

1959

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

Utah Supreme Court

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Ray, Rawlins, Jones & Henderson; Attorneys for Plaintiff and Respondent;

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

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**FILED**

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**WALKER BANK AND TRUST COM-  
PANY, a corporation,**

*Plaintiff and Respondent,*

**vs.**

**NEW YORK TERMINAL WARE-  
HOUSE COMPANY, a corporation,**

*Defendant and Appellant.*

Clerk, Supreme Court, Utah

**Case No.  
9098**

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**BRIEF OF RESPONDENT**

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In the  
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WALKER BANK AND TRUST COM-  
PANY, a corporation,  
*Plaintiff and Respondent,*

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NEW YORK TERMINAL WARE-  
HOUSE COMPANY, a corporation,  
*Defendant and Appellant.*

Case No.  
9098

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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

*Plaintiff's Case*

Plaintiff's claim is based on twelve (12) nonnegotiable warehouse receipts, issued by defendant to plaintiff under Utah's Uniform Warehouse Receipts Act (Title 72, Utah Code Annotated 1953), covering certain automatic electric washers and driers stored in defendant's warehouse in Salt



Lake City, Utah. Said goods are specifically identified in the warehouse receipts by model number, name of manufacturer and serial number (R. 1, 18, Exhibit "P-2"). The obligations, duties and responsibilities of defendant with respect to said goods are set forth in said Act and the warehouse receipts incorporate the same therein by reference thereto (Exhibit "P-2").

Defendant was required to deliver said goods either to plaintiff, as the holder of the warehouse receipts covering the same, or to a person whom plaintiff by written authority had authorized the delivery of the same. The Utah Warehouse Receipts Act so provides and plaintiff so admits. Mr. C. J. Holt, Vice President of defendant, in charge of West Coast Sales and Operations, testified with respect to the goods covered by said warehouse receipts, as follows:

"Q. That is right, and these were the bank's goods? They were stored for the bank?"

"A. Yes, sir."

"Q. As far as you are concerned they were the bank's goods and stored for the account of the bank?"

"A. That is right, sir."

"Q. The point is they are stored for the account of Walker Bank and Trust Company?"

"A. That is correct, sir."

"Q. And as far as you are concerned, the bank is the owner and entitled to possession of those goods, isn't that correct?"

"A. That is right, sir."

"Q. And the bank"—

"A. Once the warehouse receipt has been issued."

"Q. Once the warehouse receipt has been issued, as far as the warehouse company is concerned the bank owns those goods and it is entitled to possession of them?"

"A. That is right" (R. 90-91).

Printed forms designated "delivery order" were supplied by defendant for use by plaintiff in authorizing delivery of the goods from said warehouse (R. 79, Exhibits "P-3" and "P-7").

On May 10, 1957, without notifying plaintiff, defendant closed its warehouse at the location where plaintiff's goods had been stored and collected its storage charges, for reasons which are apparent from inter-office communications shown in the appendix as Appendix "A", "B", "C" and "D" (R. 100-101, 202).

Following such closing of the warehouse, plaintiff received from defendant certain delivery orders and checks (Exhibit "P-3"). Said exhibit consists of six (6) delivery orders, one of which is dated May 1, 1957, one dated May 2, 1957, one dated May 3, 1957, two dated May 7, 1957 and one dated May 10, 1957. To each of said delivery orders is attached a check signed by John R. Woods (Woods). The check attached to the delivery order dated May 7, 1957, is blank as to the date, payee and amount. Each of the remaining checks are payable to Walker Bank & Trust Company in an amount equal to the declared value of the goods shown on the delivery order to which it is attached. In

each instance, said checks are dated subsequent to the date of the delivery orders, except the check signed in blank and the check accompanying the delivery order dated May 10, 1957. The delivery orders are prepared for execution by Walker Bank & Trust Company to authorize delivery of the goods described therein to Woods. Said delivery orders were never executed nor delivered by plaintiff to defendant (R. 19, 124).

The goods described in said delivery orders constituted a part of the goods covered by the warehouse receipts on which this action is based and represented a substantial part of all the goods covered by warehouse receipts issued by defendant to plaintiff and held by plaintiff as security for the payment of indebtedness owing by Woods to plaintiff on promissory notes (R. 19, Exhibits "P-2", "P-3", "D-8"). Neither the indebtedness evidenced by said promissory notes (which exceeds the value of the goods) nor the checks have been paid and Woods has been adjudicated a bankrupt (R. 19, Exhibit "P-1").

Prior to the closing of said warehouse, the dates of the delivery orders and of the checks, the goods described in said delivery orders had been delivered out of the warehouse by defendant to a person or persons other than plaintiff—in some instances, as hereinafter shown, many months prior to said times (R. 101, 152-155, 159-170, Exhibits "P-15"—"P-20", incl., Appendix "E"). At the time of closing the warehouse and as of the dates of said checks and delivery orders, defendant knew that Woods was insolvent (R. 151-152).

Upon the foregoing facts, plaintiff brought this action against defendant for conversion of the goods described in said delivery orders, the value of which was stipulated to by defendant (R. 37, Exhibit "P-4").

### *Defendant's Affirmative Defenses*

Defendant's affirmative defenses to this action are as follows:

(1) That by an alleged agreement between plaintiff and defendant the defendant was authorized to deliver the goods in question to Woods without first obtaining a delivery order executed by plaintiff, provided that defendant, before such delivery of the goods, obtained from Woods a check payable to plaintiff for the declared value of the goods together with a delivery order signed by Woods and describing the goods to be delivered, such check and delivery order to be forthwith forwarded to plaintiff (R. 85-89).

(2) That plaintiff is estopped because, as stated in the pretrial order:

"2. Defendant also defends on the grounds of estoppel and in this respect represents that in holding the delivery orders and checks for varying long periods of time, the plaintiff led the defendant to believe that delivery of the goods to John R. Woods on the basis of a delivery order signed by him, and without plaintiff's signature was sufficient authorization as far as the plaintiff was concerned.

"It is understood in connection with this defense that to prevail the defendant must show that the

goods covered by the warehouse receipts in question were delivered in accordance with such a practice.

"The defendant urges this defense severally as against each delivery, and collectively" (R. 20).

With respect to the above defenses, the record shows as follows:

Defendant commenced in the spring of 1956 to store goods covered by warehouse receipts issued to plaintiff (R. 117). Thereafter, defendant executed and delivered to plaintiff various delivery orders authorizing delivery of the goods described therein, commencing with a delivery order dated May 21, 1956 (R. 72, Exhibit "D-8"). In each and every instance, plaintiff obtained payment of the check accompanying the delivery order before plaintiff executed and delivered the delivery order to defendant (R. 114-115, 124-125).

Some months after the commencement of said transactions, plaintiff, prompted by some request from defendant, advised defendant by a letter dated October 16, 1956, as to plaintiff's method of operation with respect to said warehouse receipts (R. 116-118, Exhibit "D-5"). In this connection, the letter states that "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."

