ORR V. HOPKINS, 1883-NMSC-011, 3 N.M. 25, 1 P. 181 (S. Ct. 1883)

William C. Orr and another
vs.
Lambert N. Hopkins

No. 154

SUPREME COURT OF NEW MEXICO

1883-NMSC-011, 3 N.M. 25, 1 P. 181

October 14, 1883, Filed

Appeal from the Second Judicial District, Bernalillo County.

JUDGES

Bristol, J. (All concur.)

AUTHOR: BRISTOL

OPINION

*{*26}* **{1}** The declaration in this case, in addition to the common counts in **assumpsit,** contains a special count upon a promissory note in the words as follows: "For that whereas the said defendant, heretofore, to-wit, on the first day of October, in the year of our Lord one thousand eight hundred and eighty-one, at, to-wit, *{*27}* the city of Saint Louis, Missouri, -- that is to say, at, to-wit, the county of Valencia aforesaid, written St. Louis, -- made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to-wit, the day and year aforesaid, and thereby then and there promised to pay, four months after the date thereof, to the order of the said plaintiffs the sum of thirteen hundred and fourteen and 65-100 dollars, for value received, with interest at the rate of ten per cent. per annum from maturity, and then and there delivered the said promissory note to the said plaintiffs, by means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay the said plaintiffs the said sum of money in the said promissory note, (mentioned,) and being so liable, he, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at, to-wit, the county of Valencia aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said promissory note specified according to the tenor and effect thereof."

{2} At the time of filing the declaration there was also filed therewith a promissory note in writing in the words and figures as follows:

"$ 1,314.65. St. Louis, October 1, 1881.

"Four months after date, I, the subscriber, of Fort Wingate, county of , state of New Mexico, promise to pay to the order of Orr & Lindsley (a firm composed of William C. Orr and De Courcey B. Lindsley) thirteen hundred and fourteen 65-100 dollars, with exchange, for value received, with interest at the rate of two per cent. per annum after maturity, until paid, without defalcation or discount, negotiable and payable at First National Bank, Santa Fe, N.M.

L. N. Hopkins, Jr."

*{*28}* **{3}** The defendant pleaded the general issue. Upon the trial the plaintiffs offered in evidence the promissory note filed with the declaration. This was objected to on the ground that it was not a negotiable promissory note, in that it provided for the payment of exchange over and above the principal and interest therein specified, which rendered the amount to be paid thereon unliquidated and uncertain, and, not being a promissory note, it did not import a consideration. The note was further objected to as evidence, on the ground of variance between it and the note declared on in the special count. Both of these objections were overruled by the court, and the note was received in evidence under exceptions.

{4} The only additional evidence for the plaintiffs was that of the witness Childers, which was very brief and as follows:

" **Gentlemen of the Jury:** I state, under my oath to you, that, on or about the seventh day of March of this year, I went to Fort Wingate for the purpose of seeing the defendant in this case, Lambert N. Hopkins, in regard to the note sued on and the collection of the debt of which it is the evidence. I presented this note to L. N. Hopkins. Hopkins admitted the indebtedness and asked me not to bring suit on it before the first day of April; that on that day he would pay it. He failed to pay it and I therefore brought suit. I have computed the interest on the note and find it to be $ 84.83; note, $ 1,314.65; total, $ 1,399.48."

{5} This testimony, also, was objected to on behalf of defendant, on the ground of its being immaterial, incompetent, and improper. The objections were overruled, and the evidence went to the jury under exceptions. No testimony was offered on behalf of the defendant. No instructions were asked for by either party.

{6} The court, therefore, on its own motion, charged *{*29}* the jury to find for the plaintiffs. This instruction was excepted to on behalf of the defendant. The jury rendered a verdict for plaintiffs in the sum of $ 1,399.48. Defendant interposed motions in arrest of judgment and for a new trial, which were overruled, and judgment rendered for the plaintiffs in the amount specified in the verdict and costs. Numerous errors are assigned on behalf of the plaintiff in error, but it is necessary to consider only those that are based upon the objections and exceptions already referred to.

{7} Whether, under any circumstances, the terms as to payment of exchange would destroy the character of an instrument in writing as a promissory note which otherwise would be a perfect promissory note, -- which may be doubted, -- no such question can arise in this case. The terms of the note as to exchange are mere surplusage and have no significance whatever. The note was made negotiable and payable at the First National Bank of Santa Fe, and payment at that bank, principal and interest, **without payment of any exchange,** would have been a full and complete satisfaction of the note. The note received in evidence is in all respects, upon its face, a valid negotiable promissory note, and the law implies a consideration for the promise therein contained.

