

1959

# Walker Bank and Trust Co. v. New York Terminal Warehouse Co. : Brief of Appellant

Utah Supreme Court

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In the Supreme Court  
of the State of Utah

FILED

SEP 25 1959

WALKER BANK AND TRUST COM-  
PANY, a corporation,

Clerk, Supreme Court, Utah

*Plaintiff and Respondent,*

vs.

Case No.  
9098

NEW YORK TERMINAL WAREHOUSE  
COMPANY, a corporation,

*Defendant and Appellant.*

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BRIEF OF APPELLANT

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# In the Supreme Court of the State of Utah

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WALKER BANK AND TRUST COM-  
PANY, a corporation,

*Plaintiff and Respondent.*

vs.

NEW YORK TERMINAL WAREHOUSE  
COMPANY, a corporation,

*Defendant and Appellant.*

Case No.  
9098

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

The District Court of Salt Lake County, Hon. Merrill C. Faux presiding, entered money judgment in favor of the plaintiff and against the defendant. The defendant has appealed from the judgment.

The complaint, following a conversion theory, claimed that defendant, New York Terminal Warehouse Company,

without authority from the plaintiff bank, wrongfully delivered plaintiff's merchandise to a third person (R. 1-2). Defendant pleaded a warehousing agreement with plaintiff, claiming delivery in accordance with that agreement, estoppel of plaintiff to claim conversion, and payment (R. 15-17). The pre-trial order reframed the issues to show that the plaintiff claimed justification in delivering by virtue of an agreement between plaintiff and defendant and another agreement between plaintiff and John R. Woods. The estoppel issue was retained as to each delivery and all deliveries (R. 18-22).

Trial was before the Hon. Merrill C. Faux, sitting without a jury. Plaintiff introduced a statement of indebtedness of John R. Woods to it (R. 35, Exh. P-1); twelve warehouse receipts issued by defendant (R. 36, Exh. P-2); five delivery orders showing delivery of merchandise to John R. Woods, together with five checks drawn on plaintiff and signed by Woods (R. 36, Exh. P-3); a summary of values of items claimed to have been converted (R. 37, Exh. P-4), and instructions to defendant's storekeeper (R. 37, Exh. P-7).

Having introduced the above exhibits, plaintiff rested and objected to the introduction of evidence by defendant (R. 42). Defendant thereupon moved for judgment of nonsuit of the ground that the plaintiff had not made a *prima facie* case (R. 42, 47, 49). The Court overruled both motions (R. 49 and 65), and defendant proceeded with its proof.

Defendant produced not only the material documentary evidence relating to receipts and deliveries of merchandise, but called as its witnesses (or introduced deposition testimony of) all the individuals most directly connected with the trans-



actions at the times they occurred: C. J. Holt, defendant's vice-president in charge of West Coast sales and operations (R. 65-66); H. A. Robbins, who was, during the course of the transactions, manager and vice-president of plaintiff's Murray branch, with general authority to bind the plaintiff in contract and to make loans (R. 21, 108), and who handled the transactions for plaintiff; John R. Woods, an appliance jobber indebted to the plaintiff, and with reference to whose business the warehouse receipts had been issued in the first place (R. 188); and Harvey R. Moorehead, a former employee of defendant, who had been storekeeper in the defendant's warehouse during much of the time material to the action (R. 143).

These four were the *dramatis personae*. Their testimony, as the following resume shows, contained substantially similar stories of the series of transactions involving plaintiff, defendant, and John R. Woods.

*Testimony of C. J. Holt.* In the spring of 1936 Holt met with H. A. Robbins and John R. Woods in plaintiff's Murray Branch bank, Woods having asked Holt to discuss with Robbins the possibility of issuing warehouse receipts to the bank against stored merchandise as a credit arrangement for Woods (R. 66). It was agreed that warehouse receipts might be issued to the bank and that the bank and Woods would arrange the method of handling the loan, but no definitive agreement was reached at that time (R. 67). Holt heard nothing more concerning the transaction until the storekeeper at the Salt Lake warehouse sent papers to defendant's Los Angeles office with a request that warehouse receipts be issued to the bank. Receipts

were issued (R. 67). Again silence. Nothing further was heard from the bank until deliveries had been made to Woods and a delivery order (authorizing such delivery) had come in signed by the bank (R. 67). Except for periodic receipt of such signed delivery orders, defendant's next communication from the bank was a letter dated October 16, 1956 (R. 68). The letter, Exhibit D-5, is reprinted in Appendix A. Holt wrote a reply letter to plaintiff stating that he took the October 16th letter to mean that the warehouseman was authorized to deliver the goods upon receipt of a check from Woods. This letter, together with a suggested warehouse agreement between plaintiff and defendant, is reprinted as Appendixes B and C. Defendant received no reply to its letter, and attempts by Holt to contact Robbins personally proved unsuccessful (R. 68-69).

Defendant maintains a record system as a means of keeping constant control over stored merchandise. Upon receipt of goods in the warehouse a receiving report is sent to defendant's Los Angeles office by the local storekeeper. From that report Los Angeles prepares warehouse receipts and forwards them to the warehouse receipt holder (plaintiff), sending one copy to the storekeeper, retaining another copy, and forwarding one to the New York office for processing on IBM cards. Each day the local storekeeper sends in a report showing whether or not he received or delivered merchandise during the course of the particular day. As deliveries are made, the storekeeper prepares delivery orders for merchandise that has been shipped and posts his copy of the delivery order to his copy of the warehouse receipt. He sends copies of the delivery order to Los Angeles on the day of its issue. There the delivery order is recorded and forwarded to the IBM department for

processing. The storekeeper's records include a copy of the receiving report, the warehouse receipt under which it is stored, and the delivery order. The warehouse receipt copy is kept posted to reflect the amount of material remaining in the warehouse under that receipt (R. 70).

Los Angeles keeps a running account of merchandise in each of its field warehouses. One of the records is a control sheet on which the information on the daily reports is recorded as they are received from the storekeeper—one daily report being received for each day. The information from the daily report is also recorded on the copy of the delivery order received from the storekeeper. The information is passed on to the IBM department for processing. Receipt of the white copy of the delivery order at the Los Angeles office gives the employees there notice that the original of the delivery order is somewhere along the route of storekeeper to receipt holder to Los Angeles office.

A file of the daily reports is maintained together with warehouse receipt copies and delivery order originals. In addition to the white copy of the delivery order, sent to it directly by the storekeeper, Los Angeles receives the original signed delivery order from the bank. The originals usually come in by mail; upon being received they are opened and time-stamped; they thus show the exact date and time of receipt in the Los Angeles office (R. 71-72).

If, in checking its records, Los Angeles found it necessary to make corrections in an original delivery order, the bank would be notified of the error, which usually would be with reference to a lot number or a model number or a serial number

or "some such minor correction" (R. 72). From the various reports received from the storekeeper and the bank the Los Angeles office would prepare a "stock and value report," which is an IBM tabulated report of the activity of the inventory (R. 77). It was defendant's practice, at the time of audits of the warehouse, to bring the IBM report up to date from the records of the storekeeper, physically check the inventory and, upon return of the auditors to the Los Angeles office, to verify that delivery orders had been received from the warehouse receipt holders clearing all inventory that had been delivered since the last IBM report. Once a month a copy of the "stock and value" report was forwarded to plaintiff and another copy to the storekeeper. There was an "automatic" check to see that the warehouse company had delivery orders to cover all goods theretofore delivered. At the time of auditing the warehouse, merchandise shown by the report to be in the warehouse was physically inventoried (R. 78). If goods were missing from the warehouse defendant would request a delivery order from the bank (R. 79).

Defendant interpreted the plaintiff's October 16th letter as meaning defendant should deliver merchandise on receipt of a check (R. 82) and construed plaintiff's failure to answer defendant's November 12th letter as an acceptance of this construction (R. 84). The purpose of the enclosure with defendant's letter (Appendix C) was to permit the bank to place additional restrictions upon the delivery of materials so that it might protect itself further (R. 88).

On or about May 6, 1957, T. B. Akeley, an auditor in defendant's Los Angeles office, sent a communication to the

Salt Lake storekeeper telling him that "until further notice from me or from my Los Angeles office no further goods may be delivered or removed from our leased warehouse area." On about May 10, 1957, Holt went to Salt Lake City to close out the warehouse. At that time he prepared a delivery order for the five or six units remaining in the warehouse, obtained a check from Woods, and personally mailed check and delivery order to the bank.

In his capacity as vice-president of New York Terminal Warehouse Company Holt made inspections of the field warehouse in Salt Lake City (R. 223). He made inspections in July of 1956 and in December of 1956 at which time he checked the physical inventory at the warehouse against the IBM records at the office (R. 223). In December of 1956 the inventory agreed with the company records (R. 223).

*Testimony of H. A. Robbins.* Robbins did most of plaintiff's work with Woods (R. 211). He recalled setting up a loan arrangement for Woods (R. 110) and would possibly have discussed it with Woods (R. 111). He recalled that the merchandise would be paid for by checks, that John R. Woods' checks were acceptable as payments, and that it was not his understanding that Woods would have to come to the bank first before withdrawing material from the warehouse (R. 111, 118, 120).

During the operation of the warehousing agreement he received delivery orders from the storekeeper (R. 113) or from Woods (R. 113). He would sign one and send it to Los Angeles (R. 114), but he would hold the delivery orders until the Woods' check was paid (R. 114, 125). Frequently he would

hold a check until deposits had been made into the account by Woods (R. 115). He knew that Woods was a "merchandise jobber" and that such jobbers ordinarily sell to retailers (R. 115).

When Robbins sent the letter to defendant on October 16, 1956, it was not his intention to make any change in the way warehousing was being handled (R. 117).

