

1953

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

Utah Supreme Court

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Golden W. Robbins; Stock and Leader & Laurence T. Himes; Attorneys for Respondent;

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IN THE SUPREME COURT

of the

STATE OF UTAH

HARDINGE COMPANY, INCORPORATED,

Respondent,

vs.

THE EIMCO CORPORATION,

Appellant.

Case No.
8000

FILED

OCT 24 1953

RESPONDENT'S BRIEF

Clerk, Supreme Court, Utah

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INDEX

	Page
STATEMENT OF FACTS (PREFACE).....	1
PLEADINGS	3-4
DETAILED STATEMENT OF FACTS.....	4-13
STATEMENT OF POINTS.....	13
ARGUMENT	13
CONCLUSIONS	31

AUTHORITIES CITED

CASES

Bracklein vs. Realty Ins., 95 Utah 490, 80 P. 2d 471.....	17, 20, 21
Brown vs. Cleverley, 93 Utah 54, 70 P. 2d 881.....	23
Clark vs. Lund, 55 Utah 284, 184 P. 821.....	17, 27
Daly vs. Olds, 35 Utah 74, 99 P. 460.....	19
George H. Brick et al vs. Cohn-Hall-Marx Co., 114 A.L.R. 521, 276 N.Y. 259, 11 N.E. 2d 902.....	27
Gibson vs. Donnelly, 13 N.Y.S. 808.....	19
Jeremy Fuel and Grain Company vs. D. & R.G.W.R.R. Co., 60 Utah 153, 207 P. 155.....	29, 30
Lawrence Barker, Inc. vs. Briggs (Cal.) 248 P. 2d 897.....	21
Logan vs. Brown, 95 P. 441, 2 A.L.R. (N.S.) 298.....	21
Leather Manufacturers Bank vs. Merchant's National Bank, 128 U.S. 26, 32 Law Ed. 1888	29
McMillan vs. Whitley, 38 Utah 452, 113 P. 1026.....	17, 21
Moulton vs. Morgan, 202 P. 2d 723.....	27
O'Brien vs. King, 164 P. 631, 174 Cal. 769.....	17, 21
Petty and Riddle, Inc. vs. Lunt, 104 Utah 130, 138 P. 2d 648....	24
Taylor Bros. Co. vs. Duden, 188 P. 2d 995, 112 Utah 436....	17, 21
Thomas E. Jeremy Estate vs. Salt Lake City, 49 P. 2d 405, 87 Utah 370	17, 21
Victor Sewing Machine Co. vs. Crockwell, 3 Utah 152, 1 P. 470	17, 21

INDEX TO TEXT AND STATUTES

Utah Code Annotated 1943, Sec. 104-2-23.....	3, 27
Utah Code Annotated 1943, Sec. 104-2-24.....	27
Utah Code Annotated 1943, Sec. 104-2-29.....	28
Utah Code Annotated 1943, Sec. 104-2-30.....	3, 26, 29
Utah Code Annotated 1953, Sec. 78-12-25.....	27, 29
Utah Code Annotated 1953, Sec. 78-12-26.....	27
Utah Code Annotated 1953, Sec. 78-12-32	28
34 American Jurisprudence, Page 50, Par. 50.....	29

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RESPONDENT'S BRIEF

Respondent and its attorneys cannot agree with Appellant's statement of facts and makes this statement as they find them.

STATEMENT OF FACTS PREFACE

During the war on lend lease Hardinge Co. entered into a contract with the United States Government by the terms of which they agreed to furnish ball mills to Russia. Hardinge Co. made an arrangement to secure manganese liners for the ball mills. Eimco Corporation learned about the contract and, wanting to sell Utaloy Steel Liners, talked to the representatives of Russia and the United States Government, Treasury Department, who in turn contacted Hardinge Co. and requested they

change the ball mills so that the ball mills would have Utaloy Steel Liners instead of manganese. Hardinge Co. had no objections as long as it did not change the price.

Written offers were made by Eimco Corporation to Hardinge Co. in which they finally agreed to sell the liners to them at \$9.40 per hundredweight f.o.b. York, Pennsylvania, shipping instructions to be given later when information was received from the United States Government. Hardinge Co. accepted the offer. Thereafter Eimco delivered the steel liners and invoiced Hardinge Co. at \$9.40 per hundred weight f.o.b. York, Pennsylvania. Hardinge Co. paid the invoice. Eimco Corporation violated their contract by not paying the freight. The United States Government made demand upon Hardinge Co. to pay the freight under the terms of the contract between them. Hardinge Co. demanded that Eimco Corporation pay the freight. The United States Government deducted from Hardinge Co.'s invoice \$1,433.76 and Hardinge Co. sent a check to the United States Government for \$4,799.36 which paid the freight.

Eimco Corporation after demand did not pay the freight from Salt Lake City to York, Pennsylvania and because they did not pay it this action was brought. After the first order for liner plates other liner plates were ordered by Hardinge Co. and Eimco Corporation also failed to pay the freight on one of the shipments that was sent f.o.b. Hardinge Co. did not pay for the subsequent purchases because Eimco was indebted to them.

