REPORTS

OF

APPEAL CASES

IN THE

HOUSE OF LORDS,

During the Session, 1814—15.

55 GEO. III.

ENGLAND.

ERROR, FROM K. B.

JOHNES—*Plt. in error.*

JOHNES—*Deft. in error.*

Nov. 21, 1814.

ERROR.—FORM OF JUDGT. ON DEMR. UNDER STAT. 8, 9 GUL. 3. s. 8.

In action of debt on bond, with penalty for performance of covenants, breaches under stat. 8. 9 Gul. 3. s. 8. may be assigned in the replication.

And, on demurrer, interlocutory judgment may be given to the extent that it appears to the court that the replication is sufficient, and that Plt. ought to recover his debt and damages for detention, and final judgment may be stayed till after award and execution of the writ of inquiry.

And where the interlocutory judgment was in E. T., and then, as the inquisition could not, according to the usual mode of holding the assizes, be taken before the justices of assize pursuant to stat. till after T. T., a day was given to the parties in M. T., passing over T. T. altogether, without continuance—held that, as in the due execution of the object of the stat. the giving a day in T. T. would have

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been nugatory, the reason for the continuance failed, and the omission was no error.

ERROR.—

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ERROR upon a judgment in K. B. in an action of debt on bond. The declaration was in the common form of debt on bond, and Deft. on Oyer set out the condition of the bond, (which was for quiet enjoyment of certain premises purchased by Plt. John Johnes, from Deft. Thomas Johnes, particularly against the claims of Mrs. Eliz. Johnes, Deft's mother,) and pleaded that Plt. had quietly enjoyed. Plt. in the replication stated that E. Johnes had filed her bill in Chancery against him setting forth her title under her marriage settlement as tenant for life, to part of the premises which had been sold by her son Thomas Johnes, to John Johnes, who had, without her knowledge or consent, been let into possession; and also alleging that an agreement had been entered into between her and John Johnes, for a lease to the latter, at a given rent, of that part of the premises claimed by her; and praying an account, an injunction to stay waste, and a specific performance of the agreement; that the Master of the Rolls had decreed the account, &c. and ordered a reference to the Master to inquire whether E. J. had a title to grant a lease; and, if she had, then he decreed a spec. per. but reserved the consideration of the costs of the inquiry as to the title and spec. per. till after the Master should have made his report, and from the subsequent proceedings it remained doubtful whether any costs were given on this last

ground. The replication then stated as the result of the suit in Chancery, and an action by E. Johnes in K. B. for damages for use and occupation, &c. that he was damnified to the amount of 6000*l*. To this replication Deft. demurred, and after joinder in demurrer, (no counsel appearing to argue it for Deft.) the Court in E. T. 1813, gave judgment so far as that it appeared to the Court that the replication was sufficient, and that Plt. ought to recover his said debt, and damages for the detention; but final judgment was stayed till the truth of the breaches could be inquired of, and the damages assessed by a jury, and a writ of inquiry was for that purpose awarded, pursuant to statute, returnable in M. T., when a day was given to the parties, (passing over T. T. altogether,) and then final judgment was given for Plt. (*vide* the form as read by Lord Eldon; C.) Deft. brought error in the Exchequer Chamber, where no counsel appearing for Deft. the judgment was affirmed, and then he brought error returnable before the Lords.

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Parke (for Plt. in error).

