

MARYLAND CASUALTY COMPANY v. PEOPLE'S LUMBER &
SUPPLY COMPANY.

Opinion delivered May 12, 1930.

ASSIGNMENT—OPEN ACCOUNT—PARTIES.—An action on an open account evidenced by gravel tickets is maintainable against a highway contractor and his surety by the assignee of a subcontractor where the latter joins in the action.

Appeal from Desha Circuit Court; *T. G. Parham*,
Judge; affirmed.

Cockrill & Armistead and *Harry T. Wooldridge*, for
appellant.

Poff & Smith, for appellee.

SMITH, J. Appellee brought this suit to recover from
J. T. Carr and the Maryland Casualty Company, herein-
after referred to as the company, the sum of \$307.90, and
interest, and for its cause of action alleged that Carr
entered into a contract with the Arkansas Highway Com-
mission to construct a certain road, and that the company
signed the contractor's bond as surety, guaranteeing,
among other things, that the said contractor would pay
all bills for material and labor entering into the construc-
tion of the road.

It was alleged that Carr, the principal contractor,
sublet to J. J. Harrison a portion of the work, and that
pursuant to his subcontract Harrison hauled gravel, and
that for each load of the gravel he was given, by a repre-
sentative of the Highway Commission, a ticket evidencing
the fact that a load of gravel had been placed in the road
and the price payable therefor. To secure the money
necessary to complete his subcontract, Harrison sold
and delivered these tickets to appellee, whose represent-
ative presented them to Carr for payment, and when
payment was refused this suit was brought. Harrison
was made a party defendant, and he filed a separate
answer and cross-complaint against Carr and the surety
company, in which he admitted the allegations of appel-
lee's complaint, and alleged that Carr had refused to
make settlement and payments to him as his subcontract
required, and that he had obtained advances from appel-
lee. That Carr had instructed him to borrow money to
continue the work and to pledge and assign his claim for
labor done, and he transferred and assigned his claim to
appellee in the sum sued for, which was due for hauling
gravel and placing same upon the road, and, evidencing
this intention, he delivered to appellee the tickets of the

checker showing the number of loads of gravel hauled with the price therefor, and he alleged that, "I authorize the said People's Lumber & Supply Company, in my name or its name, to sue for and collect and obtain payment of said claim."

A demurrer was filed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action for the following reasons: "(1) The assignment alleged to have been made by the defendant, J. J. Harrison, to the plaintiff herein, if any so made, was oral, and not evidenced by any writing. (2) The gravel tickets mentioned in said amended and substituted complaint are mere evidences of the amount of gravel hauled by the defendant, J. T. Carr, and represent neither money nor property, and are therefore not assignable, under § 475 of Crawford & Moses' Digest of the Statutes of Arkansas."

The demurrer was overruled, and, Carr and the company declining to plead further, a judgment was rendered against them, from which the company only has appealed.

It is insisted, for the reversal of the judgment appealed from, that the instant case is similar to and is controlled by the opinion in the case of *Goode v. Aetna Casualty & Surety Co.*, 178 Ark. 451, 13 S. W. (2d) 6, but we do not think so.

We do not consider or decide whether the gravel tickets were assignable instruments or not. They at least evidenced the quantity of gravel hauled, and the sum due on that account, and it was this sum—the total thereof—which Harrison assigned to appellee, and both the assignor and the assignee have sued. This is the controlling distinction between the instant case and the *Goode* case, which was a suit upon an oral assignment of an open account, which we said could not be maintained without making the assignor a party. Here the assignor is a party.

It is not questioned that Harrison's claim is covered by the bond of the surety company, and both the assignor and the assignee unite in the suit to enforce this claim against the bond. The case of *American Bank & Trust Co. v. Langston*, 180 Ark. 643, 22 S. W. (2d) 381, cited by appellant, has therefore no application.

The demurrer was properly overruled, and the judgment must be affirmed, and it is so ordered.
