

1953

Hardinge Company, Inc. v. The Eimco Corporation : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Fabian, Clendenin; Moffat & Mabey; Peter W. Billings; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *Hardinge Co. v. Eimco Corp.*, No. 8000 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1986

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

✓

IN THE SUPREME COURT
of the
STATE OF UTAH

HARDINGE COMPANY, INCOR-
PORATED,

Respondent,

vs.

THE EIMCO CORPORATION,

Appellant.

Case No.
8000

FILED IN

AUG 11 1955

FABIAN, CLENDENIN, MOFFAT
& MABEY,

PETER W. BILLINGS,

Clerk, Supreme Court

Attorneys for Appellant.

INDEX

	<i>Page</i>
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS	5
ARGUMENT	5
I. HARDINGE'S RIGHTS, IF ANY, ARE NOT FOUNDED ON A CONTRACT IN WRITING.....	5
II. THE ONLY RELIEF TO WHICH HARDINGE MAY BE ENTITLED UNDER QUASI-CON- TRACT PRINCIPLES IS BARRED BY THE STATUTE OF LIMITATIONS.	12
CONCLUSION	15

INDEX OF AUTHORITIES

CASES

Bracklein v. Realty Insurance Company, 95 Utah 490, 80 Pac. 2d 471, at 476	7
Brown v. Cleverly, 93 Utah 54, 70 Pac. 2d 881.....	9
Jeremy Fuel and Grain Co. v. Denver & Rio Grande Western Railroad Company, 60 Utah 153, 207 Pac. 155.....	14
G. S. Johnson Co. v. N. Sauer Milling Company, 148 Kan. 861, 84 Pac. 2d 934.....	12
Johnson v. Igleheart Brothers, 95 Fed. 2d 4 (C.A. 7).....	12
Leather Manufacturers Bank v. Merchant's National Bank, 128 U.S. 26, 32 Law Ed. 1888.....	13
Petty and Riddle, Inc. v. Lunt, 104 Utah 130, 138 Pac. 2d 648..	10
U. S. v. Butler, 297 U. S. 1.....	11
United States v. Kansas Flour Mills Corporation, 314 U.S. 212, 86 Law Ed. 159.....	12
United States v. Standard Rice Company, 323 U. S. 106, 89 Law Ed. 104	11
Weight v. Bailey, 45 Utah 584, 147 Pac. 899	14

STATUTES

104-12-25, Utah Code Annotated 1943.....	14
104-12-26 (3), Utah Code Annotated 1943.....	14

IN THE SUPREME COURT of the STATE OF UTAH

HARDINGE COMPANY, INCOR-
PORATED,

Respondent,

vs.

THE EIMCO CORPORATION,

Appellant.

Case No.
8000

STATEMENT OF FACTS

This is an appeal from a judgment entered in favor of Hardinge after a pre-trial conference at which the pertinent facts were all stipulated or covered by documents and statements filed with respective motions for summary judgment filed by each of the parties, requests for admissions and answers thereto, interrogatories and answers thereto. Appellant Eimco Corporation's principal defense is the statute of limitations, and the question raised on this appeal is whether the obligation of Eimco to Hardinge, if any, is founded on an instrument in writing within the meaning of Section 78-12-23, Utah Code Annotated, 1953, or is subject to the four or three-

year limitations provided by Section 78-12-25 and 78-12-26 (3), Utah Code Annotated.

In March, 1945, Hardinge and Eimco entered into a contract in writing (R. 20-23), for the supply by Eimco to Hardinge of certain "Utaloy" steel liner plates for shipment to the U. S. S. R. under lend lease provisions. The original purchase order issued by Hardinge provided,

"PRICE: \$10.40 per cwt. f.o.b. York, Penna."
(R. 20).

On April 19, 1945, Hardinge issued its alteration No. B to the purchase order (R. 25) which provided, among other things,

"This alteration order also corrects the price to \$9.40 per cwt. f.o.b. York, Pennsylvania, instead of \$10.40 per cwt. as originally specified. The \$10.40 per cwt. as shown on the order was a typographical error. The price of \$9.40 per cwt. is in accordance with our agreement with Mr. David E. Morganstern, Service Engineer."