Robbins saw Woods frequently—about "twice a week" (R. 119). Three or four times between April of 1956 (when the first delivery orders were issued) and May of 1957 (when the warehouse was closed), agents or employees of the bank made inspections of the warehouse "in a general way" (R. 121). The inspectors would examine the quarters to see whether the merchandise was properly set aside and taken care of; they would compare serial numbers on the delivery orders (R. 121). It was their duty to report shortages to the bank (R. 121). Robbins testified a second time that bank inspectors were sent to look at the goods (R. 217). Plaintiff bank never told the warehouse company that conditions were unsatisfactory (R. 217). There must have been a report to the bank (R. 219). On one or two occasions there were a couple of units "that might not have been there," and this was mentioned to Robbins by a field man (R. 200). When shortages were found plaintiff called them to the attention of Woods, not defendant, whereupon Woods would give delivery orders (R. 220, 221).

Delivery orders received by the bank showed on their face that the merchandise had been received by Woods (R. 122). The bank would sign them later (R. 122) although they were already signed by Woods (R. 122). The last five

delivery orders, for which the action was brought, were found by Robbins on his desk (R. 123). It was usual for him to find delivery orders on his desk (R. 123). Prior to closing of the warehouse Woods had mentioned to Robbins that it would be closed (R. 124) and had made arrangements for a cashier's check with which to pay storage charges (R. 124).

During the time in which Woods was using the warehouse receipt arrangement he was overdraft with the bank part of the time, and at other times the bank paid checks from his account even though there was no money in it (R. 127, 128). He knew that in purchasing goods from wholesalers some retail dealers "floored" their units (R. 128). It was not Mr. Robbins' understanding that the bank would take any steps in connection with the delivery orders before merchandise was removed from the warehouse (R. 212). When a delivery order was received with a check from John R. Woods, it was assumed that the goods had been delivered by the time the bank got the delivery order (R. 213), or would be without the bank doing anything further (R. 213, 214). The trial judge stated that this is what he would take Mr. Robbins' testimony to mean (R. 216).

*Testimony of John R. Woods.* John R. Woods ran a distributing business in Salt Lake City during which time he had dealings with Walker Bank, particularly with Robbins, for four or five years (R. 189-190). With reference to merchandise in defendant's warehouse, it was Woods' agreement with the bank that he could take the merchandise out and then pay Walker for it (R. 190). Robbins agreed to hold the checks for him (R. 190), and checks given for the merchandise didn't

have to be made good immediately. This was okay with Robbins (R. 191). It was the practice of Woods to go to the bank sometimes two or three times per week (R. 191). The bank would hold checks until Woods was able to cover them (R. 192-199). Most of the time there was not enough in the account to cover the checks (R. 199). It was his practice to have the bonded warehouseman (storekeeper) make the checks out, then the delivery orders and checks would be given to Robbins (R. 193). When defendant's agents came to Salt Lake City "every thirty days or so" the accounts had to balance (R. 201); and they usually did balance (R. 201). Signed checks were left in the office (R. 207) and were to be filled in, sometimes, but not necessarily, by the bonded agent (R. 206). The last group of delivery orders may have been delivered in part by Woods and part by mail (R. 206).

*Testimony of Harvey R. Moorehead.* Moorehead was defendant's storekeeper at the Salt Lake City warehouse, charged with the duty of maintaining the warehouse and receiving payment for the goods (R. 144). He was also employed by Woods (R. 143, 144). At all times during his tenure as a storekeeper he had in his possession blank checks signed by Woods (R. 144). It was Woods' practice to remove goods from the warehouse, Moorehead making notes of the numbers to accumulate a sufficient number to be included in a single order (R. 146). The delivery orders sometimes would be taken by Woods to the bank personally and sometimes sent. The copy of each delivery order was sent to Los Angeles on the day it was made out (R. 145, 146).

Inventories of the merchandise in the warehouse were



made from time to time by both plaintiff and defendant (R. 146). If defendant's agents discovered shortages they would clear them up and obtain a check (R. 146); but when shortages were discovered by the bank, the bank representative "would go directly to Mr. Woods," then Moorehead would do what Woods told him (R. 147). Woods made arrangements with plaintiff's vice-president, Robbins, to pay for the merchandise (R. 147).

The signed check maintained in the possession of Mr. Moorehead at all times was not actually filled in with an amount or payee or date until a delivery order was made up (R. 149).

Woods did some flooring with Refrigeration Distributors Corporation (R. 154). During Moorehead's tenure as store-keeper merchandise did not leave the warehouse without his knowledge nor were others permitted to enter unless he accompanied them (R. 182); and at all times he had a blank check signed by Woods (R. 183). Woods told Moorehead that the bank, through Robbins, would give Woods a personal loan to pay for any goods removed from the warehouse (R. 185). Moorehead took orders at times from both Woods and defendant (R. 186-187).

Counsel for plaintiff cross-examined Moorehead at length concerning testimony given at a hearing in connection with Woods' bankruptcy (R. 153 et seq.). At the prior hearing Moorehead testified that the "shipment date" shown on invoices would probably be the date upon which merchandise was shipped from the warehouse (R. 155). Counsel did not ask the witness whether he would still so testify. Counsel

pointed out that some invoices did not contain a date of shipment and asked whether he had not testified at the previous hearing that the "invoice date" would represent also the date of shipment (R. 164). The witness answered that if he had said that it "wouldn't be right" (R. 164). As to some merchandise the invoices (Exhibits P-15 through P-19) showed an earlier "shipment date" than the date of delivery shown on the delivery orders (Exhibit P-3).

On redirect Moorehead testified that the "shipment date" would mean the date merchandise was "shipped or transferred," and that it might or might not have been delivered at that time. "Part of the merchandise would have been delivered, possibly all of it, possibly none of it" (R. 173). When counsel asked the witness to explain and amplify his testimony at the prior bankruptcy proceedings the trial judge interposed. He indicated that the witness was probably a perjurer, adding that if there was a variance between the witness' testimony in this action and that in the other proceeding a complaint would be issued (R. 175). Nevertheless, the trial judge would not permit counsel to offer evidence which would explain the apparent difference in the testimony and perforce rehabilitate the witness. Defendant offered to prove that the witness would testify that in response to a further question by Mr. Holbrook at the bankruptcy proceeding, and as part of the same paragraph in which he had been interrogated as to the meaning of the invoices, he had stated, with reference to a question as to the difference between the dates on the invoices and the dates on the delivery orders that "the only explanation that I might give would be that they were not taken from the warehouse" on the earlier date; and that on more specific questioning

Moorehead had testified that this must be so because the warehouse people made periodic inspections and the goods would have had to have been in the warehouse. The Court rejected this offer on the ground that it was "speculative" (R. 182).

*The Exhibits.* Twenty-two exhibits were introduced, some primarily formal, others containing substantial evidence of the course of dealings between the parties. The documentary evidence as a whole corroborates the picture of the transaction as drawn by the four principal witnesses.

Exhibit P-1 supports the evidence that the warehouse receipts were being used as security for plaintiff's extension of credit to Woods. Two notes representing Woods' indebtedness were dated February 6, 1957. Exhibit P-2 consists of 12 warehouse receipts upon which plaintiff based its action. Exhibit P-3 consists of 5 delivery orders, one having two pages, accompanied by 5 checks, all of which contained signatures of John R. Woods in the appropriate places. It is the merchandise listed on these delivery orders of which the plaintiff claims conversion. The values of the various items are set forth in Exhibit P-4, being in some instances less than the "declared value" shown on the warehouse receipts.

Exhibits D-5 and D-6, which are printed at length in Appendixes A, B and C, comprise the only exchange of correspondence between the plaintiff and the defendant relating to the warehousing arrangement. Exhibit D-5 shows that on October 16, 1956, the vice-president of the plaintiff's Murray branch wrote to defendant that it was the bank's policy that the goods would "be paid for at the time they are withdrawn." By Exhibit D-6 defendant informed plaintiff that it interpreted

plaintiff's letter "to authorize delivery from the warehouse upon the receipt, by our storekeeper, of a check for John R. Woods Company," and suggested a long-form agreement under which plaintiff could place limits upon the quantity of merchandise to be delivered in any one day, fix the percentage of declared dollar value of the merchandise to be delivered and, among other things, place upon the warehouse company a contractual obligation to mail delivery orders and checks to the bank within a stated period.

Exhibit P-7 is a standard form of instruction to storekeepers used by the defendant company, containing instructions to Moorehead.

Exhibit P-8 consists of 25 delivery orders executed on various dates between May 21, 1956, and April 30, 1957. Each of these delivery orders contains on its face plaintiff's written authorization for defendant to deliver listed merchandise to "John R. Woods Company," the name under which John R. Woods did business (R. 189). The back of each delivery order has been stamped to show the date of its receipt in Los Angeles. This group of delivery orders is enlightening as to the methods of operation of defendant and plaintiff, particularly when examined in light of Holt's testimony as to record-keeping methods, Robbins' testimony as to plaintiff's actions with respect to delivery orders, Exhibit D-22 (a copy of the ledger sheets relating to John R. Woods Company's account in the plaintiff bank), and Exhibit D-21 (consisting of 9 checks drawn by Woods payable to plaintiff in amounts corresponding to merchandise declared values on various

delivery orders). A summary of information contained in these three exhibits is set out as Appendix D.

