1950

Monte Moses v. Archie McFarland and Sons : Brief of Appellant

Utah Supreme Court

Warwick C. Lamoreaux; David K. Watkis; Attorneys for Appellant;

7548

In the
SUPREME COURT
of the
STATE OF UTAH

MONTE MOSES, doing business as Rancho Packing Co.,
Plaintiff, Respondent,

vs.

ARCHIE McFARLAND and SONS, a corporation,
Defendant, Appellant.

Case No. 7548

BRIEF OF APPELLANT

WARWICK C. LAMOREAUX,
DAVID K. WATKIS,
Attorneys for Appellant

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STATEMENT OF THE CASE

A. PRELIMIINARY STATEMENT

The parties are referred to as in the court below.

Plaintiff brought this action in the District Court

for Salt Lake County; and following a trial before the Court sitting without a jury, a judgement for the plaintiff was entered in the sum of $2,686.98.

The amended complaint alleged that on or about the 28th day of October, 1947, plaintiff and defendant entered into a contract by the terms of which the plaintiff agreed to buy and the defendant agreed to sell 30,000 lbs. of boneless mutton at 24½ cents per pound, and the defendant agreed to deliver such merchandise at the rate of 5,000 pounds per week; that defendant delivered only 6,635 pounds and refused to deliver the remaining 23,365 lbs., thereby necessitating the plaintiff, in order to mitigate his damages , to purchase this amount on the open market which caused him a loss of $2,686.98.

By way of answer defendant admits selling meat to the plaintiff, but alleges that it was on an "open order" basis, and that such orders were subject to confirmation and acceptance by the defendant's home office in Salt Lake; that the defendant was first appraised of this claimed "order" of sale under which plaintiff is suing in January, 1948, and at that time declined to accept it but promised to ship all they could get to the plaintiff; that at the time of his conversation the price of mutton was 29½c per lb.

From the facts hereinafter related, it will appear that the evidence clearly indicated that there was no lawful contract entered into between the parties, for 30,000 pounds of boneless mutton at 24½ cents per pound as alleged.

B. THE FACTS

The defendant is a wholesale meat packing corporation with its principal place of business at Salt Lake City. It is a large organization doing business throughout the Intermountain area, and also the Pacific coast. The defendant, as is the custom in the meat packing business, employs salesmen to find markets for its merchandise. At the time in question the defendant had a sales office in San Francisco that employed 5 salesmen, one of whom was Domenith C. Basolo. (R. 84)

The plaintiff, Monte Moses, is an individual doing business in the name of Rancho Packing Company, with its principal place of business at Los Angeles. This plaintiff is a manufacturer of luncheon meats and as such purchases various types of meat throughout the country. (R. 13,40) The parties had never before done any business. (R. 20)

On the 28th day of October, 1947, defendant's salesman Basolo phoned plaintiff long distance (R. 49) and received from him four orders for meat. (Exhibit 9) The first order was for 30,000 lbs. of boneless mutton which was represented as presently on hand, and in the freezer. (R. 37) Plaintiff then stated he would like an additional 30,000 pounds of the same produce shipped 3000 to 5000 pounds per week. (R.45) Two additional orders were given, one for 5000 pounds of pigs feet, and one for Gullet meat and lamb cheeks. (R. 60, Exhibit 9)

Order Refused

The salesman Basolo telephoned Mr. Mc Farland, general manager of the defendant, told him of the orders. ((R.88) Defendant accepted the order for the presently existing car of frozen mutton, and shipped 27,716 pounds the next day. (R. 88, 78, Exhibit 1) As to the second order for the same commodity, it was refused for the reason that there was no mutton available. (R.88) The product results from the culling of sheep herds as they move from summer to winter pasture, and is only available in small quantity in defendant's territory from September to the forepart of October. (R. 77) Defendant told Basolo plaintiff could have the product "as available" on an open order basis. At the time Moses ordered the second lot of mutton, Basolo told him, testified Moses, that the latter had purchased all of the supply of boneless mutton. (R. 45) Nevertheless, plaintiff contends that Basolo "sold" him the order sued upon. Plaintiff knew that Bosolo had not conferred with the plant at the time the alleged contract was entered. (R. 46) Basolo had no authority to accept orders. His employer had instructed him to take orders and communicate them to the plant for acceptance. (R. 87) There was no course of dealing between litigants, or between the salesman and plaintiff. Moses "assumed" Basolo had contacted the plant about the transaction. (R. 47)

The San Francisco office sent evidence of the

four transactions to defendant in the form of the usual "house order" form, Exhibit 9. Plaintiff also received the said forms. (R. 69) The contested order is page 4 of that exhibit, specially marked Exhibit I. On its face shipping instructions are stated to be "as available"; however, there are later words about minimum shipments of 3000 pounds per week.

Plaintiff issued its purchase order, No. 7001, Exhibit "A"; however, there is no evidence defendant received a copy thereof. The order number appears on a letter written by Basolo to plaintiff dated October 29, wherein the salesman undertook to confirm the order for the second shipment of mutton in installments. In said letter, Exhibit "B", is a statement that "we have advised the plant that lots of less than 3000 lbs. are not desireable." The plant had been so advised, but rejected the order on that basis. (R, 88) The letter said nothing about 30,000 pounds. What amounted to a counter offer was given by the plant to ship as available on an open order basis. (R. 88). Exhibit "B" states Basolo was district manager. He had no authority to use this title and took it on himself to so designate himself, the defendant knowing nothing about it until 7 months later. (R. 105)

Shipment of the four orders commenced at once. The order for the mutton on hand was shipped on October 29th, but was several thousand pounds short. (Exhibit 1) There were six shipments of mutton thereafter during the next few weeks, but each ship-

ment was for less than 3000 pounds. (Exhibits 2 to 7, inclusive) The last three were priced out higher than the alleged order for 30,000 pounds at 24½ cents, and the plaintiff paid without question the higher price. (R. 69 and Exhibit 8)