1st OBJECTION. The judgment was erroneously entered. The first judgment or act of the Court ("*videtur Curiæ*, &c.") could not be considered as amounting to a final judgment, the *ideo consideratum est* being there wanting; and the second judgment was erroneous, as there was a discontinuance, or miscontinuance, which was error at common law, and not cured by statute. (Comyns' Dig. T. *Pleader*. W. 1.—1 Roll. Abr. 485. pl. 20.—Gilb. Hist. C. P. cap. 9.) It has been laid down that if there

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was an interruption for a whole term, or even short of that, it was error. (1 Roll. Abr. 484. 486.—*Johnson v. Norton*, 2 Roll. Rep. 442.) There were cases in which it had been held that a delay till next term, without satisfactory reason assigned, was error. (Yelv. 97.—Noy. 120.) So it was clear that mis or dis-continuance was error at common law; and here there was one or both. Stat. 8, 9 Gul. 3. cap. 11. directed the writ of inquiry to be issued after the judgment, and it was not necessary that the inquiry should be executed before; so there was no satisfactory reason for the delay over a whole term. The judgment was clearly a com. law judgment. The object of the stat. Gul. 3. was not to limit the judgment, but the execution; so there was no reason for a delay of the judgment, since it could not affect the damages, and at any rate there was no excuse for the delay over one whole term. It might be said that the inquiry could not be executed till after Trinity Term, but there was no law against its being executed before. The defect was not cured by any statute. An appearance only aided a discontinuance of process; but there was no case where a discontinuance by the act of the Court itself, was cured by appearance. (*Bradley v. Banks*, Cro. Jac. 283.—Yelv. 204.—*Phyler v. Boson*, 1 Sho. 319. *Peplow v. Rowley*, Cro. Jac. 357. where there was an appearance, and yet a discontinuance.) In a book of practice of some authority,* it was said that a dis. was cured by appearance, and *Humble v. Bland*, 6 T. R.

* *Quere* Tidd?

255. was cited; but there was no case where a discontinuance by the Court was cured by appearance. Then in stats. Jeof. no remedy was applied to judgments on demurrer. Stats. 27 El. c. 5.—4 Anne, c. 16. (the rest applying only to cases after verdict) only cured such defects as might have been assigned as cause of special demurrer: but here the discontinuance arose long after joinder in demurrer, and when the Court had made up their minds. Here then was a defect at com. law, not cured by stats. Jeof., and the judgment could not be supported. Nov. 21, 1814.

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2d OBJECTION. The replication had not distinctly averred a lawful title in the person interrupting, and therefore no sufficient breach had been assigned. (*Wootton v. Hele*, 2 Saund. 178. n. by Serjt. Williams.—*Southgate v. Chaplain*, Comyns' R. 230.)

3d OBJECTION. The damages had been improperly assessed. The bill in equity alleged an agreement between El. Johnes, and Deft. in error, for a lease to the latter &c., and prayed a spec. per. As Plt. in error had not been privy to this he was not liable for the costs, and yet no distinction had been made in the assessment; so that it was not clear but the damages were partly such as Plt. in error was not liable to pay, and he could not know how much to tender.

Eldon, (C.) As to title and damages, decree in equity was stated, and that was a judgment that the person interrupting claimed by title, since otherwise there could have been no decree: but the matter did not rest on reasoning, for M. R. had directed an inquiry as to the title, which

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was afterwards reported good, and saved the question of costs as to that part of the suit; and on farther directions it did not appear that any costs at all, as to that part, had been given; so that a claim by title was shown, and, though the jury might have included the costs of the spec. per. in the damages, it did not conclusively appear on the state of this record that they had so done.

Abbott (for Deft. in error). It appeared on the record that the parties had the claims of Mrs. E. Johnes in view, and that one of the conditions was to indemnify against them. It not only appeared that she claimed by *some* title antecedent &c., which would have been sufficient, but that she claimed by a title founded on certain deeds of settlement. But they said, "You don't aver the title;" perhaps not distinctly, but it was averred substantially. It was a defect in form, and could not avail on general demurrer. One of their Lordships had answered the objections as to the assessment of the damages. As to the other point, this judgment was warranted by stat. 8, 9 Gul. 3. c. 11. s. 8. which was made in case of Defendants, and it had been decided that it must receive a liberal construction, and that Plt. not only *might* have the real damages assessed by a jury, but was bound to do so, instead of leaving Deft. to his relief in equity as before. (*Roles v. Rosewell*, 5 T. R. 538. *et ib. cit.*—*Hardy v. Bern*, 540.) (*Eldon*, C. The only question seems to be whether these breaches ought to be assigned over again.) Yes, which would have been absurd. Stat. did not say at what time the breaches should be assigned; it gave a special

