

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 others, the object of which was to foreclose a mortgage made by [253] 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 & JAMESON.

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 Mandeville and R. B. Jamesson. The declaration consisted of three [254] counts.

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

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The first count was upon a promissory note as follows, viz: "James Sheehy complains of Joseph Mandeville and Robert Brown Jamesson, lately trading under the firm of Robert Brown Jamesson, of a plea of trespass on the case, for that, whereas, on the 17th day of July, in the year of our Lord 1804, the said defendant, Joseph Mandeville, secretly trading with the defendant, Robert B. Jamesson, by way of buying and selling merchandise, at Alexandria, in the county aforesaid, under the name, title, style and firm of Robert Brown Jamesson; and whereas, the said defendants under the said name, firm and style, on the said 17th day of July, in the year 1804, at, &c., made their certain note in writing, called a promissory note, subscribed by them, by and under the name, style, title and firm of Robert B. Jamesson, bearing date the same day and year, and then and there delivered the said note to the plaintiff, and by the said note did, under their firm aforesaid, promise to pay to the said plaintiff, or to his order, \$604.91, for value received, negotiable at the bank of Alexandria, by reason whereof, and by force of the law in such cases made and provided, the said defendants became liable to pay to the plaintiff the said sum of money contained in the said note, according to the tenor and effect of the said note; and being so liable, they, the said defendants, under the name and firm aforesaid, afterwards, to wit, the same day and year aforesaid, at Alexandria aforesaid. undertook," &c. The second count was *indebitatus assumpsit* for goods sold and delivered to the defendants, under the name and firm of Robert B. Jamesson. The third count was a *quantum valebant* for the same goods.

*255] The defendants were duly arrested, but Jamesson was discharged by a judge, upon entering a common appearance, he having been before discharged under the act of congress for the relief of insolvent debtors within the district of Columbia; and no further proceedings seem to have been had against him. The defendant Mandeville appeared and filed two pleas.

1st Plea. "And the said defendant, by George Youngs, his attorney, comes and defends the wrong and injury, when, &c., protesting that the

assertion, that a joint judgment is not *per se* a satisfaction of a joint and several bond. GRIER, J., in *United States v. Price*, 9 How. 95. But in *Mason v. Eldred*, 6 Wall. 236, Mr. Justice FIELD said, that the decision in this case had never received the entire approbation of the profession, and its correctness had been doubted and its authority disregarded, in numerous instances, by the highest tribunals of different states. It was elaborately reviewed by the supreme court of New York, in *Robertson v. Smith*, 18 Johns. 459, where its reasoning was declared unsatisfactory, and a decision rendered in direct conflict with its adjudication. In *Ward v. Johnson*, 13 Mass. 148, a similar ruling was made. In *Ward v. McNulty*, 2 Gilm. 359, the supreme court of Illinois declined to follow it as authority. So did the supreme court of Pennsylvania, in *Smith v. Black*, 9 S. & R. 142. And in *King v. Hoare*, 13 M. & W. 459, the English court of exchequer, on this case

being cited in the course of the argument, said, that though it had the greatest respect for any decision of Chief Justice MARSHALL, yet, the reasoning attributed to him in *Sheehy v. Mandeville*, was not satisfactory. In *Trafton v. United States*, 3 Story 651, Mr. Justice STORY observed, that the court of exchequer, in *King v. Hoare*, had pronounced what seemed to him a very sound and satisfactory judgment, and that for years he had entertained great doubts of the propriety of the decision in *Sheehy v. Mandeville*. And finally, in *Mason v. Eldred*, 6 Wall. 238, Mr. Justice FIELDS said, that if the common-law rule was to govern the case then before the court, they should feel obliged, notwithstanding *Sheehy v. Mandeville*, to hold that the promissory note, there in question, was merged in the judgment, and that the latter would be a bar to the action. Thus virtually overruling the case referred to.