Moses Phones Mc Farland

Sometime near January 9, 1948, plaintiff phoned Mc Farland and observed that he had a contract for 30,000 pounds of mutton but it wasn't coming through. (R. 28) Mr. Mc Farland stated there was no contract, but that shipments had been, and would be made on an open order basis, but that there was no product available. (R. 91)

Immediately thereafter, plaintiff wrote Exhibit "C" rehearsing some of what it deemed to be the understanding and asked for shipments. Mr. Mc Farland replied with Exhibit "D" on January 15th and stated there was no product, that it was almost impossible to obtain, that there were no sheep coming to market, that he would do his utmost to get some mutton as referred to in the letter. Mr. Mc Farland always understood the matter as an "as available" transaction. (R. 88) All during this time, from the shortage from 3000 pounds in the first shipment to April 28, 1948, plaintiff was buying the product in the open market. (R. 51, 31, 63) The price was rising from the time of the purchase alleged to have been made from defendant. This plaintiff knew. (R. 33, 52) At the time of the phone call and letter with and from Mc Farland, the market was

about 29½ cents. (R. 94) A purchase of 27,680 pounds of mutton was made by plaintiff on April 28, 1948 at 34 cents, and plaintiff demanded and sued for the difference between the alleged contract price of 24½ cents and the 34 cents, plus two cents for transportation cost.

The court granted judgement as prayed.

STATEMENT OF ERRORS

I.

The trial court erred in entering its finding that there was a sale of 30,000 pounds of boneless mutton for the following reasons:

1. The salesman of defendant had no authority to enter into a contract with plaintiff.
2. The defendant had a right to accept or reject orders from its salesman. The order submitted by plaintiff was rejected. A counteroffer to send mutton "as available" was given in its stead.
3. Shipments made by defendant to plaintiff did not constitute an acceptance of any contract.
4. Defendant at no time ratified the alleged contract made between plaintiff and salesman Basolo.

II.

The plaintiff waived his right to damages for the deficiencies in the first five shipments.

III.

Plaintiff did not properly mitigate damages. The judgment for money is excessive.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ENTERING ITS FINDING THAT THERE WAS A SALE OF 30,000 POUNDS OF BONELESS MUTTON FOR THE FOLLOWING REASONS:

1. THE SALESMAN OF DEFENDANT HAD NO AUTHORITY TO ENTER INTO A CONTRACT WITH PLAINTIFF.

The trial court found as a fact that defendant, through its agent Basolo, sold plaintiff 30,000 pounds of boneless mutton. (R. 9) It is contended by defendant and appellant here that the agent had no authority to so bind his principal in a sale of this kind and that the finding is error.

At the threshold, we must examine the facts in terms of the generally accepted principle of law stated by the Utah Supreme Court as follows:

> It has been stated to be the general rule that a traveling salesman has no authority to make a binding contract of sale without the approval or acceptance of the principal, unless expressly so authorized. Generally the extent of his authority is to solicit orders and transmit them. FLOOR vs. MITCHELL, 41 P. 2d, 281-286, 1935.

There was no evidence of prior dealing so that an agency by estoppel might be claimed or an apparent agency. The transaction in question was the first ever made between the parties. (R. 69, 20) The only

competent evidence then to establish Basolo's authority were the instructions given him by his employer.

Basolo was a salesman for defendant McFarland, as one of five such in the San Francisco territory sales office (R. 99, 14, 85). He had been specifically instructed, as were all salesman of defendant

Only two persons in the defendant organization had authority to accept orders, Paul McFarland, general manager, and Frank Lees, the sales manager. (R 95)

Basolo assumed to use a false title, that of District Manager. He was not the district manager. Mr. McFarland, testified that Basolo took the title "on himself to use," and that it was not until seven months after the transaction in question and that Basolo was no longer with the company, that the manager of defendant knew he had used the false title. (R 105 This information came from plaintiff in the form of Exhibit B.

Concurrently with the transactions herein taking place, Basolo was acting as a broker for other dealers. (R 86)

It is to be born in mind that statements of the agent cannot be relied upon as to his authority for the reason that persons dealing with an agent assume the risk of lack of authority. 2 Am. Jur. 76.

The plaintiff has the burden of proof of agency. The Utah Supreme Court has stated that one who has dealt with an agent or who has availed himself of

the act of an agent must in order to charge the principal, prove the authority under which the agent acted, in other words, it has cast upon him the burden of establishing the agent's authority to bind the principal by the act or contract in controversy.

CAMPBELL vs. GOWANS 100 P 397, 35 U 268.

Mr. Moses, the plaintiff, knew that Basolo did not have authority to make a firm contract for boneless mutton. In the first place, it is clear from the testimony of Mr. Moses that Basolo at no time prior to the transaction in controversy had contacted the home office, or anyone in authority, with respect to the order. (R 46, 47) It was the salesman acting alone in response to the offer of plaintiff to purchase. There was no confirmation to plaintiff and indeed Mr. Moses stated that in most of his deals, he does not rely on confirmation. (R 74)

It is to be kept in mind that the order in question was a part of four orders for meat all bearing the same date, October 28, 1947. (Exhibit 9) It all occurred in one telephone conversation from the salesman in San Francisco, to plaintiff Moses in Los Angeles. (R 20, 58, 69) The first order was for a car load of boneless mutton presently existing (R 78) Mr. Moses testified that Basolo "offered the sale of this car load of mutton, representing himself as being able to sell it to us, and describing it. We agreed to buy." (R 37) This car load had been accumulated over several

weeks of culling of sheep in the desert country moving from summer to winter range. (R 77) The salesman could not sell this meat without confirmation from the plant. (R 85, 87)

