages are recoverable, the damages ought regularly to be assessed by a jury; if they do it not where damages *only** are recoverable, the verdict shall be void; but where there is judgment without any issue tried, damages shall be assessed by the Court, *or by a writ of inquiry*." In the doctrine, as thus qualified by Comyns, it does not distinctly appear how far it is in the option of the Court either to issue the writ of inquiry, or in every species of action where there is judgment without issue tried, to assess the damages themselves.

In actions for battery, amounting to mayhem or tres-

* See the dict. *Anon.* 1 Ventr. 330. *post.* 599.

pass for a great wound, and even common trespass, the Courts not only after assessment upon a writ of inquiry, but even after a verdict limiting the damages, have exercised a power of abridging or increasing the damages. Their powers, therefore, as distinguished from their practice, if ancient authority stands unaffected by disuse, is much more extensive than the argument for the defendant in error supposed or contemplated.

In Jones's Rep. B. R. 183, it was held that the Judges, even of inferior Courts, have the power to increase the damages upon a view of mayhem; although Justices at Nisi Prius were held to have no such power. 1 Roll. Abr. 573. pl. 1. In a series of cases, extending from the Year Books to the reign of Geo. II. it was held, that the Judges of the superior Courts, having before them a certificate of the evidence indorsed upon the postea by the Judge before whom the issue was tried, and upon report, if tried, by one of the Judges of the Court, and a view of the wound, may increase the damages assessed by the jury; Bro. Dam. pl. 47; 1 Roll. Abr. 572. pl. 8; *Cook* v. *Beal*, Ld. Raym. 177; and even without view, if a Justice of the Court in which the action is depending has had a view and reports. Bro. Dam. 49; 1 Roll. Abr. 572. pl. 9.

It is said also, admitting that the Court have no direct power, yet even *in trespass*, if the damages assessed by the jury are excessive, the Court may stay judgment until the plaintiff enters a remittitur as to part, or releases them, and reduces the damages to a reasonable sum. Bro. Dam. pl. 7; Bro. Judges, pl. 22; and the Year Books *qua supra*.

In a great variety of other cases, the Courts have exercised the power, directly or indirectly, of reducing or increasing the damages after inquiry, or verdict by a jury. In trespass for taking goods after verdict for 20*l.* they increased them to 40*l.* 1 Roll. Abr. 572. pl. 1. So in cases of mayhem, the power has been exercised frequently, and without hesitation; as in 1 Roll. Abr. 573, upon appeal of mayhem, the damages assessed by the

1819.

EYRE *v.* BANK OF ENGLAND.

Jury at 20 marks, were, upon view and information of surgeons, increased to 100 *l.* In another action, the verdict being for 18 *l.* at the day in Bank, the plaintiff showed the mayhem in Court, and prayed an increase of damages; and they were increased to 40 *l.* Bro. Dam. pl. 86; 39 Ed. 3, 20. In trespass for cutting off a right hand, the damages upon view were increased from 50 *l.* to 100 *l.* *Tripcony's case,* Dyer, 105. For a thumb cut off, they were increased from 40*l.* to 100*l.* *Mallet* v. *Ferrers,* 1 Leon. 139. In trespass for a wound in the hand, upon affidavit of a surgeon, and certificate of the Judge who tried the cause, that it was the same wound as alleged and proved at the trial, the damages were increased. Latch. 223. For a broken arm the Court refused to increase the damages, because the manner of the beating was not set out. Sty. 345. So it is said, unless the Judge certifies, or there is proof that the wound is the same for which the action is brought, the Court may refuse. 1 Sid. 308. But where battery and mayhem were alleged, though the manner not set out, the damages were increased from 10 *s.* to 40 *l.* Hardres, 408. by Hale, C. J. For the loss of two fingers, upon a view, the damages were increased from 5 *l.* to 100 *l.* Freeman, 173. The Court refused to increase the damages, where the word *maihemavit* was omitted in the declaration. 1 Vent. 327. *Semb. contra* Hard. 408. But the doctrine was overruled in *Cook* v. *Beal,* 1 Ld. Raym. 176, where it was said to be sufficient, if, by the description, the wound appears to amount to mayhem, or even if it amount to a corporal hurt which is apparent. In that case it is stated that the plaintiff had nearly lost the sight of one of his eyes.

The most modern case, in which such a power has been exercised, is *Burton* v. *Baynes,* Barnes, 153. It was an action for an assault, battery and mayhem. On the trial a verdict was given for the plaintiff, damages, 11 *l.* 14 *s.* In Mich. term, 7 Geo. II. the Court was moved to

increase the damages. A rule to show cause was granted, and upon view of the party, examination of a surgeon, *ore tenus* in open Court, and hearing counsel on both sides, the damages were increased by the Court to 50*l*. In *Theale* v. *Vaughan*, 1 Wilson, 5. 16 Geo. II. upon a similar application in a similar action, the Court refused to increase the damages; but Lee, C. J. said, "There is no doubt the Court can increase the damages in this case upon view of the party maimed."

These are decisions and dicta too recent, perhaps, to permit us to consider the law as entirely obsolete or abrogated by disuse: and in a recent book of practice, (Tidd, p. 903.) which the practitioners at common law are accustomed to quote, (and justly) with the highest respect, this doctrine, as to the power of the Court to increase the damages upon a view, &c. in mayhem, is stated as existing and unabrogated law. The counsel, for the defendant in error, in arguing the case now reported, seem to have had in theory some sort of basis to ground their suggestions as to the powers of the Court, since decisions upon this head, and judicial assertions of law, are yet standing unimpeached on the records of the Courts, and no otherwise affected as rules of law, than by modern disuse, and the adoption of a new practice.