writ, which must be executed by the Justices of assize; and this could be only at the time of the assizes, and if a writ was awarded in E. T. it could not be executed till after T. T. (*Eldon*, C. It might be, but probably never would be.) He did not know of any assizes having ever been held between E. T. and T. T. Something, it was said, must be done in each term, or a reason stated for giving farther time. That mode of argument showed there was no occasion for a continuance: The Court could do nothing till the return of the writ in M. T., and to have entered any thing in T. T. would have been nugatory and absurd; so that there was neither dis-continuance nor mis-continuance, as the reason failed. But at any rate if there was a defect, it was cured by 4 Anne, c. 16. which ought to receive a large construction. (*Eldon*, C. Suppose I had advised P. R. to send no judges of assize after T. T., and he followed that advice, how then?) *Parke*. Then final judgment should be entered up at com. law. *Abbott*. The judges must reserve final judgment till after return of writ, as no judgment could be given for the costs of the inquisition till then, and this form was suggested by Mr. Serjt. Williams, in a note in Saunders, 58. and the form was approved by Lord Alvanley in *Hankin v. Broomhead*, 3 Bos. Pul. 607. 611.

Taunton (for Deft. in error). The only objection now was as to the judgment, and that resolved itself into two parts; that there was no judgment before the return of the writ, and that there was no continuance. Now in *Hankin v. Broomhead* there was a judgment before return of writ, and

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then a supplemental judgment which was held to be erroneous, and this judgment was framed so as to avoid that error. His L. F., when he said that final judgment could not be postponed till return of the writ, had overlooked the case of *Ethersay v. Jackson*, 8 T. R. 255. where it had been solemnly decided that final judgment might be suspended till after return of writ, and this had suggested to Mr. Serjt. Williams the form in his notes to *Gainsford v. Griffith*, Saund. 58. The only other point was the omission of the continuance. In what words could it be entered up? If a day was given on the record it must be for some purpose, and there was no purpose for which a day could be given in T. T. Object of stat. was to confine the legal to the real right. Plt. had judgment at com. law for the whole penalty, and in strictness the execution ought to follow the judgment; but here was an anomaly, that though there was a com. law judgment there was a statutable execution; and so far there was an apparent inconsistency, which he mentioned merely to show that, if there was an incongruity, it was owing to the provisions of the stat. It was of necessity that there should be no continuance. Unless the assizes could have been expected to be held in E. Vac., it was necessary to pass over T. T. in the record, and to make the writ returnable in M. T. and then a day was given. No day could be given in T. T. without absurdity, and there was no error therefore in the omission to enter up a continuance; but if there had been a defect, it would have been cured by 4 Anne, c. 16. s. 2. True, discontinuance at com. law was error,

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but it was cured by several stats. in cases of judgment on verdict, and by stat. Anne the remedy was extended to judgments on confession, *nihil dicit*, or *non sum informatus*, and "no *such* "judgment shall be reversed, nor any judgment "on any writ of inquiry of damages *executed* "*thereon*, be staid or reversed for, or by reason of "any imperfection, &c." The words must be understood as applying also to judgments on demurrer, as the legislature could never have meant to exempt judgments on demurrer, and leave them as before, when they too needed the remedy, and the words of the stat. were large enough to include such judgments. (*Eldon*, C. What do you make of the words "executed thereon?") Executed on such judgment, and might it not be meant that no judgment of *such a nature* should be reversed, &c.? If so, this judgment was within the meaning, and this construction was supported by a passage in Com. Dig. *Amendment*, I. from which it appeared that Comyns construed the stat. as extending to *all* judgments entered up after writ of inquiry executed, and it was not likely he should have done so without weighing the words of stat. Stats. Jeof. were always liberally and largely expounded, of which there was a strong instance in *Mallory v. Jennings*, 2 Str. 878. where the want of a writ of inquiry was held to be aided.