SENNER & KAPLAN v. GERA MILLS
173 NYS 265

A careful reading of the record will discose that it was in the same telephone conversation that Mr. Moses then asked for a second order of the same product, in the amount of 30,000 pounds, to be shipped weekly from 3000 to 5000 pounds per shipment. (R 20, 58, 69) Mr. Moses testified that he knew he was purchasing a scarce commodity that was in some sections unavailable at some times of the year (R 52); that "certain sections would dry up" when the packers were "through with their run." (R 41) Boneless mutton he said "isn't an all-year proposition in any one section . . . In a sheep section like this (Utah) it's an item that comes for a time and then stops off . . . these mutton are old ewes that have been culled form the herds." (R 41)

The salesman Basolo telephoned the two orders to McFarland for confirmation. (R 88) The first order for the boneless mutton on hand was accepted and was shipped the following day. (R 88, 79, Exhibit 1) The order for the second lot of mutton was rejected as follows:

> A. Basolo said that Rancho Pack would also take another thirty thousand pounds of mutton if we could get it, and I immediately

> told him it wasn't available . . . . We said we didn't have another thirty thousand pounds of mutton, we probably couldn't get it, but that we would ship on an open order all the boneless mutton we could get through." (R 88)

Plaintiff bought the product regularly and testified it was always available somewhere. (R 41) He testified he could have purchased mutton elsewhere on October 28, 1947, at the same price. (R 46) He bought in the South and from Chicago generally. (R40)

At the time of the telephone conversation with Basolo wherein the carload of existing mutton was ordered, and after Mr. Moses had offered to purchase another 30,000 pounds, Mr. Moses testified that Basolo told him that he, Mr. Moses, had *"bought our supply, you have already bought our present supply."* (R 45, 46) However, Mr. Moses then testified that the salesman was confident that more supply would be available. He testified Basolo had said:

> ". . . . but we do have these coming up. We are going to have them right along every week. We are in no position to accumulate a shipment of twenty five or thirty thousand pounds, but we will have them coming in each week. Now would you be satisfied to receive five thousand pounds per week?" (R 45)

It is submitted that in terms of the record, the above testimony, and that immediately following, cannot be believed; but if it is accepted, Moses should have checked with the plant. Mr. Moses said:

> "You can send us as little as three thousand pounds, but no less than that. He said, "On that basis I will contract with you to meet the operation. We have a truck coming in each week and will drop off three to five thousand pounds each week" and I insisted on conveying to him that if he failed to do that he would be putting us on a spot because *we had possibilities at that time of buying mutton at that price.*" (R 46)

Here we have the plaintiff advised that there is no more presently existing supply; plaintiff further understands the difficulties in the desert country of procuring supply, knowing that some areas dry up at the end of the season's run, knowing that he can get it in some other locality at the same price. And yet he was willing to try to enter a contract with a mere salesman for that large quantity of a scarce item! Apparent authortity is never contructed from such tenuous tissue! "One should always use proper vigilence in dealing with another; he cannot close his eyes to information which lies within his easy grasp." *Angerosa v. White Co.,* 290 N.Y.S. 204, 248 App. Div. 425.

> Johnson v. Shook & Fletcher Supply Co., 16 So. 2d, 406.

Plaintiff Moses had had no course of dealing with Basolo, nor with McFarland. This was the first and only transaction with either of them. (R 20, 34, 45, 58) And plaintiff knew that there was no immediately available stock of mutton to support the order. He himself testified that he was so advised by the sales-

man. (R 45, 46) Why should plaintiff undertake to tie up such a large supply at the wrong season of the year, through a salesman who had advised him of the lack of present supply, when plaintiff knew that he could get his product at the same price in another market? He had notice that it would be required of defendant to get the product from mutton then on the hoof. (45) It was not contemplated that the salesman was to enter the market for the purchase of processed mutton. It was that weekly supply they were evidently talking about.

Mr. Moses is a large operator. The order from defendant is "but a drop in the bucket", (R 38), and he had another supply, (R 46), yet he saw fit to deal with a traveling salesman who actually had no authority, and who put the plaintiff on notice that there was no present ability to perform. Plaintiff had notice that it was a future anticipated supply to be depended upon.

Moses testified that the contract was formed in the telephone conversation. (R 49) This was before any attempted confirmation by Basolo with the plant. In other words, plaintiff takes position and the court below so found (R 6) that the salesman had the authority to contract at the time of the first telephone conversation, that it was unnecessary for the latter to get assent from the plant.

Let it also be remembered that Basolo did telephone the plant immediately thereafter. He received

(1) confirmation of the first order for boneless mutton, and (2) refusal of the order for the sceond lot of the same product for the reason that none was available. (R. 88) In other words, any possible authority the salesman might be held to have had at the time of the telephone conversations to sell the future prospective supply of boneless mutton, was specifically countermanded by Mr. McFarland.

Plaintiff had a duty to inguire into the authority of the salesman.

> "A person dealing with a known agent is not authorized under any circumstances blindly to trust the agent's statements as to the extent of his powers; such person must not act negligently, but must use reasonable diligence and prudence to ascertain whether the agent acts within the *scope* of his powers. In other words, a person dealing with an agent assumes the risk of lack of authority in the agent. He cannot charge the principal by relying upon the agent's assumption of authority which proves to be unfounded." 2 Am. Jur. 76
>
> Dayton Bread Co. v. Montana Flour Co. 126 F2 257, 1942
>
> Johnson v. Shook & Fletcher Supply Co., 16 So. 2d, 406.
>
> ANHEUSER BUSH v. GROVIER STARR, 128 F.2, 146.
>
> CHESSOM v. RICHMOND CEDAR WORKS, 89 S.E. 800.
>
> American Nat. Bank v. Bartlett, 40 F.2, 21.
>
> WHEELER v. McGUIRE, 2 L.R.A. 808; 86 Ala. 398; 5 So. 190.