If ancient authorities, therefore, selected partially or taken promiscuously, are to decide what are the powers of Judges to assess, abridge or increase damages, those powers, according to theory and former practice, appear to be alarmingly extensive; for the decisions above cited show, that the Court, or a Judge, in the special cases stated, after a writ of inquiry, or after trial and verdict, may, upon examination and view, without further trial or a new writ of inquiry, increase the damages assessed upon the former trial or inquiry. The law is undoubtedly so existing, if ancient authority and assertion of authority are sufficient to sustain such a jurisdiction, or unless it can be maintained that those authorities are contradicted by better precedents, either of decisions upon the

points at issue in those cases, or principles stated by the Judges who decided them; or finally, unless those extraordinary powers have been abridged by contrary practice or lost by disuse.

If we are to consider the practice as distinguished from and controlling the power, the jurisdiction of the Courts to assess damages, has, for a great length of time, been confined to cases where the demand of the plaintiff in the action is certain, or depending upon a mere computation of figures. In all other cases damages are assessed upon writ of inquiry, where the defendant does not take issue on the facts. Where by the form of pleading, the action is brought to a trial, and a verdict given; from the reign of George the 2d, (and early in that reign) it has been the practice of the Courts to grant a new trial if the damages appear to be excessive; and where the damages are alleged to be too small, it is said to be a settled rule with the Courts not to grant a new trial, except under very special circumstances, as mistake of law by the sheriff or jury, miscalculation, &c. See *Mauricet* v. *Brecknock*, Doug. 491; *Markham* v. *Middleton*, 2 Stra. 1259; *Woodford* v. *Eades*, 1 Stra. 425. 1 Chitty's Rep. 644. & 729; 2 Chit. 219. In the course of the last ninety years, there is no recorded instance of any exercise of power by the Courts to increase or abridge the damages assessed by a jury upon verdict or writ of inquiry. And in a modern case, the Court of King's Bench has refused to alter verdict to increase the damages in respect of interest upon a promissory note. *Du Belloy* v. *L. Waterpark*, 1 Dowl. & Ryl. 16.

How far the authority of ancient decisions has been affected by desuetude, it might be hazardous to assert. The decisions in *The King* v. *Woolff*, 2 B. & A. and other recent cases which might be cited, are sufficient to show that mere disuse furnishes no ground to infer that ancient decisions are obsolete. Contrary practice, and the frequent refusal of the Courts to exercise the powers, put the matter on a different footing.

If neither disuse, nor long practice, nor the self-denial of the Courts, has been sufficient to affect the right to exercise these singular powers, it becomes expedient to examine the precedents upon the authority of which the right is supposed to rest, and the power as distinguished from the practice of the Courts.

The decisions are various in their character, and to a certain extent, inconsistent with each other. The question then occurs, whether any consistent principle of jurisdiction can be extracted from the decisions, notwithstanding this apparent discordance. The doctrine that the Court, with the assent of the plaintiff, has the power to assess the damages where there is judgment upon demurrer, by confession, default, &c. seems to rest upon a principle of pleading. In the case of judgment by default, as the defendant does not, by pleading to issue upon the facts, appeal to the decision of a jury, he is supposed to acknowledge, or not to controvert, the demand of the plaintiff, as stated in his declaration; and when he takes issue upon the law by demurrer, he admits the facts, and among the rest the damages laid in the declaration, to the whole of which, in theory of law, the plaintiff may be considered as entitled. But if the plaintiff assents to a fair estimation of his damage (which by many authorities is held to be an indispensable condition), the Court may assess the damages by their own judgment, or direct a writ of inquiry to issue. This is stated to be the conclusion of law, where the defendant *confesses the action.* 1 Roll. Abr. 578, pl. 6, referring to 29 Ed. 3. 13; Bro. Dam. pl. 25. So it is laid down by ancient authorities, that if there be judgment *upon demurrer* the justices may award damages without a writ of inquiry. Bro. Dam. pl. 194, referring to 14 H. 4. 39, 40. And upon a plea in justification of a rescous, damages to a certain amount having been alleged in the declaration, judgment was given for the plaintiff upon *demurrer to the plea*, the Court deciding that the plaintiff

1819.

EYRE *v.* BANK OF ENGLAND.

was entitled to the damages alleged, *because the defendant did by his plea confess the trespass, and did not deny the damages to be as alleged.* 1 Rolle's Abr. 578. pl. 4, 5; 21 Ed. 3. 4 b. & 40 b. In some cases, however, the Courts, even in ancient times, have refused to act upon this principle, where the action was of such a nature as to make the claim of the plaintiff to damages a matter of opinion. See Bro. Dam. 55, 56. This principle of pleading seems, therefore, by the authority of many cases, to have been so far qualified, that the plaintiff was compelled by the Courts to waive his theoretical damages in cases where the inquiry and compensation were matter of opinion, and to submit the estimation of the real damage suffered to the decision of a jury, or the judgment of the Court.

Upon a careful examination of the ancient precedents, it will be found, that with the exception of the cases of assault, battery and mayhem, the jurisdiction of the courts to assess damages in actions where the damages are uncertain, has been exercised with much doubt and hesitation; and the right to such jurisdiction has not, unfrequently, been denied by the Judges.

Notwithstanding some decisions and many sayings to the contrary, it might, perhaps, without much hazard, be asserted, that the sound principle to be extracted from the best of the old authorities is, that *the certainty or uncertainty* of the plaintiff's demand, arising out of the nature of his declaration, and appearing upon the record as to the amount of damages, are the true tests by which the question is to be decided, whether the Court may assess the damages, or whether the case must be referred to a jury. That such a principle existed and was acknowledged in early times, appears distinctly exemplified by the following cases.

