

1964

# Metals Manufacturing Co. v. Bank of Commerce : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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# In the Supreme Court of the State of Utah

FILED

NOV 12 1964

METALS MANUFACTURING  
COMPANY, a Utah Corporation,  
*Plaintiff and Appellant,*

vs.

BANK OF COMMERCE, a Utah  
Corporation,  
*Defendant and Respondent,*

Case No.  
10116

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## PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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# In the Supreme Court of the State of Utah

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COMPANY, a Utah Corporation,  
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*Defendant and Respondent,*

Case No.  
10116

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## **PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF**

The defendant and respondent respectfully petitions the Court for rehearing upon the following grounds and for the following reasons:

## POINT I

The Court erred in that it confused the question of the application of the private contracts statute with a question of the contractual rights of the parties involved under a lease agreement. In so doing, it failed to apply controlling decisions set down by the Utah Supreme Court for determining whether the railings were annexed to the land in such a way as to come within the private contracts statute.

## POINT II

The Court's opinion is based upon facts which are not contained in the record of the Trial Court and which, in fact, are contrary to the facts contained in such record.

## POINT III

The Court, in its decision, erred in that contrary to controlling Utah law, it construed the facts in this case in a light favorable to those who the statute is intended to protect rather than in a light most favorable to the defendant who had prevailed below.

## POINT IV

The Court, in its decision, erred in that it failed to apply controlling statutes and principles of law which are inconsistent with a broad application of the statute in question.

WHEREFORE, the petitioner prays that the judg-

ment and opinion of the Court be recalled and a reargument be permitted of the entire case.

A brief in support of this petition is filed herewith.

## STATEMENT OF THE CASE

This brief is submitted to the Supreme Court in support of a Petition for Rehearing upon the decision of this Court filed October 23, 1964, reversing a judgment of the third Judicial District Court of Salt Lake County holding that certain aluminum railings were not in the nature of an improvement to a structure on land and were, therefore, personal property not subject to the Utah Private Contracts statute, Section 14-2-1 and 14-2-2 of the Utah Code Annotated. This rehearing is urged upon the Court because of the far reaching effect of the unprecedented and unjust legal theory announced in the Court's decision.

Because of the Court's erroneous assumption that the facts of this case are undisputed, the facts, as established by the record in the Trial Court, are set forth below.

In the spring of 1963, respondent leased a bank building in Magna, Utah, for the purpose of conducting a commercial banking business. Under the terms of the lease, the building was to be remodeled by the lessor to meet certain requirements of the lessee. The lease anticipated that all furnishings contained in the bank building would be furnished by the lessee. Prior to opening its banking business, respondent contracted with Arnold Drews of Modern Ornamental Iron Works for certain aluminum

railings and gates. Drews submitted a bid for this work of \$1,457.10 which was accepted by respondent (Dep. p. 7). Drews requested an advance payment on the railings representing that a lower price could be obtained if he had the cash to pay for the materials at the time they were ordered. Respondent, through its agent, C. I. Canfield, advanced \$1,200 upon the representation of Drews that the materials were to be furnished by a Los Angeles Company (Dep. p. 4). Drews, *without respondent's knowledge or consent* (Dep. p. 4) contracted with the appellant for the construction of these railings and agreed to pay appellant \$1,748.00 for the railings. He represented to the appellant that the railings were constructed for the Idaho State Bank. Drews picked up the railings from appellant and installed them in respondent's bank. Respondent then paid him for the railings. Drews failed to pay appellant for the railings and some two months later, when appellant discovered that the railings were, in fact, in respondent's bank, it made demand on respondent for payment. Since respondent had already made payment for the railings, it refused to pay the second time, whereupon appellant commenced action, under the Utah Private Contracts Act, Section 14-2-2 of the Utah Code Annotated, to recover the reasonable value of its materials. Respondent defended this action before the Trial Court sitting without a jury, and after having considered the evidence presented by both sides, the Trial Court found that respondent had no intent to permanently affix the railings to the realty and therefore under Utah law the railings were personal property and not subject to the Utah Private Contracts Act.



## POINT I

THE COURT ERRED IN THAT IT CONFUSED THE QUESTION OF THE APPLICATION OF THE PRIVATE CONTRACTS STATUTE WITH A QUESTION OF THE CONTRACTUAL RIGHTS OF THE PARTIES INVOLVED UNDER A LEASE AGREEMENT. IN DOING SO IT FAILED TO APPLY CONTROLLING DECISIONS SET DOWN BY THE UTAH SUPREME COURT FOR DETERMINING WHETHER THE RAILINGS IN QUESTION WERE ANNEXED TO THE LAND IN SUCH A WAY AS TO COME WITHIN THE PRIVATE CONTRACTS STATUTE.