As to whether the agent was acting within the scope of his authority, suppose he had been given an order for 300,000 or even three million pounds of critical material? Could it be said then that plaintiff could believe that the salesman was acting within the scope of his powers?

Had plaintiff made any inquiry, or even called Basolo back after the latter had communicated the orders to the plant, he would have learned whether the salesman was acting within or without his powers. Of course it is the position of plaintiff that Basolo did not attempt to contract in the telephone conversation prior to his conferring with the plant; however, plaintiff grounds his whole case on the assumption that Basolo had the authority at the time of the single phone conversation, and that the contract was then and there made. (R. 49) The court below so found. (R. 6)

If Mr. Moses had been really concerned about tieing up a source of supply (amounting to a drop in the bucket) he would have determined whether or not the plant had or would sanction an order amounting to 72,000 pounds of a critical commodity. (R. 38) Mr. Moses testified that he knew at the time of the order that the salesman was not conferring with the plant, that Moses did'nt have any statement from Basolo with respect to his arrangement with McFarland in California." (R. 46) In fact, Mr. Moses testified that there was nothing said about the

salesman conferring with Mr. McFarland in Salt Lake City, but Mr. Moses, "certainly *assumed* that he had." (R. 47)

Johnson v. Shook & Fletcher Supply Co., 16 So. 2d, 406.

The letter written by Basolo, (Exhibit B), did not have authority of the plant and it does not on its face suggest it. All that is said is that the plant has been "advised" that lots of less than 3000 pounds are not desirable. Whether this letter was written before or after the instructions from McFarland is now known. But it is clear that there was no authority from the plant to write it.

That the salesman did not confer with the plant before making the alleged contract was of no concern to plaintiff, for he testified that it was not his practice to attempt confirmation. He testified that he did a lot of business with large brokerage houses of the nation, and that "in most cases the transactions that I have had with them have been done without confirmation." (R. 74) Confirmation with him was uncommon. (R.71) With defendant a must. (R. 87)

The importance of confirmation was illustrated in the record by defendant's counsel calling attention to plaintiff of a statement appearing on the letterhead of the brokerage firm with which plaintiff did the business of purchasing in the open market to "mitigate" his damages as a result of the failure of this defendant to ship the mutton. Mr. Moses stated

he was familiar with the language and policy of the James Company that "all our offerings, verbal, telegraph or mail, are subject to seller's confirmation unless specifically quoted firm." (R. 74) In other words, the James Company required confirmation of the buyer from it, with the seller. The buyer was and is warned by that plain spoken language that where there was no ttempt to get a sellers confirmation, there was no contract. The broker is in a somewhat similar position as a salesman. The house, or the plant reserved the right to affirm or disaffirm the orders taken by the broker. And why not?

Where would the large modern plant be if it did not require salesman to submit their orders? When the demand exceeds the supply, as was the case in 1947 (R. 87), salesman and brokers could over sell the supply and produce chaos. It is the rule in all business that a mere traveling salesman does not commit the supplier in the absence of a firm quotation or offering. Credit considerations if nothing else, would dictate that the ordinary salesman could not of himself close a contract for goods involving many thousand of dollars.

Wrenn v. Ehrlich 194 A. 534
Senner & Kaplan v. Gera Mills, 173 N.Y.S. 265, 185 App. Div. 562

Under the pleadings of plaintiff, his proof, and the findings of the trial court, the case is one where a bi-lateral contract is claimed and found to exist, that

is, a promise for a promise. The promise from defendant would either have to come from the salesman having authority, or, inconsistent with the findings of the court, the act of shipping by defendant would constitute promise to ship all of the ordered merchandise. The court found it came from the salesman's authority.

There was never a bi-lateral agreement. Basolo did not promise anything, and even though he had he had no authority to promise. The shipments made were on the basis of the instruction given Basolo when he phoned the plant, that there was no available supply, but that such as could be had would be shipped on an open order basis. (R. 88) The court may have had such a formation of contract in its mind, but there is no finding to that effect. The finding is to the contrary, that the agreement was the immediate result of the phone conversation. (R. 6)

What actually happened was that plaintiff simply made an offer for a bi-lateral contract which was rejected. A counter offer was given by the plant that as there was no firm supply available, the order would be filled on an open order basis. (R. 88) The plaintiff had the duty to ascertain the scope of authority of the salesman, and the salesman had the instructions forthwith. The buyer from the salesman buys at his peril as heretofore stated. If the agent has no authority, the intending buyer does not buy.

Rietz vs. Martin, 12 Ind. 306, 74 Am. Dec. 215, 24 R.C.L. 387.

The result of what happened in October, 1947, was that there was set up a series of unilateral contracts. The salesman had no authority but to communicate the order, and that he did. Anything further that he did was a nulity.

The law of the place of contracting, California, requires that Basolo's authority must be in writing before the contract would be valid under the Statute of Frauds.

The California Civil Code 2309 provides as follows:

> "An oral authorization is sufficient for any purpose except that an authority to enter with a written contract required by law to be in writing can only be given by an instrument in writing.

Section 1624 as amended Statute 1905 states:

> "The following contracts are invalid unless the same or some note or memorandum thereof, is in writing and subscribed by the party to be charged or his agent.
>
> (4) An agreement for the sale of goods, chattels, or things in action at a price not less than $200.00.