In the Year Book, 10 H. 6. 24 b. 84, it is said, damages may be increased by the Court, where the principal demand is *certain*, as in account; so in debt upon an obli-

gation where the deed is denied. 1 Roll. 572; 14 H. 4. 19 b.

In an action of debt for foreign money, which was averred to be of a certain value, a verdict was given for the plaintiff, but no damages were assessed. The Court awarded a writ of inquiry; and gave, as their reason, that the value of foreign money is no more known to the Justices than the value of twenty quarters of wheat would be. But they said, that if the action had been for money current, they might have awarded damages without a writ of inquiry, the value of current money being known to them. *Bagshaw* v. *Playn*, Cro. Eliz. 536.

In another case, (*Anon.* 1 Ventr. 330.) where application was made to the King's Bench for a prohibition to restrain proceedings in the Marches by English bill, to recover upon the promise of the defendant to pay the debt of a stranger, being in the nature of an action upon the case; notwithstanding a custom alleged, and the reservation of such customs by the stat. 33 H. 8, the prohibition was granted, upon the ground that where damages are *uncertain*, they cannot be set in a Court of Equity, *but by a jury*; and upon that occasion it was said by the Court, that if there be judgment by default in an action of debt, the Court, as the *demand is certain*, does sometimes award damages without a writ of inquiry, *but never in actions of trespass or upon the case*, because these two actions will lie *wholly* * in damages.

So it has been decided, that in all actions where the demand of the plaintiff *is certain*, as an action of debt, the damages assessed by the jury, who tried the issue joined in the action, may be increased by the Court. Bro. Dam. pl. 137. 139; Bro. Costs, pl. 28.

In *Thorngate* v. *Reeve*, 29 & 30 Eliz. B. R. cited in a note to Dyer, 105 a. it is said, if in debt on bond, &c. the jury give no damages, the Court may assess the

* See Comyns Dig. *quâ suprà*, p. 592.

1819.

EYRE v. BANK OF ENGLAND.

damages, because *the debt is certain* and the plaintiff's loss apparent.

In other cases where the demand was uncertain, the power of the Court to assess damages has been denied upon the same principle.

In a case of local trespass the power of the Court was denied. 27 H. 8. 2 *. So where the Court *has not certain knowledge* of the cause by the record or other apparent matter, as in an action for *slander*, though the defendant justify, it was held that the Court could not increase damages. 1 Roll. 572, K. 2. D. 2. Ma. 105. 15. So in trespass for trees cut. Id. 572, K. 13; 3 H. 4. 4 *; 1 Brownl. 204. So in replevin. 3 Leo. 213, *Ognell's case* *, where the Court take the distinction, by declaring that for the avowant they might assess damages without a writ of inquiry, because it is for delay in nonpayment of rent: but for the plaintiff in replevin, they said they could not do so, since he is to recover for the taking of his cattle, of which the Judges could take no notice; for the damages might be greater or less, according to the value of the cattle, and the circumstances of the taking and delaying them.

In Bro. Abr. Dam. pl. 40; 3 H. 4. 4. it is suggested, that in trespass for cutting trees there is no direct power in the Court to increase or abridge damages, because the Court cannot come *at a certain knowledge* of the damages; and upon this principle the Court refused to increase the damages in trespass for cropping trees. So it is said that damages upon verdict cannot be increased or abridged by the Court, for that the remedy is by attaint. Bro. Abr. Dam. pl. 7. In some cases, however, it appears that the Court did not adhere to the principle with perfect consistency, or being aware of a defect of authority, they resort to contrivance, and assert a power indirectly to compel the plaintiff to remit part of his damages, by refusing to give judgment but upon the terms of reduc-

* See these Cases inserted at the end of this Note, at large.

tion, if *in the opinion* of the Court the jury have given excessive damages. Bro. Abr. Judges, pl. 22. The right, however, to exercise such powers, as sometimes assumed by the Courts, has frequently been denied (obviously upon the ground of uncertainty) in actions upon the case for words, as well as other actions. Jenk. Cent. 68 *, pl. 29; Dyer, 105, *Bonham* v. *Lord Stourton*; *Hawkins* v. *Sciet* *, Palmer, 314; and in *Tong* v. *Formaby*, E. 43 Eliz. B. R. the Court refused to increase damages in an action for trover and conversion; Sayer, 77; but they said it would have been otherwise if it had been of money, the value of which is known to the Court.

In modern cases the principle has been more distinctly avowed.

In *Robinson* v. *Bland*, after argument upon special verdict, interest was given by the Court up to the time of the judgment, the action being upon a contract for repayment of *a sum certain*. So upon judgment by default, in an action of covenant upon a deed of indemnity, the Court considering that it was not a *mere question of computation*, because the defendant might, before the sheriff and jury, show satisfaction or part satisfaction of the debt, from securities and effects of the principal, the reference to the Master was refused, and a writ of inquiry awarded. *Denison* v. *Mair*, 14 East, 622.

Among the ancient authorities, being so numerous and so little consistent †, if those last selected may be considered as furnishing the true principle of jurisdiction, the cases cited in the note to *Holdipp* v. *Otway* tend to establish a doctrine with too much latitude; for if the Courts have now power to assess damages in an action of trespass for a forcible entry into a house, and illegal outrage committed by officers of the revenue, according to the precedent cited in the notes to that case, there seems to be no reason why they should not assess damages in

* See these Cases inserted at the end of this Note, at large.

† See the Abridgments of Fitzherbert, Brooke and Rolle, tit. Damage, Judges, Inquest, &c.

1819.

EYRE v. BANK OF ENGLAND.

actions for assault, libel, slander, or criminal conversation, nor why the doctrine founded on the principles of pleading should not prevail, that when judgment passes after demurrer, confession, default, &c. the plaintiff is entitled to the full damages laid in his declaration. In such case he may choose to retain them without inquiry, (for it is only with his assent that the Court can interfere,) although it were in an action for words, and 10,000*l.* are claimed for damages by the count.

