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and that the proceeding upon the reversal was also to be the same, except that after once being remanded, this court may proceed to a final decision, and award execution. In the case, then, of a reversal of a judgment of the circuit court, the 24th section of the judicial act provides, that on reversals in the supreme court, they shall proceed to render such judgment, or pass such decree, as the inferior court should have done ; and shall send a special mandate to the circuit court to award execution thereupon. If, therefore, the decree of a circuit, reversing the decree of a district, court, were reversed, the mandate would be sent to the former, and not to the latter, and by a parity of reasoning, in the present instance, the writ should be sent to the court of appeals, and not to the general court. The construction seems to be strengthened by that part of the 25th section, which contemplates, that the cause might be remanded to the state court more than once—as, it is not probable, that the court whose judgment is affirmed, would require a second order ; and it is surely proper, that the court, whose judgment is reversed, should be apprised of the event. As to costs, *Dallas* contended, that at least the costs of the court whose judgment was in favor of the defendant in error, ought not to be charged against him. But—

BY THE COURT.—The judgment of the superior court of Maryland being reversed, it has become a mere nullity ; and costs must follow the right as decided here.

Let the judgment of the general court be affirmed ; let the costs in the courts of Maryland, and in this court, be allowed to the plaintiff in error ; and let the mandate for execution issue to the general court.

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Practice.—Discontinuance.—Damages.

The entry of a default, after a plea of the general issue, no *similiter* being on the record, does not operate as a discontinuance, in Rhode Island.

In Rhode Island, the court may assess damages, in an action on a foreign bill, payable in sterling money.

Interest, on affirmance, is to be calculated on the aggregate amount of principal and interest in the court below, to the time of affirmance, but no further.¹

ERROR from the Circuit Court for the district of Rhode Island. The case was as follows : On the 10th of March 1792, Brown & Francis, merchants, of Providence, in Rhode Island, drew four sets of bills of exchange on Thomas Dickason & Co., merchants, of London, payable at 365 days' sight, to Benjamin Page, or order, for the aggregate sum of 3000*l.* sterling. Page, being at Canton, on the 28th of March 1793, indorsed these bills to Van Braam, the defendant in error, and on the same day, as the agent of Brown & Francis, drew another set of bills of exchange, upon Thomas Dickason & Co., payable also at 365 days sight, to Van Braam, or order, for 3000*l.* sterling. On the 9th of April 1793, Page, in the same character of agent, drew a similar set of bills, in favor of Van Braam, or order, for 400*l* sterling. One bill of each set was presented to Thomas Dickason & Co., in London, for acceptance, on the 31st of December 1793, but were then pro-

¹ See *Mitchell v. Harmony*, 13 How. 116; *Perkins v. Fourniquet*, 14 Id. 328.

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tested for non-acceptance, of which Brown & Francis had notice on the 1st of July 1794, though the bills and protests were not actually returned to them. The bills were again presented for payment, on the 15th of January 1795 (that is, 10 days after they were actually due), and protested for non-payment, of which Brown & Francis had notice on the 1st of April 1795.

This action was instituted in the circuit court, of November term 1796, to recover the amount of the protested bills, with interest, damages and charges; and the declaration contained a special count on each bill, together with a general *indebitatus assumpsit* for \$40,000, money had and received by the defendants to the use of the plaintiff. On the return of the record, it appeared, that Francis had died subsequently to the service of the original writ; that Brown came into court, and, after suggesting the death of Francis, pleaded the general issue; and that the plaintiff having likewise suggested the death of Francis, "prayed judgment against John Brown, the surviving defendant." There was no joinder in issue, continuance or other pleading; ^{*345]} but immediately after the above prayer for judgment, the record proceeded, in this form: "And the said John Brown made default: whereupon, this cause being submitted to the court, and the court having fully heard the parties, by their counsel, and mature deliberation being thereon had, it is considered by the court now here, that the said Andreal E. Van Braam Houchgeest, do recover against the said John Brown, the surviving partner as aforesaid, the sum of \$34,455.27 damages, and costs of suit, taxed at \$16.52." To the record of this judgment, the following memorandum was annexed: "Nota Bene.—The above sum, as ordered by the court, includes the principal and interest from the 15th January 1795, to the 19th November 1796, and ten per cent. damages, and \$29.22, charges of protest."

