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Texaco, Inc. v. Hugh Gardner, Dba, Wholesale Gasoline Market : Brief of Plaintiff And Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

TEXACO, INC.

Plaintiff and Appellant,

vs.

HUGH GARDNER, dba, WHOLE-
SALE GASOLINE MARKET,

Defendant and Respond

BRIEF OF PLAINTIFF AN

APPEAL FROM JUDGMENT O
OF SALT LAKE COUNTY, HO
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SUPREME COURT

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STATE OF UTAH

TEXACO, INC.
Plaintiff and Appellant,

vs.

HUGH GARDNER, dba, WHOLESALE GASOLINE MARKET,
Defendant and Respondent.

Case No. 13066

BRIEF OF PLAINTIFF AND APPELLANT

STATEMENT OF NATURE OF CASE

This is a suit for the purchase price of a car of oil ordered by the defendant and spotted by the railroad at the Wagstaff Spur.

DISPOSITION IN THE LOWER COURT

The lower court held there was no delivery of the oil and entered judgment in favor of the defendant.

RELIEF SOUGHT ON APPEAL

Plaintiff asks for a reversal of the Judgment and that judgment be entered in favor of plaintiff and against the

defendant in accordance with the prayer of plaintiff's complaint.

STATEMENT OF FACTS

The defendant has been buying oil from the plaintiff and two cars of oil were ordered. One car of oil, purchase order was dated June 3, 1965 and signed by Hugh Gardner. The second car of oil, purchase order was dated June 9, 1965, Wholesale Gasoline Market signed for by David Bean. The orders in the regular course of business were sent to Denver and from Denver to Port Arthur to be filled. That the orders were filled at Port Arthur and were loaded on the cars and a bill of lading on both cars was dated July 28, 1965. The one car of oil was loaded in the New York Central car number N. Y. C. 175422. The other car of oil was loaded in the Baltimore Ohio car number B. & O., 465004. The N. Y. C. billing was for $5,216.26, the amount sued for in this case. The Baltimore & Ohio was billed for $4,677.40. The two cars arrived in Salt Lake City on the 4th day of July, 1965 (R. 133) and they were spotted on the Wagstaff Spur on July 8, 1965 loaded (R. 142), Exhibit P-13. Exhibit P-13 is an actual spot record made by the switching crew. The defendant was notified that the two cars were in Salt Lake City by the railroad company telephoning David Bean on July 6, 1965 at 11:10 a.m. Exhibit P-9. Affidavit of C. C. Forslund (R. 46-47). That the yard check shows that on the 9th day of July, 1965 at 6:30 a.m. (R. 148) (R. 134) both cars were on the spur track sealed and marked for unloading. (R. 133) (R. 151) (R. 135), Ex-

hibit P-10, and also Exhibit P-11 and (R. 134). The N. Y. C. and B. & O. cars were on the Wagstaff Spur and the seals were on the N. Y. C. and B. & O. and the seals were physically checked by the witness, Robert N. Pearson, on the 9th day of July, 1965 (R. 151). That no yard check was taken on Saturday and Sunday and on Monday, the 12th day of July, 1965, the yard check showed that the New York Central had been unloaded and was on the spur track empty (R. 148) (R. 134) and Exhibit P-11. That the yard check on the 13th day of July, 1965 showed that both cars were empty and ready to be pulled (R. 148) and Exhibit P-12.

That there was introduced in evidence oral testimony and the records of the railroad company showing the above facts Exhibits P-9, P-10, P-11, P-12, P-13. That at no time was there any claim made to the railroad company by the defendant that he had not received the oil or that it was not spotted on the Wagstaff Spur. The only evidence in the record is that the two cars arrived in Salt Lake City on July 4th. David Bean, agent of plaintiff, was told that they were in Salt Lake City on July 6th. They were spotted on July 8th on the Wagstaff Spur. The cars were sealed and loaded on July 9th. The next yard check on July 12th showed that the N. Y. C. had been unloaded and the B. & O. was still sealed and on the track. The yard check on July 13th showed that both cars were unloaded and on the track marked pull.

ARGUMENT

POINT I.

TITLE PASSED AND DELIVERY WAS MADE WHEN OIL WAS DELIVERED TO THE COMMON CARRIER.

The cars of oil were delivered to the carrier and when the seller delivered the merchandise to the common carrier there is a delivery and the title passed to the buyer and the risk of loss or injury to the goods while in transit is on the buyer.