Exhibits P-9 through P-13, and D-14, consist of correspondence or memorandums exchanged between various officers and employees of New York Terminal Warehouse Company. They show a pattern of inspections, inventories and checks supporting the testimony of Holt, Robbins, Woods and Moorehead. Exhibits P-9 and D-14 should be considered together. Exhibit D-14 is an audit report relating to an inspection of the warehouse conducted on January 17, 1957, by T. B. Akeley, identified as an auditor for defendant; P-9 is an addendum to it. The two exhibits show that Mr. Akeley found some shortages and overages, that there was improvement since October 17, 1956 (approximately the time of the letter from Robbins to defendant), that the conditions were corrected, and that Woods "runs the warehouse." The last fact tends to corroborate Robbins' statement (R. 220, 221) that upon finding shortages plaintiff would notify John R. Woods Company, not the warehouse. Exhibit P-10, a report dated March 27, 1957, shows that all merchandise in the warehouse was accounted for as of that date but that some serial numbers were not in agreement. The report suggests that an adjustment record should be put through. Apparently this was done. Compare the delivery order dated April 3rd (part of Exhibit D-8), prepared for the purpose of correcting serial numbers.

Exhibit P-11, a communication dated February 4, 1957, contains a comment on the report of January 17, 1957, and shows the company's concern with maintaining an efficient warehouse. The writer of the communication suggests more-than-

normal risks should be eliminated or the warehouse closed. It is noted in this report that the warehouse had consistently checked out with respect to inventory. Exhibit P-12 shows that additional checks were being made by the defendant company as of February 19, 1957, and that the company was requiring the storekeeper to send inventories and make additional reports on his actions. This exhibit also supports Holt's testimony that there were no complaints from the bank, and shows that relationships between plaintiff and Woods were good. Because of the close relationship and the apparent good standing of Woods with the bank it was determined, according to this exhibit, to close the operation out smoothly without requiring the bank to take delivery of the merchandise. It is noted here, too, that the warehouse company did what was reasonable for it to do, i.e., watch the "flow of paper" carefully. As can be seen from Exhibits D-8 and D-22, summarized in Appendix D, watching the flow of paper might prove to be unremunerative, largely because of the plaintiff's cooperation with Woods in the processing of delivery orders. According to Exhibit P-13, on May 6, 1957, defendant sent a communication to its storekeeper stopping deliveries from the warehouse. This is consistent with Holt's testimony that on May 10, 1957, he went to Salt Lake City to close out the warehouse, made delivery orders for the five or six remaining items in the warehouse and gave the delivery order and check to plaintiff.

Exhibits P-15 and P-19 are copies of what purport to be invoices of John R. Woods Company. The significance of these invoices and their effect upon the course of the trial will be discussed in Point II of the argument.

Exhibit D-23 consists of three checks drawn by John R. Woods Company payable to plaintiff, dated May 7, 8, and 10, approximately the same time as the delivery orders of which the plaintiff complains. The significance of these checks was unknown to defendant and unexplained by plaintiff.

## STATEMENT OF POINTS

1. The defendant's motion to dismiss the action, made at the close of plaintiff's case, should have been granted.

2. The Court erred in admitting evidence offered by the plaintiff and in excluding evidence offered by the defendant.

3. In light of all the evidence, the Court's findings of fact were clearly erroneous, and its conclusions of law and judgment contrary to the evidence and against law.

4. The Court erred in denying the defendant's motion to strike plaintiff's cost bill and in allowing plaintiff's costs.

5. The Court erred in denying the defendant's motion for a new trial.

## ARGUMENT

### I

THE DEFENDANT'S MOTION TO DISMISS THE ACTION, MADE AT THE CLOSE OF PLAINTIFF'S CASE, SHOULD HAVE BEEN GRANTED.

The plaintiff put on no testimony in support of its case in chief. Its case consisted solely of facts established by the

pre-trial order and Exhibits P-1, P-2, P-3, P-4 and P-7. As pointed out in the statement of facts these exhibits included a statement of indebtedness of Woods to plaintiff, twelve warehouse receipts issued by the defendant showing that merchandise had been received from Woods for account of plaintiff, five delivery orders showing delivery of the merchandise to Woods, together with five checks drawn by Woods to plaintiff's order, a list of values, and some instructions to defendant's storekeeper. It had been stipulated that the goods were delivered to a third person or persons by the defendant, that the delivery orders and checks came into possession of plaintiff, and that the checks had not been paid (R. 19).

At this stage of the proceeding there was no evidence that plaintiff made a demand upon defendant for redelivery of the goods (unless bringing an action for the value of the merchandise constitutes a demand), or an offer to satisfy the warehouseman's lien. There was no evidence that delivery had not been made to a person lawfully entitled to possession of the goods, or his agent. In short, there was no evidence that defendant had wronged plaintiff.

In putting on its case plaintiff apparently intended to take technical advantage of the provisions of 72-1-8 Utah Code Annotated 1953, which provides:

"A warehouseman, in the absence of some lawful excuse provided for by this title, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

"(1) An offer to satisfy the warehouseman's lien.

\* \* \*



"In case the warehouseman refuses or fails to deliver the goods in compliance with such a demand by the holder or depositor, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal."

This section of the Warehouse Receipts Act puts the burden of proof upon the warehouseman in some cases; but in order for a depositor or the holder of a receipt to shift the burden he must show compliance with the provisions of the act, i.e., he has to show demand and tender of the storage charges. It was so held in *National Dock and Storage Warehouse Company v. United States*, 27 F.2d 4 (1 Cir., 1928). In commenting upon the effect of the section, the Circuit Court of Appeals said:

"The District Court was of the opinion that the provision of Section 15, relating to a demand and offer to pay, was inserted for the benefit and protection of the warehouseman, and that, unless he manifested an intention at the time the demand was made that it be accompanied by an offer to pay, he should not be permitted to avail himself thereafter of a failure to make the offer and escape the burden of proof which the statute imposed upon him. But we do not think that the mere omission of the warehouseman to request an offer of payment at the time the demand was made would excuse the depositor from accompanying his demand with an offer of payment. The requirement that the depositor so accompany his demand is a condition to the imposition of the burden of proof on the issue of negligence upon the warehouseman, and, unless he has estopped himself by his conduct from insisting upon it, it must be complied with to cast the burden of proof upon him."

In the instant case, there is not only no evidence of a tender of the storage charges, but no evidence of a demand at all. The instant action can hardly be construed as a demand for return of the goods since the plaintiff bank, in the first instance, sued outright for conversion of the goods and at no time sought or talked about their return.

. In *Dahl v. Winter-Truesdell Diercks Company*, 62 N. D. 351, 237 N. W. 202 (1931), the Supreme Court of North Dakota found a pleading bad because the pleader (the depositor) had failed to bring himself within the terms of the act as to burden of proof. Although the case is primarily concerned with a technical rule of pleading, the Court's construction of the act and its operation to shift the burden of proof is the same as that of the United States Court of Appeals in the *National Dock and Storage Warehouse* case, *supra*. Discussing the section of the North Dakota act which is substantially the same as our 72-1-8 Utah Code Annotated 1953, the Court said:

"[This section] qualifies the obligation of the warehouseman to deliver upon demand by saying that he is bound to deliver 'if such demand is accompanied with: (a) an offer to satisfy the warehouseman's lien,' and the final paragraph of the section places the burden of establishing a lawful excuse for the refusal to comply with the demand upon the warehouseman only when the demand by the holder or depositor is 'so accompanied.' Clearly, we think the making of a proper demand is a condition precedent to the obligation of the warehouseman to deliver. It is expressly made so by [the section], above quoted."

(The Utah act refers back to "such a demand" instead

of to "a demand so accompanied," but the meaning appears to be identical.)

Plaintiff having failed to put on any evidence that the delivery was wrongful, or that John R. Woods Company was not the person entitled to the goods or his agent, or that a demand had been made and refused, or that a tender of the storage charges had been made, the plaintiff did not establish a *prima facie* case either under the statute or general law. Accordingly, the Court committed error in refusing the defendant's motion for a nonsuit and placing the burden of proof on defendant. This error not only wronged the defendant then, but changed the course of the trial.

## II

### THE COURT ERRED IN ADMITTING EVIDENCE OFFERED BY THE PLAINTIFF AND IN EXCLUDING EVIDENCE OFFERED BY THE DEFENDANT.

During the course of the trial the Court committed prejudicial error by excluding evidence in two instances in which it should have been admitted and admitting evidence in one instance in which it should have been excluded.

From the moment the answer was filed the issues in the case included the extent to which plaintiff and John R. Woods might have had an arrangement between themselves as to delivery of merchandise from the defendant's warehouse. This issue was raised in the first instance in the second defense of the answer (R. 15); and with reference to it the pre-trial order stated as follows:

"The defendant claims that the circumstances under which the delivery was made constituted a contract implied in fact, and generally lies in the exchange of correspondence between plaintiff and defendant and in the practices of plaintiff and defendant in relation to deliveries and payments under the warehouse receipts. Part of the practice was that John R. Woods and H. A. Robbins, as an agent with power to act for the plaintiff in connection with the warehouse receipts, entered into an agreement, or agreements under which Walker Bank and Trust Company did carry John R. Woods on the basis of his checks, and would hold the checks after delivery of the merchandise until such time as Mr. Woods was able to obtain other financing under a 'flooring arrangement.' "

The question is also raised, inferentially, in the defendant's second contention (R. 20).

During redirect examination of Robbins the following occurred (R. 127 et seq.):

"Q As a matter of fact, Mr. Robbins, a good deal of this time that Mr. Woods was financing through your bank and using warehouse receipts, he was running overdrafts in his account, was he not?

"A Some of the time.

"Q But you were paying checks, you paid a large number of checks for him, did you not, even though there was no money in the bank?

"A We paid a number of checks off.

"Q You knew how Mr. Woods was financing these appliances when he sold them, didn't you?

"A Not always.

"Q Well, you knew some of the time, didn't you?

"A Well, I'd been told that some of the dealers floored these units.