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said goods, wares and merchandise, in the declaration mentioned, were not sold and delivered to the said Robert B. Jamesson and this defendant jointly ; for plea saith, that the said James ought not to have and maintain his action aforesaid against him, because he says, that heretofore, to wit, on the 17th day of July 1804, at Alexandria, the said Robert B. Jamesson, in the declaration named, made his promissory note, payable to the said James Sheehy or order, sixty days after date, for \$604.91, negotiable at the bank of Alexandria, which said note, so as aforesaid made by the said Jamesson, was given by the said Jamesson, to the said James Sheehy, and by him received, for and in discharge of an account or bill of the said James Sheehy against the said R. B. Jamesson, for sundry goods, wares and merchandise, at the special instance and request of the said R. B. Jamesson, sold and delivered by the said James to the said Robert B. Jamesson. And the said defendant, Joseph, avers, that the said goods, wares and merchandise mentioned in the plaintiff's declaration, are the same goods, wares and merchandise, so as aforesaid sold and delivered to the said Robert B. Jamesson by the said James Sheehy, and the same for which the said R. B. Jamesson gave his aforesaid negotiable note, and none other ; and afterwards, to wit, on the 8th day of June 1805, the said James Sheehy sued out of the clerk's office of the circuit court of the district of Columbia for the county of Alexandria, his writ in an action of debt upon the aforesaid note, against the said Robert B. Jamesson, and such proceedings * were had therein, [*256 that at the July term of the said court, in the year 1806, a judgment was rendered in favor of the said James Sheehy, against the said R. B. Jamesson, for the debt and damages mentioned in the declaration filed in that action, to be discharged by the payment of the said \$604.91, with interest from the 15th of September 1804, till paid, which will at large appear by the records of the said court, now here remaining in the said circuit court of the district of Columbia, for the county of Alexandria, which judgment still remains unreversed and in full force ; all of which the said defendant is ready to verify ; wherefore, he prays judgment, whether the said plaintiff his action aforesaid ought to have and maintain against him, upon the second and third counts in the said declaration," &c.

2d Plea. "And the said defendant, by leave of the court," &c., "for further plea saith, that the plaintiff his action aforesaid against him ought not to have and maintain, on the first count in his said declaration, because he saith, that heretofore, to wit, on the 8th day of June 1805, the said James Sheehy sued out of the clerk's office of the circuit court of the district of Columbia, for the county of Alexandria, his writ in an action of debt against the said Robert B. Jamesson, and afterwards, in July, filed his declaration therein, upon a note of the said Robert B. Jamesson to the said James Sheehy, dated the 17th day of July 1804, payable sixty days after date, for \$604.91, for value received, negotiable at the bank of Alexandria ; and afterwards, such proceedings were had in the said suit, that at July term of the said court, in the year 1806, judgment was rendered therein in favor of the said James Sheehy against the said Robert B. Jamesson, for the debt and damages in the said declaration mentioned, to be discharged by the payment of \$604.91, with interest from the 15th of September 1804, until paid, and also costs of suit ; all which the said defendant is ready to verify by the record and proceedings of the said court," &c. ; "which said judgment still

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remains unreversed and in full force, also to be verified by the record, &c.
 *257] And the *said defendant avers that the promissory note in the first count in the plaintiff's declaration mentioned and described, is the same note upon which the aforesaid judgment was rendered and obtained against the said Robert B. Jamesson, as aforesaid, and not other or different, and this the said defendant is ready to verify; whereupon, the defendant prays judgment if the said plaintiff ought to have and maintain his action aforesaid against him, upon the first count in the said declaration," &c.

To the first plea, the plaintiff demurred, and assigned as causes of demurrer: 1. That the plea does not traverse the *assumpsit* laid in the declaration. 2. It does not expressly confess or deny that the goods were sold and delivered to the said Joseph Mandeville and Robert B. Jamesson; nor that the note in the declaration mentioned, was given by the said house and firm of Robert B. Jamesson. 3. An unsatisfied judgment against Robert B. Jamesson is no bar to an action upon the same cause of action, against the other defendant, against whom no judgment has been rendered. 4. It does not aver that the judgment against Jamesson has been satisfied. 5. It does not deny or admit that the defendant, Mandeville, assumed to pay for the goods. 6. The plea is no answer to the declaration.

To the second plea, the plaintiff also demurred, and assigned the same causes of demurrer.

The judgment of the court below, upon these demurrers, was in favor of the defendant Mandeville; and the plaintiff brought his writ of error.

*258] **E. J. Lee*, for the plaintiff in error.—A debt due from joint partners is joint and several. Each is liable for the whole. *Rice v. Shute*, 5 Burr. 2613; *Watson's Law of Partnership*, 238; 3 Caines 5; 14 Vin. Abr. 607, pl. 3; *Mildmay's Case*, 6 Co. 40 b; *Higgins's Case*, Ibid. 46 a; Yelv. 67; *Darwent v. Walton*, 2 Atk. 510; 3 Caines 4; 5 East 147; Cro. Jac. 74. A judgment against one partner alone does not bind the other. It is, therefore, no bar to a suit against this other partner. The obligation of the note of Mandeville & Jamesson is not merged in the judgment against Jamesson. Mandeville cannot say he has been twice vexed for the same cause of action.