It seems, therefore, a point of some doubt whether the power can now with propriety be distinguished from the practice of the Courts, and whether, on the principles avowed in the best of the ancient authorities, the power ought not to be confounded or identified with that practice.

The decision in the case now reported, as no observation was made in giving judgment, might be supposed to proceed upon the authorities cited in the argument for the defendant in error, and to establish the unqualified proposition advanced or suggested in that argument, or to be inferred from the authorities on which it rested. But in *ex parte Greenway*, 1 Buck. 418, the Lord Chancellor, in the course of his observations, is reported to have said, " During the late sessions (1819) there was a " very learned argument before the House of Lords, in " which it was clearly made out, by the authority of cases " of great antiquity, that a Judge, where it is *a matter of* " *mere computation*, may give interest, but yet such interest " is in *the nature of damages*." In this observation, the Lord Chancellor, with that circumspect discretion which is the consummation of his great legal erudition, seems to limit the generality of the proposition within the narrow compass of actual practice. But the authorities as they were cited, and the inevitable result of the argument for the defendant in error in the case reported, is to establish a much broader position.

The extent of jurisdiction which belongs to the several Courts is a subject of most important inquiry; and it is

highly material to ascertain to what extent the doctrine in question is applicable or may be carried. Ancient authorities ought to be equally binding in all cases where they are not abrogated by contrary decisions. If the precedents cited in the argument of the case reported, and other similar precedents of equal authority, are to furnish the rule of law, and fix the boundaries of jurisdiction, the Courts of common law are now in possession of most extensive and alarming powers. But if we are not to be launched upon the wide ocean of obsolete precedents in search of the true principle and doctrine—and the jurisdiction is limited according to the restricted terms used in the observation of Lord Eldon, in *ex parte Greenway*: If the anonymous case, 1 Ventr. 330, and other precedents before noticed, are sufficient to prove that *the certainty of the demand* depending upon computation and not upon variable opinion, is the circumstance which creates the authority, or if practice, as the measure of power, is made the criterion and boundary of the jurisdiction to be exercised by the Courts, a more safe, convenient, and consistent principle of jurisdiction is established.

By the case of *Holdipp* v. *Otway*, and the authorities cited in the note of Serjeant Williams (if they are to be considered as existing law), the jurisdiction must, in theory at least, be carried far beyond the limit which modern Judges have prescribed to themselves in practice, but far short of the extent, to which, upon the authority of ancient precedents, as valid and efficient as that principal case, and those cited in the note, the Courts are entitled to exercise jurisdiction.

Such is supposed, *arguendo*, to be the theory of the law concerning the powers of the Courts, as distinguished from their practice; but the doctrine is founded upon inferences too partially drawn from unsifted authorities.

In modern practice, the exercise of the power has been confined to cases of interest upon bills of exchange or promissory notes, or in actions where the sum due appears

with certainty upon the face of the contract, as stated on the record, or is mere matter of computation. This power, in the case of bills and notes, is equally exercised by the Court, whether interest is expressly reserved or not. The interest is given, indeed, in contemplation of law, as damages for detention of the debt; but this proceeds upon mere technical reasoning. The expression of the Chancellor in *ex parte Greenway* is, that it is *in the nature of damages.*

Interest upon a bill, when over due, by the custom of merchants, is due upon the contract by implication at least; and by the custom, interest upon a bill is as much a part of the contract, though not expressed, as the principal sum. The computation directed by the Court to be made by its officer in the cases of bills of exchange, in substance, undoubtedly proceeds upon this implied contract for interest at the legal or current rate; otherwise the damages, in such case, would vary according to circumstances, and the certainty which furnishes the ground of reference would not exist. Taking the contract, independently of the custom of merchants, to be for the payment of a sum certain at a given day, or upon demand, interest, according to the rule of law, is due from the day when the money is payable, or from the demand.

Upon this principle, in *Robinson* v. *Bland,* 2 Burr. 1085, where a bill of exchange was given for money lent, Lord Mansfield said, although it was void in law as a security, it showed the intention and agreement of the parties, that the money should carry interest if not repaid within the time expressed in the bill; and the Court, upon a special verdict, gave interest to the time of the judgment.

If these may be assumed as the true grounds on which the power of the Court to assess interest is exercised, an inquiry important *in principle* arises with respect to the practice in bankruptcy, not to permit proof of interest upon bills of exchange in which interest is not expressly reserved, and the late decisions resting upon that practice (in *Cameron* v. *Smith,*

2 B. & A. 305; and *ex parte Greenway*, 1 Buck. 418), in which it was held that interest, accrued upon a bill of exchange before the act of bankruptcy, cannot be added to the principal, so as to constitute a valid debt, for a petitioning creditor.

If the two questions depend upon the same principle, and if they were untouched by decision, and unaffected by practice, it might appear surprising that such doctrines should ever have been established. The main objections to the admission of proof of interest, where it is not reserved by the contract, seem to be the following; viz. that interest, being a compensation for the use of money, or detention of a demand, where it is not matter of express contract, is not a *debt*, but in the nature of *damages*, to be assessed by a jury, and that Commissioners of bankrupt have no power to assess damages.

