

1960

Walker Bank and Trust Co. v. New York Terminal Warehouse Co. : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Walker Bank and Trust Co. v. New York Terminal Warehouse*, No. 9098 (Utah Supreme Court, 1960).
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

WALKER BANK AND TRUST
COMPANY, a corporation,

Plaintiff and Respondent,

—vs.—

NEW YORK TERMINAL WARE-
HOUSE COMPANY, INC., a corpora-
tion,

Defendant and Appellant.

May 3 - 1960

Supreme Court, Utah

No. 9098

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

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tion,
Defendant and Appellant.

No. 9098

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

The defendant, New York Terminal Warehouse Company, petitioner in the above entitled Case No. 9098, in which a decision was filed by this court on April 6, 1960, modifying and affirming a judgment of the District Court of Salt Lake County, hereby respectfully petitions the court for a rehearing, and in support thereof represents:

1. The court apparently overlooked the testimony of the plaintiff's former vice-president in determining the nature of the agreement between the parties.

2. The court overlooked controlling principles of contract law relating to the effect of silence and other conduct of the parties.

3. The court failed to consider the question of whether the defendant was estopped from claiming misdelivery.

4. The court failed to comply with the mandate of Article VIII, Section 25, Constitution of Utah, that the reasons for reversing, modifying or affirming a judgment shall be "stated concisely in writing."

ARGUMENT

GENERAL

The court used a startling approach in fixing liability upon the defendant, in effect finding a breach of a duty without defining the duty or tracing its source. The court seems to assume an agreement that arose spontaneously, or out of a supernatural something, to the effect that the defendant would not permit John R. Woods to take merchandise from the warehouse without plaintiff first having signed a delivery order. It is an agreement existing solely in the mind of the court — not between the parties. The warehouse receipts — which no one has suggested to be "integrated agreements" — contain a single, fleeting reference to a "written order." But since the case involves a continuing transaction, lasting approximately a full year, the conduct and communications of the parties form the area in which the agreement must be found.

The Warehouse Receipts Act, quoted from at some length in the opinion, doesn't really touch the problem since it demands only that a warehouseman establish the existence of lawful excuse for delivering goods, and a contract can create the "lawful excuse."

Admittedly the transcript is long and the facts are scattered throughout its pages, and perhaps the court's failure to note essential operative facts resulted from counsel's mistaken assumption that the transcript was strong enough to speak for itself. Having seen our error, we will reprint the testimony that may lead this court to see its own.

I.

THE COURT APPARENTLY OVERLOOKED THE TESTIMONY OF THE PLAINTIFF'S FORMER VICE-PRESIDENT IN DETERMINING THE NATURE OF THE AGREEMENT BETWEEN THE PARTIES.

The court did not recite the evidence from which it concluded that the original agreement required the defendant to obtain a delivery order signed by the bank as a condition of delivering merchandise to John R. Woods. The evidence is conclusive that such was not the agreement.

The following excerpts were all taken from the examination of Mr. H. A. Robbins, who was admittedly the bank's "contracting officer." The emphasis is added.

R. 110-112:

Q. And at the time you set up the loan arrangement, you would have discussed with Mr.

Woods the warehouse procedure, would you not?

A. Possibly so.

Q. Do you remember whether you did or not?

A. I wouldn't recall that. * * *

Q. *Do you recall any discussions with Mr. Woods concerning the arrangements that he would have to make in order to obtain the goods from storage?*

A. Well, the discussion — we had a discussion regarding the payment for the goods as they were taken from the warehouse and *they were to be paid for as they were withdrawn.*

Q. Now you discussed that with Mr. Woods?

A. I think generally, in general terms.

Q. *Did you discuss what you meant by payment?*

A. *Well, we meant by payment the payment of goods as they were withdrawn in the normal course of business, let me say.*

Q. *Did you mean cash?*

A. *Well, either cash or by virtue of checks. Checks is what ordinarily, in the ordinary course of business, it would be checks.*

Q. Well, so that when you suggested that they would be paid for when they were withdrawn, you were indicating, or as far as you were concerned, you meant that they would be paid for by a check?