Upon this record, the following errors were assigned, and argued by *Howell* and *Robbins*, of Rhode Island, and *Dexter*, of Massachusetts, for the plaintiff in error, and by *Barnes*, of Rhode Island, and *Mifflin*, of Pennsylvania, for the defendant in error.

1st. That after plea pleaded, there was a discontinuance of the cause in the court below, and therefore, no judgment could be rendered.

2d. That ten per cent. damages, and six per cent. interest, are included in the judgment, where no damages at all ought to have been given.

3d. That the court assessed the damages, when they ought to have been assessed by a jury.

For the *plaintiff* in error.—1st Error assigned: It appears from the record, that there was a discontinuance of the cause, by an omission of the plaintiff below, and no verdict or judgment can cure the defect. The defendant had come in, and tendered an issue upon every count in the declaration; and without a joinder of issue, or any species of replication, the suggestion of the death of Francis, is the only thing that occurs between the defendant's plea, thus traversing the whole cause of action, and the judgment against him by default. It does not appear, that the plaintiff himself was in court; nor, indeed, under all the circumstances of the record, can it be conclusively ascertained, for whom judgment ought to have been given. It is true, that by the courtesy of the bar, the *similiter* might, perhaps, have

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been entered at any time, while the cause was depending in the original jurisdiction; but until it was entered, the defendant, by pleading, had done everything that law or reason could exact from him; and it is too late to enter it, when the cause is removed upon a writ of error. In deciding [*346] on this exception, the court will be governed by the law of Rhode Island, by virtue of the reference made in the 34th section of the judicial act, to the laws of the several states, as rules of decision in trials at common law, in the courts of the United States, where they apply. But the law of Rhode Island must not be construed to recognise any loose system of practice, introduced upon the principles of mutual indulgence, for the personal accommodation of attorneys. By an act of the state, it is declared, that in all cases, for which the legislature has made no positive provision, the laws of England shall furnish the rule of decision. If, therefore, any custom, usage or practice shall be in opposition to an express statute of Rhode Island; or where there is no statute on the subject, if it shall oppugn the principles of the common law of England, it is void, and ought to be disregarded. In the present instance, there is no express statute; but the discontinuance is fatal, at common law; and therefore, fatal, by the law of Rhode Island. There can be no judgment by default, after an appearance, much less after pleading; but the plaintiff should have entered the *similiter*, and then he would have been entitled to make out his case before a jury, whether the defendant attended or not, to support his plea. As the record stands, it cannot be understood, what was tried, an issue in fact, or a demurrer in law. (a)

2d Error assigned.—By the law of Rhode Island, (b) it is declared, "that when any bill or bills of exchange shall be returned from any parts beyond sea, duly protested for non-acceptance or non-payment, the person or persons to whom the same was (or were) payable, shall be entitled to have and recover of the drawer or drawers, indorser or indorsers of the bill or bills of exchange, ten per cent. damages, over and above the principal sum for which such protested bill, or bills of exchange so protested, was or were drawn, and also lawful interest from the time such bill or bills of exchange so protested, were purchased, until final judgment for the same be obtained, and also legal charges of protesting said *bill (or bills), with costs of [*347] suit." It is agreed, that under this law, damages might have been recovered upon the protest for non-acceptance merely; but then the bills and protest for non-acceptance must have been returned in a reasonable time; whereas, they were not returned until a year had elapsed; the bills

(a) PATERSON, Justice.—I shall certainly consider myself bound, in some cases, by the practice of the state courts; and therefore, I wish to get a practical exposition of the statute, to ascertain whether the judgment by default can be considered as good for nothing, after there has been such a discontinuance as the present.

CHASE, Justice.—I shall be governed, in forming my opinion, by what the common law says must be the effect of a judgment by default; without regarding the practice of the state. If, indeed, the practice of the several states were, in every case, to be adopted, we should be involved in an endless labyrinth of false constructions, and idle forms.

(b) "An act for ascertaining damages upon protested bills of exchange," originally passed in the year 1743, but included in the revised Code of Rhode Island law (1776), page 19.

