

1979

International Harvester Credit Corporation v. Pioneer Tractor & Implement, Inc., Wayne A. Schoenfeld and Dora C. Schoenfeld : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

INTERNATIONAL HARVESTER CREDIT :
CORPORATION, :

Plaintiff-Respondent, :

vs. :

Case No. -1622

PIONEER TRACTOR & IMPLEMENT, :
INC., WAYNE A. SCHOENFELD :
and DORA C. SCHOENFELD, :

Defendants-Appellants. :

BRIEF OF RESPONDENT

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IN THE SUPREME COURT
OF THE STATE OF UTAH

INTERNATIONAL HARVESTER CREDIT :
CORPORATION, :

Plaintiff-Respondent, :

vs. :

Case No. 16250

PIONEER TRACTOR & IMPLEMENT, :
INC., WAYNE A. SCHOENFELD :
and DORA C. SCHOENFELD, :

Defendants-Appellants. :

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

INTERNATIONAL HARVESTER CREDIT :
CORPORATION, :

Plaintiff-Respondent, :

vs. :

Case No. 16250

PIONEER TRACTOR & IMPLEMENT, :
INC., WAYNE A. SCHOENFELD :
and DORA C. SCHOENFELD, :

Defendants-Appellants. :

BRIEF OF RESPONDENT

NATURE OF THE CASE

This action was filed by International Harvester Credit Corporation to recover amounts due from Pioneer Tractor and Implement, Inc., a former International Harvester dealer, and from the two owners of the business who personally guaranteed the obligations of the corporate defendant to the Plaintiff.

DISPOSITION IN THE LOWER COURT

The matter was tried to the Court, the Honorable J. Robert Bullock, District Judge presiding. At the conclusion of the trial the Court asked the parties to submit memoranda summarizing their respective positions and

dealing with certain issues which had arisen during the course of the trial. Thereafter the Court prepared a Decision and entered Findings of Fact, Conclusions of Law and a Judgment which are generally favorable to the position of the Plaintiff. A motion to amend or, in the alternative, for a new trial was filed, considered and denied and, in due course, a notice of appeal was filed.

RELIEF SOUGHT ON APPEAL

The Respondent seeks affirmance of the Judgment entered by the Trial Court.

STATEMENT OF FACTS

The Statement of Facts contained in the Appellants' brief is confusing and somewhat misleading and thus the Respondent feels an obligation to state the facts as it finds them.

On December 1, 1975, an Agreement (Exhibit 1) was entered into between International Harvester Company (hereinafter "IHC") and Pioneer Tractor and Implement, Inc. (hereinafter "Pioneer") establishing Pioneer as an International Harvester Farm Equipment Dealer. In connection with the establishment of the dealership, additional agreements were entered into providing for various kinds of financing by International Harvester Credit Corporation

(Exhibits 2 and 3) and for a personal guarantee of the obligations of the corporate dealer by Wayne A. Schoenfeld and Dora C. Schoenfeld (Exhibits 4 and 5).

International Harvester Credit Corporation (hereinafter "IHCC") offered and Pioneer made use of several different kinds of financing assistance, including:

1. Floor plan financing for new and used vehicles.

Pioneer was required to sign wholesale notes covering the separate pieces of equipment and each month it received a Wholesale Note and Inventory Statement summarizing the status of the various notes (R. 180, 181). Notes covering specific pieces of equipment became due when the items were "resold, leased or placed in use" (Exhibit 1, §11).

2. Open account financing on routine transactions with IHC. Parts purchases, interest charges, freight costs, warranty credits and other such transactions between IHC and Pioneer were handled through an open account (R. 181, 182, 212, 213). Once a month the balance in the open account was purchased by IHCC from IHC and Pioneer was then given until the 15th of the following month to pay the open account

balance (R. 182, 183).

3. Purchasing of retail contracts on sales made by Pioneer. "Exhibit E", which is part of Exhibit 2, sets forth the agreement of the parties with respect to such purchases and provides for the establishment of a reserve account to be held by IHCC during the period that retail contracts are being financed.

Pioneer operated for a fairly short time as an International Harvester dealer. Early in August of 1976 representatives of IHC were notified verbally (R. 257) and in writing (Exhibit 6) of the intention of the dealer to resign. The Dealer Sales and Service Agreement (Exhibit 1) contains very specific provisions (§29) dealing with the termination of a dealer and the outlined procedures were thereafter followed by IHC and IHCC in disposing of the parts and farm equipment inventory of Pioneer. Representatives of Pioneer were consulted and kept informed as the parts and equipment were being processed (R. 204, 259-262).

Credits generated by the sale of the parts and equipment inventory to other dealers and, where this was not possible, back to IHC, were applied to the various obligations of Pioneer to IHCC (R. 211) and this action was initiated to recover the remaining balance.

Delbert L. Homestead, the District Operations Manager for IHCC, testified in detail with respect to the procedure followed after the resignation of Pioneer as an International Harvester dealer. In accordance with Rule 70(1) (f) of the Utah Rules of Evidence, he was also permitted to summarize the numerous bookkeeping entries and accounts and testify as to the amount owing by the Appellants to IHCC (R. 212-214), including interest (R. 216, 217). The Judgment entered by the Court (R. 19) is consistent with the testimony of Mr. Homestead.