A secret partner is liable, when discovered. *Watson* 42; *Doug.* 371. If the creditor has obtained judgment against the open partner, before the discovery of the secret partner, the latter may be sued upon the original cause of action. As to him, it is not merged in the judgment. An unsatisfied execution is no bar to a second remedy against another person liable for the same debt. 5 Co. 86 b; Cro. Jac. 73; 1 Mod. 207.

A promissory note, given for goods, is no bar to an action for the price of the goods, founded on the sale. In the present case, it is not pleaded as an accord and satisfaction, and it is in that form only that the defendant can avail himself of it. It is not satisfaction, unless it be paid. 1 Esp. 148; 9 Co. 79 b; 1 Selw. 107; 1 Str. 426; 1 Burr. 9; 2 T. R. 24; 1 Selw. 108, 109.

Although the plea states that the note was received in discharge of the account for goods sold, yet it was not a discharge, without payment. *Brainthwait v. Cornwallis*, Cro. Car. 85-86; 6 Co. 44 b, 45 b; *Ashbrook v. Snape*, Cro. Eliz. 240; *Drake v. Mitchel*, 3 East 250; *McGuire v*

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Gadsby, 3 Call 234; 1 Cranch 181; *Stedman v. Gooch*, 1 Esp. 3, 5; *Puckford v. Maxwell*, 6 T. R. 52.

*The judgment (against Jamesson) upon the note is no discharge of Mandeville. The cause of action against Jamesson only is merged in the judgment; not the joint cause of action against Mandeville and Jamesson. The reason why the cause of action merges in the judgment is, that the party has obtained a remedy of a higher nature against his debtor. But a judgment against Jamesson gives no remedy against Mandeville. The plaintiff could not lose his remedy upon the note against Mandeville, until he had obtained another remedy of a higher nature against him. This he has not obtained, and therefore, has not lost his remedy upon the note.

In the former action, the declaration does not state it to be a joint note. If it had, there might perhaps be some doubt. But it was sued as the separate note of Jamesson. If the note had been in terms joint and several, a judgment against one would not have been a bar to a subsequent action upon the note against the other.

Youngs and C. Lee, contra.—The contracts made by copartners are joint, and not several. It is true, that the effect of a judgment is several, that is, the execution may be served on both, or either of the defendants; but that does not alter the nature of the contract.

In joint contracts, both are bound, or neither is bound. If one be discharged, the other is discharged; a release to one, is a release to both. If the contract be destroyed or vacated as to one, it is as to the other also. When it has once passed into a judgment, it is extinct; a plaintiff may, if he pleases, sue only one of the copartners, and if the defendant does not plead in abatement, the action may be maintained; and if the plaintiff obtains a judgment against one, he cannot have another action upon the same original cause of action against the other. This would enable the plaintiff to split and multiply actions at his pleasure. Upon a joint cause of action, you cannot have several judgments *as you can in trespass, although the defendants should plead severally. [*260

If a note be given for a precedent debt, you cannot have an action on the original cause of action, unless you can prove the note to be lost. 1 Johns. 36; 4 Esp. 159; 1 Com. Dig. 143, 144; 4 Bac. Abr. 48, 49; 2 Salk. 609; 2 Atk. 510, 609. But the plea states that the note was given and received in discharge of the prior debt; and there can be no doubt, that, by agreement of the parties, a debt may be discharged in that way.

The declaration does not state any reason for not having made Mandeville a defendant to the first suit. It ought, at least, to have stated that the plaintiff did not know that Mandeville was a partner, at the time of obtaining the judgment against Jamesson. If the plaintiff has any remedy, it must be in equity. If there can be a remedy at law, it must be upon a very special action on the case, setting forth all the circumstances.

If the plaintiff had, at first, an option to sue for goods sold and delivered, or upon the note, he has made his election to sue on the note, and having prosecuted that suit to judgment, he cannot afterwards sue for the goods sold and delivered. A man cannot have two judgments for the same cause of

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action. If the note did not destroy the right of action for goods sold, yet a judgment upon that note does.

A written instrument cannot be contradicted by parol evidence. The note purports to be the separate note of Jamesson. To show that it was a joint note, is to contradict the tenor of the instrument.

If the defendants in a joint action of *assumpsit* sever in their pleas, this does not make it a separate action against each : and if the plaintiff does not show a joint cause of action against both, he cannot recover against either.

*261] There could be no doubt, that it would *be a good plea for Jamesson, to say that the plaintiff had already recovered a judgment against him upon the same cause of action, which judgment was still in force. And a plea that would discharge Jamesson, would discharge Mandeville also, because the plaintiff having declared upon a joint cause of action, must prove it as laid ; and if he had no cause of action against Jamesson, as well as against Mandeville, he had no joint cause of action as laid in his declaration.