"Q And what is your understanding of flooring?

"MR. HENDERSON: We object your honor, it is immaterial.

"THE COURT: It seems to me that it is beyond the issue of this case, Mr. Roe, as to what he understood about flooring and how dealers were financing.

"MR. ROE: I would like to make an offer of proof on it, your honor.

\* \* \*

"MR. ROE: I offer to prove by this witness that he knew that John R. Woods was flooring the merchandise that was being held under warehouse receipts and that he also understood that when wholesalers floored merchandise they delivered it physically to the property of the retailer, from which point he can make additional financing arrangements with other financial institutions.

"THE COURT: The offer is refused."

The Court refused this offer partly on the grounds of materiality and partly, it would appear from R. 129 and following, on the ground that since Mr. Robbins previously had testified differently, further inquiring into the flooring arrangement constituted an attempt upon the part of counsel to impeach his own witness.

We submit that the Court was wrong whichever the reason. The method by which Woods dealt with retailers, and how they obtained additional financing to pay for the goods they were receiving from Woods—since obviously under

a "flooring arrangement" there must be some lapse of time between delivery and payment—cannot help but be material in this case; and it is a misconception of the rule about impeaching one's own witness to apply it to prevent a party from bringing out something inconsistent with what a witness may have said before. As said in *McCormick on Evidence*, § 38, the rule against impeachment of one's own witness does not "forbid the party to bring other evidence to dispute the facts testified to by his witness." Or, as said in another Hornbook, *McKelvey on Evidence* (5th Ed.) p. 577:

"There is, however, nothing in the rule which prevents a party from proving his case in the ordinary way, and, if one witness swears to facts which it is necessary for a party to prove otherwise to support his case, he may always do so. It is true that the incidental effect of this is to contradict his own witness, but this is not the purpose of the proof, as long as it is material upon issues in the case it is admissible."

It is apparent from the record that defendant was trying to obtain a clear statement from the witness as direct testimony. The questions asked did not constitute impeachment under any accepted test. See III *Wigmore on Evidence* (3rd Ed.), § 874 et seq.; 4 *Jones on Evidence* (5th Ed.) § 931.

The other two rulings on evidence of which defendant complains occurred during examination of witness Moorehead, who on direct examination testified generally as to his former position as defendant's storekeeper, and methods of operation of the warehouse. On cross-examination counsel for the plaintiff interrogated the witness at length concerning testimony he had given during a bankruptcy proceeding, particularly

with reference to invoices of John R. Woods Company and their meaning. The cross-examination was related to the method of operation of the warehouse, and appeared to be unobjectionable as a basis for impeachment of the witness. The method employed in examining the witness was to read from a former transcript (R. 153) and ask the witness if he had so testified on a previous occasion, the witness usually saying he had. Testimony on the previous occasion related to invoices seemingly showing a sale (and sometimes shipment) of merchandise to Woods' customers. On the basis of Mr. Moorehead's statements that he had previously testified in a certain way, plaintiff offered in evidence five invoices, Exhibits P-15 through P-19. Defendant objected to introduction of these exhibits on the grounds that they were immaterial, adding, prior to their admission, an additional ground of objection that the plaintiff had not laid a proper foundation (R. 165-167). Defendant pointed out that there was no direct testimony as to the meaning of the invoices, and it is clear that the Court understood the basis of the objection (R. 168, 169). Defendant agreed to their admission provided they were introduced solely for the purpose of impeaching the witness. Plaintiff insisted that the invoices were admissible both for impeachment and as direct evidence. They were admitted over defendant's objection (R. 170).

Having introduced the invoices in evidence the plaintiff terminated cross-examination of the witness and in redirect examination the defendant attempted to bring out the meaning of the invoices by direct testimony (R. 170 et seq.) When the witness testified, finally, that merchandise would not necessarily have been shipped from the warehouse on the date

shown on the invoice (R. 173) the trial judge as much as called the witness a perjurer and threatened him with criminal prosecution.

Because of the attitude of the trial judge and the seeming inconsistency between the witness' prior statements and his statements in the present case, defendant sought to inquire further into the testimony in the former proceeding by asking the witness questions concerning his full answers at the other hearing. Having examined the plaintiff's copy of the transcript of former testimony (R. 177) defendant's counsel proceeded as follows:

"Q (By Mr. Roe) Mr. Moorehead, inviting your attention to the testimony that you gave at the—before the Federal District Court in the bankruptcy proceeding, I'm going to read you some additional questions and answers from that proceeding and I want you to tell me if that was your testimony at that time.

"A Yes.

"THE COURT: Now you refer to pages, will you?

"MR. ROE: On page 28. Q (By Mr. Roe) That question came after discussing with you some serial numbers on invoices.

" 'You are correct, that one does not appear; it appears on this invoice which I will show you in a moment. Now with reference to your previous testimony, Mr. Moorehead, can you explain to the Court why we have an invoice here showing a delivery date, date shipped of 7-11-56, and your testimony was that these were shipped out of the warehouse on that date, whereas they also show a delivery order dated May 1, 1957, the identical items?'

" 'A No, I can't. The only'—



"MR. HOLBROOK: Just a minute, your honor, he has answered the question, 'No, I can't.' The rest of the answer is speculation on his part. He says, 'No, I can't,' and that's his answer. Then he starts to speculate about that proposition."

Following this there was considerable discussion during which the witness (R. 180) explained to the Court that the reason he couldn't "explain to the Court" the discrepancy was "because I couldn't remember specific details concerning those specific instances."

Counsel for defendant was finally permitted to make the following offer of proof (R. 181):

"MR. ROE: The witness would state that in addition to saying, 'No, I can't,' that he added: 'The only explanation'—and as a part of the same paragraph he added: 'The only explanation that I might give would be that they were not taken from the warehouse on that date.' I would also offer to prove that Mr. Holbrook questioned him more specifically on the point and that thereafter he testified that this must be so because the warehouse people made monthly inspections or possibly not monthly but periodic inspections and the goods would have to have been in the warehouse."

This offer was rejected by the Court on the ground that it appeared to be "clearly speculation." As indicated above, this ruling came shortly after the trial judge's statement that,

"if he varies his testimony and doesn't satisfactorily explain his variances to the Court, the Court may believe that he's a perjurer. Now you can take your choice on that because I'm not going to have testimony come into the Court that is contrary to his former

testimony under oath unless it is satisfactorily explained and if it appears to the Court there is perjury there is going to be a complaint issued" (R. 175).

It is submitted that these rulings on the evidence by the trial court were not only erroneous but constituted reversible error.

Clearly the invoices should not have been admitted in evidence, at least not as substantive evidence of their contents. When the Court admitted the invoices in evidence there was no useable evidence as to their meaning, how they were kept, or what they were supposed to do. Apparently proceeding to impeach the witness, counsel for plaintiff asked a number of questions about former testimony. But when an objection was made to introduction of the invoices on the ground that there was no proper foundation because no evidence of the present testimony of the witness, counsel for plaintiff declined to ask him any questions about his present testimony; and the witness was still on the stand. It is recognized in Utah and almost everywhere else that evidence admitted for the purpose of impeaching a witness does not constitute substantive evidence of facts contained in a prior statement.

In *State v. Chynoweth*, 41 Utah 354, 126 Pac. 302 (1912), this court said:

"The rule is elementary that 'what a witness, who is not a party, states out of court is not evidence in chief to prove the fact as stated by him, but can only be shown to discredit his testimony at the trial, when his testimony is contradicted by such outside statements. The effect of proving contradictory statements extends no further than the question of *credibility*; it does not tend to establish the *truth* of the matter em-

braced in the contradictory statements; it simply goes to the credibility of the witness.' "

The rule as announced was followed in *State v. Burns*, 51 Utah 73, 168 Pac. 955 (1917).

In *McCormick on Evidence*, § 39, the rule is stated thus:

"When a witness has changed sides and altered his story or forgets or claims to forget some fact, and his previous statement is received for impeachment purposes, what effect shall be given to the statement as evidence? Under the generally accepted doctrine the statement is not usable as substantive evidence of the facts stated. The adversary if he so requests is entitled to an instruction to that effect, and, more important, *if the only evidence of some essential fact is such a previous statement, the party's case fails.*" (Emphasis added.)

And as said in Morgan, *Basic Problems of Evidence* (American Law Institute) Vol. 1, p. 70:

"It must, of course, be noted that the prior statement is not to be used as evidence of the truth of the matter asserted, if there is a limiting instruction."

See, also, 58 Am. Jur., Witnesses, § 770.

It is also reversible error, particularly in light of later developments in the trial, to refuse to permit the defendant to examine the witness Moorehead further as to what his testimony was at the previous hearing. The Court had as much as branded the witness a liar but would not let him show himself not to be. Where part of a statement of a witness is relied upon to impeach him, it is obvious the whole statement should go in, particularly if there is something in the remainder

of the statement which qualifies or explains the other testimony. As said in Morgan, *Basic Problems of Evidence* (American Law Institute). Vol. 1, p. 72:

"Evidence in denial or explanation of the evidence of bias, interest, corruption or prior self-contradiction is everywhere admissible."

And in III *Wigmore on Evidence* (3rd Ed.) § 1044, the following:

"In accordance with the logical principle of Relevancy (ante, § 34), the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received."

The right to explain prior statements was recognized by this court in *Hoggan v. Caboon*, 31 Utah 172, 87 Pac. 164 (1906); see also 4 *Jones on Evidence* (5th Ed.), §§ 961, 962.