There was conflicting evidence during the course of the trial with respect to certain charges to the Pioneer account which were included in the amount claimed by IHCC. After hearing the testimony of the witnesses and considering the arguments and memoranda submitted by the parties, the Trial Court found that the charges to the account were proper and justified under the circumstances (R. 24).

The Appellants filed a Counterclaim against IHCC and a Third Party Claim against IHC contending that they were misled in connection with the opening of the dealership and the subsequent ordering of inventory. The Trial Court concluded that the Appellants had failed to meet their burden of proving actionable misconduct on the part of IHCC or IHC (R. 26) and dismissed the Counterclaim and Third Party Claim (R. 20).

ARGUMENT

POINT I

NO ERROR WAS COMMITTED IN PERMITTING
THE RESPONDENT'S WITNESS TO SUMMARIZE THE
VOLUMINOUS ACCOUNTS AND OTHER RECORDS
AND STATE HIS CONCLUSION WITH RESPECT
TO THE AMOUNTS OWING BY THE APPELLANTS

As indicated in the Statement of Facts, Delbert L. Homestead, the Respondent's District Operations Manager, was permitted to summarize numerous bookkeeping entries and accounts and testify as to the amount owing by the Appellants (R. 212-214). The Appellants have contended in Point I of their brief that the Court abused its discretion in allowing this testimony.

In considering this issue some background information may be helpful. This action was filed in October of 1977 (R. 144). In November of 1977 the Respondent answered the first set of interrogatories (R. 134) with information on the handling of the parts inventory following the termination of the dealership. Answer No. 1 indicated that complete records with respect to the parts return were available at the office of the Respondent's counsel and that they would be made available for examination or copying at any convenient time.

In December of 1977 a Request for Production of Documents (R. 131) was served by the Appellants. All of

the documents which had been gathered by the Respondent in support of its claim were made available to the Appellants in response to the Request for Production (R. 126). Thereafter the depositions of Noel R. Critchfield, Delbert L. Homestead and Steven E. Parker were taken (R. 63) and they were examined with respect to the documents that had been produced. No further request for production was served and no motion for relief was made pursuant to Rule 37 of the Utah Rules of Civil Procedure, alleging a failure to produce available documents.

At the time of the trial all of the documents which formed the basis for Mr. Homestead's conclusions (most of which had been previously copied by the Appellants) were present in the courtroom and were located upon the counsel table (R. 288, 292-297). And, Appellant Wayne Schoenfeld acknowledged in his testimony that prior to the initiation of the litigation Mr. Homestead had made the Respondent's records available to him and that he had gone through them (R. 321).

These facts clearly distinguish the instant case from the situation in Gull Laboratories, Inc. v. Louis A. Roser Company, 589 P.2d 756 (Utah, 1978) which is cited by the Appellants. There it was held that the trial court had improperly admitted a summary since the original records from which the summary had been taken had not been made

available to the opposing parties and the court. In the Gull Laboratories case this Court quoted the following language from Sprague v. Boyles Bros. Drilling Co., 4 Utah 2d 344, 294 P.2d 689 (1956):

"It has been held, and we believe the ruling to be a salutary and expedient one, that where original book entries, documents or other data are so numerous, complex or cumbersome that they cannot be conveniently examined by the fact trier, or where it would materially aid the court and the parties in analyzing such material, that a competent person who has made such examination may present such evidence. This is subject to the limitation that the evidence must be shown to be developed from records, books, or documents, the competency of which has been established, the records must be available for examination by the opposing parties, and the witnesses subject to cross-examination concerning such evidence. [Emphasis added.]"

The question of when and under what circumstances a summary of numerous documents can be received in evidence was settled when this Court adopted the Utah Rules of Evidence in 1971. Rule 70(1)(b) makes an exception to the best evidence rule,

". . . when the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

Rule 70(2) provides that,

"If evidence is to be admitted as provided in Paragraph (1)(b), the original shall be made available to the opponent for examination or copying, or both, at a reasonable time and place; and the judge may order that the originals be produced in court."

This sensible and necessary exception to the best evidence rule has long been recognized. In Wigmore on Evidence Vol. 14, §1230 (1972 Ed.), Professor Wigmore points out that where the fact to be determined depends upon a large volume of documents, it is practically out of the question to have all of the documents go into evidence and to have to prove every item therein.

"The convenience of trials demands that other evidence be allowed to be offered in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper."

In Jones on Evidence, Vol. 2, §7:30 (1972) is the following:

"Another exception to the best evidence rule, based upon necessity, arises when the primary source of proof consists of numerous documents which cannot be conveniently examined in court and the fact to be proved can only be ascertained by an examination of the whole collection. It is well established that in such a case a summary or the general result of the examination may be given in evidence by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation."

Utah cases recognizing this exception to the best evidence rule go back as far as State v. Olsen, 75 Utah 583,

287 Pac. 181 (1930), and include the cases of Nalder v. Kellogg Sales Company 6 Utah 2d 367, 314 P.2d 350 (1957) and Shupe v. Menlowe, 18 Utah 2d 130, 417 P.2d 246 (1966) which are cited by the Appellants. Statutory recognition of the exception is found in Utah Code Annotated 78-25-16(5) (1953), which permits evidence of the contents of a writing other than the writing itself to be received,

"When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

Permitting Mr. Homestead to summarize the voluminous accounting records in this case and testify as to the amount owing by the Appellants as reflected therein was completely justifiable under the circumstances:

1. Mr. Homestead was a responsible representative of the Respondent (District Operations Manager, R. 177) and he was thoroughly familiar with the records involved (R. 180-182, 292, 293).
2. The records were kept in the regular course of business and the originals of all of the monthly statements, invoices and other book-keeping entries had been furnished to Pioneer at the time that they were prepared (R. 295-300).