Parke (in reply). If the objection as to the costs were not now to be considered as out of the question, he should still say that the costs of the answer to the bill, as far as it was for spec. per. for which

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Deft. below was not liable, must have been included in the damages assessed. However the other two still pressed. The objection that no lawful title was stated in Mrs. Johnes was substantial and good on general demurrer, and also after judgment. The fact of a lawful title should have been distinctly averred, but it had only been stated that it had been found to be lawful. As to the discontinuance, the mode of entering up the judgment was easy. Final judgment might have been entered up immediately after disposing of the demurrer, and the writ of inquiry awarded after judgment, as it did not influence the judgment, but the execution; and so it had been pressed in *Hankin v. Broomhead*, where it had been decided that the second judgment was erroneous, and that case was in substance a decision that the first judgment should have been final. (*Eldon*, C. That case proves that a judgment before the writ would not be erroneous, but that one before, and another after, was erroneous.) The difficulty as to the costs had been answered by Lord Alvanley, in *Hankin v. Broomhead.* There was no reason therefore for a delay of the judgment, and Mr. Serjt. Williams' note in 1 Saund. 58. had been corrected by himself, in a note in 2 Saund. 187. If the judgment were to be delayed, it would be difficult to point out how the continuance should be entered; but there was no necessity, nor any good reason, for the delay. Stat. Anne, it was true, must be liberally construed, but still it did not cure this defect. *Ethersay v. Jackson* did not prove that the judgment might be suspended.

Roberts v. Marriet, 2 Saund. 187.

It only proved that breaches might be assigned after *non est factum* pleaded, issue joined, and notice of trial given. There was no delay there, and it fell within stat. Will. But there was no authority for the delay in entering up judgment. Nov. 21, 1814.

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Lord Eldon, (C.) In attending to this case one or two circumstances presented themselves, which rendered it proper to postpone proceeding to judgment upon it for a few days. In looking at *Hankin v. Broomhead*, it appeared that Lord Alvanley (in justice to whose memory he must say that he never in his life knew a more attentive and diligent judicial character) lamented that the Court had never been moved to settle the proper mode of entering up judgment on the statute, in cases of this nature. The present judgment had not, except in form, received the authority of a Court of Justice, and he must say that this House had not been properly treated, when, instead of having the case argued below, all the Courts had been passed over, except as to form, and the record brought there in a manner which made it be considered as having been brought merely for delay; without any suggestion which could lead their Lordships to call for the usual assistance, in a case which it was most fitting to have discussed in the presence of all the judges. This mode of proceeding left them without the benefit of that assistance in the regular way, which however, in the exercise of a cautious and diligent inquiry with respect to a question which had not before received a judicial decision, they ought to procure in some way, and

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he charged himself with that duty. In the mean time he begged he might be understood as giving no opinion; and indeed on a point which had so much distressed the profession, he could not trust himself so far as to rest satisfied with any opinion which he himself might have formed. He stated this much the rather because the question had not been argued below, and the writ of error had been considered as having been brought merely for delay, and the cause had therefore been taken out of its course. If its nature had been understood, he might have thought it right that farther time should be allowed for preparation before argument, though that would have been unnecessary, as the case had been very ably argued on both sides.

Stat. Gul. 3. c. 11. s. 8.