Moorehead was not permitted to explain, and it is obvious from the trial judge's remarks during the argument of the case that this made a difference to him *as the trier of the facts*. The judge believed the invoices meant what plaintiff said they meant, and he disbelieved Moorehead. That the judge's erroneous admission and exclusion of evidence had a substantial

effect upon his view of the facts is apparent from the following comments made during the argument:

"THE COURT: Well, I'm going to let Mr. Roe talk about this Exhibit 20 [a summary of the invoices] because the Court is going to take that as meaning just what it says, that this merchandise was out of the warehouse months in advance of the time they even made up their delivery orders." (R. 242)

\* \* \*

"THE COURT: Well, do you want the Court to disregard invoices?" (R. 244)

\* \* \*

"THE COURT: I will say this, that under the rule that binds the Court with respect to the preponderance of the evidence, the more convincing evidence seems to be that merchandise was delivered months ahead of the time that delivery orders were made up as applicable to that evidence." (R. 259)

\* \* \*

"THE COURT: Well, it sounds like fraud. You people made these up. You said here, a 'Washer, automatic, Model 232K, we are shipping out today,' and the facts were, according to Mr. Henderson, that that same washer was shipped out four months ago and was sold a half a dozen times in the meantime." (R. 262)

\* \* \*

"THE COURT: Well, when you rely upon the written order, then I have to take into consideration this evidence with respect to the time of delivery of the goods. Now, I have indicated to you how I feel about it and I have indicated to you that I am of the view that with respect to the time of delivery, the evi-

dence is more convincing to the Court that the merchandise was delivered from the warehouse months in advance of the time that the delivery orders were made up." (R. 271)

It is apparent from the foregoing that the judge believed the invoices and didn't believe Moorehead. It is also apparent that this disbelief in the credibility of the witness and the credence given to the invoices, unsupported by any direct evidence, led the judge to view the transaction entirely differently than it was viewed by all of the principals to it. Inasmuch as the invoices were the only evidence that the merchandise was shipped "months in advance," their admission in evidence and the Court's refusal to permit rehabilitation of Moorehead, constituted reversible error.

### III

IN LIGHT OF ALL THE EVIDENCE, THE COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS, AND ITS CONCLUSIONS OF LAW AND JUDGMENT CONTRARY TO THE EVIDENCE AND AGAINST LAW.

Rule 52(a) of the Utah Rules of Civil Procedure provides that the trial court, in all action tried upon the facts without a jury, shall "find the facts specially and state separately its conclusions of law." Properly applied, this rule would protect parties in cases tried to the Court from the well-known practice of deciding a case because of a particular fact and, to gain approbation, making it appear that all facts were adverse to the loser; it would tend to permit a reviewing court to determine (as it can in a jury case) whether a mistaken view of

the law materially affected the judgment. If the findings of fact are sufficient in this case, our rule serves no useful purpose, for it is impossible to determine whether the judge decided as he did because of misapplication of the Warehouse Receipts Act or because he chose to disbelieve the only testimony he had before him.

In its findings the Court concluded that deliveries by defendant were without lawful excuse and that defendant is liable to plaintiff for conversion. But to leave no doubt about the correctness of the decision, the Court also found

"all issues of fact in favor of plaintiff and against defendant, including all issues raised in the affirmative defenses to the complaint and in the pre-trial order, and without limitation of the foregoing, the Court specifically finds: that plaintiff made no representations to defendant, either express or implied by course of conduct, or otherwise, upon which defendant relied and which could form the basis in fact or in law of any estoppel or contract implied in fact; \* \* \*

The findings of fact are unintelligible and self-defeating. To fail to find a contract between plaintiff and defendant shows a misconception of the source of defendant's duty.

The Court had to find some contract, somewhere. As said by the Supreme Court of Arizona in *Arizona Storage and Dist. Co. v. Rynning*, 37 Ariz. 232, 293 Pac. 16, 19 (1930):

"The relation of warehouseman and depositor is contractual in nature. Their duties and obligations are reciprocal and depend upon their agreement, and, generally speaking, the parties are at liberty to insert in their contract any terms and conditions not forbidden

by law or contrary to public policy. In effect, the Uniform Warehouse Receipts Act so provides."

See, also, 56 Am. Jur., Warehouses, § 21, and 6 Am. Jur., Bailments, § 172.

With some minor changes the Uniform Warehouse Receipts Act has been adopted in Utah, appearing as Title 72, Utah Code Annotated 1953. The act places some duties upon a warehouseman, and limits the extent to which he may change his duties by contract, but except as limited by the act a warehouseman may contract like anybody else. Some of the relevant provisions are summarized below.

First, the act gives permission to warehouseman to issue warehouse receipts (72-1-1 Utah Code Annotated 1953), and prescribes that they must embody certain terms. For failure to include these terms in a negotiable receipt a warehouseman "shall be liable to any person injured thereby for all damages caused by their omission. The act does not fix a penalty for failure to include the terms in a non-negotiable receipt (72-1-2 U.C.A. 1953).

The right to include other provisions in a receipt is recognized by 72-1-3 U.C.A. 1953, which provides that the warehouseman may insert any terms and conditions provided they are not contrary to the provisions of the act and do not impair his obligation to exercise due care in the safekeeping of the goods. A non-negotiable receipt, the kind involved in this action, is defined by 72-1-4 U.C.A. 1953.

Three sections relate directly to the obligation of a warehouseman to deliver stored goods. In so far as pertinent to this action they provide:



"72-1-8. A warehouseman, in the absence of some lawful excuse provided for by this title, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

"(1) An offer to satisfy the warehouseman's lien;

\* \* \*

"In case the warehouseman refuses or fails to deliver the goods in compliance with such a demand by the holder or depositor, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal."

"72-1-9. A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections to one who is:

"(1) The person lawfully entitled to the possession of the goods, or his agent;

"(2) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either endorsed upon the receipt or written upon another paper; \* \* \*

"72-1-10. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for the conversion to all having a right of property or possession in the goods, if he delivers the goods otherwise than is authorized by subdivisions (2) and (3) of the preceding sections; and, though he delivers the goods as authorized by said subdivisions, he shall be so liable, if prior to such delivery he either:

"(1) Has been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or,

“(2) Has had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.”

The act nowhere prescribes a means of determining the identity of “the person lawfully entitled to the possession of the goods, or his agent,” leaving this to the common law. Neither does the act prescribe any formalities necessary to make a person “lawfully entitled.” If the person to whom goods were delivered was in fact lawfully entitled to them the warehouseman has satisfied his obligation. The reference in 72-1-9 (2) to written authority doesn’t increase but decreases the warehouseman’s burden, for he may be safe in delivering pursuant to a written order whether or not the person to whom he delivers is lawfully entitled to the goods. A person may be “lawfully entitled” because of a contract between warehouseman and depositor; or one between depositor and third person; or because of superior title.

One of the cases considering the right of a warehouseman to rely upon a contract with the depositor—not contained in the warehouse receipt itself—is *Moe v. American Ice and Cold Storage Company*, 30 Wash. 2d 51, 190 P.2d 755 (1948). This was an action against the warehouseman for the market value of stored fish. The trial court gave judgment for the warehouseman and the plaintiff appealed. The judgment was affirmed by the Supreme Court of Washington on the basis of a contract arising out of oral communications and conduct. The plaintiff contended that admission of the evidence was improper because in contravention of the parol evidence rule, but the Supreme Court of Washington held that the parol evidence rule did not apply. (It also held that where the pos-

session of the bailee had not been exclusive of that of the bailor the burden of proof to show the lack of negligence or lawful excuse did not fall upon the bailee.)

*George v. Bekins Van & Storage Company*, 33 Cal. 2d 834, 205 P.2d 1037 (1949), involved the nature of the contract between the storer and the warehouseman. In speaking of such contract the Supreme Court of California said:

"When goods are delivered to a warehouseman for storage and no warehouse receipt is issued at time of delivery, an implied contract of storage arises containing those terms required by law. If this contract is to be superseded by the contract contained in the subsequently issued warehouse receipt, it is necessary that the bailor agree to the written contract as proposed by the bailee. Ordinarily such assent may be found in the acceptance and retention of the warehouse receipt by the bailor. \* \* \* By issuing its warehouse receipt defendant proposed the terms to plaintiff upon which it would continue to store the goods. Plaintiff accepted this offer, and defendant's continued performance of the contract as bailee was adequate consideration to support the limitation clause."

The intermediate Court in *George v. Bekins Van & Storage Company*, 196 P.2d 637 (Cal. App., 1948), in upholding admission of evidence of the contents of telegrams between warehouseman and storer, had said:

"This evidence, moreover, was expressly not offered for the purpose of varying the terms of the written warehouse receipt, but went to the issue of whether the receipt was the only and entire contract between the parties."

We think it is clear from the cases and the statute that a

warehouseman can always show the terms of his contract with the storer as justification for delivering to a third person. In the present case the warehouse receipts, Exhibit P-2, do not purport to be "integrated agreements." There is, in fact, an express reference in them to another agreement with the warehouseman.

Another line of cases relevant to the decision in this case deals with delivery by a warehouseman to persons "lawfully entitled" otherwise than under the warehouseman's contract with the storer.