This reduction in price was accepted by Eimco (R. 47) but with some protest and subsequent claim that the reduction was obtained by false representations, all of which has colored the controversy which gave rise to this action (R. 76). On July 9, 1945, Hardinge issued its alteration No. E to the purchase order (R. 29) which provided,

"Ship via frieght collect on Govt. Bill of Lading, to: U. S. Treasury Dept., Procurement Division, c/o Commanding Officer, Marietta Holding

and Reconsignment Pt., Marietta, Pennsylvania.
Route via DRGW — MOPAC — PRR.”

The Utaloy steel liner plates called for by the contract were manufactured by Eimco and shipped collect on a Government bill of lading to the commanding officer at the Marietta Holding and Reconsignment Point, all as provided on alteration order E. Shipments were made on July 16, 21 and 25, 1945. Shipments constituted four hundred sixty-one thousand eight hundred ninety-three (461,893) pounds for a total contract price of Forty-Three Thousand Four Hundred Seventeen and 94/100 Dollars (\$43,417.94), which was invoiced by Eimco to Hardinge on July 25, 1945, (R. 48) and paid by Hardinge on August 6, 1945 (R. 18). Sometime between that date and September 17, 1945, Hardinge discovered that the United States Government had charged back to Hardinge the freight on the shipment (R. 49), and that no change had been made in the contract provision of \$9.40 per cwt. to allow for the **change** in the f.o.b. points. On September 17, 1945, **an** invoice for freight was sent to Eimco by Hardinge (R. 50) and on October 17, 1945, a second request for payment of that invoice was made. There then ensued a series of correspondence between Harding and Eimco with regard to the matter and finally this action was commenced on September 26, 1949, by service of Summons (R. 4).

The freight bill submitted by the government to Hardinge was actually paid by Hardinge on December 26, 1945 (R. 60, 61), and there is a dispute as to the

correct amount to be charged back to Eimco if this action is not barred by the statute of limitations and the Court should find that there is some obligation on the part of Eimco to pay freight. Eimco contends that its obligation, if any, is only on the weight actually shipped and billed by it, to-wit: 461,893 pounds, at the rate at which freight was charged back by the United States, while Hardings claims it is entitled to the freight rate of \$1.43 per cwt. from Salt Lake to Pennsylvania, multiplied by the number of pounds at which the Government charged back the freight. The trial court allowed the amount actually charged back by the Government, but a different weight.

Although the trial court made findings of fact and conclusions of law after the hearing at the pre-trial conference (R. 87 and 90), it is not clear on what basis the court did determine Eimco's liability. It is apparently on the theory that the written contract, purchase order No. 37898, (R. 20-29), as amended by the various alteration orders, required Eimco to pay the freight from Salt Lake to Pennsylvania, although judgment entered for Hardinge was based on the amount of freight actually charged back by the United States to Hardinge (R. 88, R. 60).

Eimco has also counterclaimed for amounts due it on other contracts subsequent to the one in issue, and the amount of the judgment awarded Hardinge is subject to the amounts due on those contracts. No issue is raised by either party on this appeal as to the rulings of

the trial courts on the amounts due on the counterclaim.

The controlling question before this court is whether the right of the purchaser to have an adjustment in the contract price of \$9.40 per cwt. to compensate for a change in the contract as to payment of freight and the method and routing of shipment, when nothing is said in the contract on the subject, is founded on a contract in writing or is a right in quasi-contract based on mistake or unjust enrichment. It is appellant's contention here that it is the latter.

STATEMENT OF POINTS

I. HARDINGE'S RIGHTS, IF ANY, ARE NOT FOUNDED ON A CONTRACT IN WRITING.

II. THE ONLY RELIEF TO WHICH HARDINGE MAY BE ENTITLED UNDER QUASI-CONTRACT PRINCIPLES IS BARRED BY THE STATUTE OF LIMITATIONS.

