Two errors were assigned. 1. That the court below refused a new trial. 2. That the court ought to have given the instruction to the jury as prayed by the plaintiff; and ought not to have given the direction which they did.

MARSHALL, Ch. J., said, that this court had decided at the last term, that a refusal by the court below to grant a new trial was not error.

The case being submitted upon the other point, without argument—

MARSHALL, Ch. J., delivered the opinion of the court, that there was no error in the opinion of the court below. A part of the money due on *13] the bond *might have been paid before; and such an acknowledgment, upon receipt of a sum smaller than the amount of the condition of the bond, was good evidence, upon the plea of payment.

Judgment affirmed, with costs.

COOKE and others *v.* WOODROW.

Jurisdiction in error.—Matter in dispute.—Evidence.

In an action of trover, if the judgment below be in favor of the original defendant, the value of the matter in dispute, upon a writ of error in the supreme court of the United States, is the sum claimed as damages in the declaration.[1]

Due diligence must be used to obtain the testimony of a subscribing witness.

If inquiry be made at the place where the witness was last heard of, and he cannot be found, evidence of his handwriting may be admitted.[2]

Cooke *v.* Woodrow, 1 Cr. C. C. 437, affirmed.

ERROR to the Circuit Court of the district of Columbia, in an action of trover, brought by the plaintiffs in error for sundry household goods.

A bill of exceptions stated, that the plaintiffs, on the trial, produced in evidence to support their title to the goods, a certain paper writing signed by one John Withers, to which one John Pierson had subscribed his name as a witness, and offered parol evidence to prove that the subscribing witness "had, upwards of a year ago, left the district of Columbia, and that before he left the said district, he declared that he should go to the northward, that is to say, to Philadelphia or New York, and said he had a wife in New York. That the said subscribing witness went from the said district to Norfolk, and that when he got there, he declared, that he should go on further to the south, but where, was not known, and that he has not been heard of by the witness, for the last twelve months. It appeared, that a *subpœna* had been issued in this case, for the said subscribing witness, directed to the marshal of the district of Columbia, but he could not be found in the said district, by the said marshal. The plaintiff then offered to prove the handwriting of the subscribing witness, and of the said John Withers, to the said writing, but the court refused to permit the plaintiffs to produce evidence of the handwriting of the said subscribing witness, and refused to per-*14] mit the plaintiffs to prove the handwriting of the said John Withers, otherwise than by the testimony of the said *subscribing witness; to which refusal, the plaintiffs excepted."

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[1] See Peyton *v.* Robertson, 9 Wheat. 527; Walker *v.* United States, 4 Wall. 164.

[2] Longworth *v.* Close, 1 McLean, 282; Jones *v.* Lovell, 1 Cr. C. C. 183.

C. Simms, for the plaintiffs in error, suggested, that this court must be satisfied by evidence (other than the declaration), that the sum in demand exceeded $100, exclusive of costs; and cited the rule made in the case of *Course* v. *Stead's Executor's*, 4 Dall. 22. But—

MARSHALL, Ch. J., said, that that rule applied only to cases where the property itself (and not damages) was the matter in dispute—such as actions of detinue, &c. If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but where the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value.

The point arising upon the bill of exceptions was submitted without argument.

MARSHALL, Ch. J., after stating the case as it appeared in the bill of exceptions, observed, that the court had some difficulty upon the point. The general rule of evidence is, that the best evidence must be produced which the nature of the case admits, and which is in the power of the party. In consequence of that rule, the testimony of the subscribing witness must be had, if possible. But if it appear that the testimony of the subscribing witness cannot be had, the next best evidence is proof of his handwriting. In the present case, it does not appear to the court, that the testimony of the subscribing witness could not have been obtained, if proper diligence had been used for that purpose. It does not appear, that the witness had ever left Norfolk. It is not stated, that any inquiry concerning him had been made there. If such inquiry had been made, and he could not be found, evidence of his handwriting might have been permitted. But *as the case appears in the bill of exceptions, the court below has not erred. [*15

Judgment affirmed, with costs.

MANDEVILLE & JAMESSON *v.* WILSON.

Amendment.—Statute of limitations.—Merchants' accounts.

Amendments are within the discretion of the court below.[1]

Quære? Whether the court ought to permit amendments, after judgment upon demurrer.

In the statute of limitations, the exception in favor of merchants' accounts, applies as well to actions of *assumpsit*, as to actions of account.

It extends to all accounts-current which concern the trade of merchandise.

An account closed, by the cessation of dealings between the parties, is not an account stated.

It is not necessary that any of the items should have been charged within the five years; nor that the declaration should aver the money to be due upon an open account between merchants.

Wilson *v.* Mandeville, 1 Cr. C. C. 433, 452, affirmed.

ERROR to the Circuit Court of the district of Columbia, sitting at Alexandria, in an action of *assumpsit* brought by the defendant in error for goods sold and delivered, and for the hire of a slave.

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[1] Wright *v.* Hollingsworth, 1 Pet. 165. The grant or refusal of an amendment is not, generally, assignable for error. Marine Ins. Co. *v.* Hodgson, 6 Cr. 206; Walden *v.* Craig, 9 Wheat. 576; Chirac *v.* Reinicker, 11 Id. 280; United States *v.* Buford, 3 Pet. 12; Pickett *v.* Legerwood, 7 Id. 144; Breedlove *v.* Nicolet, Id. 413; Slicer *v.* Bank of Pittsburgh, 16 How. 571; Spencer *v.* Lapsley, 20 Id. 264.