On November 12, 1956, defendant replied to plaintiff's letter, which, among other things, states, "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." Defendant's letter enclosed

a proposed letter to be executed by plaintiff and sent to defendant for authorizing the delivery of goods stored for plaintiff upon receipt by defendant's storekeeper of Woods' check, but subject to certain limitations and restrictions as set forth in said proposed letter (R. 119-120, Exhibit "D-6"). Plaintiff did not answer defendant's letter nor send any letter such as proposed by defendant (R. 119).

The alleged agreement which defendant relies upon for its delivery of the goods from the warehouse without a written delivery order authorizing the same, must be gained from plaintiff's letter and defendant's reply thereto, and concerning this matter, Mr. Holt testified as follows:

"Q. Now, Mr. Holt, in a second defense which is pleaded to our complaint in this action, it is alleged that, 'For many months prior to May 1, 1957, defendant'—that would be the warehouse company—'had operated under a warehousing agreement by the terms of which defendant was to release stored goods upon receipt from John R. Woods, an appliance dealer, of a delivery order signed by him together with payment for the stored merchandise.' Is that correct"?

"A. That is right, yes, sir."

"Q. And that agreement is to be gained from the letter Mr. Robbins wrote to you on October 16th, 1956, and your reply to that letter"?

"A. Yes, sir."

"Q. Now it says: 'By the terms of the warehousing agreement, plaintiff'—that is the Walker Bank and Trust Company—'was to sign the delivery order received by it from defendant's Salt Lake City storekeeper and send them to the defendant's Los Angeles office as evidence of authority to deliver and

delivery of the merchandise to John R. Woods or his order.' Is that correct?"

"A. That is correct" (R. 88-89).

Concerning the allegations pleaded in defendant's answer as a basis for its defense of estoppel, Mr. Holt testified in respect thereto as follows:

"Q. There are some allegations in here which I may cover very quickly with a question—otherwise I will be glad to go into them—where they speak of the bank giving credit to Woods and of overdrafts I believe and so forth, in transactions between the bank and Woods; do you know anything about those?"

"A. No, sir."

"Q. And did you at any time know anything about it?"

"A. No, sir."

"Q. And I take it as a warehouseman generally speaking you are not concerned with any arrangements or transactions between the bank and its customer, you are simply concerned with your duty as warehouseman to store the goods and deliver them upon receipt of the proper authority?"

"A. That is correct, sir. The only time we have any knowledge of what a loan percentage would be is where the bank specifics we pick up a given percentage."

"Q. As in the enclosed letter which you sent?"

"A. That is right" (R. 89).

Plaintiff's conduct in respect to all the warehousing transactions mentioned in the record is entirely consistent with the plain meaning of plaintiff's letter of October 16, 1956, namely, that plaintiff would execute and deliver a

delivery order to defendant authorizing delivery of goods from the warehouse to Woods if and when Woods' check accompanying the delivery order was paid by cash funds in the bank.

Mr. H. A. Robbins, a retired manager of defendant's Murray Branch, testified in behalf of defendant on direct examination, as follows:

"Q. Did you ever send delivery orders to Los Angeles without the checks having been paid before that?"

"A. Not to my knowledge."

"Q. Would you say that you had not done so?"

"A. I would have to say that."

"Q. Was it your understanding while you were holding the delivery orders waiting for the check to clear, that the goods were still in the warehouse?"

"A. As far as I knew" (R. 115).

On cross examination pertaining to the same subject, Mr. Robbins testified:

"Q. Now, in previous transactions evidenced by delivery orders which have been submitted—admitted in evidence as Exhibit D-8, did you receive these delivery orders accompanied by checks?"

"A. Yes, sir."

"Q. Now you may state whether at any time you signed those delivery orders and forwarded the same to Los Angeles until you had actually received funds to cover the checks?"

"A. That's correct."

"Q. Now when you refer to 'payment,' in your letter I think of October 16, 1956, do you refer to



payment by checks which have been made good through funds deposited in the account or do you refer to simply the check itself?"

"A. No, I don't refer to the check itself. I refer to the check that when it is actually paid, payment would be when the check is actually paid" (R. 125).

Regarding the alleged agreement that defendant was authorized to deliver goods from its warehouse to Woods upon its receipt of a check from Woods and without a delivery order signed by plaintiff, Mr. Robbins testified as follows:

"Q. Now, if you will listen to this question carefully. Did you have any agreement with Woods at any time, written or otherwise, whereby Mr. Woods would be authorized to take those goods from the warehouse prior to the time that you signed the delivery order and the check which he brought in was made good by funds in the bank?"

"A. No, sir."

"Q. Did you ever have any such agreement or understanding of any kind with the warehouse company?"

"A. No, sir."

"Q. Did you, as far as you can recall, ever sign a delivery order and forward it to the warehouse company until you had funds in the bank to pay the check that accompanied it?"

"A. As I recall it, that's true."

"Q. You never did?"

"A. No, sir" (R. 221).

Corroborating the testimony of Mr. Robbins in regard to the alleged agreement and also the fact that defendant

did not rely on any conduct of plaintiff in making delivery of goods from its warehouse without obtaining a delivery order executed by plaintiff authorizing the same, are the instructions of Mr. T. B. Akeley, an auditor in defendant's Los Angeles office (R. 147-148, Exhibit "P-7"). Said instructions, which are dated April 2, 1957, and contain the signature of defendant's storekeeper, Harvey R. Moorehead, accepting the same under date of April 3, 1957, whose signature is notarized on the same date, recite in said instructions the storage of the goods by defendant for plaintiff and defendant's issuance of its warehouse receipts to plaintiff for such goods, and then specifically provide:

"NOW THEREFORE, the WAREHOUSEMAN does instruct and admonish its employees, viz.:

"Supervisor, Harvey R. Moorehead, Storekeeper,	
"Asst. Storekeeper,	Asst. Storekeeper,
"Asst. Storekeeper,	Asst. Storekeeper,

(the WAREHOUSE EMPLOYEES) that the goods deposited by the STORER in the WAREHOUSE in the name and for the account of the BANK can be delivered only in strict accordance with the following instructions:

"1. Pursuant to instructions from the BANK, the WAREHOUSEMAN is authorized to deliver to the STORER only such goods as may be specified on a Delivery Order signed by an individual duly authorized to sign for the BANK, provided the following instructions are complied with:

"A. The Storekeeper must actually have in his possession a Delivery Order specifying the goods to be delivered, signed by an

individual authorized to sign for the BANK before any goods can be delivered.

“B. Before the close of business of the day on which goods are delivered from the WAREHOUSE, the Storekeeper, or in his absence one of the WAREHOUSE EMPLOYEES listed herein, will personally mail to this office with the Daily Report, the original Delivery Order.

“2. Unless the Storekeeper actually has received Delivery Order duly signed by an individual authorized to sign for the BANK as specified in Paragraph 1-A hereof and has mailed Delivery Order as specified in Paragraph 1-B hereof, all WAREHOUSE EMPLOYEES are forbidden to deliver, or permit anyone to remove, any goods from the WAREHOUSE.