3. As documented above, the complete records on which Mr. Homestead's testimony was based had been made available to the Appellants on various occasions and they were available in court for use in cross-examination. As a matter of fact, counsel for the Appellants used some of the documents in connection with his cross-examination (R. 292-297).
4. The amounts testified to by Mr. Homestead were capable of being ascertained by calculation and consisted of the balance of the obligation after deducting all proper credits and certain questionable items (R. 211-214).

POINT II

THE AMOUNT OWING TO THE RESPONDENT BASED UPON FLOORING NOTES WAS PART OF THE TOTAL BALANCE REFLECTED IN THE VOLUMINOUS RECORDS INVOLVED IN THE CASE AND THE SUMMARY THEREOF BY RESPONDENT'S WITNESS WAS PROPERLY RECEIVED IN EVIDENCE

At the time that Pioneer resigned as an IHC dealer, it had approximately \$400,000 worth of farm equipment inventory which was covered by floor plan financing provided by IHCC (R. 472). Separate pieces of equipment were covered by separate wholesale notes and the status of all of the notes was summarized in a monthly statement sent by IHCC to the dealer (R. 180, 181).

Following the resignation of Pioneer, the farm equipment in the inventory was either sold to other IHC dealers (R. 205) or was resold to IHC (R. 207). Pioneer's account was credited with the freight charges that had been imposed when Pioneer purchased the equipment (R. 206) and the amount that Pioneer had paid for the equipment, less, in some cases, an agreed 3% handling charge (R. 207).

The credits were applied to (1) a check from Pioneer in the amount of \$3,877.27 which would not clear the bank; (2) \$40,918.29 owing on equipment which had been sold but not paid for; and (3) to the notes covering the specific items which were either sold to other dealers or resold to IHC (R. 211, 212). After applying all of the credits the balance owing on the Wholesale Note and Inventory Statement was \$4,311.81 (R. 212). This amount did not necessarily relate to specific notes, it was merely a net balance owing after applying all available credits to the total flooring obligation (R. 212).

The summary of the transactions and the testimony of Mr. Homestead on the resulting balance clearly qualifies under the exception to the best evidence rule which is discussed in POINT I, above. The Appellants have contended in POINT II of their brief that the specific notes on which the \$4,311.81 balance was based should have been placed in

evidence. However, the notes were numerous and the transactions through which they were cancelled were rather complicated. In view of the volume of documents involved the Court properly and prudently permitted Mr. Homestead to summarize the transactions and state the net result.

Inasmuch as both POINTS I and II of the Appellants' Brief attack decisions made by the Trial Court in admitting evidence, it is worth reiterating that trial courts have been held to be entitled to ". . . some reasonable latitude of discretion" in rulings on the admission or the exclusion of evidence (In Re Baxter's Estate, 16 Utah 2d 284, 399 P.2d 442 (1965)). Reversal is appropriate only if a clear abuse of discretion is shown (Martin v. Safeway Stores, 565 P.2d 1139 (Utah, 1977)).

POINT III

THE EVIDENCE SUPPORTS THE DECISION OF THE TRIAL COURT WITH RESPECT TO CERTAIN DISPUTED CHARGES RELATED TO RETAIL CONTRACTS PURCHASED BY THE RESPONDENT FROM PIONEER

During the period of the business relationship between the Respondent and Pioneer, various problems arose in connection with retail contracts which had been purchased by the Respondent. Charges to Pioneer's account as a result of these problems were the subject of a good deal of conflicting testimony during the course of the trial. The Trial Court, after hearing the witness and considering

the documentary evidence, resolved the questions with respect to the disputed charges in favor of the Respondent. Inasmuch as the Trial Court had a chance to hear the witnesses and observe their demeanor first hand, the finding in favor of the Respondent should not be disturbed unless it is clearly contrary to the weight of the evidence (Wilcox v. Cloward, 88 Utah 503, 56 P.2d 1 (1936)).

The purchase of retail contracts was one of the financing services offered to International Harvester dealers by the Respondent (R. 183). Contracts covering used equipment were purchased on a full recourse basis (R. 184) and contracts covering new equipment were purchased on a limited recourse basis, with a reserve account being utilized to absorb losses up to a certain limit in connection with repossessions (R. 183-185).

"Exhibit E", which is a part of Exhibit 2, sets forth in detail the conditions under which retail contracts were purchased by the Respondent from Pioneer. The Appellant have taken some portions of this agreement out of context and have used them in contending that the procedure followed by the Respondent in handling losses experienced in connection with retail contracts was not proper. As a matter of fact, when viewed in context, the agreement is clear and consistent and the handling of the retail contracts

losses by the Respondent was in accordance with its terms.

In view of the Appellants' attempt to focus the Court's attention on isolated portions of the agreement in question and to find ambiguities where none exist, several fundamental rules of interpreting contracts are worth mentioning:

1. The intention of the parties is not to be determined from detached portions of the agreement. The intention should be ascertained by reading the agreement as a whole.

