JOHN PAYNE TUCKER, Appellant, *v.* NATHANIEL H. S. BROWNELL, Appellee.

APPEAL FROM THE DEBT COURT,
MONTSERRADO COUNTY.

Argued May 13, 1975. Decided June 26, 1975.

1. Mortgages executed to cover payment of a debt do not of themselves preclude the creditors from disregarding the mortgage contract and suing to recover the debt only.
2. The Debt Court has exclusive original jurisdiction over actions of debt when the amount sued for is $500.01 or more.
3. Averments in a pleading to which responsive pleading is required are deemed admitted when not denied in the responsive pleading.
4. A party may not on trial introduce evidence on points on which issue has not been joined in the pleadings.
5. The weight of oral testimony cannot overbalance or outweigh positive obligations contained in written documents.
6. Unless restrained by laws against usury, a mortgagor may lawfully agree to pay a bonus to the mortgagee.
7. A promissory note is as authentic and valid as any other negotiable instrument.
8. To constitute an instrument a promissory note, the document must contain an unconditional promise to pay a sum certain in money without contingency.
9. When there is no express agreement as to the rate of interest to be charged in the case of a promissory note, the creditor shall be allowed six per cent per year and no more.

Appellant executed a promissory note to the appellee in the amount of $20,000.00, in return for $15,000.00 actually loaned appellant in accord with a mortgage agreement. It appears that the $5,000.00 difference between the amount received by appellant and the amount stated on the face of the note, was intended as a bonus to induce appellee to lend the money sought by appellant for a business venture.

Appellee instituted proceedings in the Circuit Court to foreclose the mortgage, but subsequently withdrew the suit. He then sued in the Debt Court for the $20.000.00 to be repaid him under the terms of the note and recovered a judgment therein, from which an appeal was taken.

Appellant did not deny the averments of the complaint, but answered on procedural grounds only, claiming foreclosure of the mortgage was the only relief allowable to the appellee.

The Supreme Court took the position that it was proper to sue on the note in the Debt Court for recovery of the money loaned. However, the Court modified the judgment of the Debt Court by reducing it to the $15,000.00 actually loaned, with interest thereon at the rate of 6% per annum from the date the money was loaned, in accord with the law on permissible interest rates when not set forth specifically. Judgment *affirmed as modified.*

MacDonald Acolatse for appellant. *Richard Diggs* for appellee.

MR. CHIEF JUSTICE PIERRE delivered the opinion of the Court.

According to the record in this case, Mr. John Payne Tucker executed a promissory note in favor of Mr. Nathaniel H. S. Brownell in the sum of $20,000.00 "for valued received." The note states further that the $20,000.00 received by Tucker was a loan granted by Brownell, in keeping with a mortgage agreement. But nowhere in the record have we been able to find a mortgage agreement, as is referred to in the note. After repeated demands for payment of the amount, Brownell sued for debt, after having withdrawn a previous suit of foreclosure of the mortgage referred to; hence the mortgage and the foreclosure proceedings are not before us. A party may once withdraw, amend or file a new suit according to law and practice in this jurisdiction. *Davies* v. *Yancy,* 10 LLR 89 (1949).

The complaint upon which the plaintiff brought this action of debt contains only one count.

"That the said defendant is justly indebted to the

plaintiff in the sum of Twenty Thousand Dollars ($20,000.00), which amount defendant obtained from the plaintiff as a loan, to have been repaid within ten days, that is to say, on or before the 18th of December, 1972, as will more fully appear from a copy of the promissory note hereto attached and marked exhibit 'A' to form part of this complaint, the original of which is in the possession of the plaintiff and will be produced at the trial of this case. Said sum of money defendant has promised to pay upon repeated demands but has failed, refused and neglected to pay."

The note, exhibit "A" referred to, is quoted.

"PROMISSORY NOTE

"For value received we, the undersigned, promise to pay to Nathaniel H. S. Brownell of the City of Monrovia, Montserrado County, Republic of Liberia, the sum of twenty thousand dollars ($20,000.00), which amount was given us as a loan in keeping with a mortgage agreement dated December 7, 1972, without fail.

"Dated at Monrovia, Liberia
this 7th day of December, 1975
"[Sgd.] JOHN PAYNE TUCKER."

