COSTAR & HARVICK *vs.* DAVIES & GAINES.

An action cannot be maintained on an original contract for goods sold and delivered by one who has received a note as conditional payment and passed the note away.

A promissory note given and received in discharge of an open account, is a bar to an action on the account, though the note is unpaid.

Without a special contract, a note will not, of itself, discharge the original cause of action.

Generally, a higher security taken from the debtor himself extinguishes the original contract.

It is merely a question of intention. Testimony as to facts arising after suit commenced is only admissible under the general issue, in mitigation of damages: to operate as a bar, a plea, *puis darrien continuance* is necessary.

Where the purchase money is paid at the time of the sale of personal property, delivery is not essential to pass title.

The payment vests the title in the purchaser.

Appeal from Desha Circuit Court.

ASSUMPSIT, determined before Hon. WM. H. SUTTON, in May, 1846. Davies & Gaines sued Costar & Harvick; the declaration containing the common indebitatus counts. The cause was tried by the court sitting as a jury, upon the plea of *non assumpsit;* and a verdict for plaintiffs for $555.92. There was a motion for a new trial sustained, and a new trial had before a jury who found for the plaintiffs $596.64; another new trial was moved for, which was refused, and the defendants excepted.

The evidence was in substance: that after suit brought, one of the plaintiffs and one of the defendants adjusted the matters in difference. Afterwards the defendants gave their note for the balance due, $558. 92, with interest, which was verbally agreed to be paid in a negro, belonging to one of the defendants. Subsequently it was agreed that the slave was worth $750. There was also another claim of $240, against one of the defendants, to be counted in against the price of the slave. A bill of sale was executed and delivered to Byers, the plaintiffs' agent. The note and other claim were then delivered to

defendants, and the note of the defendants for about $80, given plaintiffs' agent for the balance. The claims in plaintiffs' favor were not receipted, but were delivered to defendants.

One of the defendants then went out after the slave and soon returned saying that the negro objected to leaving his wife. The slave ran off and was not delivered. The agent of the plaintiffs then tendered the bill of sale and small note, and demanded the note and $240 claim, which were refused. One of the defendants then said that he would either send the slave to Byers, or return the note and other claim. The slave was never delivered, nor the note and claim returned. This was all the evidence.

YELL, for the appellants. The subsequent agreement, arrangement and settlement, was certainly an extinguishment of the original account upon which this suit was founded, and the plaintiffs are bound to resort to their remedy on the note or upon the breach of contract to deliver the negro boy. "A negotiable note received expressly in satisfaction of a judgment is an extinguishment of the judgment debt." 11 *Johnson* 513. Where an agreement is reduced to writing all previous parol negotiations are extinguished by the writing. 4 *Conn.* 428.

A speciality executed by one partner for the payment of a partnership debt, although binding on him alone, is an extinguishment of the partnership debt. 2 *John. Rep.* 213.

Where the note has been accepted and paid in satisfaction of the debt, and although the note has not been negotiated, but has been accepted and received by the party in satisfaction of the debt, it is an extinguishment of the debt. 9 *J. R.* 310.

Where a promissory note is received in satisfaction of a judgment it is an extinguishment of the debt, although satisfaction of the judgment may not be entered. 11 *J. R.* 518.

The acceptance of other security, though for a less sum than the original debt, is a valid discharge on the ground of accord and satisfaction. 20 *J. R.* 76.

Where the plaintiff and defendant rented a house by parol agreement as co-tenants, and after the rent had become due, the defendant

executed to the landlord his individual bond for the whole rent, the execution and delivery of the bond operated by law as an extinguishment of the joint liability of the plaintiff and defendant,and the plaintiff was for ever discharged from all liability on his parol contract. *Howell* v. *Webb, 2 Ark.* 360.

An action cannot be maintained on an original contract for goods sold and delivered by a person who has received a note as a conditional payment. 3 *Cranch* 311. 1 *Cond. Rep.* 543.

A security under seal extinguishes a simple contract debt, because it is of a higher order and nature. 7 *Cranch* 299. 2 *Cond.* 501.