Seymour v. Oelrichs, 106 P. 88 is the leading California case on this point, holding that an agent's authority to enter into a contract that is required by law to be in writing also must be in writing. This case also holds that proof that an agent had authority to bind his principal by some sort of a

written contract does not, in the absence of proof of written authority, justify the inference that the agent had authority to bind the principal by a contract required to be in writing under the Statute of Frauds.

In the present case there was no probative evidence of the agents authority shown whatsoever by the plaintiff, Moses, the only evidence being the statements of Paul McFarland on Pages 85 and 87 as to the instructions he gave to Basolo.

Another more recent case applying this law of California on agency is the case of *Georgia Peanut Co. v. Famo Products Company,* 96 F. (2) 440 in which the court stated "In our opinion the provisions of the California Code Sections are subject to but one interpretation, that is, that every one exercising an authority to sell or buy, save the specifically excluded auctioneer, whether a broker or any other class of agent, must have written authority to enter into a contract required to be in writing."

It is submitted that there is nothing in the record exhibiting that the salesman had any authority to sell anything to this plaintiff. The court interrogated Paul McFarland at the end of the trial. Note the question of the court on the final page of the transcript:

> Q. The court: It appears clear to me that these agents have authority to sell the merchandise if the plant has it on hand. The agent calls and finds out. If he doesn't have it, they say, "Get down and make your apologies."

> If they do have it on hand, they fill the bill. Is that about it."
>
> A. Yes, that's about it.
>
> Q. The court: Yes, it seems to me it is clear. The only question now is what the legal effect of that is on these fellows that think they are buying the goods. (R. 110)

Any intelligent understanding of the above answer by Mr. McFarland requires the reader to recall the burden of the rest of his testimony that in all cases, he, Mr. McFarland, instructed the salesman to communicate orders to him for confirationm. (R. 85, 87, 108) In this case it is undisputed and clear that at the time of the formation of the alleged contract "the plant did not have the product on hand." Evidently the court was very concerned about the "fellows that think they are buying the goods." It is not uncommon for intending buyers to be disappointed in the unavailabiltiy of goods desired. But the court inquiry brought out the essential fact that where there is no supply the agent has no authority to sell. (R. 110) Here, there was no supply. Here there was no authority to sell. Here there is no contract.

2. THE DEFENDANT HAD A RIGHT TO ACCEPT OR REJECT ORDERS FROM ITS SALESMAN. THE ORDER SUBMITTED BY PLAINTIFF WAS REJECTED. A COUNTER-OFFER TO SEND MUTTON "AS AVAILABLE" WAS GIVEN IN ITS STEAD.

Plaintiff contends and the court found that it received 6635 pounds and that defendant failed in its contract to deliver 23,365 pounds of meat, for which it was entitled to enter the market, purchase same, and charge defendant with the difference between the 24½ cents and the market. On April 28, 1948, when plaintiff entered the market and purchased, it paid 36 cents per pound, making a claimed loss of $2,686.98, for which it sued, and recovered judgment, against defendant. Defendant takes the position that there was no contract between the parties which was enforceable by law.

In the first place it must be understood that the commodity attempted to be purchesed by plaintiff and which is the subject of this suit was virtually impossible to obtain in defendant's territory. The undertaking by defendant was that it would supply the mutton "as available."

Defendant's salesman from San Francisco called plaintiff Moses by phone in Los Angeles on the 28th day of October, 1947, and took four orders for meat. (Exhibit 9) That there was but one contract between Basolo, salesman for plaintiff, and Moses, is clear in the record upon careful analpsis. (R. 20, 35, 38, 45, 58)

The first of the four orders was for 30,000 pounds of boneless mutton which defendant had accumulated and had on hand; it was in cold storage. (R. 78) Plaintiff Moses testified "He (Basolo) offered the

sale of this carload of mutton, representing himself as being able to sell it to us, and describing it . . . We agreed to buy it." (R. 37)

Paul McFarland, general manager of defendant, testified as to that order that Basolo telephoned him and said:

> "I have an order for the boneless mutton you have in the freezer . . . . You can ship it and Basolo gave me a purchase order number, which we attached to our invoice . . . . That merchandise was shipped immediately." (R. 88)

The order number used was plaintiff's No. 7465. The invoice is Exhibit 1. Mr. Frank Lees, sales manager for defendant, testified that the car was loaded and shipped to plaintiff on October 29th. (R. 79) The car sent to plaintiff was accumulated "between the latter part of August and the end of October," (R. 78), and represented all of the stock of that product held by defendant, so testified Mr. Moses. (R. 45) This shipment was received and paid for, and is not the subject of this suit.

Contemporaneously with the giving of the above order (R. 45, 38), there was an order placed for an additional 30, 000 pounds, and it is as to this latter order that the present controversy arises. The pertinent testimony from McFarland is as follows:

> Q. Now what else was said? (after giving the first order)
>
> A. Basolo said that Rancho Pack would also take another thirty thousand pounds of

mutton if we could get it, and I immediately told him it wasn't available. We said we didn't have another thirty thousand pounds of mutton, we probably couldn't get it, but that we would ship on an open order all the boneless mutton we could get through. (R. 88)

Mr. Moses had another version of the second order for boneless mutton, testifying:

> Q. I want you to state the conversation you had with Mr. Basolo with respect to the second carload of meat.
>
> A. He said that "you have bought our supply, but we do have these coming up. We are going to have them coming right along every week. (sheep) We are in no position to accumulate a shipment of twenty-five or thirty thousand pounds, but we will have them coming in each week. Now, would you be satisfied to receive five thousand pounds per week? I said, "yes, in fact you can send as little as three thousand but no less than that." He said on that basis I will contract with you to meet that operation. We have a truck coming in each week and will drop off three to five thousand pounds each week," and I insisted on conveying to him that if he failed to do so that he would be putting us on a spot because we had possibilities at that time of buying mutton at that price. (R. 46) They will guarantee to deliver three to five thousand pounds each week. (R. 47)
>
> Q. You didn't have any statement from Mr. Basolo with respect to his arrangement with McFarland in California?
>
> A. No.