As to the first branch of the objection, in the case of *Herries* v. *Jamieson*, Lord Kenyon appears almost in terms to lay down the general proposition, that an action of debt is maintainable for interest, notwithstanding the decision of Lord Hale in *Searman* v. *Dee*, 1 Ventr. 198. "that no "action of debt lies for interest of money, but it is to be "recovered by *assumpsit* in damages;" and supposing it to be recoverable by assumpsit, according to the admission of that case, it seems that the technical rigour of pleading has been relaxed since the days of Lord Hale; and now it is held, that wherever *indebitatus assumpsit* is maintainable, debt is also maintainable. *Walker* v. *Witten*, Doug. 1. It might therefore, not without some show of authority, be said, that interest is, in contemplation of law, as much in the nature of debt as of damages; and so in fact the matter seems to be treated by the Courts in the cases above cited, where judgment passes by default, &c. For if interest upon a bill of exchange were not regulated by the custom of merchants, and by that custom reduced to a matter of certain computation; if it were truly and substantially, in such sense, a question of damages as to depend on variable opinions, the Court in practice

1819.

EYRE v. BANK OF ENGLAND.

would decline the office of giving their opinion as to the damage, and, according to many cases, have no authority to do so.

Again, debt is said to lie upon every contract in deed or *in law*. Com. Dig. tit. Debt. A judgment, therefore, being by implication of law (not otherwise), a contract by the defendant to satisfy the plaintiff, according to the terms of the judgment, debt is the form of action in such case. So if the judgment be, in a Court of London, by special custom, debt lies in the superior Courts, although the original action could not have been brought there. 1 Roll. 600. l. 45. So debt is said to lie, although there be only an implied contract, as upon a balance found due to one of the accounting parties upon account taken. 1 Roll. 598; l. 47. So if a bailiff pays more than he has received, debt lies for the surplus. Id. ib. l. 50. So for money paid by *A.* to the use of *B.* (though without his command) 1 Roll. 597. l. 25. Yelv. 23. (*Sed vide semb. contra,* 1 Roll. 597, l. 25.) So debt lies upon various customs. See Com. Dig. Debt, A. 9. and Lord Hale said, (Hard. 486.) that debt lies for every duty created by the common law or by custom. Now interest, by the custom of merchants, and by the acknowledged rules of law and equity, is due upon bills of exchange from the time when they are made payable; such interest, therefore, is due by custom, and it is due by implied contract.

But suppose the technical difficulty to be valid in law, and insuperable, the next objection is, that Commissioners of bankrupt cannot assess damages. This is not strictly accurate; for to a certain extent they do assess damages; where interest is reserved upon a promissory note, and the rate of interest is not expressed, but left to the implication of law or custom, the Commissioners are driven to the exercise of their powers of computation. The parties, to a certain extent, have agreed as to what shall be the liquidated damage for the detention of the debt, that is to say, that interest shall be paid; but there is no express agreement as to the rate.

In such case, the Commissioners supply that which the parties have in words omitted, viz. the rate of interest: they exercise a judgment, therefore, to imply the rate; and when they compute the sum due in respect of the rate and the time, (two points not expressed or settled on the face of the contract,) they so far assess damages, if mere calculation is rightly so called. The implication of a rate of interest, where no rate is expressed, is founded upon custom and statute, which constitute the law. The same custom and the same law give interest upon a bill from the day appointed for payment. If the cases are similar in principle and fact, the results should be similar; yet in one of the cases an implication is raised, and a power of computation is exercised, in the other it is refused. So although there be no contract, yet if the payment of interest in particular trades and transactions is customary, as upon a settlement and balance of account, and especially if on former settlements interest was paid, a contract is implied, and interest is calculated by the Commissioners from the time of the settlement, and at a rate assumed to be according to the contract of the parties. In such cases, interest upon interest has been allowed. *Ex parte Champion*, 3 Bro. C. C. 436. The Commissioners, therefore, do not seem altogether to want those powers of computation, which are exercised by the Courts, or their officers, in similar cases; but they refuse to put their powers in action, unless the creditor has stipulated for interest *nominatim*, or unless there be a custom *or* transaction, or custom *and* transaction, from which an agreement can be implied.

Suppose, that upon a balance of account bearing interest by custom or implication, the debtor gives to the creditor a bill of exchange in the common form; according to the present practice, no proof is allowed upon the bill which represents the balance; but if the bill is lost, destroyed, or cancelled, and there is no evidence of its existence, interest immediately becomes proveable: Surely this is a singular inconsistency.

1819.

EYRE *v.* BANK OF ENGLAND.

The creditor holding a bill which is over due has a right to interest by his implied agreement, founded on the custom of merchants and the principles of law. This right being, in case of bankruptcy, the amount of the dividend in respect of that interest, by means of the practice in question, is transferred from him to the whole body of creditors, who profit by his exclusion, and the bankrupt himself, if there is a surplus, pockets that amount of interest which, by implication and custom, he contracted to pay, and which, from him at least, is certainly due. Many cases might be put, as where a trader is largely indebted upon bills and notes actually due, in which he might be a gainer by bankruptcy to a very large amount, and at the expense of his creditors. This does not appear to be fair dealing with the bill-creditor, or equal justice as between him and his fellow creditors, or as between him and his bankrupt debtor.

The question, as unprejudiced by practice, whether the law is fairly exercised, as regards such bill-creditor individually, and without regard or relation to others, must be tried by a review and consideration of the statutes relating to this subject; by the operation of a commission of bankrupt; the mode in which it affects the right of creditors; and what benefits and privileges are conferred by these statutes upon the bankrupt and the creditors respectively.