“All previous instructions in reference to delivery of goods from WAREHOUSE are hereby rescinded” (Exhibit “P-7”).

The Exhibits, which are contained in the Appendix in chronological order as Appendix “A”, “B”, “C”, “D” and “E”, have a material bearing on defendant’s defenses based on said alleged agreement and estoppel, as does also the testimony of defendant’s storekeeper:

“Q. Well, I’m asking you this: With respect to the performance of your duties as warehouseman, whose directions did you follow in the performance of those duties, Mr. Woods or the directions of the New York Terminal Warehouse Company?”

“A. Well, I tried to follow both as much as I could. I depended on my job from Mr. Woods but

I still wanted to do my best to follow the rules as to the way things had been going."

"Q. So if Mr. Woods told you to do something with respect to your status as agent of the New York Terminal Warehouse Company, very likely you would follow his orders in that regard because of your dual capacity there?"

"A. Yes, sir" (R. 186-187).

It is clear from these inter-office communications and reports that at least as early as February 1, 1957, the defendant had abdicated its warehousing of plaintiff's goods and the operations of its warehouse in favor of Woods, notwithstanding the warehouse receipts covering said goods were held by plaintiff to secure Woods' indebtedness to plaintiff. Mr. Akeley, defendant's auditor who had made trips to Salt Lake City to audit the warehouse operations, states as of February 1, 1957 (Exhibit "P-9") :

"Frankly, he (Woods) runs the warehouse, and he will continue to do so with any employees we might put in there, outside of ourselves."

It appears that defendant decided to assume the risk for such breach of its obligations and responsibilities as a warehouseman rather than offend Woods or impair his "good standing" with plaintiff (Exhibit "P-12").

Consistent with defendant's relinquishment of its warehouse to Woods, the record shows that when Woods obtained an order for the purchase of goods stored in the warehouse, defendant's storekeeper would remove goods from the warehouse and accumulate them for as long as two or three

weeks before he received a check from Woods and made out a delivery order (R. 146, 148, 149). In the event Woods was going to be away from his office for a while, he would sign blank checks and delivery orders and leave them in his safe, to be filled in by his employees to cover goods removed from the warehouse and thereby facilitate the operations of defendant's storekeeper last above mentioned (R. 197, 198, 206).

Defendant offered no evidence to show that the goods in question had been delivered in accordance with the authority which it claims to justify such delivery as pleaded under its affirmative defenses or as contended for under the pretrial order, notwithstanding that defendant singularly had within its own knowledge and from its daily and permanent records and its audits of the warehouse the times, to whom and under what circumstances the goods in question were delivered from defendant's warehouse (R. 69-71, 77-78, 91-93). On the other hand, uncontradicted evidence adduced by plaintiff shows that a substantial part of the goods in question were shipped out of the warehouse by the defendant many months prior to the dates of the checks or delivery orders covering the goods which are the subject of this action (Exhibit "P-20", Appendix "E"). And it is a reasonable inference from the record, that all the goods in question were delivered out of the warehouse to third persons a considerable time prior to the dates of the delivery orders and checks (Exhibit "P-3") which were received by plaintiff after defendant had closed its warehouse where the goods had been stored.

## STATEMENT OF POINTS

1. The evidence supports the finding that the defendant made delivery of goods covered by nonnegotiable warehouse receipts held by plaintiff without authority from plaintiff as required by the Utah Uniform Warehouse Receipts Act.

2. The evidence supports the findings that defendant had no lawful excuse for the delivery of the goods covered by nonnegotiable warehouse receipts held by plaintiff.

3. It was not error to allow plaintiff's cost bill.

4. It was not error to deny defendant's motion for a new trial.

## ARGUMENT

## POINT NO. 1

THE EVIDENCE SUPPORTS THE FINDING THAT THE DEFENDANT MADE DELIVERY OF GOODS COVERED BY NONNEGOTIABLE WAREHOUSE RECEIPTS HELD BY PLAINTIFF WITHOUT AUTHORITY FROM PLAINTIFF AS REQUIRED BY THE UTAH UNIFORM WAREHOUSE RECEIPTS ACT.

The warehouse receipts were issued under the Uniform Warehouse Receipts Act, found in Title 72, Utah Code Annotated 1953, wherein under Section 72-1-2 it is provided that in the case of nonnegotiable receipts the receipts should provide that the goods will be delivered to a specific person. In the light of this section and since the warehouse

receipts are designated as nonnegotiable, the receipts must be construed as providing that the goods described therein would be delivered upon the written order of plaintiff for whose account the goods were stored. The warehouse receipts so provide. In addition, the delivery orders issued by the defendant warehouse addressed to it, and delivered to the plaintiff bank for its signature, provide that "you are hereby authorized to deliver to John R. Woods Company" the goods described in the delivery order, which goods are likewise described in the warehouse receipts held by the bank. Hence, the delivery orders supplied by the warehouse company for use in all of the transactions with plaintiff expressly recognize the statutory requirement that defendant deliver said goods only to a person "who has written authority from" plaintiff.

The provisions of the Utah statute applicable to this action concerning nonnegotiable warehouse receipts are as follows:

"72-1-9. Justification of warehouseman in delivering.—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 nonnegotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper; or \* \* \*

\* \* \*

"72-1-10. Warehouseman's liability for misdelivery.—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 conversion to all having a right of property or possession in the goods, if he delivers the goods otherwise than as authorized by subdivisions (2) \* \* \* of the preceding section; \* \* \*."

The warehouse receipts in question provide that the "responsibility of the warehouseman with respect to the goods in storage is defined in the Uniform Warehouse Receipts Act of the State wherein the warehouse is located."

Defendant contends that someone other than the plaintiff bank was entitled to possession of the goods covered by the warehouse receipts held by plaintiff, and, therefore, that the written authority required by the statute was unnecessary. Finding No. 2 entered by the trial court in this action provides as follows:

"At all times herein mentioned plaintiff was, and now is, the lawful holder of said warehouse receipts, entitled to delivery of the goods therein named by the terms of said receipts, and lawfully entitled to possession of the goods named therein and hereinbelow described."

Hence, the trial court has found that the contract between the parties is as contained in the warehouse receipts, which incorporates the Utah act by reference. The elements under the Utah statute are found in plaintiff's favor, including the element that plaintiff is lawfully entitled to possession of the goods covered by the warehouse receipts. As set forth in detail in the Statement of Facts, Mr. C. J. Holt, Vice President of defendant, recognized that as far as the



defendant was concerned the goods belonged to the bank, were stored for the account of the bank, and that the bank was the owner and entitled to possession of the goods once the warehouse receipts had been issued.