*Wood v. Crocker First National Bank et al.*, 107 Cal. App. 685, 291 Pac. 221 (1930), arose out of plaintiff's deposit of a valuable trunk with Crocker, which mailed a receipt to plaintiff. The trunk was deposited in plaintiff's name, and she gave no delivery instructions. On November 9, 1925, defendant delivered the trunk to the holder of a power of attorney, but without knowledge of the power. The depositor contended that the bank was not justified in delivering because its officers had no knowledge of the power of attorney; further, that the Warehouse Receipts Act restricts the general power of attorney and therefore the delivery was unauthorized. After quoting *Mecham on Agency*, § 744, to the effect that if a party can prove actual authority it is not necessary that he should have known of it or relied upon it at the time of dealing with the agent, the Court had the following to say with reference to the Warehouse Receipts Act:

"The further contention of the appellant is to the effect that this case is controlled by the Warehouse Receipts Act \* \* \*. The claim made is that the receipt

issued for the trunk being non-negotiable, under sections 8, 9 and 10 of said act, the bank was negligent in delivering the trunk to Baldwin Wood. Section 8 deals with the rights of the holder of a receipt; section 9 defines when a warehouseman is justified in delivering goods; section 10 deals with the liability of a warehouseman for the wrongful delivery of goods. Without discussing the authorities cited, we are satisfied that, if said act applies in cases of this class, section 9 of the act is contrary to the appellant's claim. So far as material, said section reads: 'A warehouseman is justified in delivering the goods subject to the provisions of the three following sections, to one who is—(a) The person lawfully entitled to the possession of the goods, or his agent, (b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either endorsed upon the receipt or written upon another paper.' As said by counsel for defendant in his brief: 'It is obvious that Mrs. Wood was a person lawfully entitled to the goods. It is obvious that Baldwin Wood was her agent. It follows that the bank was justified in delivering the trunk to Baldwin Wood, the agent for Mrs. Wood. The statement of the proposition proves itself.' Nowhere do we find anything in the said Warehouse Receipts Act that negatives this conclusion."

*In Travers v. Burdge et al.*, 101 N. J. 237, 127 Atl. 191 (1925), the defendant had received goods in storage from plaintiff and given a non-negotiable warehouse receipt. Thereafter, the defendant delivered the greater part of the goods to Brookland Furniture Company by virtue of two chattel mortgages made by plaintiff. It was admitted during trial that the goods delivered were covered by the mortgages and that

payments were in default at time of delivery. The mortgages contained the usual provision that in event of default of the stipulated payments the company should have the right to retake and sell the goods, but no formal process was sued out by Brookland Furniture Company. The Court of Errors and Appeals affirmed the holding that the warehouseman was not liable, citing the Warehouse Receipts Act as authority for the warehouseman's justification in delivering to the person entitled to the possession of the goods, or his agent.

In *Bunnell v. Ward et al.*, 241 Mich. 404, 217 N.W. 68 (1928), a negotiable warehouse receipt had been issued to a partnership by a warehouse company. Thereafter, although the receipt was not surrendered, the warehouseman delivered goods to one of the partners. The Michigan Supreme Court ruled that a partner was lawfully entitled to delivery of partnership goods; therefore the delivery was justified under the act.

*Farmers' Union Warehouse Company v. Barnett et al.*, 214 Ala. 202, 107 So. 46 (1926), involved a situation in which the plaintiffs had deposited cotton with defendant for which defendant issued negotiable receipts. In upholding the right of the defendant to deliver to a holder of a paramount title the Court said:

"Clearly no change as to the former rule could be inferred from such language, but rather a recognition thereof. The argument of counsel, reduced to its last analysis, seems to be that the warehouseman is liable in any and every case where delivery is made without a production of the receipt, regardless of whether the receipt is negotiable, or, if so, whether or not it has

in fact been negotiated. But the statute does not so provide, and if so intended, it would have been a simple matter to have been so expressed; \* \* \*

"Our attention has not been directed to any authority construing a similar statute to the contrary to this holding, and we do not think the legislative intent was to work a change in the rule in a case as here presented. Indeed, the lawmaking body deemed it necessary to specifically provide for liability of the warehouseman for delivery of the goods without taking up the receipt therefore, when such receipt had been negotiated to the purchaser in good faith."

We submit that if the trial court had correctly viewed the law it would have had to find that defendant delivered to a person "lawfully entitled" to possession. The evidence is all one way. We are aware that a trial court's findings, particularly in a law case, more often than not are held to be unassailable. But the invincibility of findings is usually confined to cases in which there is a conflict in the evidence and "substantial" evidence to support them.

An appellate court is not bound by the conclusions of a trial court based upon undisputed facts. See *King v. Buckeye Cotton Oil Company*, 155 Tenn. 491, 296 S. W. 3, 53 A.L.R. 1086 (1927); *Los Angeles Investment Company v. Home Savings Bank*, 180 Cal. 601, 182 Pac. 293, 5 A.L.R. 1193 (1919); *Klatt v. Akers*, 232 Iowa 1312, 5 N.W. 2d 605, 146 A.L.R. 808; and *Picerne v. Redd*, 72 R. I. 4, 47 A.2d 906, 166 A.L.R. 397. Under our constitutional provision (Article VIII, Section 9) this Court has, of course, been required to give great weight to the findings of the trial court in a law case. But even under this provision the Court has usually indicated that it will accept

the findings of the trial court if the "evidence is conflicting," or if there is "substantial" evidence to support it. See *Pixton v. Dunn*, 120 Utah 658, 238 P.2d 408 (1951); and *Idaho State Bank v. Hooper Sugar Company*, 74 Utah 24, 276 Pac. 659 (1929).

There were certain facts in this case that the trial court had to find. It had to find a contract between the plaintiff and the defendant—and it should have found what the terms of that contract were. In finding the terms the Court could not reasonably ignore the correspondence between plaintiff and defendant in October and November 1956 (Appendixes A, B and C). Although the trial court indicated that it did not intend to follow the rule "that silence gives consent," it should have. In the recent case of *V-1 Oil Company v. Anchor Petroleum Company*, 8 Utah 2d 349, 334 P.2d 760 (1959), this Court approved the view that one party may not permit another to believe that the contract has certain terms and then later refuse to be bound by those terms. As said in that case, "had defendant desired to make it clear that the conditional acceptance by plaintiff of defendant's offer was unacceptable it would have been a simple matter to have replied to plaintiff's letter of September 6th rejecting the same." It would have been a simple matter for the plaintiff in this case to have replied rejecting the defendant's construction of "payment." Plaintiff did not reply, and whether it did or not is of little consequence since the interpretation adopted by the defendant was acceptable to plaintiff and there was, in fact, a "meeting of the minds." As said in 3 *Corbin on Contracts*, Section 538. "if the defendant admits that he gave the same meaning to the words as did the plaintiff, he should not escape liability by convincing



the Court that no reasonable man in his place would have given the words that meaning and that no reasonable man in the other party's place would have expected him to do so." It is clear that as of the date of receipt of the November 12 letter by plaintiff there was a contract between plaintiff and defendant under which defendant was to deliver merchandise to Woods upon receipt of Woods' check by the storekeeper. This fact is borne out not only by the exchange of correspondence but by the testimony of Holt, Woods, Moorehead, and Robbins. There wasn't any other evidence on this point. Was the trial judge free to disbelieve?

Following the exchange of correspondence, for a period of approximately six months the parties operated in accordance with such an understanding, much as they had done before that time. There was no obligation on the part of the defendant to receive a signed order from plaintiff prior to delivery of any goods; no obligation to insure that the check would be paid; no guaranty that there were funds with which to pay it.

The testimony of both Moorehead and Woods was that a signed check was left with Woods at all times and that the storekeeper had authority to fill in the blanks on the check and deliver to the bank. That the check was not complete, and that the storekeeper for bookkeeping simplicity might have found it convenient, as he testified, to accumulate a number of items before preparing a delivery order and sending it to the bank, did not prevent the action of the storekeeper in obtaining a check before delivery from amounting to substantial performance of defendant's obligations under its contract with plaintiff. The negotiable instruments law makes it clear

that the taking of incompleated instruments by the storekeeper was compliance under defendant's contract with the bank. It is provided in 44-1-15 U.C.A. 1953 as follows:

"Where an instrument is wanting in any material particular the person in possession thereof has *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as *prima facie* authority to fill it up as such for any amount. \* \* \*

And 44-1-13 U.C.A. 1953 provides that:

"An instrument is not invalid for the reason only that it is antedated or postdated; provided, that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery."

The evidence is thus clear, based upon the testimony of the four principals and the documents, that the bank received substantially what it bargained for. The warehouseman delivered the goods as Woods needed them in his business and took in exchange Woods' checks. It is no answer to say that one or more checks may have been postdated, or not completed, or delivered in blank. It is no answer to say that the storekeeper may have held the checks for some time before delivering them to the bank. These things bear upon whether the warehouseman breached other obligations of its contract with plaintiff—but it would be writing a new and different contract to hold that authority to deliver was conditional upon them. Perhaps defendant breached a contractual duty when it did not transmit delivery orders and checks on a daily basis;

perhaps it was a breach to take post-dated checks; but to find a breach does not solve the problem. This contract contained a number of promises, a grant of authority, and a number of conditions. The authority granted was to deliver property to Woods. Admittedly the authority was conditional. But, considering the undisputed evidence, what was the substance of the condition? The evidence compels a finding that plaintiff wanted a Woods check, but that it didn't care about much else—whether it was given immediately before or after delivery, or whether Woods had money in the bank. Appendix D is a summary of the transactions as based upon the dates of the delivery orders, the dates they were received in Los Angeles, the period of time during which the bank held Woods' checks and the instances in which overdrafts in the account were honored. Plaintiff's conduct during the period belies its contentions now. Appendix D alone negatives any conclusion that defendant *materially* breached its contract, or *materially* breached the condition upon which delivery was authorized.

Not every breach of contract is a breach of condition. Admittedly defendant may be held liable to plaintiff for damages resulting from any breach. But if it were suing for breach of contract plaintiff would have to show that it suffered a loss because of the breach; it would have to come forward and explain its handling of the John R. Woods account and tell why, during the period in which it was dishonoring checks drawn in payment for stored goods, it was paying itself on other checks made by John R. Woods in an amount in excess of \$4700.00 (Exhibit D-23), and paying others in amounts in excess of \$1500.00 (Exhibit D-22).