(Cornwall v. Willow Creek Country Club,
13 Utah 2d 160, 369 P.2d 928 (1962) and
Thomas J. Peck and Sons, Inc. v. Lee Rock
Products, Inc. 30 Utah 2d 187, 616 P.2d 446
(1973)).

2. The concept of construing language in a contract most strongly against the party who used it is the last rule of construction to be resorted to and is only to be relied on where other rules of construction fail.

(Simpson on Contracts §67, pp. 252, 253 (1954)).
In the case of Maw v. Noble, 10 Utah 2d 440,
354 P.2d 121 (1960), the Court stated:

"We are in agreement with the well-
recognized rule urged by the defendants

that where there is uncertainty or ambiguity the contract should be strictly construed against him who draws it. But it is to be kept in mind that this rule applies only where there is some genuine lack of certainty, and not to strained or merely fanciful or wishful interpretations that may be indulged in. The primary and a more fundamental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty it must be given effect."

With these principles in mind it is appropriate to review the pertinent provisions of the contract covering retail financing arrangements ("Exhibit E" to Exhibit 2):

Paragraph A.1. - IHCC agrees to purchase retail contracts covering new and used equipment.

Paragraph B.2. - The dealer warrants that contracts sold to IHCC will be free from defenses, offsets or counterclaims and that the goods covered thereby have been delivered.

Paragraph B.3. - The dealer agrees to repurchase any contract with respect to which a warranty has been breached.

Paragraph B.5. - The dealer consents, among other things, to compromises made by IHCC with retail customers.

Paragraph B.7. - Contracts covering used equipment are purchased on a full recourse basis.

Paragraph C.8.(a) - A reserve account is established and is funded by depositing therein a percentage of the applicable finance charge collected at the time that the contract is purchased. Gains realized on the resale of repossessed goods are also credited to the account. Losses experienced by IHCC on retail contracts are to be charged to the account. While the first sentence of Paragraph C.8.(a)(iv) does not mention repossessions, the other two sentences make it clear that the losses to be charged are those relating to "repossessed goods".

Paragraph C.8.(b) - With respect to contracts purchased on a limited recourse basis, the amount charged to the reserve account or which must be paid by the dealer is limited to \$1,000.

The appellants have contended in POINT III of their Brief that all losses experienced by IHCC on retail contracts should have been charged to the reserve account and limited in amount to \$1,000. However, a consideration

of the whole agreement in context, discloses that:

1. Contracts covering used equipment were purchased on a fully guaranteed basis.
2. The responsibility to charge the reserve account and the limitation on liability relate only to repossessions involving contracts on new equipment which were purchased on a limited recourse basis.

Mr. Homestead explained this in his testimony (R. 184, 185) and the provisions of the contract fully support his testimony.

With that analysis of the agreement in mind, it is appropriate to examine the disputed charges relating to retail contracts to determine whether they were properly handled.

1. Myron Jones. Mr. Jones purchased an International tractor and traded in a Steiger tractor with the understanding that an existing obligation covering the Steiger tractor would be paid by Pioneer and that he would be relieved of his liability thereon (R. 188, 189, 244). Pioneer failed to pay off the lien on the Steiger tractor and eventually Mr. Jones rescinded the transaction by returning the International tractor and taking his Steiger tractor back (R. 189, 190). As a result of the rescission,

the Pioneer open account was charged with a \$2,500 retail delivery allowance that had been credited to it when the unit was sold to Mr. Jones and \$1,006.86 in interest lost as a result of the rescission of the retail contract (R. 190). These amounts were reduced by a \$1,790 credit, representing money received from Mr. Jones as compensation for the use of the tractor (R. 189). The net charge to the Pioneer account as a result of the rescission was \$1,716.86.

There was no obligation to charge this obligation to the Pioneer reserve account or to limit the charge to \$1,000. The rescission arose out of a defense had by the customer, contrary to the dealer's warranty that no such defenses existed, and the charge did not relate to a repossession.

2. Duane Taylor. Mr. Taylor purchased a tractor from Pioneer and the contract covering the unit was purchased by IHCC. When IHCC tried to get Mr. Taylor to make payments on the contract he contended that the true balance owing was considerably less than the amount shown on the contract (R. 191). In support of this contention Mr. Taylor supplied a different contract that he claimed was the one that he had signed and a check reflecting a \$2,000 payment which the contract did not show (R. 192). Mr. Schoenfeld attempted to straighten the matter out but he was not successful in

doing so (R. 192). After a period of time IHCC concluded that the circumstances justified entering into a compromise settlement with Mr. Taylor (R. 192, 193). Mr. Schoenfeld was advised of the intention of IHCC to compromise the matter (R. 193) and, when he failed to object, IHCC agreed to reduce Mr. Taylor's balance by \$2,832.46 (R. 193) and charged that amount to Pioneer's open account (R. 194).

Charging the amount involved to the open account was correct because the adjustment was the result of a defense asserted by the customer and the retail financing agreement gave IHCC the right to enter into compromises. No repossession occurred and so the reserve account was not involved.

3. William Branch. The Appellants do not contend in their Brief that the handling of the Branch transaction was improper. They only claim that the evidence did not support the charge. However, the matter was fully explained by Mr. Homestead (R. 194-196, 225, 226, 243). And, even though Mr. Schoenfeld took issue with some of the other charges, he presented no testimony at all on the Branch transaction. Thus, the testimony of Mr. Homestead was not disputed and it stands as the only evidence in the record on this matter.