Jones, in reply.—A judgment against one, severally, upon a joint cause of action, is no bar to a subsequent action against the others, upon the same cause of action.

A note given by one, for a precedent debt due by two, is *nudum pactum*.

A note cannot be a satisfaction of a precedent debt, unless payment be actually made of the note. Cro. Jac. 152 ; *Whelpdale's Case*, 5 Co. 119 ; 14 Vin. 607 ; 6 Co. 40 b ; Cro. Jac. 74 ; 12 Mod. 538 ; 5 Ibid. 136 ; Cro. Car. 85, 86 ; 1 Esp. 3, 5 ; 3 East 256.

Judgment may be severed, when the parties plead severally. Co. Litt. 127 b ; Lutw. 9 ; 5 Com. Dig. 8, tit. Pleader, B. 9, 10 ; *Hayden's Case*, 11 Co. 5 ; 1 Wils. 89 ; 1 Burr. 357.

Jamesson is no party to this suit. Although arrested, he has never appeared, and the suit as against him has been abandoned. The court can give judgment against Mandeville only.

The plea amounts to the general issue, and therefore, is bad upon demurrer. Cro. Eliz. 201 ; 5 Mod. 314.

March 14th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows, viz :—The plaintiff sold certain goods to Robert B. Jamesson, as follows, viz :—The plaintiff sold certain goods to Robert B. Jamesson, *262] *a merchant of Alexandria, and took his note for the amount, which he put in suit, and prosecuted to a judgment. Afterwards, supposing the other defendant Mandeville to be a secret partner, he instituted a suit against Mandeville and Jamesson. The declaration contains three counts. The first is on the note, and charges it to have been made by the defendants, under the name, firm and style of Robert B. Jamesson. The 2d and 3d counts are for goods, wares and merchandise sold and delivered to the defendants, trading under the firm of Robert B. Jamesson.

The defendant Mandeville pleads two pleas in bar. The first goes to the whole declaration, and the second applies only to the first count. The first commences with a protestation that the goods, &c., in the declaration mentioned were not sold to the defendants jointly, and then pleads in bar the promissory note which is averred to have been given and received for, and in discharge of, an account for sundry goods, wares and merchandise sold and delivered to the said Jamesson, and that the goods in the declara-

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tion mentioned are the same which were sold and delivered to the said Jamesson, and for which the said note was given. The plea also avers, that a suit was instituted and judgment obtained on the note, and concludes in bar. The second plea pleads the judgment in bar of the action.

To the first plea, the plaintiff demurs specially, and assigns for cause of demurrer. 1. That the defendant does not traverse the *assumpsit* laid in the declaration. 2. That he does not expressly confess or deny that the goods, &c., were sold and delivered to the defendants, trading under the firm of R. B. Jamesson, or that the note was given by the said firm. *3. Because an unsatisfied judgment against Jamesson is no bar to an action against Mandeville. 4. It is not averred that the judgment [*263 has been satisfied. 5. The defendant does not deny or admit that he assumed to pay for the goods, &c., in the declaration mentioned. 6. Because the plea is no answer to the declaration, or any count thereof, and is informal. The defendant joins in demurrer.

To the second plea, the plaintiff also demurs specially, and assigns, for cause of demurrer, the same, in substance, which had been assigned to the first plea, and the defendant joins in the demurrer to this plea likewise. The other defendant, Jamesson, has put in no plea, nor are there any proceedings against him, subsequent to the declaration.

Although the first plea is not expressly limited to the 2d and 3d counts, yet it would seem, from its terms, to be intended to apply to them alone. It sets up a bar to an action on an *assumpsit* for goods, wares and merchandise sold and delivered, and no such *assumpsit* is laid in the first count. If, however, it be considered as pleaded to the first count, it is clearly ill, on demurrer. For it does not deny or avoid the joint *assumpsit* laid in that count.

It remains to inquire, whether this plea contains a sufficient bar to the 2d and 3d counts. The plea is, that the note was given and received for, and in discharge of, an account or bill for goods, wares and merchandise sold and delivered by the plaintiff to Robert B. Jamesson, which are the same goods, &c., that are mentioned in the plaintiff's declaration.

*That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. But it is insisted, [*264 that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties or of a third person may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor, without any consideration. But if it did apply, there may be inducements to take a note from one partner, liquidating and evidencing a claim on a firm, which might be a sufficient consideration for discharging the firm. Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods.