Defendant's two-count answer is quoted verbatim, because of the important part it is to play in deciding this case.

"1. Because defendant says that this action is illegal, malicious, harassing and tends to indulge in multiple suits, an act which the law and equity frown upon, in that, this is a debt covered by a mortgage, and accordingly the remedy to which the mortgagee is entitled is set forth, defined, restricted and limited by the mortgage agreement. That according to the law of mortgages, the same provides unequivocally the remedy in case of default of payment, and which remedy is and only is foreclosure of mortgage and never an action of debt. What is strange is that this fact is not unknown to plaintiff, for he filed an action of fore-

closure of mortgage in the Civil Law Court, sitting in its March Term, 1973, basing his right to recovery upon (a) the mortgage agreement; (b) this very promissory note; (c) the mortgage deed, notwithstanding that he withdrew said action with reservation on the 4th day of June, 1973, meaning that the court has jurisdiction or rather that he intends to refile. A copy of a certificate from the Clerk, Civil Law Court substantiating this fact is hereto attached and marked exhibit 'A' to form a cogent part of this answer. This unmeritorious action should therefore be dismissed.

"2. And also because defendant says that this court under the circumstances and information as set forth and given in count one, *supra,* realizing that the debt or amount due is based upon and covered by a specified lien, property or collateral, thereby restricting the remedy and action available to plaintiff, will not entertain this action, especially so since a mortgage is strictly a matter cognizable in or before a court exercising equity jurisdiction. Defendant therefore prays the dismissal of said unmeritorious action."

It is to be noted that the position taken by the defendant in his answer is not a denial of the debt. He has contended that the wrong form of action has been chosen. We must assume then that not having denied his indebtedness in the sum of $20,000.00 by virtue of his promissory note, he has by such failure to deny admitted the debt. In fact, count two of the answer quoted above supports this view.

As we have said earlier on in this opinion, and as the defendant has admitted in count one of his answer, the plaintiff had filed foreclosure proceedings which he withdrew with a reservation to refile. This is a right given by our law to every party litigant, as we have also stated above. Grounds for the withdrawal of the foreclosure proceedings are not relevant to the issues involved in this

case. What we have before us is an action of debt based upon a promissory note, duly executed according to law.

Debt is a sum of money due by certain and express agreement as by a bill or note where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it. BLACK'S LAW DICTIONARY, Revised Fourth Edition. This definition adequately represents the circumstances in this case because there is a promissory note in which the defendant has promised to pay to his creditor "without fail," $20,000.00 which defendant admits receiving in his answer. Under our law such an amount is collectable in an action of debt where the promise to pay is not fulfilled. This Court said in *Davis* v. *Johnson,* 10 LLR 416 (1951), that where the clear and uncontradicted evidence of plaintiff proves defendant's indebtedness to him, judgment will be given for plaintiff.

But looking further into the record of this case, it is observed that the defendant's answer was dismissed by the judge in passing on the issues of law. Exception was taken to this ruling and it has been brought for our review in count one of the bill of exceptions. Studying the answer which we have quoted in its entirety above, it is clear that it has not denied the debt of $20,000.00, nor has it denied any of the circumstances stated in the complaint which led up to the filing of the suit for $20,000.00.

As can be seen, the answer completely ignored the subject matter of debt and addressed itself to a mortgage agreement, which is completely irrelevant to the case at bar. The answer also sought in count two to question the jurisdiction of the Debt Court over the case. As to the first point, authorities agree that mortgages which are executed to cover payment of debt, do not of themselves preclude the creditors from ignoring the mortgage contract and entering suit for recovery of the debt only. For reliance we will cite and quote authority:

"As a general rule, and in the absence of a statutory

provision restricting such right the taking of collateral security for the payment of a debt does not afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same as if no security had been given. Therefore a creditor holding a note secured by a mortgage may ignore his security and bring an action on the note, and the right to bring an independent action on the note secured by a mortgage is not dependent on the release of the mortgage, the mortgagee not being required to tender or offer a release until the debt is paid. The promise to pay, as evidenced by a promissory note, is one distinct agreement and, if couched in proper terms, is negotiable, while the pledge of real estate to secure that promise as evidenced by a mortgage is another distinct agreement which is not intended to affect in the least the promise to pay, but only to provide a remedy for the failure of performance." 36 AM. JUR., *Mortgages,* § 517 (1941).