The contention of defendant's counsel that someone other than the bank was entitled to possession of the goods violates the express terms of the warehouse receipts prepared and issued by defendant, is in derogation of the express terms of the statute, contradictory of the statements of defendant's officer who was in charge of this warehouse, contrary to the evidence and findings of the lower court, and unsupported by defendant's authorities. *Moe v. American Ice & Cold Storage Company*, 30 Wash. 2d 51, 190 P. 2d 755 (not a warehouseman — depositor relationship); *George v. Bekins Van & Storage Company*, 33 Cal. 2d 834, 205 P. 2d 1037 (goods destroyed by fire — case decided on the language of the warehouse receipt itself); *Wood v. Crocker First National Bank, et al.*, 107 Cal. App. 685, 291 Pac. 221 (actual agency established by recorded power of attorney); *Travers v. Burdge, et al.*, 101 N. J. 237, 127 Atl. 191 (depositor in default under mortgage and delivered to mortgagee pursuant to mortgage); *Bunnell v. Ward, et al.*, 241 Mich. 404, 217 N. W. 68 (goods deposited by partnership and delivered to one of the partners); *Farmers' Union Warehouse Company v. Barnett, et al.*, 214 Ala. 202, 107 So. 46 (undisputed title in third party).

Apparently, defendant's counsel reaches this interpretation on the basis of alleged defenses which we will consider in subsequent portions of this brief. The basic fallacy of defendant's argument is that defendant would have the

appellate court review the evidence and draw inferences contrary to those drawn by the trial court.

The scope of the appellate court's review in this case is so firmly established that we cite only a few of the many Utah cases on this subject. In *Lynn v. Thompson*, 112 Utah 24, 184 P. 2d 667, it was stated:

"But the lower court has seen fit to reject defendant's version of the case and the question for us to decide is not which of the two sides should be believed. We are called upon to decide whether or not there is evidence in the case that will directly or by inference support the decision of the trier of the facts. In deciding that question we decide merely—so far as circumstantial evidence is concerned—that if there are inferences to be drawn therefrom that will support the lower court's conclusions upon the probabilities of that evidence, we are bound to uphold the decision, even though had we been trying the case we might have stressed the inferences adversely to such a conclusion."

See also *John C. Cutler Association v. DeJay Stores*, 3 U. 2d 107, 279 P. 2d 700; *Adler v. Clark*, 122 Utah 472, 251 P. 2d 669.

As further evidence supporting the findings of the trial court that the contract between the parties consisted of the elements contained in the Utah Uniform Warehouse Receipts Act, the statement of facts herein reviews in some detail the testimony of defendant's witness, H. A. Robbins, who testified that signed delivery orders were not forwarded to defendant until checks had been paid; that as far as he knew, in instances when he held a delivery order

until the check accompanying the same had been cleared, the goods were still in the warehouse; and that he had no agreement with Woods or the warehouse company that the goods could be taken from the warehouse prior to the time the delivery order was signed as required by the Utah statute. Corroborating the testimony of Mr. Robbins are the instructions of Mr. T. B. Akeley, an auditor in defendant's Los Angeles office, particularly concerning the warehouse in which the subject goods were stored, accepted by Mr. Moorehead, the defendant's storekeeper under date of April 3, 1957, more than a month before defendant closed said warehouse, which instructions reiterated the statutory duties of defendant and state expressly that the defendant's storekeeper "*must actually have in his possession a delivery order specifying the goods to be delivered, signed by an individual authorized to sign for the BANK before any goods can be delivered.*" (Emphasis added.) As shown by the Statement of Facts herein, defendant's interoffice communications which for convenience of the court appear in the appendix to this brief, show that the defendant decided to assume the risk of delivery of the goods without written authorization from the bank.

Even under facts which show an agreement on the part of the warehouse receipt holder not to require written authorization, which does not exist under the evidence and findings in this case, the courts construe the statute literally and nonetheless require a written authorization. In the case of *Farmers' Bank of Weston v. Ellis*, 122 Ore. 266, 258 Pac. 186, one John H. Grafton deposited potatoes with the defendant who issued negotiable warehouse receipts.

The defendant alleged that Grafton had entered into an agreement with plaintiff bank that the sale of the perishable potatoes would be negotiated by Grafton as agent for the bank and that Grafton would deposit the proceeds from the sale of the potatoes with the bank and the warehouse receipts would be returned to Grafton as the sales and deposits were made. Defendant further alleged that this agreement was in accordance with general banking custom and recognized by the parties. Defendant further contended that by inadvertence the particular warehouse receipts involved in the action were not returned to Grafton by the plaintiff. After a verdict for the defendant, plaintiff appealed citing as error the instructions of the trial court. The Supreme Court of Oregon held that even assuming the validity of the facts which defendant alleged to exist, there was no defense to the action and the judgment was reversed and a new trial directed. In the opinion the court cites a provision of the Uniform Warehouse Receipts Act which is identical to our Section 72-1-10 and provisions of 8018 Oregon Laws which are identical to our 72-1-11. The whole tenor of the opinion is that written authority is required by the statute. While the receipts involved in the *Ellis* case were negotiable, the dissenting opinion recognizes that the bank was the person rightfully entitled to possession and had not transferred the receipts to a bona fide purchaser. Hence, the negotiability or nonnegotiability of the receipts in no way is necessary to the court's conclusions and reasoning since the effect of negotiating comes into play only when the warehouseman fails to take up a receipt and it has been transferred for value to a bona fide purchaser.

This element is not involved in the *Ellis* case nor in our case and does not add nor detract from the rule for which the *Ellis* case is cited. The Supreme Court of Oregon holds:

“We take it that the object of the law, as shown by its many provisions, was to see that each step taken, beginning with the deposit in the warehouse and the issuing of the receipt to the final delivery of the goods by the warehouseman to the holder of the receipt, should be evidenced by some statement in writing, so as to completely preclude any attempt by an unauthorized person to get possession of the property.”

In the second appeal of this case, *Farmers' Bank of Weston v. Ellis*, 126 Ore. 602, 268 Pac. 1009, the Supreme Court of Oregon affirmed its previous holding and stated that any contractual dealings between the bank and the depositor of the goods are immaterial; in the case now before the court, Mr. Holt states expressly that he had no knowledge of contractual negotiations between plaintiff and Woods, and Holt admits that any dealings between the bank and Woods were of no concern to the warehouse company.

Concerning the dissent which appears in the first *Ellis* decision, it is interesting to note that J. Rand, who dissented, finally concurred with a unanimous court in the second appeal. The dissent is important because it reviews facts which did not affect the judgment of the majority, and more important, do not exist in any degree in the present litigation: the oral contract was clear and express and conformed with general custom; the bank was tendered the proceeds of the sale which was for the full market

value of the goods; there was a showing of agency by an express agreement. As indicated above, we cite this case because it demonstrates the policy of the law requiring written authority even under extreme facts; we do not concede that such facts reviewed in the *Ellis* case exist in the case now before the court. Indeed, the evidence and findings expressly negate the existence of such facts.

In the case of *Voyt v. Bekins Moving & Storage Company*, 169 Ore. 30, 119 P. 2d 586, the court states that a warehouse receipt ordinarily constitutes the contract between the parties and holds that the right to insert in the warehouse receipt terms and conditions other than those required by statute does not give to such terms the force of contract unless it can be fairly said that the minds of the parties have met thereon. We will again call attention to this rule when we discuss the affirmative defenses raised by defendant in this action.