The stat. 8. 9 Gul. 3. c. 11. had been passed for this reason. Before that stat. where there was a bond for performance of covenants with a penalty, for instance of 50,000*l.* in case of a breach, and action brought, the Plt. had judgment for the whole sum, though the actual damage might be a mere trifle, or at least far short of the whole penalty, and Deft. was obliged to go for relief to a Court of Equity, which, by directing an issue, &c. ascertained the real damage; and in this expensive and circuitous mode justice was done. The object of the legislature was to relieve Deft. from the necessity of resorting to this course by empowering the court of law to confine the legal to the real right; and it was remarkable, after the passing of all these statutes, how far the words had fallen short of the construction which the Courts had put upon them. The remedy then devised by the stat. was

this, "that in all actions which &c., shall be com- "menced or prosecuted in any of H. M. Courts "of Record, upon any bond or bonds, or on any "penal sum for non-performance of any covenants, "or agreements in any indenture, deed, or writing, "contained, the Plt. or Plts. *may* assign as many "breaches," (meaning, in the declaration) "as he "or they shall think fit; and the jury, upon trial "of such action or actions, shall and may assess, "not only such damages and costs of suit as have "heretofore been usually done in such cases, but "also damages for such of the said breaches so to "be assigned," (meaning, in the declaration) "as "the Plt. upon trial of the issues shall prove to "have been broken, and that the like judgment "shall be entered on such verdict, as heretofore "hath been usually done in such like actions." So far the stat. related strictly to cases where breaches were to be assigned in the declaration. It then went on to cases where judgment was given without breaches previously assigned. "And if "judgment shall be given for Plt. on a demurrer, "or by confession, or *nihil dicit*, the Plt. upon the "roll *may* suggest as many breaches of the co- "venants, &c. as he shall think fit, upon which "shall issue a writ to the Sheriff of that county, "where the action shall be brought, to summon a "jury to appear before the Justices or Justice of "assize or *Nisi Prius* of that county, to inquire "of the truth of every one of those breaches, and "to assess the damages that the Plt. shall have sus- "tained thereby, &c. &c." In the obvious construction the remedy was by suggesting on the roll

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these breaches, and the subsequent part was so modified, that the judgment for the whole sum stood as a security for the damages, costs, and charges; together with such farther damages as might be sustained by future breaches, Plt. suggesting such breaches, again going to a Jury, and so from time to time satisfying himself. But the Courts had construed this statute so as to extend the remedy to cases not strictly within the words, and the case of *Ethersay v. Jackson* went a great way to that purpose. That was an action of debt on bond for performance of covenants; plea, *non est factum*, and issue thereupon, and notice of trial given. Plt. then entered a suggestion on the roll, and assigned breaches under the stat., and had a verdict—motion to set aside for irregularity, because the suggestion on the roll in this case was not warranted by the stat.; for it gave liberty to suggest only after judgment, and even that only in three cases, in judgments on demurrer, confession, or *nihil dicit*. The Court said there was no foundation for this objection, that stat. required a liberal and beneficial construction, it being made in advancement of justice and case of Defts., that it was manifest the legislature contemplated cases where Plt. had not originally assigned breaches in the declaration, which stat. enabled him to supply by suggestion on the record even after judgment, and *à fortiori* before. He was bound to suppose that this was just, and yet where a stat. gave power to assign breaches in the declaration, and to suggest them on the roll after judgment, an ordinary man would say that it was not hastily to be inferred

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that it sanctioned a third mode. But it had been properly said that this was a remedial stat., and that, in advancement of the remedy, all was to be done that could be done in a way consistent with any construction of it. This showed how anxious the Courts were to extend the remedy to cases where it was wanted. When that case occurred where it was thought that the mode of entering up two judgments was wrong, Lord Alvanley adverted to a form, of which this was nearly a transcript, which had been suggested by Mr. Serj. Williams, (1 Saund. 58. n. 1.) to which he (Lord A.) said he saw no objection. So far there was authority that this judgment was good, attending to what had been said by Serj. Williams in his note (2) in 2 Saund. 187. and though one who had held no judicial situation could not regularly be mentioned as an authority, yet he might say that to any one in a judicial situation it would be sufficiently flattering to have it said of him that he was as good a common lawyer as Mr. Serjt. Williams, for no man ever lived, to whom the character of a great common lawyer more properly applied. There was however no judicial decision on the point. Lord Alvanley had expressed his wish that the Courts had been moved to settle the proper mode of entering up judgment in such cases; and he should be sorry to part with the present case without having it settled, not only as a correct judgment for the present, but as a precedent for the future; and he should therefore use the means in his power, to ascertain whether that opinion was

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sound, which he himself had formed, but which he would not now state.