Q. He simply told you that "you have already bought our present supply?"

A. That is right. (R. 46)

As to the documentary evidence involved the following are pertinent: Plaintiff Moses testified that he had seen the four house orders comprising Exhibit 9, (R. 69), the first one of which is defendant's record of the first order for boneless mutton at 25 cents per pound. The second page of the document is for other meat, The third page of the document is for 5000 pounds of pigs feet at 9 cents per pound. The fourth page is for the merchandise which is the subject of this suit, 30,000 additional pounds of boneless mutton at 24½ cents.

It is to be noted that all four "house orders" in Exhibit 9 bear the same date. October 28, 1947, showing that all business was done during the same day. The exhibit came from plaintiff's San Francisco office. (R. 107)

An examination of the fourth page of Exhibit 9, which has been marked also as Exhibit I, (R. 71), discloses that there is a statement as to "When ship". It was ship "as available". At the trial, plaintiff was glad to have the exhibit available from defendant because of the language appearing thereon as follows:

"Ship each week in lots of no less then 3000 lbs.

More if available."

The import of the Exhibit 1 of course cannot be minimized, as it represents the transaction according

to the records of the San Francisco office of defendant. (R. 92, 107) Plaintiff testified that he had received copies of the said records also. (R. 69) He therefore had actual knowledge that in the internal handling of the item, it was being treated, as to delivery date, as an "as available" transaction.

Johnson v. Shook & Fletcher Supply 16 So. 2d. 406.

The final additional document evidencing the transaction in question is Exhibit "B", a letter written on defendant's stationary to plaintiff and signed by Basolo. Note that the latter used the title "District Manager". This he was not. (R. 105)

Two things are important in connection with Exhibit "B". The first relates to the authority of Basolo. This subject is hereinbefore dealt with at length. It is clearly there demonstrated that Basolo was but an ordinary traveling salesman, with authority only to "take orders and sell merchandise after he received confirmation from the packing house as to the availability and the price". (R. 86) Acceptance and confirmation of orders from salesman was required because at the time in question there was an insufficient supply of product to satisfy the demand. (R .87) Confirmation was the business custom. Plaintiff Moses knew when he ordered the second 30,000 pounds of boneless mutton that there was no supply. He was told by the salesman that plaintiff "had bought our supply." (R. 45, 46)

The second important aspect of Exhibit "B" is that it states not that the defendant had confirmed the order, but simply that "We have advised the plant that lots of less than 3000 lbs. are not desirable because of your production schedule". In other words, there is nothing here to announce to plaintiff that the plant, has agreed to the shipment of not less than 3000 pounds per week. It is a volunteer statement from a salesman to his patron ahead of confirmation by his employer as to what might be desirable. Basolo assumed to make the confirmation, and did so without authority. He did not have authority to write the letter or confirm the shipment. His instructions were positively to the contrary. (R. 88)

At no time during the conversation between Basolo and Moses did Basolo represent that he had authority from McFarland to commit for the second shipment, so stated Mr. Moses. In fact, Mr. Moses testified to the contrary:

> Q. You didn't have any statement from Mr. Basolo with respect to his arrangement
>
> A. No.
>
> Q. Mr. Basolo didn't tell you that he had conferred with Mr. McFarland did he? There was nothing said about that was there?
>
> A. Well, there was nothing said about it, but it certainly was *assumed* that he had. (R. 47)

The salesman assumed to confirm the order by his letter of October 9. But if he did not have authority

to confirm, the letter is a nulity. The salesman's statement that "we will ship" is worth nothing unless the salesman had actual or apparent authority. He had neither.

> Johnson v. Shook & Fletcher Supply 16 So. 2d. 406.

But even if it be assumed, that he did have some authority, the import of Exhibit 9, page 4, is not disposed of, but clearly shows that the office of the defendant at San Francisco treated in the main the transaction as an "as available" deal. It was treated in the same light by the plant, and should be so treated by this court.

The parties were dealing, and knew they were, for a commodity not then in existence. Moses knew that he had purchased all of the existing supply of boneless mutton. (R. 45) Moses further knew that certain areas of production of boneless mutton would "dry up" and that "it isn't an all-year proposition in any one section." It comes for a time and then stops. (R. 41, 77)

It was said in *Lester v. Superior Motor Car,* 117 Fed 2d 780 that:

> ". . . .where the purchaser has equal and available means for information and no fraud or artifice was used to prevent inquiry or investigation, there is a basis for the application of the rule of caveat emptor."

See also *Smith V. Hollingsworth,* 96 *So.* 394

> "If the relation of principal and agent did

> not exist but they were merely traders dealing with each other as such and, . . .at arms length, there would exist no grounds for the complainant's suit. For neither law nor equity relieves against one's own credulousness and inexcusable indifference to one's own interest in a transaction where one has no legal right to rely upon the statements, representations, and descriptions of another in the negotiations."
>
> Anheuser Bush v. Grovier Starr, 128 F. 2d. 146