As to the second point, the mortgage was merely intended to secure the loan or debt; but quite apart from the mortgage agreement, there existed a promissory note upon which the action has been brought. This is very clearly stated in the complaint, and has not been denied in the answer as we have stated hereinbefore. The Debt Court has exclusive original jurisdiction over actions of debt where the amount involved and sued for is more than $500.01. Judiciary Law, Rev. Code 17:4.2. We, therefore, find ourselves unable to agree with the appellant when he contends in count two of his answer that because the debt has been secured by a mortgage, even though foreclosure proceedings had been withdrawn, recovery of the debt should have been brought in equity.

Failure to have denied the averments contained in the complaint or to have in any manner traversed the issues raised, left the judge no alternative but to dismiss the an-

swer and place the defendant on a bare denial. Our Civil Procedure Law provides that "Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading." Rev. Code 1:9.8(3). Count one of the bill of exceptions which questions the dismissal of the answer is, therefore, overruled. Had the answer contained a general denial clause, the position of the defendant would have been much better; but he did not even generally deny the facts of the complaint. The Court is, therefore, powerless to do for him then, what he neglected to do for himself.

Count two of the bill of exceptions admits that the defendant waived production of evidence at the trial, because the plaintiff testified that the actual amount loaned to the defendant was only $15,000.00 and, therefore, $5,000.00 over and above that amount should not have been included in the amount to be repaid. This position does not harmonize with the wording of the promissory note; nor does the answer mention anything about $15,000.00. However let us look at the plaintiff's testimony at the trial.

The plaintiff testified that on December 6, 1972, Mr. John Payne Tucker accompanied by Johnny Lee, went to his house and asked him for a loan of $15,000.00, with which to buy a diamond. He informed Mr. Tucker that he could not give him an answer until he consulted his lawyer, Counsellor Richard Diggs. Mr. Tucker told the plaintiff that the diamond was actually worth $30,000.00. After consulting his lawyer the plaintiff agreed on December 9 to grant the loan. At this point the defendant voluntarily offered to give the plaintiff $5,000.00 as his share of the profit to be made on the sale of the diamond. Here is the plaintiff's own testimony on the point, as we have culled it from the certified record: "On that day (December 9, 1972) I drew the amount from my account in the presence of my lawyer, the amount of $15,000.00. 'In addition to the loan of $15,000.00 I will

give you $5,000 as your share of the profit of the diamond.' To this proposition I agreed and gave him the $15,000.00 for which he gave me a promissory note for $20,000.00." It is interesting to note just here that this promissory note was offered in evidence at the trial, and although the defendant had intended to challenge the truthfulness of the note, he did not object to its admission to form a part of the evidence.

We have not been able to agree that the trial court could have taken cognizance of any issue which had not been raised in the pleadings. This Court said in *Dennis* v. *Refell,* 9 LLR 26 (1945), a party may not on trial introduce evidence on points on which issue has not been joined in the pleadings. In *Shaheen* v. *C.F.A.O.,* 13 LLR 278 (1958), the Court said that issues not raised in the pleadings may not properly be raised on the trial of a case. We also cite the following decided cases on this point: *Coleman* v. *Cooper,* 12 LLR 226 (1955); *Weeks* v. *Ketter,* 13 LLR 546 (1960); *Tetteh* v. *Stubblefield,* 15 LLR 3 (1962). Hence, there is no way in which we can sustain the position taken in count two of the bill of exceptions. It is an old rule of our practice that no oral testimony can explain a written instrument; and in *Bryant* v. *O.A.C.* 12 LLR 330, 349 (1956), the Court said that "the weight of oral testimony cannot . . . overbalance or outweigh positive undertakings or obligations contained in written documents."

Moreover, still addressing ourselves to count two of the bill of exceptions, we would like to observe that this count would seem to be an attempt on the part of the appellant to repudiate the note he executed in apparent good faith. Could any court allow a party to do this to the hurt of his adversary? We do not think so. It was brought out in the case that the $5,000.00 offered by Mr. Tucker was a bonus or inducement to assure the granting of the loan.