The special causes of demurrer which are assigned do not, in any manner, affect the case. Whether the promise was made by Mandeville, or not, ceases to be material, if a note has been received in discharge of that prom-

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ise, and the payment of the note need not be averred, since its non-payment cannot revive the extinguished *assumpsit*.

The next subject of consideration is the second plea, which applies singly to the first count. That count is on a note charged to have been made by Mandeville and Jamesson, trading under the firm of Robert B. Jamesson. This, not being denied, must be taken as true. The plea is, that a judgment was rendered on this note against Robert B. Jamesson. *Were *265] it admitted, that this judgment bars an action against Robert B. Jamesson, the inquiry still remains, if Mandeville was originally bound, if a suit could be originally maintained against him, is the note, as to him, also merged in the judgment?

Had the action, in which judgment was obtained against Jamesson, been brought against the firm, the whole note would most probably have merged in that judgment. But that action was not brought against the firm. It was brought against Robert Brown Jamesson singly, and whatever other objections may be made to any subsequent proceedings on the same note, it cannot be correctly said, that it is carried into judgment as respects Mandeville. If it were, the judgment ought in some manner to bind him, which, most certainly it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract.

In point of real justice, there can be no reason why an unsatisfied judgment against Jamesson should bar a claim upon Mandeville; and it appears to the court, that this claim is not barred by any technical rule of law, since the proceedings in the first action were instituted upon the *assumpsit* of Jamesson individually.

It is not necessary to decide whether this action could have been maintained against Mandeville singly, with an averment that the note was made by Mandeville and Jamesson. The declaration being against both partners, that question does not arise. The declaration is clearly good in itself, and the plaintiff may recover under it, unless he be barred by a sufficient plea.

Admitting, for the present, that a previous judgment *against *266] Jamesson would be a sufficient bar, as to him, had Jameson and Mandeville joined in the same plea, it would have presented an inquiry of some intricacy, how far the benefit of that bar could be extended to Mandeville. But they have not joined in the same plea. They have severed; and as the whole note is not merged in a judgment obtained against Jamesson, on his individual *assumpsit*, the court is not of opinion, that Mandeville has so pleaded this matter as to bar the action.

In this plea, it was necessary to negative the averment of the declaration, that the note was made by Mandeville as well as Jamesson, or to show that the judgment was satisfied. The defendant has not done so. He has only stated affirmatively new matter in bar of the action, which new matter, as stated, does not furnish a sufficient bar. It is not certain, that this plea would have been good, on a general demurrer, but on a special demurrer, it is clearly ill.

The judgment, therefore, is to be reversed, and, as no other plea is

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pleaded, judgment must be rendered, on the first count, in favor of the plaintiff.

THE JUDGMENT of the court was as follows : This cause came on to be heard, on the transcript of the record, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in the judgment of the circuit court in overruling the demurrer to the first plea, so far as the same is pleaded in bar of the first count in the declaration, and that there is error in overruling the demurrer to the second plea; wherefore, it is considered by this court, that the judgment of the circuit court be reversed and annulled, and that the cause be remanded to the circuit court, with directions to sustain the demurrer to the first plea, so far as the same is pleaded in bar of the first count, in the plaintiff's declaration, and also to sustain the demurrer to the second plea, and to render *judgment in favor of the plaintiff on his said first count, and to award a writ of [*267 inquiry of damages. (a)

SKILLERN'S Executors v. MAY'S Executors.

Jurisdiction.

It is too late to question the jurisdiction of the circuit court, after the cause has been sent back by mandate.

THIS was a case certified from the Circuit Court for the district of Kentucky, the judges of that court being divided in opinion.

The former decree of the court below had been reversed in this court, and the cause "remanded for further proceedings to be had therein, in order that an equal and just partition of the 2500 acres of land, mentioned in the assignment of the 6th of March 1785, be made between the legal representatives of the said George Skillern and the said John May." (4 Cr. 141.)

The cause being before the court below upon the mandate, the question occurred which is stated in the following certificate, viz : "In this case a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to this court, it was discovered to be a cause not within the jurisdiction of the court; but a question arose, whether it can now be dismissed for want of jurisdiction, after the supreme court had acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered, "that the same be adjourned to the supreme court for their decision," &c.

THIS COURT, after consideration, directed the following opinion to be certified to the court below, viz : * "It appearing that the merits of this cause had been finally decided in this court, and that its mandate [*268 required only the execution of its decree, it is the opinion of this court, that

(a) After the opinion was given, *C. Lee* moved for a direction to the court below to allow a plea of *non assumpsit*. The court said, they had never given directions respecting amendments, but had left that question to the court below. This court cannot now undertake to say, whether the court below would be justified in granting leave to amend.