During this critical time of supply, defendant did not ship the contested product to any other buyer than plaintiff. There was none available. (R. 103) It was only natural that the salesman in writing up the house order on the transaction stated in that important shipping instruction, to ship "as available". Those had been his instructions. (R. 88) It is clear from the added language that plaintiff's order number 7001 called for the shipment of no less than 3000 pounds. This was clearly what plaintiff desired. But the order as communicated to the plant was, according to the shipping instructions, an "as available" transaction. Mr. Basolo had been instructed specifically that there was no product available. (R. 88) Plaintiff's Mr. Moses knew this to be a fact. (R. 45) Any attempt to wheedle out of a mere salesman a firm committment in such a state of supply, and in the face of positive knowledge that the salesman had no instructions from the plant as to the deal, is of itself not only ridiculous on its face, but a patent failure to effect a binding

contract. With the product unavailable, the plaintiff and salesman knowing it was unavailable; with the salesman not getting a confirmation from the plant; with specific instructions from the general manager to the salesman that he should not contract except on an open order basis; with the salesman making his own record on on "as available" basis and the plaintiff having notice thereof; and with him assuming to write an unauthorized letter of confirmation to the buyer, wherein he shows that he has not communicated with the plant, simply observing that he has "advised the plant, that lots of less than 3000 pounds are not desirable", the transaction cannot be twisted into a firm promise to deliver 30,000 pounds of mutton on any schedule.

Everything about the transaction, except the verbal testimony of Moses, points to shipments on a condition, a condition precedent. The product would only be sent if it was available. As long as the condition was not met there could be no contract. The following defination of a condition precedent has the support of many authorities:

> "a condition precedent is one that is to be performed before the agreement becomes effective and which calls for the happening of some event or the performance of some act after the terms of the contract have been agreed upon, before the contract shall be binding on the parties." Atl. Pac. Oil v. Gas Development Co. 69 P 2d 755

> "A condition precedent is one which must be performed before the agreement of the parties becomes a valid and binding contract. Whether a condition is precedent depends upon the intent of the parties, and this is to be gathered from the context." McIsaac v. Hale, 132 A. 916, 1926

In this case, the condition was to ship "as available". Shipments were made on that basis. Defendant shipped boneless mutton to no other person during the time in question than plaintiff. (R. 103) But on the other hand, the reservation in the engagement of this condition prevented any mutually binding contract from coming into existence. The defendant was not bound to make shipments if the product was unavailable.

> "as the plaintiff was not bound to make deliveries under the contract therefore, it was void for lack of mutuality in so far as it provided for future sale or purchase. The law is well settled that where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be held binding upon the parties only to the extent that it has been performed. And, with respect to distributors contracts,
>
> . . . . It is equally well settled that such a contract which does not bind the manufacturer to sell and deliver, and which is terminable at will, imposes no liability upon him if he terminates it or refuses to make deliveries to the dealer. Motor Car Supply vs. General Household Utilities Co. 80 F2 167.
>
> Also see Jordon v. Buick Motor Co. 75 F2

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Cosby Hodges Milling Co. v. Riley 149 So. 612

An "as available" transaction does not bind the shipper and any engagement to ship based on such an illusory promise, could not be binding on either party. California Ref. vs. Producers Refining Co. 76 Pac. 2d, 553, 25 Cal. Apl. 2, 104

The word "available" as defined by Websters New International Dictionary 2nd edition, means: "At disposal, accessable, or attainable, as tickets, available on that day. Synonym: ready, handy, convenient, usuable, obtainable." The word available in a coal case involving suit for failure to pay royalties for failure to work a mine, was treated as follows:

> "What is available and merchantable coal? Under the terms of the lease fairly and reasonably construed, available coal includes coal recoverable as practical and reasonable mining proposition, considering actual conditions cost, and all the surrounding circumstances". Big Vein Pocahontas v. Browning 120 So. E. 247, 252

Immediately after the order was given, it was communicated to the defendant who rejected it as given. (R. 88) A counter offer was made by the general manager. The counter offer was communicated to the salesman, and was reflected in the house order, Exhibit 9, page 4, marked Exhibit 1. This counter offer was to the effect that mutton would be shipped only as available. It is submitted that any

agreement bottomed on the proposition that the offeree shall perform only as a commodity is available, is lacking in mutuality and consideration. There was what may be called a "qualified" acceptance of the offer as made by the plaintiff, or there was a counter offer; in either event the "as available" fact of the situation was a new ingredient. 1, Williston on Contract, Rev. Ed, 144 As long as there was such uncertainly in the performance of the contract as the obligation to deliver only if available, there could be no binding contract for future performance. And so it is said the alleged contract was void for want of mutuality. Mutuality only comes into the case because the court below found that a contract resulted, and that partial shipments were made pursuant to that contract.

In a California case where parties thought they were contracting for the refining of oil, the court pointed out that while the refinery agreed to process a certain amount of product per day, yet the producer was not required to make available to the refinery any crude oil, and hence there was no contract for lack of mutuality.

> "It is uniformally held that a contract which reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery of personal property, the quantity of which delivery is dependent upon the will, wish, or desire of the other party, is void for lack of consideration

and mutuality." California Ref. Co. v. Producers Refining Corp. 76 P2 553, 25 Cal. Apl. 2d, 104.

Defendant shipped on an open order basis, the following boneless mutton to plaintiff. Note that not a single shipment corresponds to what the plaintiff claims he had a firm promise to receive:

Date Shipped	*Quantity Shipped Pounds*	*Price*	*Exhibit No.*
November 11, 1947	2,851	24½	2
November 15, 1947	1,084	24½	3
November 22, 1947	1,200	24½	4
November 29, 1947	400	24¾	5
December 6, 1947	664	24¾	6
January 31, 1948	332	25	7

Note that there is a major deviation in the amount of the shipment on the contested order with all but the first, and as to that, there is a shortage of one hundred fifty pounds. Note that as to three of the six shipments, that the price was not that claimed to have been agreed upon. If there was a contract, why did plaintiff pay the added rate per pound, and accept the short shipments? The record discloses that plaintiff paid his bill regularly and without protest. (R. 89) An examination of Exhibit 8, which is the ledger of defendant, discloses the date when all charges were made on the above items, and when they were paid. The merchandise was paid for on the basis of the billing.