"Bonus To Mortgagees. Unless restrained by the

> statute against usury, a mortgagor may lawfully agree to pay a bonus to the mortgagee, in consideration of the unsatisfactory nature of the security offered, or of the difficulty of obtaining money, or in return for some special privilege or advantage, or to pay a bonus or commission to the agent or intermediary who negotiates the loan, and if it is so stipulated in the mortgage the bonus or commission so agreed to be paid becomes a part of the mortgage debt and is covered by the security of the mortgage and is recoverable as a part of it." 27 CYC. 1077 (1907).

Therefore, paying a bonus for the granting of a loan, especially where the offer to pay the bonus was voluntary on the part of the mortgagor, is not unusual in such transactions.

But according to our General Business Law, interest on money borrowed cannot exceed 10% of the sum to be repaid. 1956 Code 15:500. At the trial the plaintiff insisted that interest on the loan had never been discussed, and in argument before us appellant's counsel agreed that the $5,000.00 was not interest. However, no matter by what name this amount of $5,000.00 was called, it is alleged by the appellant that it was not part of the actual amount lent in the transaction and, therefore, it should not have formed part of the judgment in the case.

We might have been quite prepared to accept this point of view had the note been worded differently, or had the answer challenged the correctness of the terms of the note, or had the answer denied that $20,000 was actually borrowed. But on the contrary, there has been no denial in the answer of the fact that the amount borrowed was $20,000 as appears on the face of the note. Nor has there been any showing that the note was executed under duress, the only circumstance under which its repudiation by the maker might have been tolerated. Therefore, count two of the bill of exceptions cannot be sustained.

Count three is an exception taken to the following ques-

tion asked the plaintiff on cross-examination: "So in other words you are claiming the amount which the defendant borrowed from you was interest free, am I correct?" Grounds of objections interposed were: "Unduly cumulative and soliciting an affirmative matter not proven." Recourse to the trial record shows that previous to this question, the following examination had taken place:

"Q. Mr. Witness, you have stated on your oath that you are the plaintiff in this case, and instituted this debt action to claim your just credit made to the defendant which he has failed to settle, am I correct?

"A. Yes, you are correct.

"Q. Then, Mr. Witness, tell this court how much the defendant really owes you, that is to say, how much money current within the Republic of Liberia did you lend to Mr. Tucker, and at what rate of interest?

"A. I stated in my general statement that the question of interest was never discussed. I loaned him $15,000.00 and he promised to give me $5,000.00 in addition to the amount loaned as my share of profit of the diamond.

"Q. According to this answer, am I to be made to know that you and the defendant entered into jointly undertaken business, whereby interest may be shared?

"A. John Payne Tucker and I did not undertake any business jointly, because I never even saw the diamond.

After these answers, the question does seem to be cumulative. The answer sought by this question had already been given. It is our opinion that the judge ruled correctly in sustaining the objection to this question. Therefore, count three of the bill of exceptions is overruled.

Following this line of the cross-examination, one would have thought that the defendant might have put witnesses on the stand to testify to the fact that the actual amount received was not $20,000, as he argued before us, and as the promissory note called for. At least he might have himself denied that he had offered to repay $5,000 more than he received. No matter what effect this verbal denial might have had, as against the specific averments of the complaint and the amount shown on the face of his note which he executed without coercion or duress, some effort should have been shown to correct the impression his failure to deny made in the case. Instead of doing this at the trial, or in his answer, he now tries to get the Supreme Court to consider his verbal denials here. The Court cannot do this.

The information filed by appellant in the court below, after he had failed to deny the truthfulness of the complaint in his answer, was correctly dismissed, because there were no new issues of law which he had discovered and could introduce in the case. But even if this had been the case, upon what legal basis did the defendant expect the judge to cancel his ruling on the issues of law as was requested in the bill of information, the denial of which he had formally excepted to on the record?

We shall now consider promissory notes. As defined by some writers, a promissory note is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer, or to a person therein designated or to his order. Under this definition the unconditional character of a promissory note is of great importance. Another writer in the same book has defined it to be a written engagement under seal or not, wherein the maker stipulated and promises to pay a person therein named, absolutely and unconditionally, a certain sum of money. There are also general definitions.