If the problem is viewed as one involving the extent of defendant's authority to deliver, defendant was, under the circumstances, authorized to deliver. See *Restatement of Agency*, §§ 33, 34. If viewed simply as a contractual problem, there was no material breach of defendant's duty to plaintiff. See *Restatement of Contracts*, §§ 263, 274, 275.

Regardless of plaintiff's agreement with defendant, Woods was a person "lawfully entitled, or his agent" under his agreement with the bank. Woods himself testified that Robbins agreed that he could take the goods out and use them in his business as a merchandise jobber, whether or not he could pay for them immediately. He was to have the goods by asking for them. Woods, Robins and Moorehead all bear this out. Moreover, it is apparent that the plaintiff and Woods worked the proposition together and that plaintiff retained some joint control of the warehouse. When the plaintiff discovered shortages in the warehouse Robbins pointed them out to Woods, not to the storekeeper nor to defendant's Los Angeles office. All this, and the conduct inferable from Appendix D, show that John R. Woods was lawfully entitled from the standpoint of an agreement between him and the plaintiff, or was the plaintiff's agent.

In any event, plaintiff was estopped from claiming that the deliveries to Woods were unlawful. The trial court imputed knowledge of Woods' books and accounts to the defendant storekeeper and concluded that the defendant was charged with that knowledge. *Ergo*, defendant cannot show "good faith" reliance. We submit that all of the elements of an estoppel were present. There was some kind of an arrange-

ment between Woods and plaintiff; defendant's storekeeper knew about it; defendant's storekeeper suspected that Woods was not in good financial condition; notwithstanding this suspicion and notwithstanding the drawing of checks more or less indiscriminately, all checks drawn by the storekeeper or by Woods in connection with the removal of goods from the defendant's warehouse were in fact honored by plaintiff until the first week in May, 1957; plaintiff continued to let the storekeeper (defendant's eyes and ears on the scene) believe that everything was all right, dealing directly with Woods upon discovery of shortages. It would be improper for the Court to isolate the knowledge of one of defendant's agents for the purposes of determining the extent to which defendant, a corporation, relied upon the conduct of plaintiff. It is undisputed that the corporation tried to protect itself through reports and periodic inspections and inventories of the warehouse, but plaintiff made the defendant's record keeping considerably more difficult and less rewarding through the honoring of no-fund checks, the holding of checks and delivery orders, and the giving of notices to John R. Woods when discrepancies were found in the warehouse. The defendant as a whole, as a corporation, no doubt would have taken additional steps to protect itself had it not been led by plaintiff to believe that the method in which the warehouse was being operated was satisfactory. Plaintiff as much as told the storekeeper that it would deal directly with Woods with respect to discrepancies discovered in the warehouse. (See *Larsen v. Knight*, 120 Utah 261, 233 P.2d 365, 372 (1951); and *cf Heaton et al. v. Martinez*, 3 Utah 2d 259, 282 P.2d 833, 835 (1955)).

The fact recital is based upon the testimony of the four

principals and the documents in evidence. But the Court was thrown on the wrong scent and followed five invoices away from the hunt. The invoices were accepted by the Court as showing deliveries out of the warehouse "months in advance" of issuance of delivery orders for the same merchandise by Moorehead as storekeeper. As previously pointed out, admission of the invoices was improper since their meaning, purport and validity had not been established. But assuming their admission was proper, they still do not prove what the trial court took them to prove. The testimony relating to them was that the date shown as "shipment" date on the invoices was not necessarily the date of shipment from the warehouse, and that where no shipment date was shown, the invoice date would not be the shipment date. (Moorehead testified that if he had said in a previous hearing that the invoice date represented the shipment date he would have been wrong.) But by comparing the invoices with each other, and with the warehouse receipts, it is apparent that the invoices prove nothing. Appendix E is a table prepared by comparison of serial numbers of various items found on invoices with those found on other invoices, and with the warehouse receipts. If Invoice A was correct, B was incorrect; and if either was correct, some of the goods were shipped out before they were received in the warehouse in the first place. Moreover, the invoices are unbelievable when compared with other evidence as to inspections and the method of handling delivery orders and reports. Inspection reports show that the goods were all accounted for as late as March 27, 1957 (plaintiff's Exhibit P-10). The report of January 17, 1957, and the testimony of Holt and Robbins as to inspections deprive the invoices of all weight.

#### IV

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S COST BILL AND IN ALLOWING PLAINTIFF'S COSTS.

Rule 54(d)(2) of the Utah Rules of Civil Procedure provides as follows:

"A party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed and file with the Court a verified memorandum of the items of his cost and necessary disbursements in the action or proceeding stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed, may, within five days after service of the memorandum of costs file a motion to have the bill of costs taxed by the Court in which the judgment was rendered."

The record shows that the judgment was entered on April 30, 1959 (R. 280), and that on May 5, 1959, an unverified "Memorandum of Costs and Disbursements" was filed by plaintiff (R. 284). On May 6, 1959, the defendant moved for an order striking the Memorandum of Costs and Disbursements on the ground that it had not been verified. Thereafter, on May 11, 1959, after the period within which the original Memorandum of Costs and Disbursements might have been filed under the rule, plaintiff moved for leave to file a supplemental memorandum on the ground that the one theretofore filed contained errors arising from oversight or omission. On June 5, 1959, the Court entered an order denying defendant's

motion to strike the cost bill but taking no action upon plaintiff's motion to file a supplemental bill.

This Court, in *Houghton v. Barton*, 49 Utah 611, 165 Pac. 471 (1917), stated that there must be at least a substantial compliance with the requirements of a former section, much like Rule 54(d)(2); and the Court has been strict in construing other requirements relating to costs. For instance, in *Nelson v. Arrowhead Freight Lines*, 99 Utah 129, 104 P.2d 225 (1940), it was held that a cost bill which did not reach the Clerk's office until the sixth day after verdict, although mailed on the fifth day, should have been stricken. Our rule is explicit in requiring the Memorandum of Costs and Disbursements to be verified, and the filing of an unverified one is not substantial compliance.

## V

### THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL.

On May 11, 1959, the defendant moved for a new trial, partly on the ground of newly discovered evidence which should not have been discovered before trial. The evidence was, substantially, that Superior Heating and Appliance Company, the purchaser to whom most of the shipments were shown to have been made on the John R. Woods invoices, was a company controlled by John R. Woods, indicating that it would have been possible to show shipments to this company without making any physical change of the goods from the warehouse.

Although defendants recognize that this relates to a col-



lateral matter, we believe that denial of the motion for a new trial in this case was an abuse of discretion because of the fact that the invoices, as appeared from the record, had a substantial effect on the outcome of the case; and under defendant's theory this could not have been anticipated.

The trial court knew that its view of the facts was influenced primarily by what it took the invoices to mean. When it had an opportunity to reconsider the invoices, and receive new evidence that the invoices did not mean any such thing, indicating that the remainder of the evidence—coherent, consistent and compelling belief, without the invoices—was correct, the trial judge should have granted the motion. This is particularly true in light of the other grounds for a new trial pointed out to the trial court, i.e., the error in admitting the invoices in the first place, the refusal to permit defendant to show plaintiff's knowledge of Woods' arrangements with his retail dealers, and the refusal to permit defendant to rehabilitate the witness Moorehead.

## CONCLUSION

Insofar as the merits of the case go, the evidence prohibits recovery by plaintiff in an action for conversion. The trial judge was wrong unless defendant not only had the burden of proof but the judge was free to disbelieve all the persons who had first-hand knowledge of the transactions. The trial judge seemed to be influenced primarily by the invoices and the fact that the defendant maintained a warehouse on the premises of the debtor, Woods, and employed a person theretofore and sometimes thereafter in the employ of Woods.

But the Court failed to realize that this is a fairly standard practice with reference to field warehousing arrangements such as this. See *Tom Boy Stores, Inc. v. Douglas-Guardian Warehouse Corporation*, 237 Mo. App. 892, 179 S.W. 2d 145 (1944); and *Bradley v. St. Louis Terminal Warehouse Company*, 189 F.2d 818 (8 Cir., 1951).

Defendant, as a service to plaintiff and Woods, maintained a warehouse on Woods' premises. Plaintiff knew where the warehouse was and that Woods would be there operating as a wholesaler of goods. The proof shows, indeed, that plaintiff participated to a much larger extent in Woods' activities than did defendant or any of its agents. The bank was in on things from the beginning. It knew what Woods was doing and how he was operating in the warehouse. It kept a constant check on him; and when it found something wrong, Woods was told about it. Only the defendant was kept in the dark.

The Court had to believe the defendant's evidence because the defendant produced all of the principals to the transaction; there wasn't really anyone else left to testify. There being no conflict but plenty of corroboration in the evidence, it was the duty of the Court to accept that evidence. It had to find there was a contract; it had to find that there was substantial performance by defendant; it had to find an arrangement between the plaintiff and Woods under which Woods was authorized to pick up the goods to give the bank a check for them whether he had funds or not. And at that, the evidence in defendant's behalf might have been stronger than it was. The Court refused to hear what plaintiff knew about the kind of arrangements Woods as a wholesale appliance dealer was making with his retailers.

The Court also erred in admitting the invoices in evidence. There was no direct evidence as to what the invoices meant, only statements about prior statements elicited from Moorehead on cross-examination, and which could not be used as proof of the substantive facts contained in prior statements. Even then, admission of the invoices would not have been so unpalatable if the Court had not attributed to them a validity and a meaning unwarranted by their own inconsistency and all of the other facts of the case. To "believe" the invoices, the trial court must have disbelieved all of the other evidence. Holt testified consistently that the defendant company made regular checks of the warehouse and physically counted the stocks then on hand; Moorehead said they did; Woods said they did; Robbins said the bank, too, checked the serial numbers but discovered shortages only once in awhile. (In light of this disbelief perhaps the Court did no harm in not permitting rehabilitation of Moorehead since it felt free to disregard testimony whether a witness's credibility was sullied or not.)