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were protested for non-payment; and in point of fact, it is conceded, that the action is brought upon the protest for non-payment, and not upon the protest for non-acceptance. The notice of the non-acceptance will not alter the case; for the bills, with the protest, should have been returned to the drawers, so as to put it in their power to take them up, and to pursue their remedy over against the drawee, in case he had their effects in his hands at the time of protest. Then, considering the case upon the protest for non-payment, no damages ought to be allowed, unless the bills were duly protested; and it appears, from the plaintiff's own showing, that they were not protested for ten days after they had become payable, which is not so soon as it might have been, from the nature of the case, or as it ought to have been, according to the law of merchants, by which only three days' grace are allowed. It is true, that this protest may be in time for one purpose, at common law, for instance, to maintain an action against the drawer, who had no assets in the hands of the drawee, at the time of protest; and yet the bills shall not be deemed duly protested, for another purpose, by statute, for instance, to entitle the payee to recover damages.

It will be urged, however, that the allowance of damages only appears by the *nota bene* subjoined to the judgment of the court below, and that this ought not to be taken into consideration as a part of the record. But what constitutes a record is a very different thing, in different states. The mode of stating the judgment, or the reasons for it, will likewise admit of great latitude and diversity. If the purport of the *nota bene* had been incorporated with the judgment, there would have been no ground for cavil; and where is the substantial difference, whether the judge delivers the explanation himself, or directs it (which, for aught that appears, may be the fact) to be entered by the clerk? If the court had confined its view to the mere formal part of the record, in the case of *Bingham v. Cabot* (ante, p. 19), the ground of reversing the judgment below could never have appeared; and if the *nota bene* is reversed here, it cannot be determined what has been tried by the court below. But, after all, the allowance of damages must necessarily be inferred from the record, independent of the *nota bene*. Thus, the declaration sets forth and demands the principal, interest, cost and damages, accruing by virtue of certain bills of exchange; and the demand being [348] reducible to **certainty by figures*, this court can follow the court below, and by mere calculation, from *data* existing on the record, correct any error that has been committed. Since, then, there is a judgment for more than the principal, interest and costs upon the bills of exchange, the surplus must be error; and the *nota bene* only serves to explain how that surplus has arisen.

3d Error assigned.—The damages ought not to have been assessed by the court. It is admitted, that where a demand appears to a certainty upon the record, or may be reduced to a certainty, by the use of figures, the court may itself make the calculation, or refer it to the proper officer to be done. 3 Leon. 213; 1 H. Black. 541. If, therefore, the declaration had demanded nothing more than appears on the face of the bills, the present exception could not prevail; because the specific sum to be adjudged might be conclusively ascertained, by adding, upon a simple process of figures, the amount of the interest to the principal; though even that doctrine has been controverted in a very recent case. 4 T. R. 275. But the demand is

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not only for the principal and interest, but likewise for damages, which are altogether uncertain; depending upon the fact, that the bills have been returned duly protested; and that fact involving a complicated investigation into the period of the return, as well as into the time and mode of protest. Even, indeed, with respect to the interest, a similar uncertainty arises under the provision of the Rhode Island law; since, interest is to be allowed from the time of purchasing the bills; and therefore, the time of purchasing the bills was a fact to be ascertained, before any calculation could be made. But exclusive of these points, necessarily connected with the bills, the defendant, under the general issue, which he had tendered, was entitled to bring a great variety of matters into his defence. As there is much diversity in the laws on this subject, some allowing twenty per cent., others, only ten per cent. damages, and some, no specific damages at all, the place of drawing the bills may be material. Nor can it be said, that the judgment by default, even if it had been regularly entered, would admit all that is demanded in the declaration; it admits the cause of action as stated, but does not admit the *quantum* of the demand. The defendant might, therefore, have shown an indorsement after the bills were dishonored, and a subsequent payment, on the principle laid down in 3 T. R. 82; for an indorsement, in such case, is not conclusive against the drawer. 12 Mod. 192.

It is not contended, that, under the principles of the English law, or the usage of New England, the form of a writ of inquiry is indispensable, to ascertain damages upon every judgment by default; but wherever matters of fact can be separated *from matters of law, it will be agreed, to [*349 be a general and favorite practice, to allot the assessment of damages to a jury. The ancient authorities are, it is true, exceedingly crude in relation to the distribution of jurisdiction between judges and juries; but we have received the doctrine in its modern, perfect state; and as such, are deeply interested in adhering to it. So forcible is the modern example of the English courts, that the judges have refused even to value foreign money (4 T. R. 493); and a motion for referring a bill of exchange, drawn for Irish sterling, to the master, in order to see what was due, for principal, interest and costs, has been recently rejected in Westminster Hall. 5 T. R. 87. It is here, indeed, to be remarked, that the bills of exchange, in the present instance, were drawn for British sterling money; which is, surely, as much to be denominated foreign money in an American court, as Irish sterling can be so denominated in an English court. (a) Besides, it is to be considered, that in England, damages are compensatory; while in Rhode Island, in most of the other states in the Union, and in many foreign countries, damages are in the nature of a penal sum, given by statute; and not a solitary authority can be produced, where any court has referred a bill of exchange to the prothonotary, to add, by way of damages, any sum beyond the precise computation of interest.