Where higher security is given by the debtor prima facie, the law presumes it intended as an extinguishment of the debt: but otherwise, where it is the bond of a third person. 1 *Mason's C. C. R.* 482.

A promissory note given and received for and in discharge of an open account, is a bar to an action upon an open account although the note be not paid. *Shely* v. *Mandeville et al.,* 6 *Cranch* 253. 2 *Cond. Rep.* 362.

The account upon which this suit was founded was extinguished; and as it is the plaintiff's testimony, and is therefore good to show that he had no demand upon which to found a judgment: and all the testimony goes to show that the plaintiffs had no right to look to this action for his remedy. The proof is theirs, and they prove that they had no just demand upon which they could found the aforesaid judgment.

As to whether the negro boy was delivered in discharge of the note makes no difference so far as this case is concerned. But the execution of the bill of sale and delivery thereof to Byers, was a delivery of the negro, and Byers thereby has the right to the possession of the negro; for there is no principle better settled than that the right of property draws to it the right of possession.

If this proof is irrelevant to the issue joined there is no proof to support the judgment, and it being the testimony of the plaintiffs they are bound by it.

PIKE & BALDWIN, for defendants. The judgment of the court be-

low was clearly authorized by the whole record, and should, therefore be affirmed. *Davis* v. *Gibson,* 2 *Ark.* 115.

But admit that the paper purporting to contain the evidence is properly here; and that the whole and only question is, whether the claim sued upon was extinguished by the note.

By a most clumsy fraud, the defendants got back their note, and kept their negro, leaving the original debt unpaid. However, the witness tells us that the original debt *never was paid,* and *remained due* at the trial, upon which the jury found. No objection is made to the evidence except its irrelevancy.

Citations of authority might be multiplied without end, though they are all cited in *The R. E. Bank* v. *Rawdon et al.* 5 *Ark.* 559, which are to the point, what was an extinguishment in point of law.

Here nothing of the kind is proper; the evidence swears positively that the previous debt was not extinguished, and that it was not intended to have been extinguished until the happening of an event which he also swears never did happen. Investigation is at an end. The testimony stands clear, conclusive, unimpeached, and unimpeachable.

Jackson v. *Shaffer,* 5 *J. R.* 513, is an authority against the plaintiffs in error.

The case of *Johnson* v. *Weed,* 9 *J. R.* 310, is as strong an authority against the plaintiffs in error, as could be wished. There the court held that a promissory note of a third person, is not a payment unless specially so agreed. And where a note is taken in payment, and a receipt in full is given, it is a question of fact for the jury to say whether it is a satisfaction; and the finding of the jury will not be disturbed.

The taking of the note is no extinguishment unless the note is paid. *Schermerhorn* v. *Loines,* 7 *J. R.* 313. *Muldon* v. *Whitlock,* 1 *Cow.* 290. *Cumming* v. *Hackley,* 8 *J. R.* 203. *Putnam* v. *Lewis,* 8 *J. R.* 389. *Waydell* v. *Luer,* 5 *Hill* 448. *Cole* v. *Sackett,* 1 *Hill* 516.

It will be noticed that in all the cases where the taking of the note or bond has been held a satisfaction, the proof *shows that it was so intended,* but in the case at bar the proof shows the very opposite;

and before the verdict can be disturbed, it must be decided that the witness was unworthy credit.