4. Garth Sweeten and Sam Kogianes. In both of these cases the retail customers claimed the right to receive something in addition to what they had received at the time that they signed the contracts which were sold by Pioneer to IHCC. Mr. Sweeten had not received a hitch (R. 196, 197) and Mr. Kogianes had been promised a wider grain platform (R. 197). In the case of the Kogianes problem Mr. Schoenfeld helped to remedy the problem (R. 199), and small charges were made to the Pioneer open account (\$599.03 in the case of the hitch and \$431.63, representing the cost of installing the new grain platform).

Here again it is apparent that the amounts involved were properly charged to the open account. One of the warranties made by the dealer in the retail financing agreement was that the goods covered by assigned contracts had been delivered. And, since no repossession occurred, there was no basis for charging the amounts involved to the dealer's reserve account.

In short, all of the disputed charges relating to retail contracts were supported by the evidence and the procedure followed was consistent with the detailed provisions of the retail financing agreement.

POINT IV

THE 3% HANDLING CHARGE WHICH WAS IMPOSED
IN CONNECTION WITH THE REPURCHASE OF FARM
EQUIPMENT BY INTERNATIONAL HARVESTER
WAS PROVIDED FOR BY CONTRACT AND WAS REASONABLE

Following the resignation of Pioneer as an International Harvester dealer, representatives of both IHC and IHCC travelled to Spanish Fork to assist in processing Pioneer's inventory of farm equipment and parts. As much as possible of the equipment was sold directly to other IHC dealers (R. 262, 263). No handling charge was deducted in connection with these sales and Pioneer's account was credited for the full amount that had been charged to it in connection with the purchase of the equipment, plus the freight charges that had been imposed (R. 263, 264).

Equipment which could not be sold to other dealers was repurchased by IHC. On these purchases Pioneer's account was again credited with the full cost of the equipment plus freight charges paid, less a 3% "handling charge" (R. 264, 265).

In their Answer to the Respondent's Amended Complaint, the Appellants asserted the following affirmative defense:

"The contract or contracts sued upon herein provide for penalties which should not be enforced by this court, and which bear no reasonable relationship to the out-of-pocket expenses incurred by the plaintiff or plaintiff's assignor." (R. 120).

At the time of the trial and in POINTS IV and V of their brief, the Appellants contended that the 3% handling charge imposed in connection with the repurchase of equipment by IHC was an unconscionable and an unenforceable penalty. In response to this contention the Respondent submits that, (1) the handling charge in question was specifically agreed to between the parties at the time that the dealership commenced; (2) actual costs incurred in connection with the repurchase far exceeded the modest handling charge; and (3) the evidence presented to show the actual out-of-pocket costs was competent and was properly received.

The Dealer Sales and Service Agreement (Exhibit 1) which was entered into between the parties clearly spells out the procedure to be followed in connection with the termination of a dealership. Section 29 of the Agreement provides as follows:

"Upon termination of the agreement, the Company agrees to repurchase, and the Dealer agrees to resell and deliver F.O.B. the Company's District Office, or other F.O.B. point agreed upon between the parties, all new, current, unused and salable tractors and machines, of the most current code announced by the Company, and equipment and attachments, on hand in the Dealer's place of business that have been delivered to the Dealer under this and prior agreements. The prices to be paid by the Company shall be the dealer prices at which they have been charged to the Dealer (but not more than the Company's current dealer prices) less all discounts allowed and less a handling charge of 3 per cent. In

addition, the Company will make an allowance to the Dealer for freight on such goods based on the carload freight rates in effect on the date of termination from the factories where the goods were produced to the Dealer's town or the District Office, whichever is less."

This provision of the Agreement was adhered to in every respect. The farm equipment was transported to the IHC depot in Clearfield, Utah (R. 264) and full credit was given to the dealer for the cost of the equipment plus the freight charges paid by the dealer in connection with its purchase of the equipment (R. 264, 265). The only deduction was the disputed 3% handling charge.

Noel R. Critchfield, the area manager for IHC, supervised the repurchase of the equipment. He testified that approximately \$306,000 worth of inventory was repurchased by IHC from Pioneer pursuant to the Dealer Sales and Service Agreement (R. 264). Applying the 3% handling charge to the inventory which was repurchased resulted in total handling charges of approximately \$9,180. Anticipating the argument that these charges constituted an unenforceable penalty, the Respondent presented evidence showing some of the actual expenses incurred by IHC in connection with the repurchase of the equipment, including:

\$2,000.00 - Itemized out-of-pocket expenses of
IHC employees involved in handling

the return of the equipment,
including transportation, food and
lodging (R. 267, 235, 236).

\$13,800.00- Cost to IHC of providing new credit
terms to dealers purchasing the
equipment. An interest free period
of at least six months is provided
to dealers and the cost to IHC
would be not less than \$13,800.00
(R. 270-273).

\$2,300.00 - Service fee incurred by IHC in
connection with the resale of the
equipment pursuant to regular whole-
sale flooring arrangements (R. 273-
274).

\$18,100.00- TOTAL

In addition, there was testimony that substantial
additional costs were incurred, including long distance
telephone charges (R. 268, 269) and the wages of the people
involved (R. 236, 237). Plaintiff's evidence clearly
showed that the actual costs involved in connection with
the repurchase of the inventory far exceeded the handling
charge in question.