The Lower Court granted judgment for the amount of money which Hardinge Company had to pay to the United States Government (which is less than the freight rate from Salt Lake City, to York, Pennsylvania) and allowed a set off for the other liners sold by Eimco to Hardinge Co.

PLEADINGS

Plaintiff's Complaint is based on the written correspondence between Hardinge Co. and Eimco Co. constituting the contract, alleging that the defendant had shipped the liner plates but had violated the terms of the contract in that the defendant did not pay the freight, setting out that the steel liners weighed 461,893 pounds and that the freight rate from Salt Lake City to York, Pennsylvania is \$1.43 per hundred weight which amounted to \$6,605.07 and that the Hardinge Co. paid said freight to the United States Government (R. 1).

The Defendant answered setting up certain defences but only relies upon the fourth defence (R. 6) Statute of Limitations Section 104-2-30 or 104-2-23 Utah Code Annotated 1943.

The defendants filed an answer and counterclaim for \$2,664.58 for goods sold and delivered by Eimco to Hardinge between May 23, 1946 and April 23, 1948. Plaintiff replied and denied the allegations of the answer and counterclaim.

Certain interrogatories were asked and answered by both Plaintiff and Defendant.

That a motion was made by Eimco for a summary judgment (R. 15 to R. 37) asking for a dismissal and judgment for \$2,664.58 and interest for goods, wares and merchandise sold, and delivered.

That the Plaintiff filed a motion for summary judgment (R. 38 to R. 77 and 80 to 82) asking judgment for \$6,605.07 and interest less any credit justly due to the defendant.

That the matter was submitted at the pre-trial upon affidavits and exhibits made part of the plaintiff's and Defendant's motion for summary judgment. The plaintiff submitted Findings of Facts and Judgment which are not in the record but a copy of which is submitted to the clerk of this court to be made a part of the record, said Findings and Judgment being in appellant's designation of the record, objections to proposed findings were made and after a hearing new Findings of Facts and Conclusions and Judgment were made, submitted and signed (R. 87 to R. 90 and R. 91).

DETAILED STATEMENT OF FACTS

M. M. Kaiser, manager of the Eastern Division of Eimco Corporation with offices in New York wrote a letter to Hardinge stating:

"We have found, in our dealings with the men of the Soviet Government Purchasing Commission, that they are extremely interested in "UTALOY" Steel Liners for some of the larger mills that are being purchased and while they have expressed a preference that these liners be

included in their mills, we have been asked by the Treasury Department, Procurement Division to contact you directly offering a quotation on our liners for your consideration." (R. 43 paragraph 2, Trout's Affidavit R. 39, paragraph numbered 3.)

the rest of the letter deals with the advantage of Utaloy Steel Liners over manganese with the last paragraph stating:

"Further for your consideration, we offer "UTALOY" Steel Liners, delivered to York, Pa. in carload lots at \$10.40 per hundred weight." (1½ sheet not numbered but following R. 44).

That on December 15th, 1944 David E. Morgenstern, service manager of Eimco wrote a letter to Hardinge Co. in which he confirmed a conversation and stated:

"We have discussed the above subject with Mr. Rybakov of the Russian Purchasing Commission, who in turn has requested from the Treasury Department a change in the specifications on liners in connection with the latest contract issued to you calling for four 9' x 12' ball mills. Mr. J. J. Duggan of the Treasury Procurement Division advised us that such change will be made with the understanding that the prices on the ball mills will not be changed by equipping the ball mills with Utaloy liners."

It is our understanding that our prices quoted you on Dec. 7th, 1944 are about 1¢ per pound higher than regular Manganese Steel Liners." (R. 45 paragraphs 2 and 3 and Trout's affidavit R. 40 paragraph numbered 4.)

That in confirmation of the immediately above letter on January 30th, 1945 Hardinge Co. wrote to Eimco Corporation, New York Office attention David E. Morgenstern the following:

"We understand that the price will be \$9.40 per cwt., f.o.b. York, Pennsylvania.

We are not as yet sure as to where shipment will be made and in all probability it will be necessary for you to prepare this material for export. However, we understand that you would be able to take care of this for us." (R. 46 Trouts Affidavit R. 40 paragraph numbered 5.)

On March 5th, 1945 Hardinge Co.'s purchase order #37898 was sent to Eimco Eastern Division in New York, stating:

"Hardinge Company Inc. York, Penna. To The Eimco Corporation, 67 Wall Street, Room 509, New York, 5 New York. Gentlemen: Please furnish us with the following material subject to the conditions printed on the back of this order. Unless these instructions are carried out, your invoice will not be passed for payment.

Ship Via SHIPPING INSTRUCTIONS
LATER.

* * * * *

\$9.40

PRICE: \$10.40 per cwt., f.o.b. York, Penna.

Packing and Shipping: All of the equipment on this order should be packed in four complete and equal lots with no partial shipments of any lot to be permitted from the port of embarkation in the U.S.A. to the port of arrival in the U.S.S.R. However, the possibility is that a part of these liners will be required here at York for fitting into the mill.

Shipping Documents: Original and ten copies of the bill of lading and 15 copies of the packing list are required. Also as soon as shipment is ready to go forward, please mail to us several copies of the proforma packing list so that we can obtain complete shipping instruction." (R. 20, 21 and 22, Trout's affidavit R. 40 paragraph numbered 6.)