The act 34 & 35 H. 8. c. 4, only barred the creditor of such portion of his debt as should be paid under the provisions and powers of that statute, and left him in possession of his remedies for the recovery of the residue. The same provision is made by the 13 Eliz. c. 7. s. 10; and the 1 Jac. 1. c. 15. s. 3, re-enacts the like orders, benefits and remedies as to the traders therein described, as were provided by the 13 Eliz. c. 7. s. 11. The 21 Jac. 1. c. 19, reciting that divers defects were daily found in the former statutes, &c. in the power given to the Commissioners for *distributing the bankrupt's estate, &c.* to the undoing of many clothiers

(by whom the subjects are set on work), &c. for remedy thereof, it is enacted that the former statutes, &c. shall be in all things largely and beneficially construed and expounded, for the aid, help and *relief of creditors, &c.* and by sect. 3 of this act, the same benefit and remedies are provided as by the former acts. By sect. 9, of the same act, for the better distribution of the bankrupt's property among his creditors, the Commissioners are empowered to examine them on oath as to the truth and certainty of *their debts.*

So that the *early* statutes relating to bankruptcy appear to have the interest of the creditors only in contemplation. They treat the bankrupt as a fraudulent debtor and criminal; and in the title, preamble, and body of these acts, the relief intended and proposed to be given is for the creditor only. Every doubt as to his rights is to be expounded in his favour, if possible; and after receiving a dividend upon his debt, he is left in possession of his legal remedies for what remains unpaid.

By the provisions of the two first statutes, which are re-enacted by the third, the effects of the bankrupt are to be sold, and ordered for the payment of the creditors according to the quantity of their *debts.* (34 & 35 H. 8. c. 4. s. 1. 13 Eliz. c. 7. s. 2.) Here it is to be remarked, that the provision is for payment of *debts,* and no other word being used in these acts, it is material to ascertain whether this was intended in a technical sense. That it could not be so intended, is almost conclusively proved by the reservation of the rights and remedies of creditors after payment of dividends, and until their whole demand is paid. If any part of the claim of a creditor, as interest upon a bill of exchange over due, or upon money lent, remained unpaid by distributionof the effects under the commission, or provisions and powers of these recited acts, the creditor might have brought his action for the amount. It would therefore, so far as the bankrupt was concerned, have been nugatory; whilst such right and remedy existed, to have made a

1819.

EYRE v. BANK OF ENGLAND.

distinction between principal and interest in assorting the dividend, as if the one were a debt contemplated by the statute, and the other only a demand or unliquidated claim, in respect of the detention of the debt, to be compensated in damages; and in truth, if nothing but debts, technically so called, were to be considered in distribution, a bill of exchange, and many other claims then and now undoubtedly proveable under a commission, were not debts in a technical sense, but choses in action, and according to this strict construction of the word, could not have been proved at all.

In this state the law of bankruptcy, as it regarded the rights and remedies of creditors, continued from the reign of Henry the 8th to that of Queen Anne.

The stat. 4 & 5 Anne, c. 17, reciting that bankruptcies happen not so often from losses or misfortune, as from the fraudulent design of evading the just "*debts and duties*" of creditors, after providing that bankrupts not surrendering and conforming, as required by the statute, shall suffer death as felons, enacts (s. 7.), that those who do surrender and conform shall have an allowance out of the effects, and be discharged from all *debts* due and owing at the time (of the bankruptcy); and in case such bankrupt shall be arrested, prosecuted, or impleaded for any *debt* due before (the bankruptcy), such bankrupt shall be discharged upon common bail, &c. This act has expired, but the clause is repeated verbatim in subsequent statutes also expired, and is re-enacted in the same words by the 5 Geo. 2. c. 30. s. 7.

Now in all acts made *in pari materiâ*, and particularly in all the clauses of one and the same act, the same word must have the same meaning. It would be a singular rule of construction to establish, that in one clause a word should have a given meaning, and in another clause of the same act, being used with the same unqualified context, might have a different meaning. In the preamble to the 4th and 5th Anne, c. 17, the *debts and duties* due and owing to creditors are mentioned as the

1819.

EYRE v. BANK OF ENGLAND.

subjects in contemplation, for the securing which, a remedy is to be provided by that act. But all the other statutes of bankrupt, in the clauses which relate to the investigation and proof of the claims of creditors, speak only of "debts." The 5 Geo. 2. c. 30, being in most respects a transcript and compilation of the former statutes, adopts the same enactments in the same words. In the preamble it speaks of bankrupts by extravagance, &c. having contracted great *debts*, and absconding with their effects in order to oblige their creditors to accept a composition for their *debts*, &c. By section 25 of the same act, creditors are allowed to prove their *debts* without contribution, &c.; and the bankrupt, by section 7, is discharged from all *debts*, &c. in the same terms as by the expired statute of the 4th and 5th Anne.

Here I presume it cannot be disputed, that the *debts* contemplated in the preamble of these acts, and the debts in the clauses relating to proof and discharge, are the same things in *genere et specie*. If debts are technical things in the preamble, they must be technical also throughout the act; and if interest due upon a bill of exchange, before and at the time of the bankruptcy, cannot be proved, because it is held not to be a debt technically, but to sound in damages; then as the bankrupt is discharged only from *debts* (technically also) due and owing at the date of the bankruptcy, a very serious question might have arisen, whether interest due upon a bill of exchange was a claim discharged by the certificate, and whether, if debts are not held in construction of the act to comprise such damages as are due for the detention of money, an action might not be brought for interest due upon a bill after the bankruptcy, and notwithstanding the certificate, especially as it has been pronounced by a Judge of considerable authority, that "debts proveable under the commission, and debts "discharged by the certificate, are convertible terms." See *Barnford* v. *Burrell*, 2 B. & P. Dict. of Buller, J.

1819.

EYRE *v.* BANK OF ENGLAND.