The doctrine having, then, been thus settled in England, the question

(a) PATERSON, Justice.—The value of foreign money, generally speaking, is uncertain; but it may be rendered certain, by adopting the coin and fixing its value by law. There was a resolution of congress adopting the pound sterling and fixing its value in dollars: and the value of the principal foreign coins has been fixed by an act of congress (of 4th August 1790, § 56), so far as relates to the payment of duties.

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arises, whether the statutes of Rhode Island have made any difference in the common law? By the act regulating the proceedings in the courts of that state (page 59), it is provided, "That in all cases, both at the inferior and superior courts, where judgment shall pass by default, discontinuance, *nihil dicit, non sum informatus*, or demurrer, where damages are to be inquired into and assessed, damages shall be inquired into and assessed by the court, or otherwise by a writ of inquiry, at the discretion of the courts." This provision may be regarded in two points of view: 1st. Considering it, upon the ground of the opposite construction, whether it furnishes a rule for the federal courts, from which they can derive any new authority; and 2d. Considering it, upon the ground of our construction, whether the assessment of the damages ought not to have been referred to a jury.

1st. On the first of these grounds of consideration, there is no key to [350] an explanation, but the act of congress; which declares *that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Now, though this is an adoption of the laws of Rhode Island, where they apply, it cannot be considered as a recognition of all the modes of practice which may have been introduced to determine the rights of a party; compelling the federal courts, whatever may be the extravagance of those modes, to be in all respects as erratic as the courts of the states. For instance, though where the state law regulates the descent of real property, the circuit court must decide conformable to the *lex loci*; yet, if the state legislature had instituted the ordeal, or trial by battle, to ascertain who was the right heir, the judges of the circuit court would not, surely, erect themselves into such a tribunal, and preside at such a mockery. If the federal courts should attempt to alter the fundamental laws of descent, the citizens of Massachusetts, or Rhode Island, would have reason to complain, and the complaint would certainly be heard; but if, disdaining to sanctify the errors of clerks, and the blunders of yearlings (to whom too often the business of keeping and making up a record is confided), the federal courts should discountenance and reject the errors and irregularities of the practice of the state courts, every suitor would gratefully acknowledge the obligation. There is, perhaps, occasion to lament, that errors in jurisprudence have too long kept the citizens of the eastern states in darkness, ignorant of their rights and duties; and it is one of the beneficial consequences that may be fairly expected from the establishment of the national government, that such amendments will everywhere be introduced into the practice of the law, as are consistent with substantial justice, legislative acts and ancient usages, approved by experience or favored by local peculiarities. Take the law and practice of Rhode Island, however, to be such as they are described by the opposite counsel, they cannot prevail over an express law of congress. In this case, there can be no denial, that the plea tendered an issue in fact; and all trials of issues in fact must, says the judicial act, be by jury.

2d. But it is not necessary to insist further on this ground, since a true construction of the Rhode Island law itself, must give the assessment of damages to a jury. The law says that, in certain cases, "damages shall be inquired into and assessed by the court, or otherwise by a writ of inquiry, at