That the error in price was discovered and corrected by Alteration B. of Purchase Order number 37898, HA. 9360 dated April 18, 1945, we quote therefrom:

"The following quantity of each item of Utaloy Steel liner plates is to be shipped to us at York, Pennsylvania, marked for Western Maryland delivery:

11—Pattern No. 7576-A Utaloy Steel Liner Plates.

11—Pattern No. 7577-A Utaloy Steel Liner Plates.

6—Pattern No. 7561, Utaloy Steel Liner Plates.

30—Pattern No. 7562, Utaloy Steel Liner Plates.

The rest of the liner plates are to be shipped direct, complete instructions will be given to you later.

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." (R. 25 paragraphs 1, 2 and 4, and Trout's Affidavit R. 41 paragraph 7.)

That on April 25, 1945 M. M. Kaiser, Manager of the Eastern Division of Eimco Corporation wrote to Hardinge Co. as follows:

"This will refer to your letter of the 24th and our conversation of today relative to the above numbered order.

As advised, this order is acceptable at the revised figure of \$9.40 cwt." (R. 47) (Trout's affidavit R. 41, numbered paragraph 8).

That pursuant to the original purchase order that shipping instructions would be sent later, Alteration number D. was sent.

"We have received the filled-in forms, requesting shipping instructions and have forwarded them to Washington; therefore, we expect to have complete instructions and government bill of lading, which will be forwarded to you immediately upon their receipt.

The Treasury Department release has also been received.

This is a confirmation of our telephone instructions to Mr. M. M. Kaiser of June 22." (R. 27)

That pursuant to the original order that shipping instructions would be sent later, alteration order E. was sent.

"We are enclosing four sets of Govt. Bills of lading Nos. DA-TPS-1052955 to 1052958 inclusive for use in shipping the Utaloy Steel Lining on this order.

Ship via freight 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.” (R. 29)

That on July 25, 1945 Eimco Corporation forwarded their invoice to Hardinge Co. at \$9.40 per cwt. and in accordance with their original order f.o.b. York, Pennsylvania (R. 48, Trout’s affidavit R. 42 paragraph numbered 10).

We have set out in detail the pertinent matters in the exhibits because we think that this constitutes the agreement between Hardinge Co. and Eimco Corporation and the violation is Eimco’s failure to show on the invoice the freight from Salt Lake City to York, Pennsylvania—and to pay it.

That on September 17, 1945 an invoice was sent to the Eimco Corporation by Hardinge Co. for \$7,944.56 being the freight charged on the shipment at the erroneous rate of \$1.72 per hundredweight (R. 50, paragraph 4).

Demand was made for settlement (R. 54 exhibit A.) (R. 50 Everhart Aff. Paragraph 5).

Joe Rosenblatt, Manager of the Eimco Corporation asked for duplicate invoice (R. 55) (R. 50 Everhart Affidavit, Paragraph 6).

That W. M. Everhart sent duplicate copies of the invoices. He further stated that Hardinge Co. Inc. was unable to furnish copies of paid freight bill as the material was shipped collect on Government Bills of Lading, to the Government Depot as requested by the Government and that the paid freight bills were retained by the Government and should have been allowed on Eimco

invoice (R. 56, Exhibit "C", Everharts Affidavit, R. 50, Paragraph 7).

Joe Rosenblatt, Manager of the Eimco Corporation, sent a letter denying that Hardinge Co.'s invoice covering freight charges were proper in as much as no actual freight was paid by Hardinge Co. (R. 57 Exhibit D.) (Everhart Affidavit, R. 51, Paragraph 8).

Letter dated November 16, 1945, set out the correct freight rate of \$1.43 asking for the payment of \$6,605.07, explaining that the error was because the East - West rate was \$1.72, while the West - East rate was \$1.43 (R. 58, Exhibit "E") (Everhart Affidavit, R. 51, Paragraph 9).

November 29, 1945, M. M. Kaiser, Manager Eastern Division, Eimco Corporation, asked for the Government bills of lading and that payment would be made upon receipt of them (R. 59, Exhibit "F") (Everhart Affidavit, R. 52, Paragraph 10).

That Hardinge Co. Inc. received a letter from the Procurement Division of the United States Treasury Department dated December 17, 1945 with reference to Hardinge Co.'s invoice covering Utaloy Steel Liners shipped by Eimco Corporation under Hardinge Co.'s purchase order number 37898 for Government contract number DA-TPS-74800. This letter shows that a freight deduction of \$1,433.76 was made by the Government in payment of Hardinge Co.'s invoice. That a further calculation showed a balance due the government by Hardinge Co. of \$4,799.36 (R. 60, Exhibit "G") (Everhart Affidavit, R. 53, Paragraph 11).

vit, R. 52, Paragraph 11). A check for \$4,799.36 was sent by Hardinge to the United States dated December 26, 1945 (R. 61) (Everhart Affidavit R. 52, paragraph 12), resulting in a total of \$6,233.12 being paid by Hardinge Co.