Defendant attempts to avoid the judgment on the untenable theory that plaintiff failed to make out a prima facie case because plaintiff had made no demand of defendant for return of the goods and had failed to make an offer to satisfy the warehouseman's lien. In the first place, contrary to defendant's contention, there is no question before this appellate court as to whether plaintiff made out a prima facie case when it rested at the conclusion of its evidence in chief and defendant interposed a motion to dismiss (R. 42), as the court declined to render any judgment until the close of all the evidence (R. 49, 65, 74, 75), and then made findings of fact and conclusions of law and entered judgment herein on all the material and com-

petent evidence adduced by both parties. Rule 41(b), Utah Rules of Civil Procedure. Further, defendant waived its right to object on the ground its motion to dismiss was erroneously denied by proceeding to introduce evidence. *Century Indemnity Co. v. Nelson*, 90 F. 2d 644 (C. C. A. 9th, 1936).

Furthermore, the alleged failure of plaintiff to make a demand for the return of the goods or offer to satisfy defendant's warehouse charges did not operate to shift defendant's burden of proof. In the first place, defendant overlooks the undisputed fact that the warehouse charges had been paid and that defendant had delivered the goods to someone other than the plaintiff prior to defendant's closing the warehouse where the goods were stored. It is elementary that demand for delivery and tender of charges is not required where it would serve no useful purpose, such as when the warehouseman has received his storage charges and has put it out of his power to deliver the goods, "since a vain and useless act is not required by the depositor or receipt holder." 56 Am. Jur., Warehouse, Section 191; 93 C. J. S., Warehouseman and Safe Depositories, Sections 72c and 51; *State ex rel. Hermann Reitmeier v. Oakley*, 129 Wash. 553, 225 Pac. 425; *State v. Farmers' Elevator Company*, 59 N. D. 679, 231 N. W. 725; *Cody v. Müller*, 91 Ohio App. 36, 102 N. E. 2d 727. Hence, delivery of the goods without authority from the plaintiff "renders the warehouseman liable without a demand." 56 Am. Jur., Warehouse, Section 191. Moreover, under the general law in an action for conversion, the "defendant bears the burden of proof as to any affirmative matter set up by him

as a defense to the action." 53 Am. Jur., Trover and Conversion, Section 176.

## POINT NO. 2

THE EVIDENCE SUPPORTS THE FINDINGS THAT DEFENDANT HAD NO LAWFUL EXCUSE FOR THE DELIVERY OF THE GOODS COVERED BY NONNEGOTIABLE WAREHOUSE RECEIPTS HELD BY PLAINTIFF.

The existence of a lawful excuse for delivery without having obtained written authority from plaintiff is pleaded and actually constitutes an affirmative defense to plaintiff's complaint, as to which defendant had the burden of proof. Defendant failed completely to discharge this burden. The only evidence offered by defendant concerns inspections made by defendant's officers and only general statements of the results of these inspections were offered in evidence. The reliability and probative value of the inspections were rendered meaningless by the admissions of defendant in its interoffice communications that shortages existed in the warehouse, that the warehouse was not being operated properly, and that Woods completely controlled the warehouse. Let us now consider the affirmative defenses raised by defendant.

*There was no written authority which authorized defendant to deliver the goods from the warehouse.*

The court entered findings as follows:

"At various times commencing on or about September 28, 1956, the defendant, in the absence of



lawful excuse, without authority from plaintiff, and contrary to its obligations and duties as a warehouseman, delivered to a person or persons who were not lawfully entitled to the possession thereof, nor entitled to delivery by the terms of the said receipts, nor having authority from the plaintiff who was so entitled, certain goods covered by said warehouse receipts.

\* \* \*

“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; and that defendant made delivery of said goods without any authority by plaintiff and even contrary to the authority claimed by defendant to exist by reason of any of the matters pleaded or made an issue in the pretrial order as a defense to this action.”

We will now consider the question of whether there existed the alleged agreement between plaintiff and defendant under which defendant contends it was authorized to deliver the goods to Woods upon its obtaining from Woods a check and without obtaining from plaintiff a delivery order authorizing the delivery of the goods. The sequence of events leading to the exchange of correspondence which defendant claims constituted its authority for the delivery of the goods without a delivery order is reviewed in the Statement of Facts herein. It is undisputed that, prior to said exchange of correspondence between Robbins and Holt, plaintiff in each instance obtained payment of the checks accompanying the delivery orders before plaintiff executed and delivered delivery orders to defendant. It also is un-

disputed that from the spring of 1956 until said exchange of correspondence, the defendant had no written authority to deliver goods covered by warehouse receipts held by defendant except the authority contained in delivery orders executed and delivered by plaintiff to defendant (Exhibit "D-8"). On October 16, 1956, plaintiff wrote to the defendant stating that "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." Mr. Robbins, who wrote the letter, testified that the letter was not intended to reflect any changes in his methods of operation and that following the exchange of correspondence the bank still obtained payment of the checks accompanying the delivery orders before plaintiff executed and delivered the delivery orders to defendant.

The defendant's Vice President, Mr. Holt, testified in effect that he construed the exchange of correspondence as authorizing defendant to deliver the goods to Woods, upon receipt only of Woods' check, as provided for by the proposed instructions enclosed in Holt's letter for execution by the bank, but without any limitations as to the amount of goods which could be released at any time upon receipt of such check. It is admitted that the instructions which Holt proposed that the bank execute and deliver to the defendant, were never executed and delivered and the instructions themselves provide:

"These instructions executed by us in triplicate shall become effective only upon your delivery to us of a duly executed copy thereof signed by one of your officers evidencing acceptance of the provisions contained herein. Upon becoming effective, these

instructions shall supercede all previous instructions and shall remain in full force and effect until amended or cancelled by the bank in writing."

Hence, it appears that the alleged agreement under which defendant claims to have had authority to deliver the goods, is based upon the plaintiff's failure to reply to Holt's letter and defendant's claim that such correspondence effected a modification of defendant's previous obligation not to deliver the goods from the warehouse until it had received a written delivery order from plaintiff authorizing the same. In fact, by some legerdemain defendant reduces the alleged agreement to a situation where "the plaintiff wanted a Woods' check, but that it did not care about much else—whether it was given immediately, before or after delivery or whether Woods had money in the bank." In other words, defendant argues that by such exchange of correspondence it thereafter was justified in relinquishing control of its warehouse to Woods, provided Woods had left an unsigned check in his safe.

By the terms of the enclosure itself, defendant clearly recognized that a check was not payment, notwithstanding Mr. Holt's testimony that the warehouse company in all its dealings throughout the United States always interpreted a receipt holders' instructions to release goods upon payment to mean the goods could be released upon receipt of a check (R. 81-82).

The law is perfectly clear that under the circumstances of this case a check is not payment. *Ashton v. Skeen*, 85 Utah 489, 39 P. 2d 1073. A check is only conditional pay-

ment, the condition being its collectibility from the bank on which it is drawn and in order for a check to constitute payment an express, positive and specific agreement is necessary. 70 C. J. S., Payment, Section 24. *Hale v. Bohannon*, 38 Cal. 2d 458, 241 P. 2d 4; *State v. U. S. Steel Corporation*, 12 N. J. 38, 95 Atl. 2d 734; Paton's Digest of Legal Opinions, Vol. 1, Page 1091, cases cited therein.