Since no allowance was given to defendant for any of the disputed deliveries, the trial court must also have disbelieved Holt's undisputed, corroborated testimony that on May 10, 1957, he found 5 or 6 units in the warehouse, made a delivery order for them, obtained a check from Woods and sent the check and delivery order to the bank—else how was defendant a converter of *those* units?

The trial court made at least three reversible errors in its ruling upon the evidence; another in placing the burden of proof upon the defendant. Notwithstanding these errors, the defendant met the burden of proof with more evidence than

was necessary; but the Court disregarded the evidence and even found *all* facts in favor of the plaintiff and against the defendant. We believe it is clear that the trial court either misunderstood the law or disregarded the purport of uncontradicted evidence in the case. The judgment should be reversed and the Court directed to enter judgment for the defendant, no cause of action.

Respectfully submitted,

Bryce E. Roe  
FABIAN & CLENDENIN  
800 Continental Bank Building  
Salt Lake City 1, Utah

*Attorneys for Defendant and Appellant*

## APPENDIX A

### FIRST MURRAY BRANCH

Murray 7, Utah

October 16, 1956

H. A. ROBBINS

Vice President-Manager

New York Terminal Warehouse Company, Inc.

520 West Seventh Street

Los Angeles 14, California

Attention: Mr. Jack Holt

Gentlemen:

We are presently financing against your warehouse receipts for the John R. Woods Company, Salt Lake City, Utah. These receipts cover appliances, and it is our method of operation that these units, one or more, be paid for at the time they are withdrawn.

This is to advise you that this is the manner in which we will handle all transactions which we presently have or may have in the future.

/s/ H. A. ROBBINS

H. A. Robbins

Vice President-Manager

HAR:ec

CC: John R. Woods Company

## APPENDIX B

### NEW YORK TERMINAL WAREHOUSE CO.

520 West Seventh Street  
Los Angeles 14, California

November 12, 1956

Mr. H. A. Robbins, Vice President  
Walker Bank & Trust Company  
Murray 7, Utah

Dear Mr. Robbins:

I have been away from the city most of the time for the past three weeks and apologize for being so late in answering your letter of October 16th, relative to delivery of goods from our Warehouse No. 2552-2 operated for John R. Woods Co.

I asked Mr. Woods to arrange with you the method of delivery which you wanted to authorize of material from the warehouse under the warehouse receipts which you are holding, and from your letter interpret that you wish to authorize delivery from the warehouse upon the receipt, by our Storekeeper, of a check from John R. Woods Co. I am attaching for your inspection, and modification if you so desire, an outline of Delivery Instructions which are often tendered to us by warehouse receipt holders for the delivery of goods from our warehouses.

I think you will find that the instructions as outlined give protection to both the warehouse company and the Bank and set definite limits on the operation of the warehouse. We would like very much to have our delivery instructions from you in somewhat the outlined form, in triplicate. Please understand that we can and will operate within any limits that you set.

If you have any questions, as to this or any other phase of the operation, do not hesitate to write to us.

Very truly yours,

Incorporated  
NEW YORK TERMINAL WAREHOUSE CO.  
/s/ C. J. HOLT  
C. J. Holt  
Vice President

## APPENDIX C

### (Bank Letterhead)

New York Terminal Warehouse Company, Inc.  
520 West Seventh Street  
Los Angeles 14, California

Date.....

Gentlemen:

To secure certain loans made and to be made by the Walker Bank & Trust Company (hereinafter sometimes referred to as the "Storer"), the Storer has and will pledge to the Bank non-negotiable warehouse receipts evidencing the storage of appliances. We understand that these items will be held in your Warehouse No. 2552 at 525 West 1st South, Salt Lake City, Utah. Other locations, however, may be utilized as necessary.

These Instructions are your authority to deliver to the Storer from such merchandise stored in the Bank's name and held for its account the following described goods subject to the conditions and restrictions outlined herein.

1. You may deliver goods, in any one day, having a total dollar value of \$..... based on values as shown on your warehouse receipts and/or your receiving record on which the warehouse receipt is based.
2. Prior to any release of inventory made by you under the provisions of these instructions, the John R. Woods Company is to tender to you its check drawn on and payable to Walker Bank & Trust Company in an amount equal to ..... % ..... of the declared dollar Value of the merchandise to be delivered.
3. This check, together with your regular delivery order form (in duplicate) on which is to be listed the particular goods delivered, together with reference to the Warehouse Receipt number, or numbers, under which it was stored, and other pertinent descriptions are to be mailed via United States First Class Mail by a representative of the New York Terminal Warehouse Co., on the same day which it is received. It is agreed that you shall have no further liability in connection with such checks or the value thereof. The depositing in the United States Mails as outlined above shall automatically re-instate your authority to deliver to John R. Woods Company, subject to the limitations set forth above. This Delivery Order in duplicate (one copy to be retained by us) we agree to execute

and return to you promptly at 520 West Beventh Street, Los Angeles, California, if complete and in proper order.

4. This authority to deliver merchandise shall not give to the John R. Woods Company, any right, title or interest in or to any of the merchandise in said warehouse stored in our name and for our account except as noted above and subject to the various restrictions and stipulations as outlined herein.
5. You will not permit any charge for any reason which may be or become a lien on the merchandise covered by your Warehouse Receipt or Receipts and held by us to remain unpaid longer than 30 days after the end of the month in which such charges accrued, unless you shall immediately notify us as to such unpaid charges in each instance.
6. These instructions executed by us in triplicate shall become effective only upon your delivery to us of a duly executed copy hereof signed by one of your officers evidencing acceptance of the provisions contained therein. Upon becoming effective, these instructions shall supersede all previous instructions and shall remain in full force and effect until amended or cancelled by the bank in writing.

Please acknowledge receipt of and agreement to these conditions by signing and returning the attached carbon copy of this letter.

Sincerely yours,



	Delivery Order			Check		Received in L.A. Date D.O.
	Number	Date	Amount	Date	Amount	Date Charged To Account
	1001	5-21-56	\$ 184.45	Unknown	\$ 184.45	5-23-56
	1002	7-17-56	2962.15			7-24-56
	1003	7-17-56	548.00	Unknown	3510.15	7-23-56
	1004	7-19-56	573.00	Unknown	573.60	8- 6-56
	1005	9-12-56	822.00	Unknown	822.00	9-21-56
	1006	9-18-56	2923.63			10-15-56
	1007	9-18-56	1596.75	Unknown	4520.35	10-10-56*
	1008	9-19-56	303.60	Unknown	303.60	10-11-56
	1009	10-16-56	527.35	Unknown	527.35	10-19-56
	1010	10-17-56	3372.30	Unknown	3372.30	11- 8-56
	1011	11- 7-56	1271.40	Unknown	1271.40	11-15-56
	1012	11- 9-56	2226.45	Unknown	2226.45	11-15-56
	1013	11-21-56	134.35	Unknown	_____	Not Charged
	1014	12- 5-56	1465.00	Unknown	1465.00	12-11-56*
	1015	12- 6-56	2713.80			12-17-56
59	1016	12- 6-56	1282.05	12- 6-56	3995.85	12-14-56
	1017	12- 7-56	1040.35	1- 2-57	1040.35	1- 8-57
	1018	1- 9-57	734.35	1- 9-57	734.35	1-15-57
	1019	1-17-57	1072.10	2- 5-57	1072.10	2- 6-57
	1020	1-21-57	1389.70	2- 5-57	1389.70	2-19-57*
	1021	2-14-57	935.60	2-14-57	935.60	2-19-57*
	1022	2-21-57	1635.10	2-25-57	1635.10	3-20-57*
	1023	3-11-57	1101.05	3-15-57	1101.05	4-16-57
	1024#	4 -3-57	1164.80	_____	_____	5- 6-57
	1025	4-30-57	685.00	4-30-57	685.00	5- 9-57
	1026	5- 1-57	822.00	5- 9-57	822.00	
	1027	5- 2-57	965.00	5- 9-57	965.00	
	1028	5- 3-57	1507.00	5-16-57	1507.00	
	1029	5- 7-57	6814.30	_____	_____	
	1030	5-10-57	628.70	5-10-57	628.70	

\*Indicates overdraft.

#1024 was for correcting serial numbers. No check accompanied it.

# APPENDIX E

Merchandise		Invoices on Which Shown				Warehouse Receipt		Delivery Order	
Model	Serial No.	No.	Date	No.	Date	No.	Date	No.	Date
332X	83771	1852	9-28-56	2033	11- 7-56	15-09	10-15-56	1024	4- 3-57
232X	85296	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1020	1-21-57
232X	85291	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1029*	5- 7-57
232X	85289	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1027*	5- 2-57
232X	85257	1852	9-28-56	2033	11- 7-56	14-09	10-15-56	1026*	3- 1-57
232X	85287	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1025	4-30-57
232X	85282	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1025	4-30-57
232X	85258	1852	9-28-56	2033	11- 7-56	14-09	10-15-56	1026*	5- 1-57
232X	85288	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1027*	5- 2-57
232X	85259	1852	9-28-56	2033	11- 7-56	14-09	10-15-56	1026*	5- 1-57
232X	85295	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1027*	5- 2-57
232X	85290	1852	9-28-56	2349	1-17-57	14-09	10-15-56	1022	2-21-57
332X	83126	1892	10-10-56	2033	11- 7-56	15-09	10-15-56	1024	4- 3-57

60

\*Identifies final group of delivery orders not signed by plaintiff.