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With respect to the other points, he was of opinion that there was nothing on this record which compelled them to take it as if the costs of the spec. per. had been included in the damages assessed; and that prior to the demurrer there was enough to show that Mrs. E. Johnes claimed by title. As to the allowance of interest, nothing could be more proper than to discourage the practice of bringing writs of error for delay, and the converting their Lordships' House into a Court of original jurisdiction. Costs including interest might be given within the sum (400*l.*) in the recognizance, if that should appear proper upon a sober and judicious consideration of the whole circumstances of the case.

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Lord Eldon, (C.) This was an action of debt on bond, with penalty conditioned for the quiet enjoyment of certain purchased premises, and breaches were assigned in the replication to which Deft. below demurred, and after joinder in demurrer, no Counsel appearing to argue the case for Deft., Plt. had judgment which was in the following form:—

Form of the Judgment, 1813.

"But because the Court of the said Lord the King now "here is not yet advised what Judgment to give of and "upon the premises, a further day is therefore given to the "parties aforesaid, to come before our said Lord the King, at "Westminster, on Saturday next after eight days of Saint Hi-"lary to hear judgment thereon, for that the Court of our said

" Lord the King now here is not yet advised thereof: at which Nov. 30, 1814.
" day before our said Lord the King at Westminster, come
" the parties aforesaid, by their Attornies aforesaid; but, ERROR.— FORM OF JUDGT. ON DEMR. UNDER STAT. 8, 9 GUL. 3. s. 8.
" because the Court of the said Lord the King now here is
" not yet advised what judgment to give of and upon the
" premises, a further day is therefore given to the parties
" aforesaid, to come before our said Lord the King at West-
" minster, on Wednesday next after fifteen days of Easter,
" to hear Judgment thereon, for that the Court of our said
" Lord the King now here is not yet advised thereof: at
" which day before our said Lord the King at Westminster,
" come the parties aforesaid, by their attornies aforesaid:
" Whereupon all and singular the premises, being and by
" the Court of our said Lord the King now here fully under- Interlocutory judgment.
" stood, and mature deliberation being thereupon had, it
" appears to the said Court here, that the said replication of
" the said John Johnes, to the said plea of him the said
" Thomas, and the matters therein contained in manner and
" form as the same are above pleaded and set forth, are suf-
" ficient in law for him the said John Johnes to have and
" maintain his aforesaid action thereof, against the said
" Thomas; wherefore the said John Johnes ought to recover
" against the said Thomas his said debt, together with his
" damages by him sustained on occasion of the detention
" thereof, &c. But, because it is convenient and necessary
" that judgment should not be given hereupon, until the
" truth of the aforesaid breaches of the said condition of the
" said writing obligatory above assigned shall have been in-
" quired into, and the damages which the said John Johnes
" has sustained thereby shall have been assessed by a Jury of
" the country in that behalf, according to the form of the
" statute in such case made and provided; therefore, let
" judgment hereupon be stayed in the mean time: And the
" said John Johnes having prayed the writ of our said Lord Award of writ of inquiry, to inquire into the truth of the breaches.
" the King to be directed to the Sheriff of Herefordshire, and
" to His Majesty's Justices assigned to take the assize in the
" said county, to inquire of the truth of the aforesaid breaches
" of the said condition of the said writing obligatory above

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Inquisition.

Final judgment, signed 10th day of Jan. 1814.