III. THE AMOUNT OF CREDIT FOR FREIGHT ALLOWED BY THE TRIAL COURT WAS IN ERROR.

ARGUMENT

I. HARDINGE'S RIGHTS, IF ANY, ARE NOT FOUNDED ON A CONTRACT IN WRITING.

The contract, as finally performed after several written modifications, provided for a price of \$9.40 cwt. shipped freight collect on government bill of lading to the Marietta Holding and Reconsignment Point via the Denver and Rio Grande Western Railroad, the Missouri Pacific Railroad, and the Pennsylvania Railroad. There is nothing said about Eimco paying or absorbing the

freight or about an adjustment of the price to allow for the change in the arrangements as to the freight or the change in the method of shipment and the ultimate destination. In short, the written contract between Hardinge and Eimco at the date of shipment provided that the government would pay the freight to Marietta, Pennsylvania, that Eimco was to ship the castings via the Denver and Rio Grande, the Missouri Pacific and the Pennsylvania Railroads to that point and that Hardinge was to pay Eimco \$9.40 per cwt. This contract was performed to the letter. What Hardinge is now seeking by this action is not damages for breach of that contract but equitable relief to change the contract to insert something the parties themselves neglected to state therein.

For Hardinge to be entitled to any refund from Eimco founded on the written contract between the parties there must be something in the written contract so providing. The change in the contract giving rise to the controversy between the parties, did more than change the provision as to freight. It changed the ultimate destination from York to Marietta. It specified the routing of the shipment and switched the risk of loss in transit. Under the original contract, "f.o.b. York," meant that Eimco's price of \$10.40 included freight to that destination, but how much freight was absorbed in that composite price is not apparent from the contract. Under the original contract Eimco could route the shipment in any way and by such carriers as it chose in order

to save whatever shipping cost it could by such routing. Under the change it had to ship via the railroads specified. Confined to the four corners of a written document how is a court to make allowance for these changes in adjusting the price for the parties when they neglected to do so? As stated by this court in

Bracklein vs. Realty Insurance Company, 95 Utah 490, 80 Pac. 2d 471, at 476:

“A cause of action is not founded on a written instrument merely because it is indirectly connected with the instrument. And the fact that a written instrument may be a link in the chain of evidence establishing the liability is not sufficient to say the cause of action is founded on such writing, nor is a parol acceptance of a written offer, alone, sufficient, to make an agreement in writing within the statute.”

Suppose, for example, change order E had read Portland, Maine instead of Marietta, Pennsylvania? Would not the parties have had to make some *express* agreement with respect to adjusting the price to reflect the increase in the freight due to the changed destination? Or suppose Eimco had a rate of \$1.25 per cwt. quoted by the Union Pacific-New York Central? Would not Eimco have had to absorb the loss when the change order specified Denver and Rio Grande—Missouri Pacific—Pennsylvania Railroad unless some *express* adjustment were made in the written contract?

It may be admitted that the change in the written contract to place the burden of freight payment on the

Government without a change in the price of \$9.40 per cwt. in this particular case gave Eimco a windfall, but until the written contract price is changed can Hardinge say that Eimco received more than the written contract provided?

Under the original contract the Government played no part. By change order E a Government bill of lading was interposed. A Government bill of lading is a contract between the carrier and the Government whereby the Government pays the freight. It is often employed by the Government to obtain for itself the benefits of land grant rates and/or special rates under Section 22 of the Interstate Commerce Act, not available to ordinary commercial shippers. Whether the Government would pass back to Hardinge the freight that the Government paid to the carrier would, of course, depend upon the terms of the contract between the Government and Hardinge. So far as the written contract between Hardinge and Eimco was concerned, after change order E was issued the Government was to pay the freight. Adjusting the change in the economic advantage of that assumption of a burden by the Government is something beyond the written contract between Hardinge and Eimco as it stood in 1945 and as it stands now. (Giving Hardinge relief in this action cannot be founded on that written contract but rests in the realm of fireside equity and restitution.