The law is equally clear that under the circumstances of this case, the failure of plaintiff to reply to defendant's letter of November 12, 1956 was not sufficient evidence to establish a modified contract. The enclosure in the letter expressly stated that it did not become effective until accepted by plaintiff which, of course, plaintiff did not do. In 17 C. J. S., Contracts, Section 41e, it is stated:

“Silence alone, however, does not give consent, even by estoppel, for there must not only be the right, but the duty, to speak before the failure so to do can estop a person from afterward setting up the truth, particularly where the silence or inaction has an uncertain or ambiguous meaning and the parties have reasonable differing views as to what was in fact meant.”

See also *Utah State Building Commission v. Great American Indemnity Company*, 105 Utah 11, 140 P. 2d 763; *Cohen v. Johnson*, 91 Fed. Supp. 231 (D. C. Pa.); *Security First National Bank of Los Angeles v. Spring Street Properties*, 20 Cal. App. 2d 618, 67 P. 2d 720; *Hoosier Drilling Company v. Ellis*, 282 Ky. 137, 137 S. W. 2d 1084.

The case of *Voyt v. Belkins Moving & Storage Company*, supra, recognizes the danger in allowing modifications of

the statutory contract resulting from the issuance of a warehouse receipt under the Uniform Act. This is consistent with the policy of the law announced in the case of *Farmers' Bank of Weston v. Ellis*, supra, that any "other construction would leave a loophole in the law which would render it practically nugatory in many instances." Under the evidence surely it cannot be fairly said that the minds of the parties have met on any modifications of the statutory contract. The trial court agreed.

*The elements of Estoppel are Totally Lacking.*

The essential elements of an estoppel are completely lacking in this case. These elements are cited in 19 Am. Jur., Estoppel, Section 42, Page 642-43, as follows:

"(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially."

It would be redundant to consider each of said elements required to establish an estoppel and to demonstrate that there is a complete lack of supporting evidence. However, we deem it advisable to mention again the fact that Mr.

Holt testified that as far as any dealings between Woods and the bank were concerned, the warehouse company knew nothing about any such dealings and were not concerned with them.

The lower court found that no estoppel existed. Defendant in its brief disregards the testimony of Mr. Holt, the principal witness for defendant, and attempts to twist and confuse the testimony of Mr. Robbins, another of defendant's witnesses. The testimony of Mr. Robbins is reviewed in detail in the Statement of Facts. Defendant finds it convenient to refer only to that portion of his testimony where he was somewhat confused. Again, defendant fails to recognize the rule of review in appellate practice. In the case of *Mueller v. Barnes*, 139 Cal. App. 2d 847, 294 P. 2d 505, the court said:

"These were factual matters for the determination of the trial judge who had the responsibility, in making the determination, to pass upon the credibility of the witnesses, the weight that should be given their testimony, and to resolve the conflicts and inconsistencies even in the testimony of an individual witness. *Peterson v. Peterson*, 74 Cal. App. 2d 312, 319, 169 P. 2d 474. Such a factual decision is controlling on appeal."

The following authorities uphold the unanimous rule that inconsistencies in the testimony of an individual witness are to be resolved by the trier of the fact and that under firmly established legal principles the appellate court is not at liberty to reweigh the evidence and draw inference contrary to those drawn by the trial court: *Peterson v. Peterson*, 74 Cal. App. 2d 312, 168 P. 2d 474;

*Showalter v. Western Pacific R. R. Company*, 16 Cal. 460, 106 P. 2d 895; *Sukiasian v. Shakarian*, 115 Cal. App. 798, 252 P. 2d 956; *People v. Alonzo*, 158 Cal. App. 2d 45, 322 P. 2d 42.

Defendant claims that the lower court erred in not allowing Mr. Robbins to testify as to his "understanding of flooring." On direct examination, Mr. Robbins testified that he had no knowledge of the general class of Woods clientele and "didn't know who the merchandise was being sold to or under what terms or anything else." In redirect examination, Mr. Roe attempted to impeach his own witness by a question which was inherently based on surmise, hearsay and conclusions. In the case of *Hansen v. Hansen*, 110 Utah 222, 171 P. 2d 392, 394, this court stated:

"Certain answers to questions involved surmise, hearsay and conclusions. The court did not err in not receiving them in evidence. Indeed the court could not base any finding on such answers without indulging in speculation."

See also: *Farmers' and Merchants Savings Bank v. Jensen*, 64 Utah 609, 232 Pac. 1084.

Questions of materiality and relevancy rest largely in the discretion of the trial court and the trial judge may exclude evidence which is remote or of comparatively little probative force. The determination as to when a matter so lacks significance or materiality as to justify exclusion is within the trial court's discretion. *Independent School District No. 24 v. Weinmann*, 243 Minn. 469, 68 N. W. 2d 248; *Testa v. Metropolitan Life Insurance Company*, 136 N. J.

L. 9, 54 Atl. 2d 455; *Bjorkman v. Town of Newington*, 113 Conn. 181, 154 Atl. 346.

The testimony solicited by Mr. Roe both on direct and redirect examination of Mr. Robbins was clearly an attempt to impeach his own witness and was improper. *Schlatter v. McCarthy*, 113 Utah 543, 196 P. 2d 968, rehearing denied, 113 Utah 560, 198 P. 2d 473; *Xenakis v. Garrett Freight Lines, Inc.*, 1 U. 2d 299, 265 P. 2d 1007. The citations to McCormick, Wigmore and Jones in defendant's brief do not refer to impeachment of a witness by asking that witness questions, but refer rather to the introduction of contradictory evidence by another witness. Defendant is confused on the application of the doctrine relied upon.

*Even if it be assumed that an alleged agreement existed which authorized defendant's delivery of goods described in the delivery orders upon receipt of Woods' checks, the evidence shows that defendant delivered the goods in question contrary to such an alleged agreement.*

In this regard, the trial court found in finding No. 6 that "defendant made delivery of said goods without any authority by plaintiff and even contrary to the authority claimed by defendant to exist by reason of any of the matters pleaded or made an issue in the pretrial order as a defense to this action."

In introducing this phase of our brief, we point out that the warehouse should have been at all times under the supervision and control of defendant. But the defendant's officers and employees saw fit to relinquish control of the warehouse to Woods. The defendant allowed goods to be



withdrawn from the warehouse at random, with only a blank check left in Woods' safe, supposedly supporting the accumulation of deliveries while Woods was away from his office. This was done by defendant with full knowledge that Woods was financially insolvent, prompting defendant's storekeeper to quit his job because, as stated by the trial court, he was abandoning a sinking ship.

Only the defendant was in a position to insure the valid operation of the warehouse. It was the defendant that set up the warehouse and had the duty to see that the goods were properly segregated, identified and delivered; the defendant is in the warehouse business; it was paid for its services; only defendant was entitled to control the operations of the warehouse.

