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Hawaiian Equipment Company, Limited v. The Eimco Corporation : Petition for Rehearing

Utah Supreme Court

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**In the Supreme Court
of the State of Utah**

HAWAIIAN EQUIPMENT COM-
PANY,

Respondent,

vs.

THE EIMCO CORPORATION, a
corporation,

Appellant.

Case No.
7188

PETITION FOR REHEARING

FILED

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In the Supreme Court of the State of Utah

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THE EIMCO CORPORATION, a
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PETITION FOR REHEARING

Comes now the appellant and respectfully petitions the court to set aside its judgment in the above entitled cause and to grant a rehearing herein upon the following grounds:

1. That the court has misconceived the nature of this action and has decided the case upon a theory not pleaded or relied upon by the plaintiff; and that in adopting said theory the court holds that there has been a compliance with the statute of frauds when it affirma-

tively appears, without dispute, that as to the cause of action pleaded in the complaint there has been no compliance with said statute.

2. Conceding that a party may be permitted to recover upon a theory not pleaded or relied upon, the court nevertheless erred in permitting an oral issue of fact involving such theory to be resolved by the jury when the statute of frauds demands that such issue involving an essential term of the contract should have been foreclosed by the written memorandum.

3. The court has not only impaired the effectiveness of the statute of frauds (Section 81-1-4) but this decision if adhered to, will utterly destroy it as a rule of evidence in this State.

WILLIS W. RITTER
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CERTIFICATE

We, the undersigned attorneys for appellant, do hereby certify that in our opinion there is good reason to believe the judgment rendered herein is erroneous and that the cause ought to be re-examined.

WILLIS W. RITTER
JESSE R. S. BUDGE

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ARGUMENT

This court, as a basis for its later decision, quotes from *Restatement of the Law, Contracts*, Sec. 207, to the effect that the memorandum required by the statute of frauds must state with reasonable certainty:

“The land, goods or other subject matter to which the contract relates, the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made,”

followed by the comment of the compilers of that volume that:

The degree of particularity with which the terms of the contract * * * must be set out cannot be reduced to an exact formula. There must be reasonable certainty and there must be accuracy, but the possibility need not be excluded that some other subject matter * * * will also fall within the words of the writing.”

The court then identifies one of the particular issues presented on the appeal, to-wit, the sufficiency of the memorandum signed by the party to be charged. It concludes that because of the familiarity of the parties with the merchandise involved in the transaction, they understood to what the words “reference hammers” related and that parol evidence was admissible to apply the memorandum to the subject matter. The court then holds the memorandum to be sufficient.

We now come to those statements in the opinion which we feel constitute a false basis for the court’s conclusion. Says his Honor, Judge Latimer:

“The principle that the goods must be identified and the other terms and conditions set forth with reasonable certainty must be considered in connection with the knowledge and relationship of the parties and trade usages to determine whether the contents of the memorandum sufficiently conveyed to the parties involved an identity of the

subject matter and a reasonable certainty of the other terms and conditions. * * * The parties represented business interests which were familiar with the articles being sold and understood the meaning to be given the words 'hammers' and 'scalers'. The use of the abbreviated phrase 'reference hammers' presupposed some prior discussion with reference to hammers. While the use of abbreviated phrases may render the writing unintelligible to an uninstructed person, the phrase may still have meaning when viewed in the light of circumstances surrounding the sending of the cablegram. When this court scrutinizes the language of the cablegram it gives the words used the meaning ascribed to them by merchants who are familiar with their usage and have occasion to deal with them in the commercial world. If by giving the words such meaning the subject matter is intelligently identified and the terms and conditions are fairly disclosed then parol evidence is admissible for a limited purpose. While this type of evidence is not competent to contradict or vary the terms of a memorandum to show what is intended, the situation of the parties and the surrounding circumstances at the time the contract was made may be shown by such proof to apply the memorandum to the subject matter. The cablegram is not so lacking in details as to amount to a nullity and when it is interpreted in the light of the surrounding facts and circumstances any deficiencies are supplied and the instrument then becomes certain in all its terms. The conditions are not changed or modified; they are explained and the explanation makes it possible to determine from the cablegram what appellant was offering to purchase. The cablegram, even though not a

model of clarity, was sufficient to fully disclose the essential terms of the offer and parol evidence was admissible for the purpose of applying the terms of the cablegram to the sale of the hammers.”