It is submitted that the case at bar is strikingly like the situation in

Brown vs. Cleverly, 93 Utah 54, 70 Pac. 2d 881. In that case the Plaintiff was purchaser of real estate under a written contract. The seller claimed default and repossessed the property. Later the buyer brought an action to recover the payments made on the contract and to assert an equitable lien on the property to secure said repayments. Defendant seller raised the defense of the statute of limitations and the issue before this court was whether the right of the buyer to recover the money under the contract was founded on a contract in writing. Speaking for a unanimous court, Justice Hanson said:

“The contract of purchase and sale involved in this action does not contain any express provision giving plaintiffs, as purchasers, a right to recover the purchase money paid by them in the event of the defendant’s failure or refusal to perform, nor does it give, by express provision a vendee’s lien for such payments We must consider first whether plaintiff’s right to recover the purchase money paid by them is founded upon the written contract although it contains no express provision covering such right. If founded upon such contract, then Section 104-2-22 R. S. 1933, fixing the limitation at 6 years would be applicable. We are of the opinion that plaintiffs’ right to recover the payments made by them rests, not upon the written contract, but upon an implied promise, created by law, of defendants to repay the purchase money paid if they should default in the performance of the contract. The action could not be based upon the written contract, for it contained no promise by defendants to return the purchase price. While it is true that the

payments were made under the written contract and the relations of the parties were to that extent affected by the writing, yet that instrument is not declared on in the action to recover the payments made as a basis of the right to recover. It is only an incident to the accrual of the right to recover. The basis for recovery rests upon the implied promise of defendants to return the purchase money which the law creates from their duty to return it upon failure by them to perform the contract and give plaintiffs what they contracted for. The action rests in implied assumpsit as for money had and received."

In

Petty and Riddle, Inc. vs. Lunt, 104 Utah 130, 138
Pac. 2d 648,

there was no express agreement to pay the bills of the corporation. The written contract merely provided,

"The balance to be divided equally after all bills payable are paid from the monies on hand." This court rejected a contention that the action to recover defendants' share of certain bills later discovered was founded on a contract in writing, stating,

"Nor would the action be one upon a contract, obligation or liability founded upon an instrument in writing under the provisions of Section 104-2-22 R.S.U. 1933, but would be governed by the provisions of Section 104-2-23 as 'not founded upon an instrument in writing.' The obligation, if any, to refund the money in this case did not arise from the written contract, but was imposed by law because of the circumstances under which it was paid. The Restatement of the Law of

Restitution covers this field of liability under the heading 'Mistake of Fact.' Section 20 thereof reads as follows:

'A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty, for the performance of a condition, or for the acceptance of an offer, is entitled to restitution of the excess.'"

The court then cited and quoted with approval from

Brown vs. Cleverly, Supra,

and from cases from a number of other jurisdictions and concluded that the action was barred by the statute of limitations on the grounds that an action to recover money paid or obtained through an honest mistake of fact or law is an action founded upon an implied contract or liability, not in writing.

Compare the situation in the case at bar with those cases arising out of the holding by the Supreme Court of the United States that the processing tax under the Agricultural Adjustment Act was unconstitutional. See

U. S. vs. Butler, 297 U. S. 1.

Where the tax was included in the composite price and no provision was made in the written contract for the reduction of the price in case of change in the tax, no recovery was allowed *on the contract*. See

United States vs. Standard Rice Co., 323 U. S. 106, 89 Law Ed. 104;

G. S. Johnson Co. vs. N. Sauer Milling Co., 148
Kan. 861, 84 Pac. 2d 934.

But revision of the price was allowed under the contract when specific contractual provision was made.

United States vs. Kansas Flour Mills Corporation,
314 U. S. 212, 86 Law Ed. 159.

Depending upon the equities of the situation, relief in some cases was allowed to buyers, not founded on the written contract of purchase and sale, but under quasi-contract principles.

Johnson vs. N. Sauer Milling Co., Supra;
Johnson vs. Igleheart Brothers, 95 Fed. 2d 4
(C. A. 7).

So in the case at bar there is no provision in the written contract for adjustment in the price to reflect the change in the method of shipment and the payment of freight and routing of the materials to Marietta. Whatever relief Hardinge may be entitled to must arise under principles of quasi-contract.

Petty and Riddle, Inc. vs. Lunt, Supra.

II. THE ONLY RELIEF TO WHICH HARDINGE MAY BE ENTITLED UNDER QUASI-CONTRACT PRINCIPLES IS BARRED BY THE STATUTE OF LIMITATIONS.