Considering this as a point of practice, all questions may now be precluded by decision; but, for the sake of consistency in construction, there was a time when it deserved better consideration in courts of justice; and it may even now be not undeserving of the attention of the legislature, upon a revision and consolidation of the bankrupt laws. That interest upon bills of exchange under the earliest of the statutes concerning bankruptcy, should not have been admitted to proof, may not be surprising, because the law-merchant, as it relates to bills of exchange, was, at that time, strange to our courts of justice, and not very clearly understood or recognized. In the days of Lutwyche it was held that none but actual merchants could draw a bill of exchange. 891. 1585. And at the time when Ventris and Salkeld reported, it seems to have been seriously debated, whether a person, not a merchant, making a bill of exchange, should be bound by it according to the usage of merchants. In the King's Bench the decision was in the negative; but upon argument in the Exchequer chamber, that judgment was reversed; and this judgment of reversal was reversed upon writ of error in Parliament. The decisions, therefore, in these early times, as to bills of exchange, and the interest due upon them, whether by Courts of justice or Commissioners of bankrupt, ought not to excite our surprise. But that no provision should have been made upon the subject in the comprehensive statute which was framed and passed in the commercial age of George the Second, is truly matter of astonishment.

If the claim of the creditor, in respect of interest, although recoverable only as *damages*, is discharged by the certificate under the term "*debt*," then it must be supposed, that the legislature, which took away the remedy of the creditor by action, intended to deal justly with him by substituting an equal or a better statutory remedy. It is in this sense, probably, that a commission

of bankrupt has, by the highest authority, been frequently described as *uno flatu*, an action and an execution. If it were so intended for the benefit of creditors, as a more speedy and certain remedy against failing traders than the slow process of a suit at law, ought it not, in the construction of the statutes, to be intended with respect to all debts (or claims) discharged by the certificate, that the creditor is to have the same right of proof under the commission, as if he had commenced and prosecuted his action through all its stages, till he had obtained its fruit by execution executed. If the statute had not deprived the creditor of his legal remedy he would, in the course of process, have obtained the usual reference to the Master to compute interest, &c. upon his bill; or, according to the authorities cited in the case now reported, the Judges themselves might have assessed the damages without reference. If this be so, and the statute gives to the creditor, as it must be admitted, the substituted remedy of a commission, and empowers him to prove his debt, how could it be supposed that the debt contemplated was any other than that for which an action might have been brought, and for which, by virtue of the statute, the creditor has execution at once?

So the Commissioners having power to investigate and admit (if genuine) the debts of creditors, under a statute which transfers to them and their assignees all the effects of the bankrupt, to be distributed among the creditors rateably, as if they had brought their actions and obtained execution, ought it not to have been intended that they had the same power as Judges have in actions prosecuted by creditors? or that the statute, in giving the effect of execution, supplied by intendment of law all the intermediate necessary steps to make the claim of the creditor effectual.

There is another point of view in which this subject may be considered. Commissioners of bankrupt, as well as the Chancellor, are held to have an equitable

1819.

EYRE v. BANK OF ENGLAND.

as well as a legal jurisdiction, which they exercise in various cases; as where a verdict has been obtained at law for a pre-existing debt, if the Commissioners have reason to doubt the propriety of the verdict, or if there be equitable grounds sufficient to intercept the fruit of the verdict, though *per se* unimpeachable, they may reject the proof of the debt standing upon such verdicts. *Ex parte Butterfill*, 1 Rose, 172. So (probably) as to a judgment also, if equity would restrain execution against the bankrupt defendant. These are large powers which Commissioners of bankrupt habitually exercise—powers with which the computation of interest upon a bill of exchange is hardly to be put in competition; and it has been decided by a Judge of great eminence, that notes and bills of exchange payable on a certain day, or upon demand, not being paid on that day, or upon demand, shall carry interest in equity. *Per* Grant, M. R. *Lowndes* v. *Collins*, 17 Ves. 27. Here the objection will be renewed, that Commissioners, though they may exercise a judgment as to the validity of a debt, cannot assume a jurisdiction to assess damages. But in truth, it is, in the latter case, the mere exercise of the faculty of numeration, and this is the ground, and the only ground in practice, upon which the Judges assess damages (if it must be so termed), by reference to their officer in the case of judgment by default, &c. in a suit upon a bill of exchange. To assimilate the assessment of damages in such a case, with the assessment of damages in cases of assault, libel, slander, trespass, or any case of *tort*, may be sheltered under the technical definitions of law, but is an affront to common sense and to the established practice of the Courts.

It is, moreover, to be remarked, as applicable to the equitable jurisdiction of the Commissioners, that where there is any impediment to the remedy at law, equity removes it, or administers relief. Now if the claim of interest is barred by the certificate, and cannot *legally* be admitted

to proof under the commission, because the Commissioners have no power to assess damages, might not a creditor, without incurring the charge of gross sophistry, contend that the statute and commission are impediments to his legal claim by action, and under the authority of *Lowndes* v. *Collins*, appeal to the equitable jurisdiction of the Commissioners, to admit his proof for interest?

Of the debts usually proved under a commission, some carry interest by contract: Upon some, interest is allowed by implication from former transactions, or from the custom of trade. In the case of other debts, as by bond, &c. interest (if not provided) is obtained under the shelter of penalties imposed by the instrument of contract; and in those which, perhaps, in all commissions are the most numerous class, *viz.* debts for goods sold and delivered, the tradesmen-creditors have taken care, in the price charged, to have ample remuneration for interest and profit, sometimes to the amount of cent per cent upon the prime cost—all these debts are admitted to proof without scruple. But if the words "with interest in case of nonpayment when due" (which are never inserted, because by the custom of merchants they are implied upon all bill transactions) are not to be found in a bill of exchange, the unfortunate holder, upon a technical fiction, which is evaded or surmounted by another technicality in the Courts of Justice, is excluded upon a commission of bankrupt, from his claim of interest for which, by the law-merchant, and the law of the land, an implied contract was made in the formation of the bill.