Evidence as to the time deliveries took place from the warehouse was fully within the possession of the defendant, but no such evidence was offered by defendant at the trial. Why? Because it knew of the condition of the warehouse; that the goods had been delivered out of the warehouse contrary to its obligations as a warehouseman and hoped that it could avoid its responsibility by attempting to place the blame on plaintiff. It is inconceivable that the vague testimony of Robbins that approximately four inspections made by an unknown employee of plaintiff of the general condition of the warehouse, where no reports were made to plaintiff's officers, could operate to shift the responsibility of warehouse management to plaintiff. Plaintiff is in the banking and not the warehouse business and the risk of seeing to it that the warehouse is being properly managed is on the warehouse company and not the bank.

Concerning the delivery of merchandise from the warehouse, defendant's storekeeper, Robert R. Moorehead, testified that, even though the instructions quoted in the Statement of Facts herein specifically governed his duties and responsibilities in the operations of this warehouse, the goods were delivered by him from the warehouse without complying with the instructions.

In addition, Mr. Moorehead identified Exhibits "P-15" to "P-19", inclusive, as true and correct copies of Woods' invoices which he had prepared (R. 170, et seq.). These invoices were also certified by the United States District Court as true and correct copies of documents on file in the Bankruptcy Division of that court. This certification was completed pursuant to the pretrial order to forestall any objections as to the admissibility of copies. The materiality of these invoices is clearly shown on Exhibit "P-20", appended to this brief, since merchandise is identified by serial number on the invoices as the same merchandise identified by serial number on the delivery orders covering the merchandise upon which this action is based. The important fact is that the invoices show deliveries long before the date when the delivery orders and checks were delivered either to defendant or plaintiff in May of 1957.

Defendant objects to the materiality of these invoices of Woods. In the case of *Adler v. Clark*, 122 Utah 472, 251 P. 2d 669, the court held that invoices provided ample evidence to support the findings of the court concerning merchandise furnished, charges, previous balance, payments and credits. Similarly, the courts universally recognize that invoices and other similar data taken from the records of

a company are sufficient to show delivery of the merchandise: *Wiley & Foss, Inc. v. Saxony Theatres*, 332 Mass. 172, 124 N. E. 2d 903; *East Basin Oil & Uranium Company v. Pound*, 321 P. 2d 694, (Okla., 1958); *Albert S. Eastwood Lumber Company v. Britto*, 51 R. I. 406, 155 Atl. 354; *McKnight v. Anderson*, 76 Ga. App. 81, 44 S. E. 2d 814.

Moreover, it is the prerogative of the trial court to determine when a sufficient foundation is laid and when there is established sufficient credibility of the evidence. *State v. Davie*, 121 Utah 189, 240 P. 2d 265; *Zeigler Milling Company v. Denman*, 79 Ohio App. 250, 72 N. E. 2d 686.

The foregoing review of the evidence of Harvey R. Moorehead, which alone supports the findings of the court, does not include any reference to his testimony before the Referee in Bankruptcy of the United States District Court which was received in evidence in the trial of this case. Defendant now objects to this testimony and states that it is proper only for impeachment purposes. Admittedly, the testimony served to impeach the testimony of Mr. Moorehead, but it also was material to the issues in this case. In the course of the testimony, the defendant failed to enter any objection to this evidence except when the invoices themselves were offered and these were identified by testimony of Mr. Moorehead on both direct and cross examination as having been prepared by him. The bankruptcy testimony was admissible for evidentiary purposes if only because of the defendant's failure to object. In *Child v. Child*,

8 U. 2d 261, 332 P. 2d 981, one of appellant's alleged errors was the admission of hearsay evidence. The court stated:

"It is urged that as this is an out of court declaration offered to prove the truth of the matter asserted, it is hearsay and therefore incompetent \* \* \* Whatever merit there may have been to this objection, the defendant is now precluded from voicing it. The testimony was elicited without objection. This constituted a waiver of the right to question its competency. And the evidence being so received could be relied upon as proof of the fact to which it related."

In any event, the testimony of Moorehead before the bankruptcy court was admissible as an admission against defendant's interest by its employee, defendant having vouched for his credibility by calling him as a witness. 31 C. J. S., Evidence, Sec. 311, Sec. 353. The invoices of Woods prepared by Moorehead are likewise admissible solely as admission against interest. *Browning v. Equitable Life Assurance Society of the United States*, 94 Utah 532, 74 P. 2d 1060.

Regardless of the admissibility of any of the evidence complained of, there is abundant evidence to support the findings and judgment of the trial court, and the appellate court must presume that the trial court in arriving at its judgment considered only that evidence which was material, competent and relevant. *Christensen v. Johnson*, 90 Utah 273, 61 P. 2d 597; *Federal Land Bank of Berkeley v. Salt Lake Valley Sand & Gravel Company*, 96 Utah 359, 85 P. 2d 791; *Big Cottonwood Tanner Ditch Company v. Kay*, 108 Utah 110, 157 P. 2d 795.

Defendant complains because the trial court rejected an offer of proof that Moorehead would testify that his testimony before the bankruptcy court must have been in error since defendant's officers, from time to time, conducted inspections of the warehouse. This is the same vague proof upon which defendant relies to fulfill the burden of showing that deliveries were made in accordance with its alleged modified contract. The trial court properly rejected the offer because it was an attempt by defendant to impeach his own witness, *Silva v. Pickard*, 10 Utah 78, 37 Pac. 86; *Senn v. Lackner*, 91 Ohio App. 83, 100 N. E. 2d 419; *State v. Bagley*, 229 N. C. 723, 51 S. E. 2d 298, was founded on hearsay, was vague and indefinite, and was admittedly speculative. *Hansen v. Hansen*, 110 Utah 222, 171 P. 2d 392; *Elizabeth Trust Company v. Williams*, 128 N. J. L. 102, 23 Atl. 2d 569.

Finally, the defendant admits that 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 the admitted breach could only be that the deliveries were improper, and if the deliveries were improper there was a conversion and plaintiff is entitled to judgment. So said the trial court.

### POINT NO. 3

#### IT WAS NOT ERROR TO ALLOW PLAINTIFF'S COST BILL.

Plaintiff's cost bill was not verified, but was signed by its attorney who thereby certified that it was read and to

the best of his knowledge, information and belief there was good ground to support it. Rule 11, Utah Rules of Civil Procedure. It is submitted that there was substantial compliance with the statute and that the amended cost bill was properly allowed. *Vignan v. Nelson*, 26 Utah 186, 72 Pac. 936.

#### POINT NO. 4

#### IT WAS NOT ERROR TO DENY DEFENDANT'S MOTION FOR A NEW TRIAL.

The affidavit in support of the motion for a new trial does not make a showing of "newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." Rule 59(a)(4), Utah Rules of Civil Procedure.