The question of the rights of third parties under the lease was not before the Supreme Court in this case since it was not considered by the Trial Court nor was it in any way raised by the pleadings. This case does not turn on the subjective intent of the parties to the lease agreement. The Supreme Court seems to have the mistaken impression that respondent in relying for relief on its contractual rights under the lease agreement. This is not the case. The respondent relies on objective evidence as to whether the property in question was real property subject to the Private Contracts Act or personal property *not* subject to the Act. This evidence was presented to the Trial Court and in respondents' brief on appeal so as to meet the test set forth by the Utah Court in the case of *King Bros., Inc., v. Utah Dry Kiln Company* 13 U 2d 339, 342, 374 P 2d 154 (1962).

The question that is before the Supreme Court in this case is application of the private contracts statute to items of property about which there is some uncertainty as to whether they are real property or personal property. In such cases, the Utah Supreme Court has held that "in order to qualify under the Private Contracts Statute, it is necessary that there be an annexation to the land, or to some permanent structure upon it, so that the materials in question can properly be regarded as having become a part of the realty, or a fixture appurtenant to it, and this must have been done with an intention of making it a permanent part thereof." *King Bros., Inc., supra*.

The test of intention is further explained by the case cited by the Supreme Court as authority for the rule in the *King* case *supra*. That test is set forth as follows:

"The intent is not to be gathered from testimony of the actual state of the mind of the party making the annexation \* \* \* but is to be inferred, when not determined by an express agreement, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made." *Westinghouse Electric Supply Company, v. Hawthorn*, 150 P. 2d 55, 57 (1944).

The Trial Court carefully applied these rules to the evidence submitted in the present case and determined as a matter of *fact* that respondent had no intention to permanently affix the railings in question to the building. Having reached this factual conclusion, the lower court applied the rule of the *King* case *supra* to hold that the

Private Contracts statute has no application to the present case. The Supreme Court by overturning that decision has placed itself in the position of the trier of fact. In acting as the trier of fact, it has overlooked the rule previously set down by it in the *King Bros. case supra*.

## POINT II

THE COURT'S OPINION IS BASED UPON FACTS WHICH ARE NOT CONTAINED IN THE RECORD OF THE TRIAL COURT AND WHICH, IN FACT, ARE CONTRARY TO THE FACTS CONTAINED IN SUCH RECORD.

1. In paragraph three of its opinion, the Court states that the respondent bank “. . . contracted with one Drews to obtain and place on the premises certain aluminum railings and gates, according to specifications demanded by the bank. *With the bank's knowledge* Drews obtained the railings and gates from plaintiff . . .” [emphasis supplied].

The record contains no support for the Court's factual finding that the respondent had knowledge that the railings and gates were purchased from the plaintiff. The record (Dep. p. 4) contains the following:

MR. CANFIELD: “. . . he told me at the time he didn't have sufficient aluminum on hand to complete the job and would have to order it out of Los Angeles.

“I asked him how long it would take and he informed me two or three days.

"Shortly after that, he called at the bank and said that the aluminum railing was coming in . . . and he didn't have quite enough money to pay for them but he could get a discount by paying for them at the time and asked me if I would advance him a little money to help pick up the costs on this material and if I would do so he would decrease his bid by 10 per cent."

and in another place, contains the following (Dep. p. 6):

"MR. CANFIELD: ". . . He asked me if we did buy the fixtures from Drews. I told him yes.

"He said, have you paid for them?

"I said, 'yes' "

"He said, we made these.

"I said, I have no knowledge of it."

The record of the Trial Court clearly shows that respondent bank had no knowledge of the source from which Drews obtained the railings except the representation of Drews that they came from Los Angeles.

2. Respondents presented substantial evidence to the Trial Court to support a *factual* conclusion that the respondents did not install the railings in question with an *intention* of making them a permanent part of the realty. In its statement of the pertinent facts of this case, the Supreme Court makes no mention of the facts and circumstances presented by respondents to the Trial Court to show the lack of any intention to permanently annex the railings to the real estate. If the facts of this case were

undisputed as the Supreme Court concludes there would be no question as to what the intention of the respondent was. Respondent contends that it had no intention of making the railings in question a permanent part of the realty. It supports this fact by evidence as to the nature of the railings which shows that they were designed to be and were in fact easily portable (Defendants Exhibit D-5, Testimony of Respondents' Vice President, Rec. 11, 12, 13, 14) that they were constructed and attached in such a way that they could be moved from place to place or moved entirely (Rec. 9). These plans for the use of the railings were communicated to the lessor of respondents' building and among respondents' officers (Rec. 17, 18, 19, Dep. p. 10, lines 8-10) with regard to the design of the railings, Mr. C. R. Canfield, Vice President of respondent, stated at pages 12, 13, 16 and 17 of the record.

"Q. Well, just the general theory of the plan that was used for the bank. Was there any one central idea that prevailed in planning the bank?

"A. Well, he set up the plan of the bank, the inside of the bank, so that it can be adjusted and moved as situations require it in our operation.

"Q. Thank you. At the time you planned the bank building, did you contemplate the possibility that you might have to move to a different building?

"A. Well, we discussed it; there is always that possibility.

"Q. And if you did move to another building did you contemplate the necessity of moving the interior facilities of the bank?