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the discretion of the courts." If, then, discretion here means a sound legal discretion, and not mere will, whim and caprice, it must be applied to a discernment and corresponding allotment of the cases, in which the law authorizes a court to fix the **quantum* of debt, and in which it demands the interference of a jury for the assessment of damages. [*351] The opposite construction leads to the absurdlest consequences: the judge might, at pleasure, submit a promissory note to a jury, for the mere calculation of interest; and undertake himself to assess the damages in an action for a libel, when judgment has been given on demurrer for the plaintiff. In the latter instance, he would be obliged to try the truth of the allegation, and the credibility of the witnesses, and to decide the extent of the injury which the libel has produced; and if a judgment thus preposterously rendered should be brought hither, this court would be bound to affirm it: but there is surely no case, consistently with the scope of the judicial act, where the circuit court can decide a point of law, without affording an opportunity upon the record, for its being examined, affirmed or reversed on a writ of error. In equity causes, it is provided, that the facts on which the decree of the circuit court is founded, shall be made to appear upon the record; and in common-law causes, the principle equally applies, that a judge ought not to be allowed to travel over ground, where he can never be traced. Then, if the discretion mentioned in the Rhode Island act is a legal discretion to ascertain the distributive jurisdiction between judges and juries, and not an authority for the former to blend and usurp the powers of the latter; and if the judges in this case have decided what the jury ought to have assessed; it is an error in point of law, which this court is competent to correct. Whatever may be the practice of the lawyers of Rhode Island, it is but a construction of the law, and not the law itself; and if it is an erroneous construction, this court, so far from being bound to adopt, is bound to reject it. Nor is the error cured by any statute of *jeoffaile*. The case from 7 Vin. Abr., p. 308, pl. 24, only shows that the want of a formal writ of inquiry was cured, where the damages appeared to have been, in fact, assessed by a jury: but there is no reason in the case itself, nor in the cases there cited, that if damages had not been assessed at all, or had been assessed by an improper tribunal, the error would not be fatal.

For the defendant in error.—1st Error assigned: It will be proper to premise, on general principles, that great difficulties must have arisen in organizing the federal courts, so as to prevent an injurious clashing with the jurisdiction and practice of the various state courts. From these difficulties, there could be found no other mode of escaping, than by adopting for the government of the federal courts, the same law and practice that prevailed in the respective states, in which those courts, from time to time, exercised their functions. The policy of the measure was likewise supported by its tendency to **make* the new government sit easy on the public mind, [*352] and to facilitate the administration of justice throughout the Union. For as the law and forms of the respective state courts had been adopted in order to accomplish substantial justice, according to the peculiar and local circumstances of each state; and as the people were content under the operation of those municipal regulations; it was natural to presume, that by adopting the same rule for the federal courts, the same salutary effect would

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be produced. But on the other hand, it is obvious, that any project for a general system of jurisprudence, co-extensive with the Union, could only have engendered discontents, and must have been abortive. To have attempted a theory of law and practice entirely novel, would have occasioned endless perplexity; and to have superseded the settled practice of some states, in order to introduce the practice of others; to compel, for instance, the lawyers of Massachusetts, to study and enforce the practice of the lawyers of South Carolina, would have occasioned endless jealousy and inconvenience. From these considerations, the congress wisely enacted, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This adoption of the state laws extends as well to the unwritten, as to the written law—to the law arising from established usage and judicial determinations, as well as to the law created by positive acts of the legislature. And the act for regulating process, in language equally general adopts "in each state respectively, such forms and modes as are used or allowed in the supreme courts of the same." (a) The only question, therefore, to ascertain the legal correctness of the present record, is—what are the laws and modes adopted by the state of Rhode Island, in relation to the controverted points? It is immaterial, how far the answer shall be inconsistent with certain *dogma* of the English common law, or at variance with the municipal regulations of any other state; it is enough, to show that such are the laws and modes of Rhode Island, and that they are competent to all the purposes of justice.

With respect, then, to the assignment of error, because there was a discontinuance of the suit, a reference to the uniform practice of Rhode Island, must furnish a decisive refutation. Both in the court of common pleas, and the superior court of that state, the court proceeds to call the parties in the actions depending on the docket. If either party neglects to appear, in *353] whatever state of the pleadings, his non-appearance *is noted by the clerk, and judgment is rendered for the other party. If, as in the present instance, a plea has been pleaded: and on calling over the docket, the plaintiff appears, and the defendant does not, the judgment is entered for the plaintiff, without regarding the plea. If, on the other hand, the defendant had appeared, and the plaintiff had not, judgment would have been entered, in favor of the former, for costs. But if both had appeared, whenever called by the court, the *similiter* could be entered at any time, and it is usual to enter it, at the time of qualifying the jury. Even, however, where an issue has been regularly joined, the court never proceed to try it, unless both parties appear; but enter judgment as above stated, against the delinquent. (b) Thus, it is plain, that the non-attendance of the defendant is considered, in the practice of Rhode Island, as an abandonment of his plea. Nor is the practice without sanction from the books of English law; which show how a departure of a party, in despite of the court, will be recorded, and how, in almost any stage of a suit, it may be a ground for rendering

(a) See the acts of the 29th of September 1789, and 8th of May 1792.

