That an account closed, by the cessation of dealings between the parties, is
*19] not an account *stated, and that it is not necessary that any of the items should come within the five years. That the replication was good, and not repugnant to the declaration; and that the rejoinder was bad.

Judgment affirmed, with costs.

FAIRFAX'S executor *v.* ANN FAIRFAX.

Action against executrix.—Marriage of defendant.

Upon the issue of *plene administravit*, the jury must find specially the amount of assets in the hands of the executor; otherwise, the court cannot render judgment upon the verdict.

If the defendant below intermarry, after the judgment, and before the service of the writ of error, the service of the citation upon the husband is sufficient.

Fairfax *v.* Fairfax, 1 Cr. C. C. 292, reversed.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of *assumpsit*, brought by the defendant in error against the plaintiff in error, as executor.

Upon the issues of *non assumpsit* and *plene administravit*, the jury found a general verdict, which was recorded in this form: "We of the jury find the issues for the plaintiff, and assess the damages to $220.95." Upon which verdict, the judgment of the court was, "that the plaintiff recover against the defendant her damages aforesaid, in form aforesaid assessed, and also her costs by her about her suit in this behalf expended, to be levied of the goods and chattels of the said Bryan Fairfax, deceased, at the time of his death, in the hands of the said defendant to be administered, if so much, &c., but if he hath not so much, then the costs aforesaid to be levied of the proper goods and chattels of the said defendant; and the said defendant in mercy," &c.

The error relied upon by the plaintiff in error was, that the jury had not found the amount of assets in his hands to be administered.

Swann, for the plaintiff in error, having cited Esp. N. P. 263, and the case of *Booth's Executors* v. *Armstrong*, 2 Wash. 301, was stopped by the court, who requested to hear Mr. *E. J. Lee* on the other side.

*20] *E. J. Lee*, contrà.—There was no necessity for the jury to find specially the amount of the assets, for, if ever so small a sum had been found, the judgment would have been the same, as if assets had been found to the whole amount of the plaintiff's claim. The sum found by the jury would not alter the judgment. It would still have been for the whole debt *de bonis testatoris*, *si*, &c., and *si non*, then the costs *de bonis propriis*.

But here the jury have in substance found that the defendant had assets more than sufficient to satisfy the debt due to the plaintiff; for that is the allegation of the plaintiff in her replication, and the jury have found the issue for the plaintiff upon that replication. It is not more necessary to find specially upon this issue, than upon *non assumpsit* or *nil debet*.

There is a difference between this case and that of *Booth's Executors* v. *Armstrong*, 2 Wash. 301, for there the finding was not, as here, generally, "we find the issues for the plaintiff;" but "we find for the plaintiff, the debt in the declaration mentioned, and one penny damages." The finding

there was special, and could not be construed to be a finding of the matter of the plaintiff's replication, as the finding in the present case may and ought to be.

The cases cited to show that the amount of assets found could not alter the judgment were *Mary Shipley's case*, 8 Co. 34; *Waterhouse* v. *Wood, street*, Cro. Eliz. 592; *Gawdy* v. *Ingham*, Styles 38; *Oxenden* v. *Hobdy*, Freem. 351; Bro., Execution, pl. 34; pl. 82; *Newman* v. *Babington*, Godbolt 178; *Dorchester* v. *Webb*, Cro. Car. 373; Lex Test. 414.

February 21st, 1809. MARSHALL, Ch. J., delivered the opinion of the court to the following effect:—*The verdict ought to have found the amount of the assets in the hands of the defendant to be administered. [*21 The cases cited to show that the judgment must be for the whole sum, if the verdict find any assets, have been overruled. This is declared by Lord MANSFIELD, in a case cited in Gwillim's edition of Bac. Abr., and the law is now well understood to be, that the executor is only liable for the amount of assets found by the jury. In Virginia, the law has been so settled. The case cited from 2 Wash. 301, is precisely in point. The counsel for the defendant in error attempted to show a distinction arising from the difference of form in which the verdicts were rendered. But the two verdicts appear to the court to be precisely alike in substance.

The defendant in error relies on the form of the issue. She contends, that as the replication alleges that the defendant has assets more than sufficient to satisfy the debt, the finding of that issue for the plaintiff below, is, in effect, finding that the defendant has assets more than sufficient to satisfy the debt; and if so, it is wholly immaterial what the real amount of assets is. But if this were the issue, and the demand were $500, if the jury should find that the defendant had assets to the amount of $499, the judgment must be for the defendant. But the law is not so. An executor is liable for the amount of assets in his hands, and not more. The issue really is, whether the defendant has any, and what amount of, assets in his hands.

Judgment reversed.(*a*)[1]

(*a*) See Harrison v. Beecles, 3 T. R. 688, 689.

E. J. Lee had previously moved this court to quash the writ of error, because the citation was not served on Ann Fairfax, the defendant in error; but on her husband, Charles I. Catlett, with whom she had intermarried since the judgment below. But THE COURT overruled the motion, saying,—

That the act of congress (1 U. S. Stat. 85, § 22), does not designate the person upon whom the citation shall be served, but only directs that the adverse party shall have at least thirty days' notice. The citation served on the husband is well. The service is sufficient.

[1] For a further decision in this case, see 2 Cr. C. C. 25.