The injustice done to the holder of a bill, as between him and his fellow creditors, is obvious; but as between him and the bankrupt, in case of a surplus, it is flagrant injustice. Let it be supposed that a trader is indebted 200,000*l.* to creditors, upon bills of exchange in the ordinary form, which are ove due, and his only debts: let it be further supposed that he holds notes and other securities, bearing interest, to the amount of 200,000*l.* which are his only effects; upon all these

1819.

EYRE v. BANK OF ENGLAND.

securities interest is received for him by his assignees: then, after discharging the debts, and paying the expenses of the commission, the bankrupt pockets the surplus, composed of interest, which, if the commission has been long in operation, will be a considerable sum, and the bill-creditors are left, perhaps, to supply their necessities, occasioned by the bankruptcy, by borrowing money to the amount of their respective debts proved under the commission, and paying interest upon the loans from the time when their respective bills became due to the time when they receive their dividend. Can such a result have been intended by statutes made professedly for the benefit of creditors?

Lord Hardwicke, according to the report in *Ex parte Bennet*, 2 Atk. 527, said, that "the fund (in bankruptcy) "was a dead fund; and in such a shipwreck, if there "is a salvage of part to each person, it is as much as "can be expected." But here is a case, occurring partially in many bankruptcies, where the fund, in respect of interest, is dead to the creditors, but living to the bankrupt; where the creditors suffer shipwreck, and the bankrupt looks on with complacency from his retreat on the shore.

That the Commissioners of bankrupt should now, after inveterate practice, undertake to begin so important an alteration in the administration of the bankrupt law, is not to be expected or desired; but when the statutes of bankruptcy are under revision, the subject may deserve consideration.

The following are some of the Cases cited in the foregoing Note. The two first are close Translations from the Year Books.

Year Book, 3 H. 4. 4.

Trespass was brought against a man for trees cut, who pleaded that he was not guilty; and he was found guilty to the damage of 40 *s.* and they taxed the costs of the writ at 5 *s.* Whereupon

Culpepper, for the plaintiff, prayed that the damages might be increased; and then Thirning said, that he had spoken of this matter to all his companions, and also to the Justices of the King's Bench, and it seemed to them that it lay within our cognizance and discretion as to the costs of the writ, and this we may well have full power to increase; but as to the damages for the trees cut, by no means; for that this lies not within our cognizance.

At the end of the case as it stands reported, the following observation and authorities appear: "Where the Judges increase and abridge damages, see M. 19 H. 6. 16; T. 32 H. 6. 1; M. 38 E. 3. 30; M. 39 E. 3. 26; M. 22 E. 3. 11. 30; 20 Lib. Ass. plac. 30; P. 8 H. 4. 23; 7 H. 4. 31."

Year Book, 27 H. 8. 2.

In trespass *quare clausum fregit*, the defendant pleaded in bar. Whereupon the plaintiff demurred, and it was adjudged no plea. Wherefore a writ issued to inquire of the damages, and damages were found to the value of five marks. Wilby prayed the Court that they would abridge the damages, for (as he alleged) the truth was, that the plaintiff was not damnified to the value of twelve pence, aud this proceeding being only an inquest of office, he said the Court may increase or abridge the damages at their discretion. But Fitzherbert, Shelley and Englefield interposed, and said, "that cannot be done as to the damages; you "have never seen this in your life: as to the costs, it lies in our "discretion, but damages cannot be increased upon a local trespass." Wilby again suggested that the Court might have assessed the damages to the plaintiff without any writ of inquiry, and would have inferred the power from that circumstance. But Englefield interposed, and repeated, "this cannot be done upon "a local trespass which is done in pais," and assigned as a reason that they could have no knowledge of it; and this doctrine Fitzherbert and Shelley did not deny.

Hawkins v. Sciet, Palmer, 314.

In an action upon the case for calling the plaintiff a bankrupt, upon the general issue it was found for the plaintiff, and 150 *l.* damages given. And because of these great damages, the Court, from some circumstances, reduced them to 50 *l.*; but afterwards, upon great advice, they revoked this, and were not willing to

1819.

EYRE *v.* BANK OF ENGLAND.

change the course of law, and resolved to leave such matters of fact to the finding of a jury, who better know the quality of persons and their condition, and the damage they may have sustained by such disgrace. But otherwise where the action is grounded upon a cause which may appear to the view of the Court, upon which they may judge, as in mayhem, &c. and Dyer, 105, acc. and so they gave judgment for 150 *l.* according to the verdict.

In Jenkins, Cent. 68. ca. 29. the law is thus laid down: In a writ of trespass *de clauso facto*, the jury found damages; the Judges can neither increase nor abridge them. So it is where there is a writ to inquire of damages in trespass; 27 H. 8. 2. So it is in an action on the case for slander, where the jury taxes damages. So in an assize. But it is otherwise upon a writ of inquiry of damages in debt, mayhem, detinue, covenant, battery, the Court may increase or diminish the damages assessed by the jury. 9 H. 6. 2; 19 H. 6. 18; 11 H. 4. 10. 61; Dyer, 105; 14 H. 4, recordare; 13 E. 3; Fitz. Damage, 28; 41 E. 3. 19.

In the margin is the following entry: 3 H. 4. 4; 22 E. 3. 1; 19 E. 3. 65; 8 H. 4. 17. by all the Judges of England.

Ognell's case, P. 30 *Eliz.* 3 *Leon.* 213.

In replevin, the plaintiff being nonsuited, the Court were of opinion, upon a question made, that they might assess damages for the defendant without a writ of inquiry, because they accrue to the avowant for the *delay in nonpayment of the rent.* But if *judgment had been given for the plaintiff*, the Court said they could not assess the damages, for he ought to recover for the taking of his cattle, of which the Judges could not take notice; for the damages might be greater or less, according to the value of the cattle, and the circumstances of the taking and delaying of them.