A. *That was my assumption.*

* * *

Q. But *you didn't have any idea that Mr. Woods would have to come to you first and obtain a signed delivery order?*

A. That he'd have to come to me first?

Q. That wasn't your understanding, was it?

A. No.

* * *

R. 211-213:

Q. Now at the time you undertook to use this kind of financing or this kind of an arrangement I suppose you had some understanding as to what the obligations of the various parties were?

A. Yes.

Q. What was your understanding as to the way the goods or the circumstances under which the goods would be removed from the warehouse? That is, what things would have to be done? * * *

A. I knew our understanding was that the goods would not be removed from the warehouse until we [the bank] were given a delivery order covering the units.

Q. Was it your understanding that the delivery order would be presented to the bank before any steps were taken to remove goods? * * *

A. I would say so.

Q. *Was it your understanding that the bank would sign the delivery order before any goods were removed?*

A. That we would sign the order?

Q. Yes.

A. *No. * * **

Q. *Were you to take any steps in connection with the delivery order before the goods were removed from the warehouse?*

A. *No, we weren't to take any steps.*

Q. *You were merely to have the delivery orders delivered to you?*

A. *Along with the check.*

Q. *Was it your understanding that when those were delivered to you the goods would have been removed?*

A. *We assumed that they had been delivered when we got our receipt.*

Q. *When you received the delivery order and the check you assumed the goods were no longer in the warehouse? * * **

A. *Well, it wasn't — I wouldn't say my understanding, but I assumed that the goods had gone, or at least shall I add to that, at least they would be delivered or shipped. * * **

R. 213-214:

Q. *Do I understand you now — is it my understanding I want to be clear on this, that you did not understand that you were to sign the delivery orders before the goods were removed from the warehouse?*

A. *To sign the order before they were removed?*

Q. *Yes.*

A. *No, sir.*

* * *

R. 214-216:

Q. When you say the delivery order was held, was it your understanding that the goods were also being held?

A. That I couldn't say; I don't know whether they were still being held or not.

Q. Was it your understanding of the transaction that they should have been held?

A. That they should have been held?

Q. Held until you signed it?

A. I didn't have any understanding as to that one way or the other. I mean —

MR. ROE: Your Honor, there is a problem in here. His testimony is inconsistent in a certain respect. It is a detail—with the testimony that he gave in his deposition and I can make such showing of that to the court as it would desire. I would like to lead the witness and ask him about the deposition.

* * *

MR. ROE: Referring to page 10, specifically starting on line 22.

THE COURT: I don't know that that has been covered and I don't know that your question would enable the witness to cover that because you have been talking about what the bank would do with the goods.

MR. ROE: I was asking him about his understanding as to whether the goods would have already been withdrawn from the warehouse when he received the delivery order.

THE COURT: I don't think there is any variation there.

MR. ROE: And the answer beginning at line 24:
A. *'The delivery order would be received by us
at the bank accompanied by the check covering
those items that had been withdrawn.'* * * *

THE COURT: The testimony seems to be without a clear contradiction but may be indistinct. That is the most I can say for it. *I will conclude that this is his answer; that he assumed the goods had been delivered or would be without the bank having anything to do about it.*

Having retired from the bank, Robbins was not an officer of an adverse party, but it is clear from the testimony that he was hostile and unwilling on direct, easily led by the bank and its counsel during cross. Robbins nevertheless made it absolutely, undeniably clear that the bank's understanding *from the time the warehouse was established* was that defendant could deliver merchandise upon receipt of a check from John R. Woods. *And that was how the transactions were in fact handled for a period of 12 months.*

II

THE COURT OVERLOOKED CONTROLLING PRINCIPLES OF CONTRACT LAW RELATING TO THE EFFECT OF SILENCE AND OTHER CONDUCT OF THE PARTIES.