That the United States Government freight charge was calculated as set out in R. 60, Exhibit G. in which .095 per hundred weight was deducted from the rate of \$1.43; the .095 rate being the freight charge from New York Pennsylvania to Marietta, Pennsylvania which the United States Government would have paid had the freight been shipped to York Pennsylvania and then from York, Pennsylvania to Marietta, Pennsylvania (R. 60) (Everhart Affidavit, R. 53, Paragraph 14).

That the freight rate from Salt Lake City, Utah to York, Pennsylvania is the same as the rate from Salt Lake City, Utah to Marietta Pennsylvania (R. 68 & 69, paragraph 12 & 13 and R. 51, paragraph 9 and R. 58 and R. 60).

On January 10, 1946, J. J. Cadot of Hardinge Co. wrote to M. M. Kaiser, Manager of the Eimco Corporation Eastern Division, regarding these freight charges. (R. 71 and R. 72, Exhibit A.) (Cadot Affidavit, R. 69, paragraph 14).

“Please bear in mind that we sold some liners f.o.b. York, Pennsylvania and bought them freight allowed to York, Pennsylvania. There isn't any way of talking the Government out of that, even if we were of the same mind as your Salt Lake City Office is trying to prevent living up to a contract.” (R. 72)

That on February 5, 1946 M. M. Kaiser wrote to Hardinge Co. requesting copies of the freight bills covering the shipment (R. 73, Cadot's affidavit, R. 69, paragraph 15).

That on February 7, 1946, Mr. Cadot wrote to Eimco Corporation, New York Office, Attention M. M. Kaiser, stating that the freight bills covering the shipment were paid by the Government and were in the Government's possession and copies could not be obtained by Hardinge Co. (R. 74 and 75) (Cadot's Affidavit, R. 69 and 70, paragraph 16).

That on March 11, 1946, Mr. Joe Rosenblatt of the Eimco Corporation wrote to Hardinge Company in which after complaining that he thought his price had been too low, and trying to justify himself in not paying the freight stated:

"If as a matter of fact, these liners have cost you more than the \$9.40 price, f.o.b. Marietta, then it would appear that you are entitled to be reimbursed by an amount equal to a freight charge which would have increased this figure. However, we are certainly entitled to have documentary authenticated proof that they have cost you more than this figure. If, on the other hand, these freight charges have been in some manner absorbed by the Government, then this is a benefit which should accrue to us as well as to yourself." (R. 76 and 77, Exhibit "D") (Cadot's affidavit, R. 70, paragraph 17).

There is a second affidavit of W. M. Everhart in the files in which he sets out the various transactions between

Eimco Corporation and Hardinge Co. In paragraph 4, he sets out another example where Eimco Corporation billed it f.o.b. but did not deduct the freight and that Hardinge Company is now claiming as a setoff \$117.00 against the sum charged by said invoice (R. 82 and R. 34).

That a recapitulation of the transactions between Hardinge Co. and Eimco Corporation are found at R. 82.

That Lower Court found that there was a contract; that the contract was violated when Eimco did not pay the freight and allowed plaintiff the sum of \$6,233.12, which is the actual amount of money that the Government charged Hardinge Co. and gave them interest on that sum, but required them to deduct therefrom the amount of the subsequent shipments made by Eimco to Hardinge Co. with interest on said shipment.

STATEMENT OF POINTS

That Plaintiff and respondent is entitled to the full amount of Freight from Salt Lake City, Utah, to York, Pennsylvania.

ARGUMENT

Appellant filed their cross-appeal and makes their statement of points so that if the Lower Court erred in its calculations of the freight there would be no question about this Court having authority to grant respondent relief.

Respondent will argue the three points set out in appellant's brief and their statement of points together because, all of the points are involved in the construction and interpretation of the contract between Hardinge Co. and Eimco Corporation. Respondent will also make special reference to them.

We have set out in our brief the important paragraphs of the various documents which constitute the contract between Hardinge Co. and Eimco. The contract between Hardinge Company and Eimco originated because Eimco convinced the representatives of the Soviet Government and the Treasury Department to ask Hardinge Company to substitute their Utaloy liners for manganese liners so Eimco knew about the Government contract with Hardinge Co. and knew what it was for and where the liners were going.

Eimco's first letter offered Utaloy Steel Liners at \$10.40 per hundred weight (R. 43 and 44 and 1/2 page). The first offer was modified by Eimco's second letter of December 15, 1944, in which they stated that they understood that the price quoted for Utaloy Steel Liners was 1¢ higher per pound than manganese (R. 45). In confirming this letter a letter was sent by Hardinge Co. to Eimco in which they stated Hardinge Co. understood that the price would be \$9.40 per hundred weight f.o.b. York, Pennsylvania, also stating that they were not sure where shipment would be made to and in all probabilities it would be necessary to prepare the material for export and Hardinge understood that Eimco would be able to take care of that for them (R. 46).

The next development was the purchase order from Hardinge Co. to Eimco Corporation. This order gave detailed instructions as to what was to be furnished by Eimco Corporation and it also provided that shipping instructions would be sent later, the price erroneously being at \$10.40 (R. 20). In the original order they also stated that the shipment would have to be made to the port of embarkation in the United States, and that they would have to get complete shipping instructions (R. 20, 21 and 22).

