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Open Account: Title 12 Section 936 Oklahoma Statutes Titled Attorney Fees Taxed As Costs in Actions to Recover Open Accounts

J. C. Joyce

regulate this fashion,[18] but it appears that wearing a topless gown or bathing suit (in absence of some other legislation) will not be a criminal act.

Leigh H. Taylor

OPEN ACCOUNT: TITLE 12 SECTION 936 OKLAHOMA STATUTES TITLED "ATTORNEY FEES TAXED AS COSTS IN ACTIONS TO RECOVER OPEN ACCOUNTS"

Title 12 Section 936 of the Oklahoma Statutes provides as follows: "In any civil action to recover on an open account the prevailing party shall be allowed a reasonable attorney fee to be set by the court to be taxed and collected as costs."

This statute presents two problems; the first being a determination of what is an open account, which will be dealt with in this note, and the second being what constitutes a reasonable attorney fee under this statute. The problem of reasonable attorney fees is dealt with, in part in the various Bar Association's minimum fee schedules.

The rule for statutory construction in Oklahoma is; "Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears. . . ."[1]

"Account" (as defined in the Uniform Commercial Code) "means a right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper."[2] The Legislature has not given us a definitive statement on the meaning of the word "open," as used in this statute, therefore the Court must define the phrase "open account."

The problem is that this is an old phrase used in a new statute, and a statute that necessarily requires a precise definition of the phrase. Prior to enactment of statutes such as this it made little difference whether the action brought was one on an implied contract, an account stated, a book account, or an open account. This is reflected in the statement of the California Court in *Fresno Credit Bureau v. Batteate*,[3] where the Court, using the phrases "open account," "open book account," and "book account" interchangeably, said;

> The evidence was sufficient to support a judgment upon the

[18] S.H.A. Ch. 38 § 11-9.a.3 (ILL. REV. STAT. 1961) provides punishment for "a lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person." The Committee Comment states ". . . that the exposure necessary is an exposure of the 'body' and not of a particular part. This does not imply an intent to regulate swim fashions. . . . However, certain exposures of the body could occur which would justly deserve attention as shocking and disgusting public affronts." This statute while it seems to exclude topless bathing suits, might be broad enough to include topless gowns although it seems ridiculous to regulate one and not the other.

[1] 25 OKLA. STAT. § 1.
[2] UNIFORM COMMERCIAL CODE § 9-106.
[3] 102 Cal.App.2d 545, 227 P.2d 851 (1951).

cause of action based on an open book account or upon an implied contract and, as was said in Hansen v. Burford, 212 Cal. 100, 107, 297 P. 908, 911; "The distinction, as a matter of pleading, between a book account and an ordinary contract debt not founded on a writing, in only important when, as in Wright v. Loaiza, 177 Cal. 605, 171 P. 311, the statute of limitations is involved and where the question arises whether suit may be commenced within four years, or must be begun within two years after the cause of action has accrued. In the present case, all the transactions were had within two years before the complaint was filed. *In these circumstances the distinction between pleading a book account and pleading an indebtedness generally seems to us inconsequential.*"[4]
(emphasis added)

In the case of *Drakos v. Edwards*,[5] an action for money due on open account, professional services had been rendered to Drakos, intermittently over a period of about four and one-half years. Charges were made for the services rendered and Drakos was given credits for payments made to Dr. Edwards. The court in this case does not enter into a discussion of whether or not this would constitute an "open account" under the statute, but in sustaining the trial courts allowance of an attorney's fee for the trial of the case, and granting an additional attorneys fee for the appeal of the suit, necessarily did decide that this factual situation constitutes an "open account."

In *Globe & Republic Ins. Co. v. Independent Trucking Co.*[6] the only other case construing this statute, the court held that the claim sued upon did not constitute an "open account." In this case Independent was in the business of hauling oil field equipment. Globe furnished an insurance policy to Independent covering loss or damage of such equipment while in the hands of Independent. Independent was engaged to haul certain equipment and it was damaged while in its custody. The owner sued Independent and Globe defended the suit. The judgment was against Independent and Globe refused to pay this judgment on the grounds that the damage was not covered by its insurance policy. Independent paid the judgment and then brought this action to recover the amount paid plus a reasonable attorney's fee. The trial court found for Independent and allowed an attorney's fee of $450.00.

On appeal in support of the court's allowance of the attorney fee, Independent contended its action was one founded on an open account within the meaning of the phrase as used in the statute. The Oklahoma Supreme Court speaking through Justice Davison, held that the statute was not applicable in that Independent's action was based upon a written contract. The court quoted the following statement from *Connor Livestock Co. v. Fisher*,[7]

Generally speaking, an open account is one where there are running on concurrent dealings between the parties, which are kept unclosed with the expectation of further transactions . . . An express contract

[4] 227 P.2d at 852.
[5] 385 P.2d 459 (Okla. 1963).
[6] 387 P.2d 644 (Okla. 1963).
[7] 32 Ariz. 80, 255 P. 996 (1927).

which defines the duties and liabilities of the parties, whether it be oral or written is not as a rule an open account.[8]

The *Drakos* case can be taken as representing a fact situation which would always constitute an "open account," while the *Globe* case is an example of a fact situation which does not constitute an "open account." The latter provides a hint or guideline to follow in determining what future factual situations the court will hold to be "open accounts," in the gray area which lies between these two decisions.

One of the major problems that lies in this gray area is the determination of what type of contract will be embraced in a restricted definition of "open account." The court, in the *Globe* case, speaking in generalities, said; "An express contract which defines the duties and liabilities of the parties, whether it be oral or written, *is not, as a rule, an open account.*"[9] (emphasis added) Does this mean that the signing of a sales slip, which has terms and conditions printed thereon, for a charge purchase at a department store would remove the running balance of that charge account from the purview of the "open account" statute? A strong argument could be made in support of an affirmative answer to this question in light of the *Globe* decision. However it would appear that this is the very type of account this statute was designed to cover. These are the accounts on which numerous charge purchases are made. and on which a running balance is kept with the expectation of further transactions and periodic payments. It is submitted that this is the first type of account which the layman as well as the attorney might think of when he hears the phrase "open account."

It would appear that an account stated cannot be defined as an "open account" because: "An account stated is an agreement, express or implied. The amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent cause of action represented by the particular constituent items . . . An account stated is a new obligation, taking the place of the obligation upon the prior account."[10] Arguably an open account can be changed into an account stated to effect an avoidance of the attorneys fee allowed for a suit on an "open account." This would be beneficial to both the debtor and the creditor. If the debtor knows that he owes the balance claimed by his creditor he can admit that balance, thus changing the "open account" into an account stated, and avoid the additional expense of the attorney fee. If the debtor takes this course the creditor will be in a much better position to reduce his claim to a final judgment, because of the difficulties which are associated with proving the individual items in an "open account" and the comparative ease in proving the

[8] *Supra* note 6 at 647.

[9] *Ibid.*

[10] Webster Drilling Co. v. Sterling Oil of Okla., Inc. 376 P.2d 236, 238 (Okla. 1962) This case stands for the proposition that an account stated is an agreement express or implied. For cases holding that an open account cannot be evidenced by such an agreement see: Costello v. Bank of America Nat'l. Trust & Sav. Ass'n, 246 F.2d 807 (9th Cir. 1957); Globe & Republic Ins. Co. v. Independent Trucking 387 P.2d 644 (Okla. 1963); Durkin v. Durkin 133 Cal.App.2d 283, 284 P.2d 185 (Cal. 1955); Connor Livestock Co. v. Fisher 32 Ariz. 80, 255 P. 996 (1927)