There are two somewhat related legal doctrines relating to construction of contracts, neither of which seems to have been honored by the court in the instant case. The first is that silence will be deemed to be assent to a proposition where there is a duty to speak; the other is that an interpretation placed upon a contract by the

parties themselves will ordinarily control. The doctrine that silence may constitute assent, particularly if the other party could reasonably construe such silence as consent, was applied by this court in *F-1 Oil Company v. Anchor Petroleum Company*, 8 Utah 2d 349, 334 P.2d 760 (1959), cited in appellant's brief on appeal. The case is supported by other cases and the text writers. See 1 *Williston on Contracts* (3d Ed.) § 91 *et seq.*; 1 *Corbin on Contracts*, § 75.

Although in the instant case the court indicated that there was no "duty to speak," this must have been based upon a failure to note the testimony heretofore set out; and the court did not even discuss the question of the interpretation placed upon the contract by the parties themselves. As stated in 3 *Williston on Contracts* (Rev. Ed.) § 623:

"The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered. But if the meaning of a contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning. *Such conduct of the parties, however, may be evidence of a subsequent modification of their contracts.*" (Emphasis added.)

A similar rule was adopted by this court in *Woodward v. Edmunds*, 20 Utah 118, 57 Pac. 848 (1899):

"Manifestly, by their acts and conduct, the parties to the instrument construed it as one of bailment merely, and, where there is any ambiguity in a contract, *the practical construction which*

the parties to the instrument have given it before any controversy arose between them should be adopted by the court." (Emphasis added.)

And as said in *Scotch Manufacturing Company v. Carr*, 54 Fla. 480, 482, 43 So. 427 :

"If it be true, even in the case of a written contract the terms of which are doubtful or ambiguous that the construction placed thereon by the parties themselves may be shown and shall govern, as the cited cases hold, with how much more force does this principle apply to oral contracts? The principles of technical nicety cannot be applied in the construction of these everyday oral contracts made by plain businessmen in their course of trade and traffic. To do so would frequently result in overthrowing the meaning and understanding of the parties."

(In our case the court, by technical nicety in assuming a relationship between the enclosure and the statements in the letter, did overthrow the meaning and understanding of the parties.)

The *Restatement of Contracts*, § 235, adopts the following rule:

"The following rules aid in application of the standards stated in Sections 230, 233 [which apply both to integrated and unintegrated agreements]:

* * *

(d) All circumstances accompanying the transaction may be taken into consideration, subject in case of integrations to the qualifications stated in Section 230.

(e) *If the conduct of the parties subsequent to a manifestation of intention indicates that all*

the parties placed a particular interpretation upon it, that meaning is adopted if they reasonably could attach it to the manifestation." (Emphasis added.)

In the instant case, insofar as authority to deliver the goods to John R. Woods was concerned, the New York Terminal Warehouse Company was plaintiff's agent. As stated in 2 C.J.S., *Agency*, § 99 (p. 1232):

"* * * Knowledge of, and acquiescence in, the agent's acts may be enough [to imply authority], and even they may rest in inference if the agent's course of dealing has been for such time and of such character as to justify the inference.

"Authority may be implied where the principal habitually or regularly permits the agent to pursue a particular course of conduct, or has repeatedly acquiesced in and adopted similar acts of the agent. * * * Where a principal, upon receiving information that an agent intends to act beyond the scope of his precedent authority, thereupon furnishes the agent with the means or instrumentalities essential to the performance of the act to proposed, his conduct amounts to investing the agent with the authority requisite for the transaction."

If the above authorities, or precedents in general, have any weight, it is difficult to comprehend how it was possible to conclude that the warehouse company should deliver only upon receipt of an order signed by the bank.