Both parties knew that this was a Government contract between the United States and Hardinge Co. and this was a sub contract and they both would have to comply with the Government contract.

That because of the mistake in the original order an alternate order was sent in which they corrected the price and asked for a few of the liners to be sent to York, Pennsylvania and stated, "The rest of the liner plates are to be shipped direct, complete instruction will be given to you later" (R. 25).

That after the alternate order Eimco Corporation sent a letter in which they agreed that the price was \$9.40 per hundred weight (R. 47).

That as provided by the original order and the subsequent orders the final shipping instructions were given to Eimco Corporation to ship on Government bill of lading which they did and after they had so shipped Eimco sent their invoice showing its construction of the contract, by billing Hardinge Co. for the actual weight of

the liners f.o.b. York Pennsylvania on this invoice. Eimco should have deducted the freight to York, Pennsylvania (R. 48).

What are the rights of the parties under the contract in the light of what was written and the act and conduct of the parties during the making and the performance of the transaction and subsequent thereto? We can only see one construction and that is that the liners were sold for \$9.40 per hundred weight f.o.b. York, Pennsylvania.

The appellant talked about a wind fall; there is no wind fall. Hardinge is merely asking for Eimco to carry out the terms of their contract. In construing this contract the question is who is to pay the freight—Eimco or Hardinge Company?

It is obvious that Eimco should pay it. They contend that the contract was modified by the amended order, but this was merely further instructions carrying out the original agreement that shipping instructions would follow. The actual amount of freight from Salt Lake to York, Pennsylvania, at the time of the shipments was easy to determine and, it is admitted by both parties that the agreed rate is \$1.43 per hundred weight (R. 60, R. 68), all that is to be done is to multiply the tonage by \$1.43 which gives the figure that we are suing for. The contract cannot possibly be construed that by further telling Eimco how to ship on Government bill of lading that it changed the price and that they were not to pay the freight.

The exact point where the shipment was to be sent was not certain. The parties refer to the point of embarkation. Under the terms of the order Hardinge Co. was to direct Eimco where to send the liners so the shipping of the liners to Marrieta, Pennsylvania did not change the price, or the terms of the contract. The price would still be the same \$9.40 per hundred weight less the freight from Salt Lake to York Pennsylvania. The orders themselves said that part of the orders would have to be used at York to fit into the ball mills but the rest of them would be sent direct.

There can only be one logical construction of the contract and that is that Eimco Corporation was to pay the freight from Salt Lake City to York, Pennsylvania, no matter where shipped.

The following cases illustrate, construe and hold that the action is on a contract and that the statute of limitation on a written contract applies.

McMillan vs. Whitley, 38 Utah 452; 113 P. 1026;

Victor Sewing Machine Co. vs. Crockwell, 3 Utah 152; 1 P. 470;

Thomas E. Jeremy Estate vs. Salt Lake City, 49 P. 2d 405; 87 Utah 370;

Taylor Bros. Co. vs. Duden, 188 P. 2d 995; 112 Utah 436;

O'Brien vs. King, 164 P. 631; 174 Cal. 769. The O'Brien case is cited in the Utah Case of *Bracklein vs. Realty Insurance Company* case, hereinafter discussed.

Clark vs. Lund, 55 Utah 284, 184 P. 821;

Appellant Eimco in their brief talks about a wind fall, the only possible way there could be a windfall would be if the United States Government did not deduct from one of Hardinge Co.'s statements the freight and did not require them to pay for the freight.

The evidence in this case shows that Hardinge Co. sold to the United States Government f.o.b. York, Pennsylvania, further shipping instructions to be sent later and Hardinge Co. brought from Eimco Corporation f.o.b. York, Pennsylvania, with shipping instructions to be sent later (R. 20, 21, 22, Order and R. 72).

The evidence in this case shows that the freight rate from Salt Lake to York, Pennsylvania and the freight rate to Marietta, Pennsylvania were exactly the same, there is no financial burden placed upon Eimco (R. 58). The only actual difference was whether the city on the Bill of Lading was York or Marietta. Of course no objections were made by Eimco. If the freight was more than from Salt Lake to York, Hardinge would have to pay the difference.

The appellant in their brief contends that Hardinge is asking equitable relief to change the contract. That is not the fact as shown by the pleadings, which we referred to in our statement of fact and we are asking the court to enforce the contract.

Appellant contends that there is nothing in the contract which would entitle Hardinge Co. to the freight. We submit that the contract was f.o.b. York, Pennsylvania, that shipping instructions were to be sent later

and the instructions sent out by Hardinge Co., the acknowledgement of these instructions by Eimco Co. and the performance of these instructions is a ratification and the parties own construction of the contract and in no way changed the price to be paid for the steel liners or that Eimco was not to pay the freight.

Eimco got this order indirectly by having Russia put the pressure on the Treasury Department and Hardinge Co. to change to Utaloy Liners. Eimco understood the mechanics and what would have to be done as well as Hardinge Co. They contracted in the light of these facts and their knowledge.

We think it is clear from the terms of the contract, that Eimco is to pay the freight but if there is any doubt in the contract, the court has the right to look to the situation, conditions and circumstances. This rule is set out in the Utah case of *Daly vs. Old*, 35 Utah 74, 99 P. 460 on page 463 top of the second column.