" assigned, and to assess the damages which the said John " Johnes hath sustained thereby: Therefore according to " the form of the statute, in such case made and provided, " the said Sheriff is commanded, that he summon twelve " good and lawful men of his bailiwick, to appear before his " said Majesty's Justices of assize, on Monday the sixteenth " day of August next, at Hereford, in the said county of " Hereford, to inquire diligently, on their oath, of the truth " of the premises, and to assess the damages which the said " John Johnes hath sustained by reason of the aforesaid " breaches; and that he have on that day, before his said " Majesty's said Justices of assize, the writ of our said Lord " the King, to them thereupon directed: It is likewise com- " manded to his said Majesty's said Justices of assize, that " they certify the inquisition before them taken to our said " Lord the King, at Westminster, on Friday next after the " morrow of All Souls, together with the names of those by " whose oath such inquisition shall be taken; and that they " also have there then that writ; and the same day is given " to the parties aforesaid, at the same place; at which day " before our said Lord the King, at Westminster, come the " parties aforesaid, by their attornies aforesaid; and the said " Justices of assize now here return a certain inquisition in- " dented, taken before them by virtue of the said writ, on " Monday, the said sixteenth day of August next after the " issuing of the said writ, at Hereford aforesaid, in the " county aforesaid, upon the oath of twelve good and lawful " men of the said county; by which it is found that the " several breaches of the said condition of the said writing " obligatory above assigned, are and each and every of them " is true, and that the said John Johnes hath sustained " damages on occasion of the aforesaid breaches, to the sum " of 4685*l.* 11*s.* 11*d.*, besides his costs and charges by him " about his suit in this behalf expounded: Therefore it is " considered that the said John Johnes do recover against the " said Thomas Johnes his said debt, and also as well one " shilling for his damages which he hath sustained on occasion " of detaining the said debt, as 198*l.* 8*s.* 1*d.* for his costs

" and charges by him about his suit in this behalf expended, Nov. 30, 1814.
" by the Court of our said Lord the King now here adjudged
" to the said John Johnes, and with his assent."

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It would be observed that there was here a regular continuance from Hilary to Easter. There was no continuance from Easter to Trinity, but a day was given in M. T. so that the continuance might be said to be from Easter to Michaelmas Term. Then error was brought in the Exchequer Chamber; but there was no argument, nor any suggestion as to what was the error in the judgment. The matter then came to that House, where it was the clear right of the subject to bring a case in this way, and, if there was error, to call upon their Lordships so to declare. But when the case came to be considered with reference to the conduct of the parties, and a view to costs, it became material to know why the question had not been argued below, and, if the circumstances called for it, to set Defendant in error right in respect of costs and interest.

A few words as to the chief point to which he had before adverted. The simplicity of the com. law restricted parties to one judgment in the same cause; but this simplicity had been made to give way by several acts of Parliament, such as enclosure acts, &c.; and under these acts there might, in the same cause, be a variety of judgments. Their Lordships were aware that, where there were covenants with a bond and penalty for performance, if any one of them was broken the whole penalty was gone, though the real damage in consequence

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of the breach might be but small in comparison. The subject was therefore obliged to go to a Court of Equity, which, by directing an issue of *quantum damnificatus*, &c. ascertained the real amount of the damage; and on payment of the damages and costs of the proceedings, the party was relieved, the penalty standing as a security for damages that might accrue by any future breaches, and leave being given to apply to the Court *de tempore in tempus* for similar issues. In the time of King William it was thought proper to relieve Defendant by giving the Courts of Law an equitable jurisdiction; and Plaintiff, upon action on bond and judgment for the whole penalty, might suggest different breaches on the roll, and then pray that the real amount of the damage suffered might be inquired of by a Jury, and the Court was to find means to award execution; and in case of future breaches Plaintiff might apply for interlocutory judgments, and future inquiries, *de tempore in tempus*. And the Court, in furtherance of the object of the act, construed *may* as compulsory on the Plaintiff to proceed in this way. The form then by this mode was, after judgment apparently final, to suggest breaches on the roll as they occurred, and so to have judgment after judgment from time to time. This was felt to be attended with difficulties; and the late Mr. Serjt. Williams, an eminent pleader, not merely from his acquaintance with the forms, but because there was no man whose mind was more richly stored with the principles of pleading, suggested a form of which this was nearly a transcript. But errors having been suggested here for the first time