(b) At the suggestion of the court, Mr. Barnes reduced this statement of the practice of Rhode Island to the form of a certificate, and filed it in the clerk's office.

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judgment against him. 7 Vin. Abr. p. 450, pl. 3, 5, 11; Ibid. p. 473, pl. 10; Ibid. p. 474, pl. 19; Ibid. p. 476, pl. 7; Ibid. p. 487, pl. 2; 1 Str. 267. It is material, too, that the judgment is expressly rendered upon the defendants making default. 5 Com. Dig. 11.

2d Error assigned.—The allowance of damages only appears on the *nota bene* annexed to the record, which was an act of supererogation on the part of the clerk, and ought to be treated as mere surplusage. If, however, the court were right in assessing the damages themselves, the assessment stands in the place of a writ of inquiry; and surely, the principles on which a jury give their verdict, can never be the foundation for a writ of error. Bills of exchange and protests are coeval with the 13th century; and from the time of introducing a protest, to the present day, its only use has been to enable the drawer of the protested bill to take his funds out of the hands of the drawee; but if no funds were in the hands of the drawee, then the fate of the bill must have been anticipated, no injury can be done to the drawer, and no notice will be necessary. It is true, that if the drawee had failed, with effects in his hands, between the time of the bills becoming due, and the time of protest, the drawer would be discharged from any responsibility to the holder of the bills; but this fact, operating as a discharge, must be proved on the part of him who wishes to take advantage of it; since *prima facie*, whatever may be the date of the protest, *the drawer is responsible for the amount of the bills. (a) *Id. Raymond*; 12 Mod. 15; Show. 317; *Cun. B. of Ex.* 9; 1 *T. R.* 465; *Doug.* 55, 654. But independently of this general principle, the bills were duly protested, in time and manner, according to the law of merchants; and as the Rhode Island act does not designate any particular process of protest, that law must have been contemplated as furnishing a rule to decide the question. It is manifest, then, from all the authorities as well as from the reason of the case, that in order to be duly protested, according to the law of merchants, it is not necessary to be done, within the three days of grace, or any other specific term. The usances on bills of exchange differ, in different countries; and the case in *Shower's Reports*, p. 317, proves that a bill may be duly protested, even thirty days after it has become due, if the drawer does not show that he has sustained some damage by the delay.

3d Error assigned.—It may be thought by some to be a subject for regret, that Rhode Island has not discovered the superior merits of the systems resting on the English common law, or invented by the jurisprudential skill of her sister states; but as it has so happened, it will not be disputed, that within her jurisdiction, whatever is her law, and not what is the law of other countries or states, must furnish the rule for decision. On the cases in which there exists a necessity of employing writs of inquiry, the diversity of theory and practice has been great, at different periods of juridical history, and at

(a) *CHASE, Justice.*—You surely need not labor that point. The drawer would not be answerable for anything—not for the principal, and of course, not for the damages—if the payee had not done his duty: but what discharges the drawer, he is surely bound to show, and not his adversary.

Dexter.—This is not the ground of our argument: we contend, that the payee is not entitled to damages, under a positive law, because the bills have not been duly protested, within the meaning of the law.

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different places, influenced by the principles of the British laws. In some of the states, writs of inquiry are executed on every occasion, even to fix a mere computation of interest, but in New England, and especially in Massachusetts and Rhode Island, a writ of inquiry never issues, but at the request of the parties, or by the discretion of the court, in whose presence it is invariably executed. No language can be more forcible to exclude the opposite construction, than the language of the Rhode Island act, which declares, "that in all cases where judgment shall pass by default, &c., where damages are to be inquired into and assessed, it shall be done by the court, or otherwise, at their discretion." The practice founded on this law, and coeval with it in commencement, furnishes the best exposition. Thus, the judges assign a day, after every term, to assess damages in defaulted cases; and however preposterous it may be deemed by those who practice upon another *plan, it is not the less true, that they constantly exercise the ^{*355]} power of assessment, in trover, in cases of special contract, and even in actions of slander. Suppose, that the statute had said, in explicit terms, the court shall assess damages, and not a jury, could a writ of inquiry be issued? And if the legislature could give the jurisdiction to the court, the uniform construction that they have given it, except where a writ of inquiry is awarded by their own discretion, or requested by a party, ought not to be arbitrarily rejected. Then, if the state court had the power, the circuit court, sitting in Rhode Island, also possessed it; and in their discretion, were bound either to exercise it themselves, or to refer it to a jury. Neither party asked for a writ of inquiry; but in the words of the record, "the cause being submitted to the court,"(a) the court saw no more reason to issue a writ of inquiry to ascertain the damages specifically given by law, than to ascertain the interest at the legal rate; and after the judgment by default, nothing could be submitted to the court, but the damages. This, therefore, was the matter tried; and it sufficiently appears, without the aid of the excrescent *nota bene*.