“If the intention of the parties cannot readily be ascertained from the language alone, then the court must have recourse to the situation, conditions, and the circumstances which affected the parties, and from the language when considered in the light that these matters afford determine the real intention of the parties.”

The acts of Eimco also ratified any changes that were made. In the case of *Gibson vs. Donnelly*, 13 N.Y.S. 808. The Court says:

“When in an action for milk sold and delivered defendant counterclaimed for damages

sustained by reason of Plaintiff's failure to deliver at the place agreed, and it appeared that the defendant received the milk at a substitute location for five months without objection and renewed his contract for another year, without dissent as to the place of delivery. It was held that the defendant's course constituted an implied assent to a modification of the agreement."

Appellant's brief says that Eimco could deliver the shipment in any way they chose, but this is not the fact and the statement is not in accordance with the contract. Shipping instructions were to be sent later, which was done and which was acquiesced in by Eimco and they were satisfied because the invoice was marked f.o.b. York, Pennsylvania.

The Appellant's cite the case of *Bracklien vs. Realty Insurance Company*, 95 Utah 490, 80 P. 2d 471 at 476. That case is not in Appellant's favor but is in respondents favor. In that case the court stated that the plaintiff was NOT suing on a contract. There was a third party involved in that case, but in this case there is no third party involved and Eimco entered into a contract with Hardinge Co., and that is the contract that the instance case is founded on.

The court in the *Bracklein case*, 95 Utah 490, 80 P. 2d 471, supra on 476 page of the Pac. said:

"If the instrument acknowledges or states a fact from which the law implies an obligation to pay such obligation is founded upon a written instrument within the statute. If the writing upon its face shows a liability to pay, such liability is

on a written instrument within the statute of limitations. So, also, is an action in which the instrument in writing itself contains the contract of promise to pay or do the thing, to compel the doing of which the action is brought. The promise must arise directly from the writing itself and be included in its terms. An obligation being established by a writing, a promise to pay or to perform is implied. By necessary inference of law and fact such promise is embodied in the language of the writing although it may not be expressed in words."

Also see

McMilland vs. Whitley, 38 Utah 452, 113 P. 1026, supra;

Victor Sewing Machine Co. vs. Crockwell, 3 Utah 152; 1P. 470, supra;

Thomas E. Jeremy Estate vs. Salt Lake City, 49 P. 2d 405; 87 Utah 370, supra;

Taylor Bros. Co. vs. Duden, 188 P. 2d 995, 112 Utah 436, supra;

O'Brien vs. King, 164 P. 631; 174 Cal. 769. The O'Brien case is cited in the Utah case of *Bracklein vs. Realty Ins. Company* case, supra.

Also see

Logan vs. Brown, 95 P. 441;

Lawrence Barker Inc. vs. Briggs (Cal.) 248 P. 2d 897, headnote 1 and 2.

The Appellant in its brief says "Suppose for example Change Order E. read Portland, Maine, instead of Marrietta, Pennsylvania." That would not change the purchase price at all, the price would still be \$9.40 per hundred weight less the freight from Salt Lake to York,

Pennsylvania. This could easily be ascertained and Hardinge Co. would have to pay the difference in the freight to Maine. Such a contingency is included in the contract "ship via: Shipping instructions later" because Eimco and Hardinge Co. understood that the liners would be shipped direct to a port of embarkation except a few liners to be fitted in to the mill which were to be sent to York, Pennsylvania.

Under the terms of the contract both parties knew that the Government had the right to ship on their bill of lading if they so desired. Undoubtedly that was one of the reasons that shipping instructions were to follow later and both parties full understood it. There was no complaint made by Eimco about shipping on Government bills of lading; In fact, they ratified it by putting it on their invoice and billing it f.o.b. York, Pennsylvania—it is their own construction of the contract (R. 48).

Mr. Joe Rosenblatt admits in his letter that Hardinge Co. is entitled to the money, his construction of the contract and tries to justify his keeping it by saying that they should not have sold the liners for \$9.40. There is not a scintilla of evidence in this record but the evidence is to the contrary that Manganese Liners were 1¢ less than what Eimco originally quoted, in my opinion, it would not have made any difference whether the price had been \$10.40 or \$9.40 Eimco would still have tried to keep the money.

Appellant stated in its brief that "Under the original contract the Government played no part." This is entirely

in error because Eimco got the contract by having the Government intervene (R. 43, 46) and the contract between Eimco and Hardinge Co. was subject to the Government contract and at all times the shipping instructions were left open until the complete instructions were given (R. 22, 25) and Hardinge Co. sent forms containing information for shipment to Eimco (R. 17, par. 7) who in turn sent to Hardinge Co. (R. 22 and 27) and by them was sent to the United States Government (R. 27, 29).

Appellant in their brief state "So far as the written contract between Hardinge Co. and Eimco was concerned, after change Order E. was issued the Government was to pay the freight." "Giving Hardinge relief in this action cannot be founded on that written contract and rests in the realm of fireside equity and restitution." That statement cannot possibly be correct. The contract dealt with the price of the merchandise and that it was to be priced f.o.b. York, Pennsylvania, with shipping instructions to follow later. There was nothing in the contract any place where it was intimated that the Government would pay the freight. It certainly never came into the mind of Hardinge Co. or Eimco that when the shipping instructions were given that Eimco would not pay the freight, or why did Eimco bill correctly f.o.b. York, Pennsylvania.