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after passing the Courts below, there was one point with respect to which, as it had not been found to have been decided before, and as this would be a precedent for the future, he had thought it right, though he had formed an opinion, privately to consult those whose assistance was most material under these circumstances. The objection was of this nature, that the law required the parties to be constantly in Court, that when it was stated on the record that the Court was not prepared to give judgment on any particular term, the parties should be ordered to attend on a given day in the next term, and so on from term to term. In this way the cause had been continued from H. T. to E. T., and then an interlocutory judgment was given to the extent, that it appeared to the Court that Plt. below ought to recover his debt. But then the record went on, "because it is convenient and "necessary that judgment should not be given "hereupon, until the truth of the aforesaid breaches "&c. shall have been inquired into, &c." giving a day to the parties not in T. T. but in M. T., directing an inquiry in the mean time before the Judges of assize, which from the ordinary mode of holding the assizes could only be executed subsequent to T. T. It was said however that the reason for the ordinary continuance ceasing, there was no occasion for it in this instance, and that the question was, not what was necessary by the common law, but whether the record was sufficient to satisfy the enactments of the statutes. And it had been said on the other hand, that there might by possibility be no assizes before Michaelmas:

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Salk. 700. 2 Raym. 775.

true; but a day was given in that term, and there might be a farther continuance. Attending then to the reason of the common law and the object of the statutes, it was clear that this record was sufficient and right, as providing in every respect for the due execution of the statute; and the point for their Lordships' consideration was, whether there was error with reference to the due execution of the statute. The common law said there must be only one judgment, but in the due execution of certain statutes there must be several judgments; and if this record satisfied the statute, it appeared to him to be sufficient. A Ca. Sa. need not be made returnable the term after it issued, the object being to give time for payment of the debt, &c. and the reason therefore ceasing. It was otherwise, he believed, on *mesne process;* but this showed that the reason of the thing was to be considered, and they would apply the common law reason as far as it enabled them to go in due execution of the statute. That was his view of the case, and having waited to see whether others, whose minds were more enlightened on the subject than his own, concurred with him, he was now prepared to recommend to their Lordships to decide that there was no error on this record.

With respect to costs, he could not help saying that, when a party travelled through the Courts below without argument, it did afford a strong ground to show that the other party was entitled to his costs and interest. He had now been there for twelve years, attending to writs of error, and had found that not more than one in fifty was

argued, so that forty-nine out of fifty were brought for delay. Delay was one of the greatest mischiefs in the administration of justice; and as far as that could be checked by giving exemplary costs, their Lordships would be disposed so to check it. But let it not be thought that, in a case where there were merits, he wished to prevent its being considered and reconsidered again and again, that they might be sure they were right; what he meant to say was this, that that House must not be employed as an instrument in doing what was gross injustice.

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Judgment affirmed with (including interest) 350*l.* costs. Dec. 1, 1814.

Agent for Plt. in error, ——.
Agent for Deft. in error, GREY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2D DIV.)

PARKER AND OTHERS—*Appellants.*
POTTS AND OTHERS—*Respondents.*

Feb. 15, 1815.

INSURANCE.—SEA-WORTHINESS.

WHEN a ship, soon after her sailing on a voyage insured, is found to be unfit for sea, the question whether or not she was sea-worthy at the commencement of the risk, or the voyage, (when not otherwise ascertained,) must be decided by rational inference from the circumstances.

A ship is *primâ facie* to be deemed sea-worthy. But if it is found soon after her sailing that she is not so sound, without adequate cause by stress of weather, or otherwise, to