No. 8584

Supreme Court of Illinois

Horner & Hypes

vs.

Adm'x. of Starkey

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Supreme Court of Illinois. 1st Division.

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Horner and Hypes
vs.
Adm'x of Starkey } Error to Monroe

Page 1. The pltffs, in error filed two notes in the county court of Monroe county for allowance. They were
Page 3. disallowed. The pltffs appealed to the circuit court of Monroe county where the cause was tried at
Page 6. its May term 1861 by the court and judgment given for the deft. Motion was made for a new Trial. Overruled and exceptions filed. The bill of exception recites all the evidence.

Page 4. Pltffs. introduced a promissory note under seal dated November 14. 1838 made by Wm. A. Strong and Wm. C. Starkey for the payment of fifty one dollars and seventeen cents one day after date with interest at twelve per cent from date and payable to Horner and Hypes. Also another promissory note under seal dated November 14. 1838 made by Wm. C. Starkey and Wm. A. Strong for the payment of twelve dollars and sixty eight cents with twelve per cent interest from date and payable one day after date to Horner and Hypes.

Henry Horner testified that he was collecting agent for pltffs., and as such handed to or sent said notes to Thomas Quick, an Attorney of Monroe county, for collection in the year 1848 or 1849. That Starkey left Lebanon and removed to Waterloo in 1839 und Horner and Hypes dissolved partnership in 1840 and that in these notes were all their accounts against Starkey.

Thomas Quick testified that Horner placed in his hands evidences of indebtness against Starkey for collection in 1848 or 1849. Believed they were sent in a letter and are the ones now sued on. It
Page 5. was an old claim of about the amount of these notes, sixty dollars and interest. In 1848 witness went, saw Starkey and told him the notes were placed in witness hands for collection. Starkey said if Hypes would wait a while he would pay it to witness. He said I am not in a condition now to pay
Page 6. it, but say to Mr. Hypes, that when I make a raise I'll pay it. Witness thinks he was not at that time able to pay. Witness told Starkey at the time of conversation the amount and nature of the indebtedness. Witness afterwards sent the papers back to Hypes with a statement of what Starkey said. The reason why witness did not try to collect by law said claim was, Starkey was a warm personal friend of witness. This was all the evidence.

Pltffs now assign for error:

1st. The court erred in finding for deft.

2d. In refusing to grant pltffs. a new trial.

BRIEF:

1st. Suits on writings obligatory, are barred in 16 years. Purp. Statutes 729, sec's 4, 17, 20.

2d. A new promise to take a case out of the statute of limitation arises out of such facts as identify the debt and indicate a present, unqualified willingness and intention to pay it, at the time acted upon and acceded to by the creditor. 12 Ill. R. 146, Reeves vs. Krull et. al. 19 Id. 191. 15 Wend. R. 284—302.

3d. It is immaterial whether the new promise is made before or after the debt is barred by the statute of limitation. The new promise is an express recognition *de novo* of the debt and the statute commences to run from the time of such new promise. Ang. on L. Sec. 237. Dean vs. Heewett, 5 Wend. R. 257. Tompkins vs. Brown 1 Denio R. 247. 8 Mass. R. 133. Hazzlebacker vs. Reeves 9 Barr. (Pa.) R. 258, Stump vs. Hughes 5 Haw R. 93. Saund, on Pl. and Ev. Vol. 2. Part 1. Page 312, 8 Wend. R, 600.

4th. The only condition of the promise of Starkey to pay, was that pltffs. should "wait a while." The *reason* for non payment when demanded, was, that Starkey had not the *money* then. And he agreed to raise it soon and then pay it, which last promise he never performed, although pltffs. complied with the condition, by waiting. Where a debtor promised to pay if allowed a little time a forbearance of two years is sufficient. Gray vs. Tanes 6 Gil. (Md.) R. 82. Watkins vs. Stephens 4th Barber's R. 168.

WM. H. UNDERWOOD,
Atty for pltff in error.

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Horner & Hypes
vs.
Admr. of Starkey

Abstract & Brief

8584

Filed Nov. 15. 1861.
A. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } SS

The People of the State of Illinois,

To the Sheriff of Monroe County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Monroe county, before the Judge thereof between

Nathan Homer & Benjamin Hypes plaintiffs and

Mary A Starkey - Admix - of Wm C Starkey deceased defendant it is said that manifest error hath intervened to the injury of said Nathan Homer and Benjamin Hypes as we are informed by this complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof; to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Mary A Starkey - Admix as aforesaid -

that She be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at **Mount Vernon,** in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if She shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Mary A Starkey notice together with this writ.

WITNESS, the Hon: John D. Caton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this first day of August in the year of our Lord one thousand eight hundred and Sixty-One.

Noah Johnston

Clerk of the Supreme Court.

(85844-2)

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SUPREME COURT.

First Grand Division.

Nathan Homer &
Benjamin Hypes

Plaintiffs in Error,

Aug. 21st

VS.

Mary A. Starkey - Admx
of Wm. C. Starkey Deceased

Defendant in Error.

Executed the within by reading the same to the within named Mary A. Starkey.
August 21 A.D. 1861

H. F. Hinckley
Aff. R. P. Ills
Geo. L. Rice
Deputy

Fees
Service .50
Mileage 5
Return 10
$0.65

SCIRE FACIAS.

FILED.

1861

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