In 46 Am. Jur. Sales, Section 172, page 347 it says:

> "Shipment by carrier. It is a well-established general rule that when goods are to be shipped to the buyer, a delivery by the seller to the carrier designated by the buyer is a delivery to the buyer, and constitutes a full performance of the seller's obligation to make delivery. This is on the theory that the carrier is made the agent of the buyer to accept the delivery. A delivery of goods to a carrier on a sale F. O. B. at the place of shipment is a delivery to the buyer. It is also well established that if the buyer directs the goods to be sent to him by carrier, without designating any particular carrier, a delivery to the carrier selected by the seller if proper care is used in the selection is a delivery to the buyer to the same extent as though the buyer had himself selected the carrier. In the latter case, the seller, acting in this respect under the order of the buyer to forward the goods, is his agent in the selection of the carrier, and in either case the carrier is, in contemplation of law, chosen by the buyer. Also, if it is the usual course of busi-

> ness for the seller on the receipt of orders from a distant buyer to deliver the goods to a carrier for transportation to the buyer, a delivery to a carrier selected by him will constitute a delivery to the buyer."

The last paragraph under Section 172, page 349 is as follows:

> "If the delivery of the goods to the carrier is considered a delivery to the buyer, it follows that this is a sufficient delivery to enable the seller to maintain an action for the price irrespective of the actual receipt or acceptance of the goods by the buyer, and since by such delivery the title passes to the buyer, the risk of loss or injury to the goods while in transit is on the buyer."

46 Am. Jur. Sec. 584, page 725 Delivery to Carrier as Authorizing Action for Price, and we quote as follows:

> "Ordinarily, when a delivery is made to a common carrier according to the contract of sale or the direction of the buyer, the carrier is thereby made the agent of the buyer and title passes to the buyer,[17] thus enabling the seller to maintain an action for the price as for goods sold and delivered."[18]

At 55 C. J. Sales, Section 566, page 559, it states:

> "Under a contract of sale f. o. b. the point of shipment, the title passes at the moment of delivery to a carrier."

To the same effect is 77 C. J. S. Section 164 page 887, Delivery to Carrier General.

> "a. General Rules.
>
> Ordinarily, in the absence of an agreement show-

> ing an intention to the contrary, a delivery of the goods by the seller to a carrier for shipment to the buyer is a delivery to the buyer."

Further in Section 164 on page 888 2nd paragraph top of 1st column it states:

> "On delivery to the carrier, the carrier becomes the agent of bailee of the buyer, so that the seller is not liable for loss or injury to the goods in transit, as discussed infra § 465, or for delay in delivery by the carrier, without fault on his part, although under some circumstances the carrier may be the agent of both parties."

To the same effect is 55 C. J. under Sales Section 364, page 367.

The case of *Brooks Shoe Mfg. Co.* v. *Denton*, 57 N. M. 575, 260 P. 2d 1109, on page 1110 it states:

> "that the goods had been delivered to a common carrier properly packed for shipment to the defendant at Clovis, and that the failure of the shoes to arrive there was not due to the negligence of the plaintiff, but to the flood in Kansas City. * * * The conclusion of the trial court that delivery to the carrier f. o. b. Philadelphia constituted delivery to the defendant was correct. 46 Am. Jur. (Sales) sec. 172."

The case of *Pabst Brewing Co.* v. *Smith*, Okla., 135 P. 381. This is a sale of liquor during prohibition times and we quote from page 382 of the Pacific:

> "On the other hand, it is evident that the delivery to defendant actually took place at the time of the delivery to the railroad company for carriage; said

railroad company being the agent of defendant in the receipt of the beer."

The case of *Boston Iron & Metal Co.* v. *Rosenthal*, 156 P. 2d 963, on page 965 the Court says:

"(1-3) Boston relies upon the words 'delivered Japan' as creating a condition that Rosenthal had to actually land the material there. There is nothing in the contract touching the place of delivery other than may be suggested by the words 'delivered Japan', and it is settled law that 'if, in a contract for purchase and sale of goods to be shipped to a given point,' nothing is stated as to the place of delivery, the delivery to the buyer is complete when it is made to the common carrier at the place where the seller produces them or has them for sale."

In the case of *Hill* v. *Fruita Mercantile Co.*, 94 Pac. 354, on page 356, it states:

"The controlling question on this issue, as well as on the merits of the case, is: Was the delivery of the potatoes to the common carrier a delivery to appellant?