The bank and the warehouse company were not involved in a single, isolated transaction. The relationship could have been terminated by any party at any time. If the bank didn't like the arrangement it could have

given new instructions. The letter from the warehouse company to the bank set out the company's *understanding* of what the bank's letter of October 16, 1956, meant. It would be strange doctrine indeed to permit a contracting party to sit back after the other party has informed him, in clear and unequivocal terms, what he took his communication to mean and then, after months of deliveries in accordance with that meaning, repudiate the suggested interpretation. Holt's letter of November 12 stated that defendant interpreted Robbins' letter to mean that the warehouse could make deliveries from the warehouse upon a receipt of a check from John R. Woods. The letter also stated: "*Please understand that we can and will operate within any limits that you set.*"

To paraphrase Humpty Dumpty's proclamation to Alice, "When I interpret words they mean just what I choose them to mean — neither more nor less." A statement in some proposed instructions that they are not to become effective until a copy has been signed by an officer of the *defendant* becomes a statement that an interpretation of a letter is to be disregarded unless a copy of some instructions has been signed by an officer of the *plaintiff*; ~~a~~ a statement that goods are to be "paid for" when withdrawn becomes a statement that they are to be withdrawn only on the basis of an order signed by the bank; and invoices which show neither a delivery date nor a receipt become "invoices of delivery."

Relying on testimony of Robbins the court says that the letter was not sufficient to constitute a "modification" of "the original agreement"; but the court failed to look

at Robbins' testimony in determining what the original agreement was. In the following excerpts emphasis has been added.

R. 117-118:

Q. (To Mr. Robbins) On October 16, 1956, you wrote a letter to New York Terminal Warehouse, did you not?

A. That's correct.

Q. I will show you the letter, D-5.

A. Yes, sir.

Q. You do remember that letter, do you, Mr. Robbins?

A. Yes, sir.

Q. What was the occasion for you writing that letter?

A. *I'm sure that was in response to some word we had from the New York Terminal.*

Q. Do you recall receiving communications from them in one way or another about it?

A. Well, I'm sure there was a communication with reference to this reply.

Q. In other words, you think New York Terminal Warehouse may have sent you a letter before this October 16 letter?

A. That I don't recall.

Q. How else might the communication have come?

A. Well, as I say, it must have come by mail. I have no file here or anything so I wouldn't be able to say but—

Q. Prior to the time of your writing that letter

you had been operating with New York Terminal for about six or seven months, had you not?

A. That is correct.

Q. Now when you wrote the letter did you mean to change in any way the method of operation theretofore?

A. No, it was our idea that this was the manner in which the way that they were to be handled.

Q. When you say that the goods would be *paid for* when delivered what did you mean by that?

A. Well, I meant that we'd get a settlement or a payment of the merchandise that went out.

Q. And that that settlement would be at the bank?

A. That's right.

Q. *Did you mean for them to understand that the checks of John R. Woods would not be considered payment?*

A. No.

Q. You didn't mean them to understand that?

A. That we — that they would not be acceptable as payment?

Q. Yes.

A. *No, we figured that they would be acceptable as payment.*

* * *

R. 119-120:

Q. Now I believe—had I shown you Exhibit D-6 before we went out? I'll show you Exhibit D-

6, Mr. Robbins, and you may hold that if you like. Do you recall receiving that letter, Mr. Robbins?

A. Yes, sir.

Q. And was the enclosure, that is, the proposal attached to it when you received it?

A. That's correct.

Q. Did you ever reply to that letter?

A. No, sir.

Q. Did you ever contact New York Terminal Warehouse in any way about it?

A. No, sir.

Q. Was there some reason for your not answering it or —

A. There were parts of the agreement that we didn't care to subscribe to as I recall it. * * *

Q. If you looked the proposed agreement over now, do you think it would refresh your recollection as to what parts you may have objected to? * * *