“A. He set it up so that all of the equipment we have got belongs to the company, so that we can move it if we want to.”

Evidence that respondents were lessees supports a factual conclusion that they had no intention to permanently affix the railings to the realty and thereby enrich the freehold. *Westinghouse Electric Supply Co. v. Hawthorn Supra.*

Testimony of a witness engaged in the production of such railings indicates that they were frequently moved from place to place by banking institutions and are treated much the same as furniture (R. 31, line 1-7, 16-24). The lease was introduced in the Trial Court not to show that appellant was legally bound by its provisions but rather as evidence of the intent of the party annexing the property not to permanently annex the property to the realty. Respondents intention not to permanently annex the railings is shown by evidence that the railings were designed so as to be removable without material injury to the premises and that a supply of matching rubber tile was maintained by respondent to cover the screwholes in the floor in the event the railings were removed, (Rec. 19, line 23-30; 20 line 1-6). Evidence as to the purpose for which the annexation was made further supports a *factual* conclusion of lack of intent to permanently affix to the realty. The record contains evidence that the railings are used to direct traffic in the bank and to decorate the bank's interior—all of such evidence supports the factual conclusion reached by the Trial Court.

The Supreme Court, in its opinion has failed to even mention any of this evidence and has concluded that the facts are undisputed, yet in the recent case of *King Bros., Inc., supra*, the court, considering the application of the exact same statute that is involved in this case, stated:

“Ordinarily there is not much difficulty in telling when materials become a part of the realty, but in the fringe areas where uncertainties exist, their status frequently depends on the particular circumstances. The facts must be ascertained so that under the guidance of applicable principles of law the correct determination can be made.”

It would seem that the principal fact in this case, namely, what the intention of the annexing party was, is very much in dispute. In determining the outcome of this dispute, the Trial Court reached the factual conclusion that no intent to permanently affix existed.

### POINT III

THE COURT IN ITS DECISION ERRED IN THAT CONTRARY TO CONTROLLING UTAH LAW IT CONSTRUED THE FACTS IN THIS CASE IN A LIGHT FAVORABLE TO THOSE TO WHOM THE STATUTE IS INTENDED TO PROTECT RATHER THAN IN A LIGHT MOST FAVORABLE TO THE DEFENDANT WHO HAD PREVAILED BELOW.

According to its opinion, the Court has construed the facts in this case “with an eye focused on the word-



ing purpose and intent of the statute involved, and in a light favorable to those to whom it intends to protect.” To put itself in a position to apply this rule, the Court concluded that the facts of the case were not in dispute. In light of the quotations and references set forth in II above, which show that there is substantial dispute in the factual question of intent and on the question of the respondents knowledge of Drews’ purchase of the railings from appellant, it is clear that this rule would not apply. In cases where the lower court has made a factual determination, the Utah law is as follows:

“The question . . . being generally one of fact as to what was the intention of the parties, is to be determined from all attendant circumstances . . . the Defendant having prevailed, is entitled to have the Supreme Court view the evidence and every fair inference and intendment arising therefrom in the light most favorable to it, and if when so regarded, there is any substantial evidence, or, as sometimes stated, any reasonable basis in the evidence, to support the finding made by the Trial Court, it will not be disturbed.” *John C. Cutler Assn, v. D. Jay Stores*, 3 U 2d 107, 279 P 2d 700 (1955).

If this rule is applied, the Supreme Court would be required to uphold the lower court’s conclusion that respondents had no intent to permanently affix the railings to the realty, therefore, the railings involved were personal property not subject to the Utah Private Contracts Act.



## POINT IV

THE COURT IN ITS DECISION ERRED IN THAT IT FAILED TO APPLY CONTROLLING STATUTES AND PRINCIPLES OF LAW WHICH ARE INCONSISTENT WITH A BROAD APPLICATION OF THE STATUTE IN QUESTION.

The first full paragraph on page 2 of the court's opinion implies that Section 14-2-1 of the Utah Code would apply even though there was no annexation of the railings in question to the land or structures upon it so as to make the railings a part of the realty. The Court apparently held that any person who has furnished material or performed labor for or upon any such building, structure or improvement, payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the value of the materials or labor.

Such a ruling seems clearly contrary to the statute which provides for application only to contracts "for the construction, addition to, or alteration or repair of, any building, structure or improvement upon land. . . ." It also is contrary to the rule in the *King Bros.* case, *supra* and entirely inconsistent with the rule in *Backus v. Hooten* 4 U 2d 364, 294 P 2d 703 (1956) favoring strict construction of a statute imposing double liability.

## CONCLUSION

In conclusion, it is submitted that the Supreme Court should reconsider this case in light of the cases and facts

referred to herein in order to avoid an unjust or unnecessary broadening of this statute that would be contrary to the intention of the legislature and inconsistent with established legal precedents in the State of Utah. A reconsideration would also give the Court an opportunity to avoid the unjust result reached here on the basis of facts not contained in the record of the Trial Court.

Respectfully submitted,

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