Assuming, arguendo, that Hardinge showed some facts upon which it might be entitled to relief on principles of restitution or implied contract, it is submitted the applicable Utah statute of limitations had run before

the action was instituted.

Hardinge has two theories available for seeking relief. One, on implied contract resulting from unjust enrichment,

Brown vs. Cleverly, Supra,

and the other for restitution of payment made by mistake,

Petty and Riddle, Inc. vs. Lunt, Supra.

Under the unjust enrichment theory the cause of action accrued when payment was made by Hardinge to Eimco on August 6, 1945.

Leather Manufacturer's Bank vs. Merchant's National Bank, 128 U. S. 26, 32 Law Ed. 1888.

In that case, speaking for the court, Justice Gray said,

“In the case at bar the plaintiffs right of action did not depend upon any express promise by the defendant after discovery of the mistake, or upon any demand by plaintiff upon defendant, but was to recover back the money, as paid without consideration and had and received by defendant to plaintiff's use. That right accrued at the date of payment and was barred by the statute of limitations.”

Under the mistake theory, which is the one apparently adopted by Hardinge, (see affidavits in the record, pages 49 to 70) the cause of action accrued,

“on behalf of the corporation when it discovered that there was an overpayment and demand for

restitution had been made.”

Petty and Riddle, Inc. vs. Lunt, Supra, 138 Pac.
2d 648, 652.

See also

Weight vs. Bailey, 45 Utah 584, 147 Pac. 899.

In the case at bar the alleged mistake was discovered by Mr. Eberhardt in the Accounting Department of Hardinge (R. 49), sometime between August 6, 1945 and September 17, 1945, and subsequently on September 17, 1945, a demand for payment of the freight (R. 50) was made. Summons was served on Eimco on September 26, 1949 (R. 4) and the Complaint filed on October 7, 1949 (R. 2), both dates more than four years after the dates of discovery and demand.

Accordingly, the claim is barred on either theory, as more than four years have elapsed between the accrual of the cause of action in 1945 and the commencement of this action in 1949.

Petty and Riddle, Inc. vs. Lunt, Supra;

Brown vs. Cleverly, Supra;

104-12-25, Utah Code Annotated 1943;

104-12-26 (3), Utah Code Annotated 1943;

*Jeremy Fuel and Grain Company vs. Denver &
Rio Grande Western Railroad Co.*, 60 Utah
153, 207 Pac. 155.

III. THE AMOUNT OF CREDIT FOR FREIGHT ALLOWED BY THE TRIAL COURT WAS IN ERROR.

Having held the action was founded on a contract in writing, the trial court proceeded to determine the amount to be charged Eimco for freight. Aside from the error in its ruling on the nature of the action and the statute of limitations applicable, it is submitted the trial court erred in fixing the amount of adjustment due Hardinge. The Government, in making its charge back to Hardinge, made allowance for the difference between shipping from Salt Lake City to York and Salt Lake City to Marietta (R. 60). This the Trial Court also allowed (R. 88-89), charging Eimco exactly what the Government had charged Hardinge, that is, \$6,233.12. It is submitted this amount is also erroneous as the \$6,233.12 charged by the Government is based on a weight of 466,900 pounds (R. 60). All Eimco shipped to Hardinge and all Eimco was paid by Hardinge was for 461,893 pounds at \$9.40 cwt. (R. 48, 64, 65). Applying the freight rate charged by the Government of 1.335 cwt. to the weight shipped and billed by Eimco to Hardinge gives only \$6,166.27, instead of \$6,233.12. If the action is not barred by the statute of limitations the lesser amount is all Hardinge is entitled to recover. See proposed Findings of Fact, Paragraph 9 (R. 84).

CONCLUSION

Based upon the foregoing it is submitted the decision of the Trial Court on the claims of Hardinge should be

reversed and judgment in favor of Eimco on its counter-claim entered.

Respectfully submitted,

FABIAN, CLENDENIN, MOFFAT
& MABEY,
PETER W. BILLINGS,
Attorneys for Appellant.