The rule is well settled that, in the absence of any agreement to the contrary, delivery to the carrier is delivery to the consignee. 4 Elliott on Railroads, § 414, and cases cited in note 60 * * * by the delivery of the goods to a carrier on behalf of the consignee, and if they have been placed at his absolute disposal, and no other fact appears, the legal presumption is that he is the true owner, and the property in the goods then becomes immediately vested in him; and therefore, in the event of a loss, he, and not the consignor, must bring the action, for the consignor has his remedy against

> the purchaser. As appears from the statement of facts, the potatoes were sold to appellant on a telegram August 20, 1903, to be shipped that day. Appellee loaded them, and obtained bill of lading from the common carrier on that day, and notified appellant at once that the potatoes had been shipped, giving him the description of the car. From these undisputed facts we think the case clearly comes within the general rule above stated."

To the same effect is *Lamar Alfalfa Milling Co.* v. *Bishop*, 250 P. 689, and on page 690, paragraph 5, it states:

> "In the absence of any agreement to the contrary, delivery to the carrier is delivery to the consignee. *Hill* v. *Fruita Merc. Co.*, 42 Colo. 491, 497, 94 P. 354, 126 Am. St. Rep. 172; *Cary* v. *Williams*, 47 Colo. 256, 260, 107 P. 219, 135 Am. St. Rep. 219; 35 Cyc. 193; 4 Elliott on Railroads (3d Ed.) § 2127."

In the case of *Hatcher* v. *Ferguson*, 198 P. 680, on page 684, the court sets down the rule:

> "When the seller enters into a contract with the carrier for shipment to a particular destination, he does so at the request of the buyer, and in designating the destination acts as the buyer's agent. He has done his duty when he demands of the carrier a shipping contract to the destination requested by the buyer. If any loss results from the refusal of the carrier to make a contract to deliver at the desired destination, the loss must be borne by the buyer and not by the seller."

We have quoted the law as stated in American Jurisprudence, in Corpus Juris, in Corpus Juris Secundum, and in the cases, and the same ruling of law is carried forward into the Uniform Sales Act, Section 70 A-2-509. Risk of loss in the absence of breach — (a) where the contract requires or authorizes the seller to ship the goods by carrier.

> "(a) If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation."

We found a case construing the above quoted section which is *Dana Debbs, Inc.* v. *Lady Rose Stores, Inc.*, 319 N. Y. S. 2d 111. In the instant case not only did the title pass when the cars were loaded at Port Arthur and a bill of lading obtained, but the car was actually spotted at 1775 Beck St. by the railroad company. There is nothing in the contract specifically about delivering it to any particular place, and in the *Dana Debbs* v. *Lady Rose* case on page 112, paragraph 1, 2, the court says:

> "(1, 2) The court decides that this was not a destination contract since there was no express requirement that they be delivered at a particular destination. The word 'require' means that there is an explicit written understanding to that effect for otherwise every shipment would be deemed a destination contract. Clearly, here the buyer designated Stuart Express Co., Inc. to make the shipment and, therefore, subparagraph (a) would be applicable because there is no destination contract or express requirement for delivery at a particular

> designation. The risk of loss passed to the buyer upon such delivery to Stuart Express Co., Inc."

And on page 113, the court says:

> "The general rule is that upon a sale 'F. C. B. the point of shipment (here New York City),' title passes from the seller at the moment of delivery to the carrier and the subject of the sale is thereafter at the buyer's risk. In other words, the delivery to carrier is delivery to the buyer. * * * Plaintiff's Motion for summary judgment is granted and the defendant's answer is stricken."

CONCLUSION

In this case an order was given to Texaco, Inc. They filled the order in their regular course of business and loaded the oil on the cars at Port Arthur and obtained a bill of lading. At this time the title passed to the defendant and he was liable to pay for the oil. Plaintiff went further and with undisputed evidence proved that the cars were received in Salt Lake City. David Bean, the agent of the defendant company, was notified the cars were in Salt Lake City and the cars were spotted on the Wagstaff Spur loaded and sealed. The N. Y. C. car was unloaded first, and marked ready to pull. The next yard check showed that they were both empty and marked ready to pull.

There is no contradiction in the evidence that the cars did not arrive in Salt Lake City, that David Bean was notified and the cars were spotted on the Wagstaff Spur.

We submit that plaintiff is entitled to judgment in accordance with the prayer of its complaint.

Respectfully submitted,

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