MR. ROE: I'm just inviting his attention to this particular language, Your Honor, if I may. It is a short sentence: 'And from your letter interpret that you wish to authorize delivery from the warehouse upon receipt by our storekeeper of a check from John R. Woods Company.' *Did you have any objections to that particular provision?*

A. *You mean receiving a check from the John R. Woods Company?*

Q. Yes.

A. No, sir.

Q. But you felt that that interpretation of your letter was correct?

A. Yes, sir.

From the foregoing testimony it is apparent that when Robbins wrote to the New York Terminal Warehouse Company that the bank expected the units to be paid for at the time of delivery, he meant the warehouse company was to obtain a check from John R. Woods. Under the "objective" theory of contract law, there has been a "manifestation of mutual assent"; under the "subjective" theory there has been a "meeting of the minds." The bank meant for the goods to be released from the warehouse on receipt of a check from John R. Woods. The warehouse company understood him to mean that. Not only that, but defendant made its understanding known in a letter to the bank, and the bank *in fact* agreed that the understanding was correct.

The court recites that it was the practice of the bank to hold the delivery orders until John R. Woods had put his account in balance. It is difficult to see what bearing this has upon the obligations of the warehouseman with respect to *delivery of the goods*. A warehouseman is a person who stores goods and delivers them as directed by the person who owns or controls them. To assume that a warehouseman, having been authorized to deliver goods upon receipt of a check, means to or is meant to remain liable as an "implied guarantor" of payment of the check requires a disregard of the kind of business a warehouseman is in. To assume that a bank continues

to rely on collateral security after knowledge that possession of it had been delivered to the debtor is incredible.

That the court has overlooked relevant and controlling testimony is clear from the following paragraph of the court's opinion:

"If there were sufficient monies therein to cover the check, the plaintiff would charge Woods' account accordingly, sign the delivery order and mail it to the defendant's office in Los Angeles. *Receipt of this signed delivery order was defendant's authorization to deliver the goods from its Salt Lake warehouse.*" (Emphasis added.)

Compare Robbins' testimony (R. 112):

Q. I'll show you Exhibit D-8, Mr. Robbins, do you recognize this? Well, the top form on it?

A. Uh-huh, yes, sir.

Q. That is the delivery orders we are talking about, is it not? Now in what form would these delivery orders be when received by you at the bank?

A. Well, they would be signed by the John R. Woods Company.

Q. That is, *this statement that 'Receipt of above described property is good order is hereby acknowledged,' and the signature?*

A. *That is the way it would come to us.*

Q. *And your name would be put on at a latter date?*

A. *That's right.* (Emphasis added.)

According to the court's view of the case defendant was to receive its authorization to deliver the goods after they had been delivered. In other words, it wasn't an "authorization" but a "ratification." And under the court's theory the bank could go on taking its interest from Woods, receive the benefits of the jobber's activity—and hold the defendant liable when something went wrong.

III

THE COURT FAILED TO CONSIDER THE QUESTION OF WHETHER THE PLAINTIFF WAS ESTOPPED FROM CLAIMING MISDELIVERY.

By the pleadings, and by the pre-trial order, one of the defenses raised was that the plaintiff, because of its conduct over a period of approximately one year, was estopped from claiming that the defendant had no authority to deliver goods from the warehouse. This theory was included in the case and the question of estoppel was raised on appeal at page 46 of the appellant's brief. Notwithstanding this, the court did not discuss nor dispose of the question of the plaintiff's estoppel. It is submitted that the testimony above recited, if it is not sufficient to establish a contract as contended for by the defendant, certainly is sufficient to create an estoppel against the plaintiff.

The bank knew all along (or assumed) that defendant was releasing goods from the warehouse without having a signed delivery order from the bank. If the bank didn't like this arrangement it would have been a simple

enough matter to say so before it watched Woods go bankrupt.