Well, if it is sufficient, there is no memorandum—and this is our firm conviction—there is no memorandum in any case where parties, both of whom are especially familiar with the merchandise which is the subject of the contract, which cannot be supplemented by sufficient parol evidence in order to make it enforceable notwithstanding the statute of frauds. The parties may have been thoroughly familiar with the words or language used in the business to which their transaction related; they may even have agreed on all the terms of a contract so that they understood one another perfectly, but that is not sufficient. The terms of their understanding and *all* the essential terms must be reduced to writing and signed by the party to be charged. In the cablegram, which, in this case, must constitute the “memorandum” required by the statute, there is no statement whatever:

- (a) of quantities, kinds or makes of hammers; or
- (b) of what is meant by “will take all,” whether all plaintiff had in stock, or all it would acquire, or all it might elect to sell.

Of course we argued this point in our brief, but we again suggest it because we cannot believe that this court wishes to nullify the statute by saying, in effect, that the knowledge of the parties concerning the sub-

ject matter of the contract justifies reading into the memorandum a specific description of the property supplied by parol, in order to make the memorandum comply with the statute. The court says that

“The cablegram is not so lacking in details as to amount to a nullity.”

What details does it give? It merely says “Reference hammers bid maximum twenty-four dollars each scalers 17.50 each Honolulu will take all.” If the court will please refer to paragraph 3 of the complaint, it will observe that the respondent alleges an “*agreement in writing*” for the sale of equipment by *quantity and description* and that it particularly specifies the *models and makes and numbers of each model and make* of both scaling and chipping hammers which it claims were the subject matter of the contract. The contract as it is alleged, is the contract upon which respondent relied and which it attempted to prove. If there was such a contract it embraced, of course, a specification of all these different models and makes of hammers and the numbers of each model and make; and with the omission of all these details of the contract, the court, nevertheless, states that it was not so lacking in details that parol evidence was not permissible to add all these details to the contract in order to make it enforceable under the statute of frauds.

For our present purpose, we may concede that there was “prior discussion” and that the parties understood the character of merchandise which was the subject of their negotiations. We may concede that they discussed

the source from which the merchandise was to be obtained. We may even concede that they specified the numbers of hammers (although the evidence does not show that the numbers talked about corresponded with the allegations in the complaint) but, with all these concessions, even though they might establish the fact that a contract was made, it nevertheless was not an *enforceable* contract. The statute of frauds does not say that persons may not exercise the right to contract by dealings in parol or by dealings partly in parol and partly in writing, but it does declare that a contract to sell goods of the value of \$500.00 or upwards *shall not be enforceable* by action “unless * * * some note or memorandum in writing of the contract of sale is signed by the party to be charged or his agent in that behalf.”

Let us suppose, by way of example, that two livestock men enter into negotiations for the sale and purchase of cattle and after they had discussed the matter over the telephone, the buyer should telegraph:

“Reference livestock. Will take all. Steers
Seventy-Five Dollars Heifers Sixty-Five Dollars
Calves Twenty-Five Dollars.”

Would such a memorandum be sufficient to sustain a complaint wherein it is alleged:

“1. That plaintiff and defendant entered into an agreement in writing as follows: That on or about the day of..... the defendant offered and agreed to purchase from plaintiff, and on or about the day of the plaintiff ac-

cepted said offer and agreed to sell to the defendant certain cattle designated as steers, heifers and calves for the price and upon the terms and conditions hereinafter alleged.