The appellant quoted from the case of *Brown vs. Cleverley*, 93 Utah 54, 70 Pacific 2d 881. This case is not in point because in the instant case the contract specifi-

cally provided that Eimco pay the freight to York, Pennsylvania. In the Cleverley case the contract was rescinded and they asked for the money back and did not sue on the contract. In this case, as shown by the complaint and the fact, we are suing on the contract.

The appellant cites case of *Petty and Riddle, Incorporated vs. Lund*, 104 Utah 130, 138 Pac. 2d 648. This case is distinguishable on its facts from the instance case because in the Petty case the two partners made an agreement and then the Corporation sued. It was not a suit directly on the contract between two contracting parties but would have to be a third party beneficiary, the court also points out that the parties did not contract about paying taxes, but in this case the parties did contract in regards to the freight and we are suing on the contract one contracting party against the other.

Cases are cited in Appellant's brief pertaining to the processing tax under the Agricultural Adjustment Act. We will not discuss these cases separately because they are substantially the same, but not one of these cases have a situation similar nor does the fact fit the instance case because those were cases in which a tax had been collected and the tax was held to be unconstitutional. It was a question between the contracting parties who should keep the money. If the processing tax had not been held unconstitutional there would have been no wind fall—no money to quarrel over in those cases. There is no wind fall in the instance case. By the terms of the contract Eimco is to pay the freight, but when they did not do it and the Government charged Hardinge Co.

and Hardinge paid the freight it was money out of Hardinge Co.'s pocket which should have been paid by Eimco.

Defendants second assignment of error is "The only relief to which Hardinge Co. may be entitled under Quasi-Contract principle is barred by the Statute of Limitations." Appellants in the first part of their brief has argued how the contract should be construed, and that there was no duty on Eimco Co. to pay the freight after they were told to ship collect on Government Bills of Lading. There is clearly put in issue in this case the construction of the contract, and the question is, under the terms of the contract does Hardinge Co. pay the freight or does Eimco Co. pay the freight. When the contract was put in issue, then the statute of limitation is a six year statute. They had to assume that we are suing upon some principle of restitution or implied contract, which is an erroneous assumption, and also upon the theory that there was a wind-fall. Apparently Eimco tried to get a wind-fall because Eimco failed to deduct the freight from the invoice that they sent to Hardinge Co. Because they did not properly bill by deducting the freight the full amount of the invoice was paid. Eimco is now contending that they don't have to pay the freight. The failure to deduct the freight may have been deliberate because as Eimco did not deduct freight on the other invoice sent f.o.b. they are not contending that it is not a proper set off. Undoubtedly Eimco would have had a wind-fall if it had not been for the fact that the Government charged the freight back to Hardinge Co. Mr.

Rosenblatt did not believe that Hardinge Co. had paid the freight, so he wrote a letter asking for the paid freight bills, and when they explained that the Government had paid it and that they could not get the paid freight bills, he doubted their word and said that "There was no actual freight paid out by you" (R. 57). Apparently, Mr. Rosenblatt thought he got a wind-fall by the Government not charging the freight back to Hardinge Co. but, of course, there was not a wind-fall, because the Government did charge the freight back. Even if the Government had not charged the freight back to Hardinge Co. it would not have changed the terms of the agreement.

If Hardinge Co. had originally deducted the freight, they would have deducted \$1.72 per hundred weight east-west rate, and if Eimco Co. had sued for the difference in freight as calculated on the west-east rate of \$1.43 per hundred weight, they certainly would have sued on the contract for the difference. No matter who sued who their rights would be determined by the terms of the contract.

When Hardinge Co. discovered that Eimco had not paid the freight they were very unhappy because they had not made the deduction, but under the terms of the contract insisted that they were entitled to the freight from Salt Lake City, Utah to York, Pennsylvania. Of course they would have been in a better position if they had the money instead of Eimco.

The appellant pleads two statutes of Limitations—Sec. 104-2-30, Utah Code Annotated 1943 which is now

Sec. 78-12-25 sub division 2, Utah Code Annotated 1953, pertaining to relief not provided for in any other section and 104-2-23, Utah Code Annotated 1943 now Sec. 78-12-25 sub division 1, Utah Code Annotated 1953, pertaining to an action upon an open account.

The appellant for the first time in his brief has interjected into the case Sec. 78-12-26 sub division 3, formerly 104-2-24, Utah Code Annotated 1943, pertaining to fraud and mistake. This statute was not pleaded or raised in the Lower Court and we consider that the section has been waived.

The foregoing sections on fraud and mistake could not apply because this is not an action based on neither fraud or mistake, there is no allegations in the complaint of fraud or mistake.

Even if we had mentioned fraud or mistake, but merely used it to explain the conduct of the party we are still suing on the contract, the courts have held that it is a suit on the contract.