The costs listed above were incurred by IHC,

the party repurchasing the equipment and imposing the handling charge. The terms of the repurchase were settled by the Agreement (Exhibit 1) between Pioneer and IHC. The only concern of Respondent IHCC with this process was to see that it occurred and that funds were generated thereby to apply to the substantial amount owing to it by Pioneer. The net amount resulting from the repurchase by IHC was applied to the Pioneer account.

Since the disputed handling charge was imposed by IHC and the Appellants have not taken issue on appeal with the dismissal of their Third-Party Complaint against IHC, the issue really has no place in this appeal which involves only the claim of IHCC.

Nevertheless, a brief additional discussion of several additional points may be in order. First, the Appellants have argued that the evidentiary support for the costs incurred by IHC was inadequate. The primary witness presenting testimony on the matter was Noel R. Critchfield. Mr. Critchfield is the area manager for IHC (R. 256) and, as such, he supervised and had direct responsibility for the repurchase and the eventual resale of the equipment which was purchased from Pioneer, and the costs connected therewith. No other person had more direct, first hand knowledge of these facts than Mr. Critchfield. Rule 19 of the Utah

Rules of Evidence provides as follows:

"As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required."

Second, the actual costs shown by the evidence are sufficient in amount as to eliminate any argument that the handling charge constituted a penalty. The pertinent cases only require that the out-of-pocket costs bear some reasonable relationship to the amount of the agreed charge:

- (1) Perkins v. Spencer, 112 Utah 468, 243 P.2d 446 (1952) - the contractual charge will not be enforced where it is "unconscionable and exorbitant . . . bearing no relationship to the actual damages suffered."
- (2) Johnson v. Carman, 572 P.2d 371 (Utah, 1977) - enforcement denied where the liquidated damages are " . . . grossly excessive and disproportionate to any possible loss."

The undisputed evidence in this case clearly demonstrated that IHC incurred costs far in excess of the handling charge imposed in connection with the repurchase of equipment from the Pioneer inventory. Even if the Appellants' dispute was with IHC, they would have no basis for com-

plaining about the small handling charge. The Respondent, IHCC, did not impose the charge in question and the question of whether it was justified has no place in an appeal of its judgment.

POINT V

THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION IN REFUSING TO PERMIT
A BELATED AMENDMENT OF THE PLEADINGS,
PARTICULARLY SINCE THE EVIDENCE RELATING
TO THE NEW THEORY WAS UNCLEAR AND UNCONVINCING

In POINT VI of their Brief, the Appellants contend that the Trial Court should have permitted an amendment of the pleadings to conform to the evidence. Specifically, the Appellants contend that Exhibit No. 25 was shown during the trial to have been accepted by the parties as a valid agreement reflecting the liability of the Appellants to the Respondent. This contention is completely lacking in merit for a number of reasons.

First, before an amendment to conform to the evidence is proper under Rule 15(b) of the Utah Rules of Civil Procedure, the issue not raised by the pleadings must have been, " . . . tried by express or implied consent of the parties . . . " When the Appellants made their motion to amend at the close of the trial (R. 551), counsel for the Respondent stated as follows:

"Mr. Pugsley: I'd strenuously object, your Honor, I think that's a whole new theory of the case. It comes as a complete news to us that they intended to assert such a theory. I think it's absolutely improper to bring it in at this point." (R. 552)

Thus, there clearly was no consent to including the affirmative defense of "novation" as an issue in the case. Rule 8(c) of the Utah Rules of Civil Procedure specifically requires that such affirmative defenses be pleaded. Where they are not and where, as here, the opposing party does not consent to the trial of the issue or to the amendment and asserts both surprise and prejudice in meeting the new issue, it is proper for the Trial Court to deny the motion to amend.

In the case of National Farmers Union Property and Casualty Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249 (1955), the Court upheld a ruling denying a party the right to rely on an issue not raised in the pleadings where there was no consent to try the issue. In doing so the Court stated that,

"Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it."

This language has been cited and relied upon by the Court on various occasions since the date of the National Farmers Union case (see e.g. Buehner Block Co. v. Glezos, 6 Utah 2d 226, 310 P.2d 517 (1957)).

In one of the most recent decisions on the issue of a proposed amendment to conform to the evidence, Meyer v. Deluke, 123 Utah 2d 74, 457 P.2d 966 (1969), the Court upheld a ruling of the trial court denying a motion to amend on the ground that the defendants had known the facts at the time that they filed their answer but had failed to assert the affirmative defense. Under those facts the trial court was held to have discretion in denying the motion to amend and its decision to do so was upheld.

In the instant case it was particularly appropriate for the motion to amend to be denied since the evidence with respect to the exhibit in question was confusing and conflicting and the exhibit does not on its face reflect a new agreement or a waiver of anything.

In their brief the Appellants contend that Exhibit 25 constitutes a novation and a waiver of the 3% handling charge. There was no evidence that it represented any such thing. Defendant Wayne Schoenfeld testified that Exhibit 25 was prepared during a meeting with representatives of the IHC and IHCC and that the result

of the calculations was an agreed obligation to the Respondent of approximately \$44,000 (R. 506, 507). This is substantially more than the Respondent is claiming. The second large page of Exhibit 25 was, according to Mr. Schoenfeld, prepared and executed for the purpose of securing the \$44,000 obligation which was agreed upon (R. 507). It is remarkable that the Appellants contend that a document reflecting a \$44,000 obligation (more than the Respondent's Judgment) was a novation, or a new contractual obligation which was substituted for an old one. There was no testimony with respect to payments thereon or a reduction of the obligation and, if Exhibit 25 was in fact a novation, the only alternative for the Trial Court would have been to have entered judgment in favor of the Respondent in the amount of \$44,000.