“2. That the quantity and description of said livestock which defendant agreed to purchase from the plaintiff, as aforesaid, are as follows:

<i>Steers</i>	<i>Heifers</i>	<i>Calves</i>
50 Durham	25 Jersey	60 Herefords
60 Hereford	40 Holstein	90 Guernsey
80 Poled Angus	30 Guernsey	75 Durham

Would such a state of facts differ, in principle, from the facts in the case? Would the supposed memorandum comply with the statute of frauds? Based on such a memorandum, could the seller recover for 50 Durham steers, 40 Holstein heifers, etc.? Could he show by parol the numbers of each class and kind which were the subject of the contract? Would the case not fall squarely within the rule announced in *Ellis v. Denver & Rio Grand Railroad*, (Colo.) 43 Pac. 457, where the court said:

“All agree that the terms of the bargain must be so stated as to render it possible therefrom to gather what the parties have agreed to. Tested by this very general rule which is sufficient for our purpose, a simple inspection of the memorandum will demonstrate its insufficiency. We are unadvised by its terms *what number of ties of the various descriptions were agreed to be delivered by the contracting party.*” (Italics ours)

Will the court please again read this case and Wiliston on Contracts Rev. Ed. Vol. II, p. 578, and other authorities cited at pages 11 to 20 of our brief, and see, also *Burley etc. Co. v. Onken Brothers*, (Wyo.) 183 Pac. 747.

We most respectfully contend that this court's statement that "the cablegram, even though not a model of clarity, was sufficient to fully disclose the essential terms of the offer and parol evidence was admissible for the purpose of applying the terms of the cablegram to the sale of the hammers," is erroneous and this court ought not to permit such a construction of the statute to stand. Can the document in this case be so supplemented by parol as to establish a contract for the sale of the particular equipment specified in the complaint? Is it sufficient to say, and we make this remark with all due respect to the court, that

"Although the goods were merely described as 'hammers' and 'scalars' each party in effect concedes that these terms of the cablegram were understood by them to refer to 'chipping hammers' and 'scaling hammers'".

As we have heretofore remarked, suppose it was so understood by both parties, was it also understood that there were 418 model K-1 Ingersoll-Rand Company scaling hammers, 1250 model FC Chicago Pneumatic Tool Company scaling hammers, 140 model MM Independent Pneumatic Tool Company scaling hammers, etc., and also 708 model No. 2 Master Pneumatic Tool Company chipping hammers and 188 model 2 Chicago Pneu-

matic Tool Company chipping hammers? And even if we should assume that the words "chipping hammers" and "scaling hammers" were meant by the parties to include these various models and makes specified in the complaint, we are, after all, here concerned with whether there is before the court an enforceable contract under the statute, not with what the parties understood. The only contract proved, if respondent proved a contract, is made up of the memorandum and of the parol evidence specifying the particular descriptions of the particular equipment according to model, make and number of each. Did not such parol evidence add terms to the written memorandum in order to make out *all* the terms of the contract which should have been set forth in the memorandum alone?

But this court goes further. To quote:

"The point on which the parties divide is the uncertainty concerning the make, model and number of each kind of hammers involved in the contemplated purchase. Although the testimony on behalf of the parties on the question of the makes involved in the government offering is in direct conflict, *the jury resolved the evidence in favor of respondent and found the tools substantially as represented. The sale being by lot rather than by individual description, the evidence concerning identification was sufficient to remove any uncertainty about the make or model.*" (Italics ours)

Of course our contention is that the court should never have permitted the jury to "resolve the evidence in favor of the respondent" because no enforceable contract for