The question of delivery of the merchandise was raised at the pretrial and made a specific issue in that hearing and the pretrial order placed the burden upon the defendant. Similarly, defendant was advised of the bankruptcy proceedings at the pretrial and stipulated as to the manner of introducing documents of John R. Woods Company on file with the bankruptcy court. The bankruptcy proceedings constituted an open forum and defendant had an equal opportunity with plaintiff to appear and examine the books and records of John R. Woods Company and the witnesses appearing in those proceedings. Mr. Moorehead was defendant's own witness and a former employee of defendant, who was available in Salt Lake City for subpoena and has been available in Salt Lake City during the entire pen-

dency of this action. When Mr. Moorehead was asked in the trial if he recalled his testimony before the bankruptcy court, he replied, "You bet." Prior to the trial, if defendant's attorney had asked a similar question of his witness, he would have received a similar answer. Surely, the defendant cannot claim that it has exercised due and reasonable dilligence to procure evidence before the trial which it now says was influential and material to the outcome. Such a showing is mandatory. *Van Dyke v. Ogden Savings Bank*, 48 Utah 606, 161 Pac. 50.

Moreover, the claim of newly discovered evidence could not legally affect the result of this action, since it has no probative value and as shown by this brief, the overwhelming weight of the evidence supports the findings of the court.

## CONCLUSIONS

It is submitted that the findings of the trial court are supported by the evidence and the judgment is in accordance with the law.

Respectfully submitted,

**RAY, RAWLINS, JONES  
& HENDERSON,**

By C. E. Henderson,  
Donald B. Holbrook,

*Attorneys for Plaintiff  
and Respondent.*

## APPENDIX "A"

Los Angeles 16

T. B. Akeley

Thomas Clines — New York

February 1, 1957

Attachment to Audit Report

January 17, 1957

John R. Woods Co., #2552

During my audit of October 17, 1956 I found considerable shortages, some overages, erroneous records and goods in warehouse other than those on receipt. I spent much time in instructing the employees in each step of re-organizing the warehouse, clearing the records, breaking in the new Asst. Storekeeper and obtaining releases, etc. to correct inventory.

During the current audit I found lesser shortages, but shortages nevertheless; also overages, erroneous records and even more goods not on receipt in more spots within our area. The reasons for this condition (which I understand has been pretty consistent) lie, I believe, in the personality of Mr. Woods.

Mr. Woods is a very nice guy, probably as honest as anyone but he's a very nervous, highflying character and very, very overbearing. He is full of "yes, ok, fine, anything you want, we'll do it right now, great, goodbye etc." So full that he never hear's what you are telling him. Frankly, he run's the warehouse, and he will continue to do so with any employees we might put in there, outside of ourselves.

As far as full cooperation in operation of warehouse is concerned, Woods will pay-off any shortage very quickly and look for the reasons later, but that doesn't improve our position any and short of this he has to be clubbed into submission on every point.

Jack and I have discussed this at length again and both feel very unsafe in this account. For the revenue involved it seems that almost any excuse to get out of it would be a welcome event.



## APPENDIX "B"

New York

J. Gevertz

C. J. Holt — Los Angeles

February 4, 1957

John R. Woods Co.  
Whse #2552Thomas Clines — New York  
T. B. Akeley — Los Angeles

We have the January 17th report covering audit at the subject. There is no indication of the amount of the discrepancy but nevertheless we did have overages and shortages. There was a period of time when local accountants were checking this account and with nearly no exception the warehouse checked properly continuously. We have presume (sic.) that these reports were factual.

In the last six or seven months we have had increasing difficulties to secure monthly checks from this company and now we are faced with poor control.

The memo from Akeley indicates that he discussed this account with you and it is doubtful that it can be properly handled due to the domination of Mr. Woods.

Unless this account can be brought into line so that we have no more than normal risk we cannot continue. If proper safeguards cannot be taken we have no other alternation (sic.) but to give notice and close out.

Please follow thru and advise.

JB:BJ

## APPENDIX "C"

NEW YORK

J. Gevertz

C. J. Holt — Los Angeles

February 19, 1958

John R. Woods Co.

Whse #2552

We have not heard further from you regarding the status of this account.

Advise.

JB:BJ

Los Angeles

C. J. Holt

J. Gefertz

Feb. 21, 1957

Feb. 19, 1957

John R. Woods Co.

Whse #2552

We have checked with the Storekeeper a couple of times and had him send inventories in to us and report his actions other than on the Daily Report, so feel that this is fairly accurate at the moment.

Mr. Woods was here in Los Angeles last week and I had a long talk with him and suggested that with the size of his present inventory he can get along without the warehouse operation. I think we will get out of this with the good will of all persons concerned and within the next month. Akeley will be in Salt Lake City in a couple of weeks on the regular audit swing and will follow up on the closing out of the operation. Since Mr. Woods has a good standing with the Bank as a distributor and also with some of his suppliers (Ben Hur Mfg. Co. included) I would rather this closed out on a friendly basis rather than having to notify receipt holders to take delivery.

In the meantime we are watching the flow of paper carefully and checking as best we can from here. Actually Woods got a little overextended by putting some \$10,000.00 into a housing deal and this is going a little slow at the moment, so while he is very short of cash he is not broke.

APPENDIX "D"

Los Angeles 16

T. B. Akeley

H. R. Moorehead, Storekeeper  
Warehouse 2552

May 6, 1957

Delivery Instructions

Until further notice from me or from my Los Angeles Office  
no further goods may be delivered or removed from our  
leased Warehouse Area

T. B. Akeley

## APPENDIX "E"

## WALKER BANK &amp; TRUST COMPANY

- vs -

## NEW YORK TERMINAL WAREHOUSE CO., INC.

## Comparison Schedule

John R. Woods Company Invoices  
and Warehouse Receipts Delivery Orders

(1) Date and No. of Delivery Order Under Whse. Receipts.	(2) Date and No. of J. R. Woods Invoice — and to Whom Delivered	(3) Description and Serial No. of Appliances Appearing in Both (1) and (2).
5/1/57-1026	11/7/56-2033 REDISCO	232X Washers : 85259 85258 85257 85256 85255 85254
5/2/57-1027	11/17/57-2349 People's Finance	232X Washers : 85288 85295 85289
	9/28/56-1852 Continental Bank	85288 85295
5/3/57-1028	9/28/56-1852 Continental Bank	85292
	11/7/56-2033 REDISCO	85250
	10/10/56-1892 REDISCO	85265 85233 85268 85266

(1) Date and No. of Delivery Order Under Whse. Receipts.	(2) Date and No. of J. R. Woods Invoice — and to Whom Delivered	(3) Description and Serial No. of Appliances Appearing in Both (1) and (2).
5/7/57-1029	1/17/57-2349 People's Finance	232X Washers: 85291
	5/1/57-2697 Refrigeration Discount Corp.	332X Washers: 79141 79183 79177
		375 Washers: 74995 84404 78331 84402 78332 84380 78328 84406 78250 84428 78322 84379 84391 84347 84405
	9/28/56-1852 Continental Bank	375 Washer: 84201
		332X Washers: 83704
		232X Washer: 85291
	11/7/56-2033 REDISCO	332X Washers: 83106 83103
		232X Washers: 85246 85242 85251 85249 85247 85273