The testimony of Mr. Homestead on cross-examination with respect to the meeting with Mr. Schoenfeld or another one shortly thereafter was that the parties could not agree on the amount owing and that Mr. Schoenfeld disagreed with a number of the items that the Respondent was claiming. (R. 219, 220).

Thus, the record with respect to Exhibit 25 was not clear. If it did represent a novation, the agreed obligation was well in excess of the amount claimed by the

Respondent in this suit. Under these circumstances, and particularly in view of the Respondent's strong objection to the proposed amendment to conform to the evidence, the Trial Court was clearly justified in refusing to permit the Appellants to rely on a new and novel theory which they had not pled and which the evidence did not support.

POINT VI

THE TRIAL COURT WAS CORRECT IN
INCLUDING AS PART OF THE JUDGMENT
ENTERED HEREIN INTEREST IN THE
AMOUNT OF \$5,291.09

The Trial Court found (R. 23) that interest on the principal amount of the claim in the amount of \$5,291.09 was supported by the evidence and the agreements entered into between the parties, and included this amount as part of the Judgment (R. 20).

The Respondent's claim to interest was based upon the provisions of the Schedule of Discounts and Terms which is a part of Exhibit 1. Page 4 of the Schedule includes the following language:

"Interest owed on floor plan obligations will be assessed and due monthly. Before and after-maturity rates for the ensuing month will be determined in relation to the prime rate in effect at four of seven specified New York City banks on the third Monday of the current month. The before-maturity rate will be one and one-half (1 1/2) percent and the after-maturity rate will be three and one-half (3 1/2) percent

over the prime rate. The minimum rates established by the Company are eight (8) percent before maturity and ten (10) percent after maturity. If the interest rates determined as set forth herein exceed rates permitted by law, then the highest rates permitted by law shall apply.

The after-maturity rate determined by the preceding paragraph shall apply for calculating interest due on open-account obligations not paid at maturity."

The Respondent's principal witness, Delbert L. Homestead, testified with respect to the calculation of interest based upon the language of the Agreement. His testimony (R. 216, 217) was that the interest had been calculated on the basis of 3 1/2% over the prime rate, that the dealer had been advised monthly of the interest rate that applied for that month and that, applying the applicable interest rates for the period in question to the principal amount of the obligation of the Appellants, interest in the amount of \$5,291.09 was due. Appellants' counsel failed to cross-examine with respect to this testimony and no evidence was offered tending to call into question the way that the interest was calculated or the amount of the interest due.

It is remarkable that the Appellants contend that the interest rate to be applied to the open account obligation was not specified. The language of the Agreement which is quoted above specifically applies the interest rate

used by Mr. Homestead to " . . . open-account obligations not paid at maturity."

In view of the fact that the written agreement between the parties expressly provides for interest and the interest calculation of the only witness who testified with respect to the matter was made in specific compliance with the contractual provision, there is simply no basis for the Appellants to complain about this part of the Judgment. The dates when the obligations became due on the flooring financing and the open account were covered by the testimony of Mr. Homestead (R. 181, 182).

Having established the dates when the obligations became due, the rate of interest agreed to between the parties and the principal amount to which the interest applied, the calculation of the amount of interest due was a simple matter and, as indicated above, the testimony of Mr. Homestead thereon was neither challenged through cross-examination nor called into question by any contrary evidence. The interest could be and it was calculated with certainty and it thus satisfied the cases cited by the Appellants, including Fell v. Union Pacific Railway Co., 32 Utah 101, 88 Pac. 1003 (1907), Anderson v. State Farm Fire and Casualty Co., 583 P.2d 101 (Utah, 1978) and Uintah Pipeline Corporation v. White Superior Company, 546 P.2d 885 (Utah, 1976).

In view of the Appellants' attempt to avoid the payment of interest which was specifically agreed to by contract, the following language from the case of Farnsworth v. Jensen, 117 Utah 494, 217 P.2d 571 (1950) seems appropriate for consideration:

"Conventional interest in the ordinary acceptance of the term is such interest as the parties to a contract have agreed upon as part of their contract, and is as much an integral part of the debt as the principal itself; and while it forms an element in computing the amount of recovery, it does so in the way that a provision of the contract limiting liability, or any other contractual provision as to the amount involved in the contract, does".

POINT VII

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN STRIKING THE APPELLANTS' DEMAND FOR JURY TRIAL AND IN PROCEEDING TO HEAR AND DECIDE THE MATTER WITHOUT A JURY

POINT VIII of the Appellants' Brief contends at the start that it was error for the Trial Court to deny them a trial by jury. In the discussion of the matter, however, the Appellants concede that the case had "equitable aspects" and that " . . . a jury could have acted in an advisory capacity . . . "

The Appellants filed a Request for Jury Trial on May 24, 1978 (R. 106). On June 19, 1978 the Respondent filed a Motion to Strike (R. 94) and a Memorandum in Support

(R. 95). Contrary to Rule 2.8(b) of the Rules of Practice in the District Courts, the Appellants failed to file answering points and authorities and, on August 21, 1978, the Motion was granted (R. 65).