the sale of any hammers had been proved. That was the reason for appellant's request for a directed verdict. Furthermore, how can the court say that the sale was "by lot rather than by individual description" in face of the allegations of the complaint which specifically set forth a contract for the sale of certain goods by a particular description as to kind, model, make and the number of each? And this contract, as they alleged it, respondent was, of course, bound to prove. This court would not, of course, intentionally make a misstatement and it cannot wish to permit such a misstatement to operate as the basis for upholding as sufficient, evidence by parol of a bulk or lot sale contract when no such contract was pleaded or relied upon. Respondent must stand or fall on the contract he pleads and which it contends is enforceable because all necessary terms are embraced within the "memorandum signed by the party to be charged." It cannot claim a valid sale by lot. That is not what it alleged the contract to be. It is this court that advances that theory. If a party should attempt to change his theory on appeal, this court would not permit it to do so. *Crame v. Judge*, 30 Utah 50, 83 Pac. 566. According to the opinion, the court has changed the theory for respondent, and, upon the assumption that the sale was "by lot," holds the evidence of identification to be sufficient when, as before stated, the plaintiff itself specifically describes the particular items and kind of equipment it declares appellant agreed to buy. This court holds in effect that it was proper to permit the jury "to resolve this evidence" (that is, the oral evi-

dence) "in favor of respondent" and thus establish with sufficient certainty the models and makes of the equipment so as to give rise to a contract for sale "*by lot*." If the jury can resolve disputes between the parties as to the identity of the goods, that is, as to "the makes involved" or as to any other essential term of a contract, of what use is the statute of frauds? Such an issue was submitted to the jury at early common law, but it was to put a stop to the temptation to perjury involved in trying out such an issue by oral evidence that this ancient statute was passed. Its purpose was, and is, to put a stop to one party claiming orally what goods were sold by lot or by description and other party claiming orally the opposite. That the statute is salutary is evidenced by the fact that in all English speaking countries, it has been adopted. We most respectfully point out that the very fact that an issue of fact relating to an essential term in the bargain exists, *is of itself sufficient proof that the statute has not been complied with*. Whether the goods were sold "as is" or "by lot" or "by description" should be settled and determined by the writing itself as an essential term of the contract. It was for this reason, among others, that we urged upon the court below that the respondent cannot recover as a matter of law, since this, a controlling issue in the case, should have been settled and determined by the cablegrams—the offer and the acceptance—and because these writings are entirely silent on this issue, that deficiency cannot be supplied by making an oral disputed issue of fact out of it to be disposed of by the jury. For the trial court to

overrule our motion and submit the issue to the jury, would have been regular in all respects but for the statute, which makes any contract, all essential terms of which are not embodied in a memorandum in writing signed by the party to be charged, unenforceable.

We really feel that should a similar case hereafter come before this court, there would not be an adherence to the doctrine here announced, to-wit, that a plaintiff may declare, on a written contract of sale and purchase of *specific goods by specific description* and without any written memorandum containing any specification of such goods either by kind, make, model, quantity or type, may recover on such alleged contract because both parties, being familiar with the particular property, knew what was intended and that parol evidence may be resorted to supply each and all of the deficiencies in the terms of the contract. It really makes no difference how much information the parties possessed, or that each knew what the other intended, or whether they in fact made a contract, the question here is did they make an *enforceable contract*?

Then on the question as to whether the acceptance of the offer was or was not conditional. The court, in effect, says that because appellant knew that the property, whatever it was, was to be obtained from government surplus, that fact should be read into the memorandum to make it read:

“Reference hammers such as the government has in its surplus stock, bid maximum twenty-

four dollars each scalers 17.50 each, Honolulu
Will take all."

or

"Reference hammers, bid maximum twenty-four dollars each scalers 17.50 each Honolulu
Will take all of which you can secure delivery
from government surplus."

If such had been the offer (memorandum) then, disregarding for this discussion, the defect as to description of the property, the reply to respondent "subject to delivery from surplus" would have been an acceptance in the terms of the offer, but when it is necessary to add to the memorandum by parol such terms of the offer as that the property intended comprised a certain number of certain models and makes of different kinds of hammers to be delivered to or obtained by respondent from a government stock pile, it results that two-thirds of the terms of the contract rest in parol.

We feel that this court has misconceived the character of this action and has given a latitude of construction to the statute of frauds and its application as to render that statute meaningless and useless permitting "surrounding circumstances" to outweigh the statute's plain requirements.

We most respectfully urge that a re-hearing should be granted.

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