A leading case is *George H. Brick et al. vs. Cohn-Hall-Marx Co.*, 114 A. L. R., page 521, 276 N.Y. 259, 11 N.E. 2d 902.

There is an A. L. R. note on page 525 following said case citing cases from other Jurisdictions. There is also cited under the A. L. R. note the Utah case of *Clark vs. Lund*, 55 Utah 284, 184 P. 821. Also see the recent case of *Moulton vs. Morgan*, 202 P. 2d 723 at page 627 in which the Court says:

“Under this theory the allegations as to fraud and trust are incidental to the main relief sought,

and serve to explain why the conveyances did not divest Josie of equitable title to the property under this theory of the pleadings.”

Assuming that Hardinge Co. was not entitled to the money under the contract which we emphatically deny the Statute of Limitations pertaining to an open account or relief not provided for or mistake or fraud would not apply, because defendants counter claims for goods, wares and merchandise, sold and delivered between May 23, 1946 and April 23, 1948, and as a matter of fact, Eimco was given credit for an item even after the case was filed, invoice dated July 17, 1951 and itemized statement of the dealings between Eimco Co. and Hardinge Co. is set out in a recapitulation at R. 82 and by the further order sent by Hardinge Co. and received by Eimco Co. There are mutual demands on an open account, on which there is a balance due Hardinge Co.

There were orders given by Hardinge Co. and goods sent by Eimco Co. and then there were the adjustments on the freight on the original invoice and then there was an adjustment on the freight on the invoice for March 20, 1947 of \$117.00. Eimco Co. did the same thing on that invoice as they did on the first invoice. They invoiced it f.o.b. (R. 34) but they did not deduct the freight. Certainly if the six year Statute did not apply, the four year Statute on the open account would apply and four years has not elapsed since the last charge or the last payment. Also under Section 104-2-29, Laws of Utah 1943 now Section 78-12-32, action on mutual accounts would apply, which section provides:

“When there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.”

Certainly Section 104-2-30 now 78-12-25, relief not provided for cannot apply because neither under the theory of unjust enrichment or wind-fall, because the money was paid to the Government by deduction on Dec. 17, 1945 (R. 60) and by check Dec. 26, 1945 (R. 61) which was within 4 years from time suit was started, Sept. 29, 1949.

If there is any question as to which statute of Limitations should be applied the general rule as stated in 34 American Jurisprudence, page 50, paragraph 50, sub. 7, as follows:

“If a substantial doubt exists as to which is the applicable statute of limitations the longer rather than the shorter period of limitations is to be preferred.”

The defendant cites the case of *Leather Manufacturer's Bank vs. Merchant's National Bank*, 128 U.S. 26, 32 Law Ed. 1888, but that case is not applicable to the Utah Statute of Limitations. It is based on a different statute than any pleaded and is not applicable to the facts of the instance case. Hardinge was not out their money until they paid the Government and they had the right to assume that Eimco would pay the freight until they refused to do so. Hardinge had no right to sue until they paid the Government.

We have read the case of *Jeremy Fuel and Grain Company vs. Denver and Rio Grande Western Railroad*

Company, 60 Utah 153, 207 P. 155. We cannot see where this case is of any help, there is nothing in this case which is similar to the case at bar. That case is in regards to an overcharge of freight by the Railroad and that the rates were discriminatory, and discusses whether the suit was on contract under the common law or a suit under the statute.

The second part of the appellant's brief which deals with the notion that Hardinge Co. is trying to recover on an implied contract is entirely begging the question. The fact is that we rely upon the written contract and the Statute in Utah is six years.

The appellant's third point "The amount of credit for freight allowed by the trial court, was an error." We also assign error in regards to this calculation through an abundance of caution, so that if this court wanted to correct the amount of freight due under our theory, it could do so. In our complaint we asked for the freight from Salt Lake City to York, Pennsylvania, which is the respondents construction of the contract. The freight amounted to \$6,605.07. The trial court did not think that respondent should get more than they actually paid for the freight which was \$6,233.12, being a difference of \$371.95. Eimco Corporation invoice set out that the weight was 461,893 pounds while the Government set out the total weight at 466,900 pounds. The difference between Eimco Corporation weight and the Government weight undoubtedly is the crating.

The Eimco Corporation said that the freight rate should be 1.335 per hundred weight instead of \$1.43. The

difference being because the Government allowed a deduction of the freight rate from York, Pennsylvania to Marrietta, Pennsylvania (R. 60, 68 and 69, paragraph 12). Of course, the correct construction is that the freight should be the rate from Salt Lake City to York, Pennsylvania, which is \$1.43 which is an admitted fact and the freight rate from Salt Lake to York, or Marrietta is the same.

The appellant says "That the Government charged freight at 1.335 per hundred." The Government did not charge the freight at that price; they charged it at \$1.43 from Salt Lake to York, Pennsylvania.

Eimco asks for judgment on their counterclaim, certainly any merchandise that was sent to Hardinge Co. by Eimco is an offset against the liability that Eimco have to Hardinge Co. no matter what the ruling is on the other points raised in the brief.

CONCLUSION

The judgment of the Lower Court should be sustained.

There is no reason why Eimco Co. should not live up to the terms of their contract.

Respectfully submitted,

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