Rule 38(a) of the Utah Rules of Civil Procedure provides that,

"The right of trial by jury as declared by the Constitution or as given by statute shall be preserved to the parties."

Thus, the right to a jury trial must be predicated upon a constitutional provision or a statute. Article I Section 10 of the Constitution of Utah provides as follows:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury, in civil cases, shall be waived unless demanded."

While this provision recognizes that there are civil actions in which a jury may be demanded, it does not by its terms guarantee a jury trial, as a matter of right, in civil actions. That right remains "inviolate" only in "capital cases". Therefore, the right to a jury trial in civil cases is neither an absolute matter of right nor is it conferred by the Constitution. Since the language of the Utah jury trial provision does not specifically require a

right to jury trial, the requirement should not be created by implication. See, Degnan, Right to Civil Trial in Utah: Constitution and Statute, 8 Utah L. Rev. 97, 121-22 (1962).

The other basis for a jury trial provided for in Rule 38(a) is "by statute". Utah Code Annotated §78-21-1 (1953) provides:

"In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered. [Emphasis added.]

By its terms, the statute is permissive rather than mandatory because it states that certain types of action "may be tried by a jury" and not that they must be as a matter of right.

Under the pertinent decisions of this Court, the matter of whether a jury trial is appropriate depends on the nature of the primary issues involved in the case. The clearest statement of the fundamental rule in Utah is as follows:

"If the issues are legal or the major issue legal, either party is entitled upon proper demand to a jury trial; but, if the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity apply."

Norback v. Board of Directors of Church Extension Soc., 84 Utah 514, 37 P.2d 339 (1934). The court reaffirmed this rule in Holland v. Wilson, 8 Utah 2d 11, 327 P.2d 250 (1958).

The issues in the instant case are such that the defendants were not entitled to a jury trial. The action was initiated for the purpose of recovering a deficiency following an agreed procedure which in essence was a foreclosure. The Utah Supreme Court has stated that actions for

"the foreclosure of mortgages . . . were historically and traditionally equitable . . . "

Petty v. Clark, 102 Utah 186, 129 P.2d 568, 572 (1942).

In that same case, the court said:

"The cases in Utah are definite. They explicitly hold that in a foreclosure suit on a note and a mortgage the issue of indebtedness is not triable by a jury as a matter of right." Id. at 574.

In Consolidated Wagon & Machine Co. v. Kay, 81 Utah 595, 21 P.2d 836 (1933), a case which is markedly similar to the instant suit, the court held:

"Under statutes such as we have and as generally obtain in other jurisdictions, a necessary part or basis of a mortgage is a debt or other obligation to secure the payment or performance of which the mortgage is given. When the debt or obligation is denied, proof thereof is essential to the right of foreclosure,

and, if the debt or other obligation falls, the mortgage falls. Here the mortgage was given to secure the payment of what then remained due and unpaid on the contract of purchase of the machinery, amounting to \$1,183. By the complaint it is alleged that thereafter there was paid on the indebtedness \$243, leaving a balance due and unpaid in the sum of \$963. That balance so remaining due and unpaid was denied. It also is denied that the mortgage was given for a good consideration, and it was alleged that it was given without consideration. All that related to the right of foreclosure itself. Though the pleaded affirmative defenses in character were legal, yet they no more prevented or relieved the court from determining the whole issue than if the defendant had pleaded payment or non est factum. Because as to the pleaded defenses the burden of proof was cast on the defendants, again no more relieved the court from the duty and responsibility of determining the whole issue than if a plea of payment or of confession and avoidance had been interposed. We therefore are of the opinion that no error was committed in the court's ruling dismissing the jury and in determining the whole issue presented by the pleadings." [Emphasis added.]

Despite the fact that the Consolidated Wagon case preceded the passage of the Uniform Commercial Code in Utah, it is still applicable. While the present suit is based upon a security agreement, the term "security agreement" is nothing more than a new term under the Uniform Commercial Code to cover a variety of older interests, the chattel mortgage being among them. (See, Utah Code Annotated 70A-9-102 (2) (1953)).

Finally, in State Bank of Lehi v. Woolsey, 565 P.2d 413 (Utah, 1977) the court held that "the trial court did not err in ruling defendants were not entitled to a jury trial . . . " in an action to foreclose a security interest in both real and personal property. The court once again noted that the action was equitable.

It was clearly within the discretion of the Trial Court to deny the Appellants' request for a jury trial (Sweeney v. Happy Valley, Inc., 18 Utah 2d 113, 417 P.2d 126 (1966)). Both the Respondent's claim and the Appellants' defenses were essentially equitable in character and, under those circumstances, the Court's decision to hear and decide the case without the aid of a jury was justified and should be upheld.

CONCLUSION

This rather complicated case was presented to the Trial Court over a period of several days. Extensive testimony and numerous exhibits were presented in evidence. The Trial Court had the benefit of memoranda from both sides covering a number of legal and factual issues. The record on appeal does not contain and the Appellants' Brief fails to point out any legally sufficient basis for overturning any of the findings and conclusions made by the Trial Court or for granting a new trial.

The decision which was entered was supported by the evidence and the law and the Judgment should be affirmed.

Respectfully submitted,


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Corporation

CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the foregoing Brief of Plaintiff-Respondent were delivered to John L. McCoy, Ten West Broadway Building, Suite 430, Salt Lake City, Utah 84101, this 25th day of May, 1979.

Philip C. Bigelow