Even though plaintiff knew the warehouse was being closed it did nothing. Hear Robbins at R. 123:

- Q. During the week of May 1 to 7, 1957, did Mr. Woods discuss with you the problem of closing the warehouse or the termination of this arrangement?
- A. I think he mentioned something about it.
- Q. What did he tell you about it if you remember?
- A. I don't recall the exact conversation.
- Q. But it is your recollection that he told you that they were going to close the warehouse?
- A. Something was mentioned about it.
- Q. Did he at that time make any arrangements with you to obtain a cashier's check to New York Terminal Warehouse, if you remember?
- A. I think so.

IV

THE COURT FAILED TO COMPLY WITH THE MANDATE OF ARTICLE VIII, SECTION 25, OF THE CONSTITUTION OF UTAH, THAT IN REVERSING, MODIFYING OR AFFIRMING A JUDGMENT THE "REASONS THEREFORE SHALL BE STATED CONCISELY IN WRITING."

In accordance with its understanding of the requirements of appellate practice and the court's rules, appellants raised as one of the points on appeal a question as to the admissibility of evidence. The appellant was par-

ticularly concerned with the admission of some invoices in evidence which were accepted by the trial court as evidence of certain facts purported to be shown in them. Some effort was made to point out to the court authorities and cases supporting the propositions advanced as a basis for objection to admission of the evidence. The evidence was detailed at length and the authorities were discussed for the court. The court rejected the proposition summarily with the statement that "the record fails to sustain this contention"; moreover, the court itself then relied upon the invoices even though the misdeliveries purportedly shown by them would have been apparent to the bank's own inspectors between November 1956 and May 1957 (R. 216).

Admittedly, the dictates of Article VIII, Section 25, of the Utah Constitution must be applied with reason. But litigants have a right to be informed of the reasons for the court's rulings. In the area of practice and evidence, the deciding of cases by judicial fiat without discussion of the points raised and the basis for them creates a burden upon litigants in future cases. Orderly proceedings in the courts below depend, to some extent, upon understanding the bases for admitting and excluding evidence. The appellant's attempts to have this court review the question of the admissibility of the invoices was not a point thrown into the brief with the purpose of filling space but because the appellant was convinced that the admission of this evidence was contrary to the rules of evidence as adopted by the court, other courts, and evidence text writers.

If it is the purpose of this court to hold that documents referred to in the cross-examination of a witness, without any primary evidence as to their reliability or the method by which they were prepared (when they are business documents of one sort or another) are admissible in evidence as proof of the facts set out in them, without further foundation having been laid, we believe that in fairness to litigants and lawyers the court should say so and should publish such a holding in the syllabus required by Article VIII, Section 26, of the Constitution of Utah.

In any event, Article VIII, Section 25, requires the court to state its *reasons*—not just its decision.

CONCLUSION

We believe the court should grant a rehearing in this case for the reason that it has overlooked or misinterpreted much of the testimony relating to the transactions: it stated that when deliveries were *requested* by Woods the storekeeper would prepare a delivery order and send it to the bank. The record actually shows that this was done when deliveries were in fact *made*. The record shows that receipt for the goods had been signed by Woods at the time the delivery order was sent or taken to the bank.

The court stated that receipt of the delivery order was defendant's *authorization* to deliver the goods. The evidence was all contrary to this. The goods were being removed before the bank received the delivery order,

which the bank knew; and this was *before* the delivery order was sent to the defendant's Los Angeles office.

In characterizing the appellant's first point, the court talks as if the appellant contended that it had no duty to plaintiff absent a demand for delivery. Actually, the first point was made in relation to the burden of proof, a technical question under the Uniform Warehouse Receipts Act.

The court states that "the letter from Mr. Robbins was simply a letter informing the warehouse office of the existence of the credit arrangement between the bank and Woods," while the record shows that it was written because of the defendant's request for instructions (R. 117, line 4; R. 118, line 29).

Finally, the court emphasizes the fact that the goods would be "paid" for when delivered, and assumes -- contrary to the evidence—that "paid" meant "paid by cash."

Respectfully submitted,

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