Besides, on this point, as well as on the point of discontinuance, the English authorities countenance the Rhode Island law and practice. Thus, on a demurrer in law, the justices may award damages for the party by their discretion, or award a writ to inquire of damages, at their election. 7 Vin. Abr. p. 301, pl. 4. Where judgment is by default, the court may give the damages, without putting the party to the trouble of a writ of inquiry. Ibid. p. 308, pl. 22. The court may not only assess damages originally, but increase the damages previously assessed by a jury. Ibid. p. 270, pl. 7, 9. It is the course of the court, to give interest for damages upon a single bill, or bills of exchange, &c., and there needs no writ of inquiry. Ibid. p. 307, pl. 16. Nay, a writ of inquiry is considered, in some cases, merely sounding in damages, as a mere instrument to inform the conscience of the court, "who, if they please (says Chief Justice WILMOT), may themselves assess the damages." 3 Wils. 61; s. p., 2 Ibid. 244. The modern cases, likewise, show the latitude to which the court extend this part of their jurisdiction; and it is the established practice to refer it to the prothonotary, to ascertain

(a) PATERSON, Justice.—Is it the usual way of making up a record, where neither party demands a writ of inquiry, to say—the cause is submitted to the court?

Barnes.—Yes, it is the constant practice.

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damages and costs, and calculate interest on a promissory note or bill of exchange, after judgment by default. H. Bl. 252, 541, 559, 4 T. R. 275. Bailey on B. of Ex. 66, 67, app. 5; Kyd on B. of Ex. 155. But, after all, when judgment has been entered by default, *the want of a writ of inquiry is aided by the statutes of *jeoffaile*. Fitzg. 162-3; 7 Vin. p. [*356 308, pl. 24; 2 Str. 878. s. c. 2 Ld. Raym. 397.

On the 13th of February 1797, WILSON, Justice, delivered the opinion of the court.

BY THE COURT.—We are unanimously of opinion, that under the laws and the practical construction of the courts of Rhode Island, the judgment of the circuit court ought to be affirmed.(a)

With respect to the entry of this affirmance, interest is to be calculated to the present time, upon the aggregate sum of principal and interest in the judgment below; but no further. We cannot extend the calculation to June term next, when the mandate will operate in the circuit court, as the party has a right to pay the money immediately.

The judgment affirmed, with single costs.

RULE.

February 13th, 1797. It is Ordered by the Court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of the proceedings in the cause, under his hand and the seal of the Court.

*AUGUST TERM, 1797.

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FENEMORE, Plaintiff in error, v. UNITED STATES.

Assumpsit.—Waiver of tort.—Certiorari.

If one false represent that he is a public creditor, and thereby obtains a certificate of stock in the public funds, the government may waive the *tort*, affirm the transaction, and recover the value of the certificate, in *assumpsit*.¹

And the interest paid may be recovered back, under a count for money had and received. It seems, that a *certiorari*, issued on a suggestion of diminution of record, is to be returned in the same manner as a writ of error.

WRIT of Error to the Circuit Court for the district of New Jersey. On the return of the record, it appeared, that a declaration in case had been filed in this action, containing three counts; the first and second of which were special counts for a fraud and deceit, and the third was a general count, for money had and received by the defendant to the use of the plaintiff.

(a) CHASE, Justice, observed, that he concurred in the opinion of the court; but that it was on common-law principles, and not in compliance with the laws and practice of the state.

¹ In general, a party may waive his action of *tort* for a deceit, and sue in *assumpsit* for the money paid on the footing of the contract *Gray v. Griffith*, 10 Watts 431; *Pearson v*