STAAB V. HERSCH, 1884-NMSC-018, 3 N.M. 209, 3 P. 248 (S. Ct. 1884)

Zadoc Staab and Abraham Staab
vs.
Luis Hersch

No. 183

SUPREME COURT OF NEW MEXICO

1884-NMSC-018, 3 N.M. 209, 3 P. 248

February 27, 1884, Filed

COUNSEL

Breedin, Catron, Thornton & Clancy, for appellees.

Gildersleeve & Knaeble, for appellant.

JUDGES

Bristol, J. Bell, J., concurring.

AUTHOR: BRISTOL

OPINION

*{*211}* **{1}** The case is here by appeal from the district court of Santa Fe county. The record discloses the following facts:

> On the twentieth day of January, 1883, Zadoc Staab and Abraham Staab, as the members of a partnership, as Z. Staab & Bro., the appellees, filed in the court below their declaration in **assumpsit** against the appellant, Luis Hersch. The declaration contains but one count, which is as follows: "For that whereas the said defendant heretofore, to-wit, on the sixteenth day of January, A. D. 1882, at the county of Santa Fe, aforesaid, was justly indebted to the said plaintiffs in the sum of $ 545.67 for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendant, and at his special instance and request, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at the county of Santa Fe, aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money above mentioned, when he, the said defendant, should be thereunto afterwards," etc. The count then contains the usual allegation of non-payment, and demands judgment. On the

same day on which the declaration was filed the appellees filed an affidavit for an attachment, the affidavit being as follows:

*{*212}* " **Territory of New Mexico, County of Santa Fe -- ss.:** This day personally appeared before me, the undersigned, clerk of the district court for said county, Abraham Staab, and being duly sworn, says that Luis Hersch is justly indebted to the said Abraham Staab and Zadoc Staab, doing business under the name of Staab & Bro., in the sum of five hundred and forty-five dollars and sixty-seven cents, after allowing all just credits and offsets, on account of goods, wares, and merchandise sold and delivered; said sum of money is not yet due and payable according to the contract of sale and delivery of the goods, but the sum of two hundred and eighty-six dollars and twenty cents will become due and payable on the first day of February next, and the whole of the residue thereof on the fifteenth day of February, A. D. 1882; and that this affiant has good reason to believe, and does believe, that the said Luis Hersch is about fraudulently to dispose of his property or effects so as to hinder, delay, or defraud his creditors. Abraham Staab.

"Subscribed and sworn to before me this twentieth day of January, 1882.

"F. W. Clancy, Clerk."

On the eighth day of February, 1882, the appellant pleaded the general issue of **non-assumpsit** to the declaration, (but without concluding to the country.) On the fourth day of December, 1883, a jury was called in the court below to try the issues raised upon the affidavit for attachment. Upon the conclusion of the evidence, and while the jury were out considering of their verdict, on the following day, the appellees moved the court to proceed to the trial of the cause on the issue raised by the plea of **non-assumpsit** to the declaration. This was objected to, on behalf of appellant, on the ground that such trial was premature, and could not properly be proceeded in until the determination *{*213}* of the issues as to the truth of the affidavit for attachment; and upon the further ground that it appeared on the record of the attachment proceedings that the action was brought to recover demands before they were due and payable. Each of these objections being overruled, exceptions were duly taken. A trial thereupon was then had. A sale of the goods, wares, and merchandise, as alleged in the declaration, was established, except as to the time of payment; the appellees admitting on the trial that, under the contract of sale, a credit was given until some time in February, 1882. Upon this condition of the evidence, appellant moved for a nonsuit, on the grounds that the attachment issue had not yet been disposed of; that the trial of the main issue was premature; and that it appeared from the plaintiff's own evidence that no part of the claims sued on was due or payable when the action was commenced. This motion was overruled, and an exception taken. The appellant then, on substantially the same grounds, moved the court to instruct the jury to find for the defendant. This motion was overruled, and an exception taken. The court thereupon instructed the jury to find for the plaintiffs, to which

instruction the appellant excepted. The jury brought in a verdict for appellant in the sum of $ 561.04, and judgment was rendered thereon for that sum, and costs. Thereafter, the jury, in the attachment proceeding, came in, and announced their disagreement, and, without finding a verdict, were discharged.

{2} The questions raised in this court are upon the exceptions taken in the court below. As the law now stands in this territory, attachment proceedings are auxiliary to actions at law, but each is characterized by separate pleadings and a distinct practice. The affidavit for an attachment has never been considered sufficient as a declaration, under our practice. This *{*214}* common-law declaration must be responded to by a common-law plea in order to raise an issue. If the defendant desires to raise an issue on the affidavit for an attachment, he must do so by a specific denial of some material fact or facts contained in the affidavit instead of pleading by a general denial; the statute on the subject being as follows:

"In all cases where property or effects shall be attached, the defendant may, at the court to which the writ is returnable, put in his answer, without oath, denying the truth of any material fact contained in the affidavit, to which the plaintiff may reply. A trial of the truth of the affidavit shall be had at the same term, and on such trial the plaintiff shall be held to prove the existence of the facts set forth in the affidavit **as the ground of the attachment.**" Prince's St. p. 139, § 16.

