De Butts *v.* Bacon and others.

Usury.

If an agent, who has, by permission of his principal, sold eight per cent. stock, applies the money to his own use, and being pressed for payment, gives a mortgage to secure the repayment of the amount of the stock, with eight per cent. interest thereon, it is usury.[1]

Error to the Circuit Court for the district of Columbia, in a suit in chancery, brought by Samuel De *Butts against James Bacon and [*253
others, the object of which was to foreclose a mortgage made by Bacon to De Butts. The condition of the mortgage was, that if the defendant, Bacon, should pay to the complainant the interest of eight per cent. upon $1000 of eight per cent. stock of the United States, loaned by the complainant to the defendant, and should further pay to the complainant "the said sum of $1000," &c., the deed should be void.

The defendant, Bacon, pleaded the statute of usury, alleging that it was a loan of money and not of stock.

The facts of the case appeared to be, that the complainant, Samuel De Butts, intending to speculate in a voyage with Captain Elias De Butts, authorized the latter to sell $1000 of eight per cent. stock of the United States, which he did through the agency of the defendant, Bacon, who received the money. The plan of the voyage not having been prosecuted, the complainant wished to get his stock back again, but could not get either the stock or the money from Bacon. It was however finally agreed, that Bacon should be considered as answerable for the stock, and should give a mortgage to secure the repayment of the stock, and eight per cent interest.

The Court below decided the contract to be usurious, and decreed the mortgage to be void. Which decree, this court, after argument, by *Swann* for the appellant, and *Youngs*, for the appellees,

Affirmed.

Sheehy *v.* Mandeville & Jamesson.

Payment by note.—Judgment against joint maker.—Amendments.

A promissory note, given and received for and in discharge of an open account, is a bar to an action upon the open account, although the note be not paid.

A several suit and judgment against one of two joint makers of a promissory note, is no bar to a joint action against both upon the same note.[2]

The whole of a joint note is not merged in a judgment against one of the makers, on his individual *assumpsit;* but the other may be charged, in a subsequent joint action, if he pleads severally.

This court will not direct the court below to allow the proceedings to be amended.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of *assumpsit*, *brought by Sheehy against Joseph [*254
Mandeville and R. B. Jamesson. The declaration consisted of three counts.

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[1] In Palmer *v.* Mead, 7 Conn. 149, it is said, that this case was probably decided on the local law; it is not an authority in other states.

[2] This case, though sometimes criticised and doubted in other courts, goes no further than to decide, that when one partner is sued severally, on a joint or partnership contract, and judgment obtained against him, it is no bar to a suit against the other, because this contract was not merged in the judgment, and because the first judgment was founded on a several, not a joint contract. It gives no countenance to the