{8} The objection to the note received in evidence, that it varies from the note as declared on, is no doubt well taken, so far as the special count in the declaration is concerned.

{9} No principle of law is better settled, under any system of pleading, than when a promissory note, bill of exchange, or other instrument in writing is sued on it must be set out in the declaration in each and all its material terms and conditions, according to their precise legal effect. 1 Chit. Pl. 305, with note 3, and authorities cited.

{10} What constitutes the variance between the note as *{*30}* declared on in this case and the note received in evidence is, the former is made negotiable and payable generally or absolutely, while a limitation is placed upon the latter, in that it is made negotiable and payable at a particular specified place. It cannot be said, therefore, that the terms of both have the same legal effect. This has always been considered a fatal variance. 1 Chit. Pl. 309; 14 Pet. 43; 9 Wheat. 558; 4 Cranch, C. C. 11.

{11} Had the declaration contained only the special count on the promissory note, it is clear that, upon the evidence received under objection, it would have been error to have rendered judgment thereon for the plaintiffs in any sum whatever.

{12} But it seems that now the practice is sanctioned by high judicial authority of receiving promissory notes and bills of exchange as **prima facie** evidence in support of any or all the common counts in **assumpsit** between the immediate parties. 2 Greenl. Ev. § 112.

{13} It is difficult to comprehend the reasonableness of this practice to the extent it has been carried by some of the courts. It must necessarily lead to many absurdities. For instance, upon the common count for money lent, if supported by oral testimony, it would be necessary to prove that the transaction was essentially a loan of money; yet it is held that a promissory note, though it may have been given for work and labor, may be received to support the common count for money loaned.

{14} However this may be on principle, it is clear that every promissory note or bill of exchange necessarily includes an account stated between the immediate parties thereto; that is, that there had been a prior transaction or transactions between the parties, involving an indebtedness from one to the other, -- a mutual settlement thereof

upon examination -- an acceptance thereof *{*31}* by them, resulting in finding a certain amount in money to be due, and a promise, express or implied, to pay the same.

{15} Upon every account stated the law implies a valuable consideration, and it is not necessary to inquire into the nature or items of the original account. 1 Chit. Pl. 358. Proof of a settlement and stated account between the parties makes out a **prima facie** case.

{16} A promissory note, therefore, is from its very terms the most satisfactory evidence that there had been a settlement between the parties, and that the principal sum therein specified had been found to be due from the maker to the payee. Chit. Cont. (10th Amer. Ed.) 723.

{17} The promissory note, therefore, was properly received in evidence in support of the common count, upon an account stated.

{18} As no judgment could be properly rendered under the evidence on the special count on the promissory note, then we are to consider the case on the common counts exclusively, and as though no such special count was in the declaration.

{19} In this view of the case it is evident that the judgment is for a larger sum than is claimed under the common counts, which cannot exceed the sum of $ 1,314.65, and interest at 6 per cent. per annum from the date of the stated account between the parties to the date of the judgment. This is all that can be claimed under the common counts, and is all that is claimed in the declaration on these counts.

{20} At common law, in the absence of any statutory provisions as to interest, none could be recovered on any of the common counts. 1 Chit. Pl. 356.

{21} If, at the date of the account stated, there was a promise to pay interest at a stipulated rate above legal interest, then to recover the same, in addition to the *{*32}* amount due on the account stated, there should have been a count therefor alleging forbearance as the consideration for the promise. **Vide** "Count for Interest," 2 Chit. Pl. 88.

{22} Our statute allows interest at 6 per cent. per annum on money due upon the settlement of matured accounts. Prince, St. 414. This, of course, covers an account stated, and may be recovered on a count on an account stated. Judgment cannot be rendered for a greater amount than the damages laid in the declaration. **Hogan** v. **Taylor,** Hemp. 20.

{23} On the common counts, therefore, the plaintiff is entitled to recover only the sum of $ 1,314.65, and interest thereon from the first day of October, 1881, at 6 per cent. per annum, instead of 10 per cent., as in the judgment rendered.

{24} The proper practice on an appeal, where the record shows a judgment in excess of the amount laid in the declaration, and the amount of the excess is capable of exact computation, seems to be to permit the judgment creditor to file a remission of the excess, and, if done, to affirm the judgment as to the residue; otherwise, to reverse the judgment and order a new trial. 14 Cal. 640; 10 Iowa, 233; 20 Ind. 306.

{25} It is ordered that the defendant in error have leave, until the second Monday of January, 1884, to file a remission, as indicated by this opinion, and, if done within that time, the judgment to be affirmed as to the residue; and on failure so to do, the judgment to be reversed and the cause remanded for a new trial.