"A promissory note or, as it is frequently called, a note

of hand, is a written promise by one person to pay to another person therein named or order a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive." 7 CYC. 532 (1903).

Judge Bouvier has defined a promissory note as "a written promise to pay a certain sum of money, at a future time, unconditionally; an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated or his order." A promissory note differs from a mere acknowledgment of a debt without any promise to pay, as when the debtor gives his creditor an I.O.U. In its form it usually contains a promise to pay at a time therein expressed, a sum of money to a certain person therein named or to his order, for value received. It is dated and signed by the maker. He who makes this promise is called the maker, and he to whom it is made is the payee. A writing in the form of a note payable to the maker's order, becomes a note by endorsement. A note payable to the maker's order, and endorsed by him in blank, is, in legal effect, a note payable to bearer and is transferable by delivery. Judge Bouvier has further defined it. "Although a promissory note in its original shape bears no resemblance to a bill of exchange, yet when endorsed it is exactly similar to one; for then it is an order by the endorser of the note upon the maker to pay the endorsee. The endorser is as it were the drawer; the maker the acceptor; and the endorsee the payee."

By these authorities it is established that a promissory note is as authentic and valid as any other negotiable instrument. It may be given for the payment of debt upon endorsement by the payee; it represents cash to the value shown on its face. Judge Bouvier has stated that "there are two qualities essential to the validity of a note: first, contingency; second, it is required that it be for the payment of money only."

An instrument, to be negotiable, must contain an unconditional promise or order to pay a sum certain in money without contingency. Thus it is essential to the negotiability of an instrument that the promise be to pay absolutely and not contingently, and generally, and not out of a particular fund. No contract or agreement is a promissory note, either negotiable or non-negotiable, which does not provide for payment absolutely and unconditionally. If payment depends on a contingency which may never happen, it is not a promissory note. But where a check was payable on condition, it was held that the check was a non-negotiable instrument which could be paid when the condition was fulfilled.

An order must be more than an authorization or request, but the unqualified word "pay" constitutes an order, and the prefixing of words of courtesy, such as "please pay," does not qualify as an order.

The written promise to pay, necessary to constitute a promissory note, need not be expressed in any particular form of words. It is enough if, from the language used on the face of the instrument, a written undertaking to pay may be fairly inferred. Any form of expression, though not in direct terms, is sufficient if from it there can be deduced an undertaking to pay the sum specified.

> "Bills and promissory notes compared. Bills of exchange and promissory notes are much alike, and perform nearly the same office in commercial transactions. Promissory notes after endorsement partake of the character of bills of exchange, the endorser being likened to the drawer, and the maker to the acceptor of a bill. Promissory notes, like bills of exchange, enjoy the privilege, conceded to no other unsealed instruments, of being presumed to be founded on a valid and valuable consideration." 7 AM. JUR., *Bills and Notes,* § 12 (1937).

With these definitions to support the position we have taken in this case, we hold that no matter what were the

actual arrangements the note stands for itself, and normally the amount shown on its face would be collectable as a debt. In fact, under ordinary circumstances the payee could endorse it and make it payable to his creditor, and if it were dishonored it would have almost the same effect as issuing a worthless check.

According to the circumstances as appear in the record of this case, and in keeping with the law cited, we are of the opinion that the judgment of the trial court should be affirmed, but only as to the actual amount of the money loaned, $15,000.00, plus interest at 6% per annum from the date of the promissory note, which is to be paid to the appellee in satisfaction of the judgment which should have been rendered. We have taken this position because to do otherwise would violate our General Business Law.

> "When there is no express agreement as to the rate of interest to be charged in the case of open accounts, promissory notes, bills of exchange, other negotiable paper, or other debts or obligations, the creditor shall be allowed six per cent per year and no more." 1956 Code 15:500.

We have come to this decision in spite of the fact that the appellant made no effort to deny the averments of the complaint, or to offer testimony in explanation of the promissory note and/or the circumstances under which it was executed. The judgment of the trial court is, therefore, being modified, but not because of any effort on the appellant's part.

In view of the circumstances, it is our opinion that interest on $15,000.00 at 6% per annum from December, 1972, on, in addition to the $15,000.00 actually borrowed by the appellant, which amounts to $17,250.00, be the judgment to be enforced. And it so ordered.

Affirmed as modified.