1824.

Baits
v.
Peters.

[EXTINGUISHMENT.]

BAITS v. PETERS & STEBBINS.

A covenant, under seal, to come to a settlement within a limited time, and to pay the balance which might be found due, is merely collateral, and cannot be pleaded as an extinguishment of a simple contract debt, the period within which the settlement was to be made, having elapsed before the commencement of the suit, and the plea not averring that any such settlement had been made.

ERROR to the District Court of Alabama.

This was an action of assumpsit, commenced in the Court below, in February, 1821, by Baits, the plantiff in error, against Peters & Stebbins, the defendants in error, in which the plaintiff declared against the defendants, upon an agreement to account with him for goods delivered by him to the defendants, for sale on commission, and also for money had and received, and upon an *in simul computassent.* The defendants pleaded the following pleas: 1st. The general issue. 2d. Payment. 3d. An agreement, under seal, made at New-York, on the 15th of July, 1820, and long after the said promises and undertaking, between the plaintiff and one of the defendants, by which the plaintiff covenanted not to sue the defendants within six months, and to send on an agent, within the same term of time, to settle the accounts with the defendants, at Blakely, in Alabama; and the defendants covenanted to come to a settlement

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with the said agent, and to pay the balance which should be found to be due. To this last plea there was a demurrer, and, judgment being rendered thereon, by the Court below, for the defendants, the cause was brought by writ of error to this Court.

Feb. 20th.

The cause was argued by Mr. *Wheaton*, for the plaintiff in error, no counsel appearing for the defendants in error. He argued that the agreement thus pleaded in bar, as an extinguishment, was not a sufficient bar to the action, but was merely a collateral undertaking, which did not extinguish the original demand.[a]

Mr. Chief Justice MARSHALL delivered the opinion of the Court, that the third plea was bad. The agreement stated in that plea, although under seal, did not operate as an extinguishment of the simple contract debt. The agreement was but a collateral undertaking, to come to a settlement within a limited period, which had elapsed before the commencement of the suit, and to pay the balance found due upon such settlement. There was no averment in the plea that any such settlement had been had, under that agreement, and, consequently, the covenant to pay the balance did not appear to have attached upon the demand.

a The Bank of Columbia v. Patterson, 7 *Cranch*, 299. 303. Day v. Leal, 14 *Johns. Rep.* 404.