{3} In 1874 an act was passed containing, among others, the following provisions:

"In all cases hereafter commenced by attachment, in which the truth of the affidavit for attachment, or of any material allegation therein contained, shall be denied, and the issue thus formed shall, upon the trial, be found for the defendant, the attachment shall be dismissed, and all property, rights, effects, and credits held or affected thereby or thereunder shall be released and discharged from the operation thereof; **but the dismissal of the attachment shall not abate the suit, but the same shall proceed as in ordinary cases.**" Id. p. 143, § 38.

{4} This statute removes all doubt as to the mode of proceeding on matured money demands. A common-law action may be commenced, attended with common-law pleadings and practice, and, simultaneously, proceedings by attachment, auxiliary thereto, may be instituted and attended with statutory pleadings. If, on trial of the issues, as to the grounds of the attachment *{*215}* alleged in the affidavit, a verdict is rendered for the defendant, the attachment is dissolved, but the action at law proceeds to final judgment. But what should be the mode of procedure in cases of an attachment on demands not due? The only provision of statute on this question is as follows:

"An attachment may be issued on a demand not yet due, in any case where an attachment is authorized, in the same manner as upon demands already due." Id. p. 143, subd. 3, § 37.

{5} All the other provisions of statute on the subject of attachment relate to demands due at the institution of the proceedings. Can this statute, thus injected into attachment proceedings, be construed as authorizing by implication an action at law to be commenced before demands are due, for the purpose of obtaining judgment thereon after they become due? The statute is silent as to the mode of procedure in a contingency of this kind. Attachment proceedings, being in derogation of the common law, must be construed strictly; nothing can be inferred. If an action be commenced on demands not due, when should the defendant be cited to appear and plead to the declaration? It cannot be inferred from this brief statute that he must interpose his defense, if he has any, before he can be called on to pay the demand. There being no statute regulations on the subject, this court no doubt has authority to prescribe by rule what the practice may be, so as to give effect to attachments covering demands not due, without in the least changing the practice in actions at law to recover judgment on the same demands. The sole object of an attachment is to create a prior lien on the property of the attachment debtor, as security on any judgment that may thereafter be obtained against him on the demands covered by the attachment. When this extraordinary remedy is resorted to, covering demands not due, and especially *{*216}* where long credits are given, and the grounds of the attachment are traversed, a speedy determination of that issue becomes of the greatest importance; but it is evident that the main issue on the indebtedness cannot be raised, nor any defense interposed, until the maturity of the demand sued on, except to show that no such demands exist on which an attachment will lie.

{6} Under our common-law pleadings and practice the only consistent mode of procedure in cases of this kind would be to treat the attachment proceedings on debts not due as separate and distinct from any action at law to recover judgment thereon, and to go no further than to create an attachment lien in advance of the commencement of such action, -- the writ of attachment to contain a citation to the defendant to appear and answer the affidavit; the issue, if any, thus raised in the attachment proceedings, to be speedily tried, and the attachment lien dissolved or continued, according to the verdict of the jury for or against the defendant; if sustained, the attachment to remain a subsisting lien on the property of the debtor, and, upon the maturity of the demand, a declaration to be filed and the defendant cited to plead thereto; if the plaintiff recover judgment, then a writ of **venditioni exponas** to be issued for the sale of the property attached and the proceeds applied to the satisfaction of the judgment. The record in this case discloses the fact that, in addition to the affidavit for an attachment covering demands not due, a common-law declaration was at the same time filed, containing a single count for goods, wares, and merchandise sold and delivered, etc., and a promise on the part of the defendant **to pay on demand.** The defendant pleaded that he did not so promise. On the issue thus raised the parties went to trial, resulting in a verdict and judgment for the plaintiffs. The commencement of the action was the plaintiffs' demand for payment; and if the count in the declaration were true, the demand at once *{*217}* became due and payable. But the plaintiffs on the trial admitted that the demand, at the time mentioned in the declaration, was not due and payable, and did not become due for some time thereafter, under the express contract of sale and delivery of the goods. This was conclusive upon the plaintiffs, and left them without any evidence to support

their count in the declaration. The count was not true, and the plea of **non-assumpsit** was sustained by the evidence. As to the attachment, the indebtedness alleged in the affidavit does not correspond with that specified in the declaration. In the affidavit it consists of two demands, due at different specified future dates, while the declaration is upon a single demand, due and payable on demand. The plea of the declaration of **non-assumpsit** does not conclude to the country, and technically no issue was tendered thereby.

{7} The parties having appeared generally in all the proceedings in the court below, and as irregularities have been committed on either side, we are of the opinion not only that the judgment below ought to be reversed, but that the cause should also be remanded to the court below, with directions to grant leave to the plaintiffs to file a new declaration in accordance with this opinion, and thereupon to proceed by due course of law and practice to final judgment. And it is so ordered.