JOHNSON, C. J. It is contended by the appellants, that the note executed by them in favor of the appellees, operated as an extinguishment of the cause of action upon which this suit was founded: and that, therefore, they were entitled to a judgment in the court below. An action cannot be maintained on an original contract for goods sold and delivered by one who has received a note as conditional payment, and has passed away the note. *Harris* v. *Johnson,* 3 *Cranch* 318. 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 note without a special contract, will not of itself discharge the original cause of action. But, by express agreement, even the note of a third person may be received in payment. 6 *Cranch* 253. In general, a higher security taken from the debtor himself, extinguishes the original contract. This proceeds upon a presumption of law, that it is taken in satisfaction of the original debt; for if it appear otherwise upon the face of the security, it will not operate as an extinguishment. It is a mere question of intention. *The United States* v. *Lyman,* 1 *Mason* 482. It was admitted by the witness of the appellees, that the note was executed upon a settlement of the accounts between the parties, and that it was to be considered as a satisfaction of the original debt, in case it should be paid with a certain slave or otherwise; but that not until then was the suit to be dismissed. The only point then to be determined is, whether the contingency has happened, upon which the note was to operate as an extinguishment of the original debt. Thomas N. Byers, the witness of the appellees, and the only one who testified in the case, states, in substance, that about the 31st December, 1845, he, as the agent of the appellees, called on the appellants to settle said claim, and that he, as such agent, settled the same at the sum of $558 92-100, with interest at the rate of six per cent. from the 18th of March, 1845, and that he then took from them their note for that amount, with a verbal understanding that in case it should be settled by the sale of a certain negro or otherwise, that then, and not until then,

should it operate as an extinguishment of the original debt, and that, in that event, the suit should be dismissed. He further testified, that on the thirteenth of February, 1846, he called on the appellants, and it was agreed that he should have a certain slave at the sum of $750, and that he gave, in payment therefor, the Davies & Gaines claim, and a claim against Costar, individually, in favor of Stephen Stewart, for about two hundred and forty dollars; that Costar called the boy into the bar-room of his hotel; that he looked at him, and that the boy then retired; that after some consultation he agreed to give the $750, and a bill of sale or memorandum of the sale was made, signed, and sealed, as he believed, by Harvick, one of the appellants, for the slave, and handed to him; that he handed to Costar their note, which they had executed to the appellees, and also the note or claim due to Stewart, and that upon a settlement, there was a balance due from the appellants of about eighty dollars, for which Costar gave his note, signed by the firm's name, and made payable to Byers and Chapman. This testimony being confined exclusively to a matter that arose after the commencement of the suit, was admissible alone under the general issue, for the purpose of mitigating the damages, and could not possibly operate as a bar to the whole action. The appellees, in answer to the argument that the execution of the note operated as an extinguishment of the original debt, insist that it was only so to be regarded in the event that it was paid by the sale of a negro or otherwise; and that the negro contracted for never was delivered, so as to constitute a sale, and that the note had not been paid in any manner whatever. This position is supposed to have been based upon the statute of frauds; and that it was conceived that, in order to effect a sale of personal property, under that act, so as to pass the title, and vest it in the vendee, it was absolutely essential that an actual delivery should have been made. If an actual delivery was not necessary in this case, to pass the title, then it is clear, that the condition upon which the note was to become a satisfaction, had been performed; and that in case it had been properly pleaded, would have been a complete bar to the action based upon the original contract. If the argument of the original debt, was drawn from the statute of frauds, it is

perfectly manifest that it was not legitimate, as the case cannot by possibility come within the operation of that act. Where the purchase money is paid at the time of the sale of personal property, there certainly can be no necessity for an actual delivery. This is one of the very cases excepted by the statute. The instant that Byers, as the agent of the appellees, purchased the slave and paid the price agreed upon, the title passed out of the appellants, and vested in the appellees; nor did it lie in the mouth of either, from that time, to deny that the sale had been fully and completely consummated. If the appellees had commenced their suit for the property thus conveyed, it most unquestionably would have been no answer to the declaration, that it had not actually been delivered; and it is equally clear that such a plea could not avail them in an action to recover back the purchase money. It is clear, therefore, that had this matter been pleaded *puis darrein continuance,* it would have constituted a full and effectual bar to the entire suit; but as it was offered under the general issue, it could only mitigate the damages. It is clear, therefore, that the Circuit Court erred in rendering judgment against the appellants for the full amount claimed, and that under the state of case, as presented by the record, it should have been alone for nominal damages and costs. The cause is, therefore, reversed, and remanded with instructions to proceed according to law, and not inconsistent with this opinion.