Defendant never treated the transaction at any time as one binding on it. Paul McFarland testified that it was always his understanding that he was to ship on an "open order (R. 88, 96), "as available."

What would have been the status if the evidence was that McFarland agreed: "I will send you the mutton in installments if I can find it"? If Mr. Moses made a contract with an automobile dealer to deliver a certain make of car "if he could get one", he would have little chance of prevailing in a suit for damages. The contract would be void for want of mutuality. If the car was produced and delivered within a reasonable time, a unilateral contract would have resulted; but ahead of the finding and delivery of the car, there was no enforceable contract. In this case, the undelivered meat was never available, and there could never be a contract except for the price if the commodity were actually delivered.

In this record, it cannot be doubted that the defendant intended at the time to have delivery conditional. So far as defendant was concerned it has to be on that basis. It would have been insanity for it to contract otherwise. For plaintiff to attempt to make such a contract with a mere salesman, with no checking with the plant, was folly. Knowing there was no supply, it could not rely on the representation of a mere salesman to make a firm committment. Plaintiff knew, or should have known, that the sales-

man was being put out on a limb to undertake to bind the plant to an impossible performance. There was never a meeting of the minds on a firm promise for a promise. There was an order given and accepted on a condition precedent that there should be available a supply. The condition attached defeated the formation of a binding contract, and in its stead left the parties without a contract.

The simple law of formation of contracts requires a meeting of the minds. Todorovich v. Kinnickinnic Mut. Loan Assn. 135 A.L.R. 818, 298 NW 226 238 Wis. 39. That court said:

> "To constitute an acceptance and the creation of a contract there must be a meeting of the minds upon all essential terms thereof. Where an acceptance varies from the offer in respect to such terms it amounts to a rejection of the offer and the submission of a counter proposal without forming a contract unless the party making the offer renews it and agrees to the suggested modifications."

Here there was an offer in the form of plaintiff's purchase order, (Exhibit "A"), or better, the conversation with Basolo. This offer was never accepted by one with authority; and the evidence from the San Francisco office in the form of the house orders, (Exhibit 9), communicated at the time to both plaintiff and defendant by the salesman, showed that he treated the order not as a firm committment. Certainly in the first stages of the transaction there was no

semblence of an authorized acceptance of the offer. Everything points to the existence of a condition being attached to the transaction. Thus we have a counter offer stating a condition. There is nothing in the record which shows acceptance by plaintiff of the condition, which proves there could be no contract. And even if plaintiff did accept the condition, it would still lack mutuality and consideration and would not qualify as a binding contract. In truth and in fact, the minds of the litigants never met in establishing a firm committment to deliver personal property virtually impossible of abtaining. Ajax Holding Co. v. Heinsbergen 149 P2 189

Defendant agreed to deliver plaintiff mutton as available, and this he faithfully did. To construct over the heads of the parties a bi-lateral contract is unfair and not reflective of the true intents of the parties, and the practices of the packing industry. The court committed error in finding a contract existed and assessing damages for breach thereof. The lower court should be reversed.

3. SHIPMENTS MADE BY DEFENDANT TO PLAINTIFF DID NOT CONSTITUTE AN ACCEPTANCE OF ANY CONTRACT.

The trial court entered findings that the contract came into being in the telephone conversation. (R. 6) We have undertaken hereinbefore to prove the court was in error. However, it might be argued that as a

consequence of the shipments of the mutton, there was an acceptance of an offer. We here dispute that any shipment made by defendant constituted an acceptance of any outstanding offer, or resulted in any oblgation of contract other than for plaintiff to pay the price for the goods accepted.

It may be argued that by defendant shipping under the original offer, it became bound to ship all of the 30,000 pounds ordered. In the first place, what evidence is there in the record that defendant at the time knew there was a firm offer for 30,000 pounds? There is no evidence that McFarland received a copy of plaintiff's order number 7001, Exhibit "A". However, defendant received Exhibit I, which is page 4 of Exhibit 9.

We can be sure that Basolo phoned McFarland and told him of the two orders, the first of which was accepted and shipped immediately. The second order was declined except on the basis of an open order. (R. 88) Plaintiff may argue that by shipping 2851 pounds as in Exhibit 2 there was an acceptance of the whole order. It would take a tortured interpretation of the facts for the court to go along with the view when under the circumstances, the supply was so much in doubt. Had there been no question of supply, it might be argued that acceptance was presumed by shipping the first installment. But enough has been said to show that plaintiff was on notice of the impossibility of full performance, and hence no implication of an intention to do a vrtually impossible thing should be entertained.

Almost the same precise facts accompany the order for 5000 pounds of pigs feet given at the same time. (Exhibit 9, page 3) The plaintiff Moses testified that he ordered that quantity of pigs feet from Basolo, but that it was no "contract." (R. 62) It was an "order" he said. How is it not also a contract if the mutton was a contract? The defendant shipped pigs feet on the 5000 pound order as follows:

Date Shipped	*Quantity*	*Price*	*Exhibit No.*
November 15, 1947.....	627 lbs.	9c	3
November 22, 1947.....	728 lbs.	10c	4
November 29, 1947.....	314 lbs.	15c	5
December 6, 1947.....	129 lbs.	10c	6

If the court below took the position that it was the conduct of the plant in actually shipping on the first installment of the order that brought the contract for mutton into being, then there should also be found a contract existed for the shipment of pigs feet. There was a shipment, and in the first instance, it was at the price offered. Why didn't plaintiff enter suit for pigs feet not shipped and for a refund for over charging? Under the thinking of plaintiff, and the trial court in the mutton facts, there was a contract for pigs feet! Yet plaintiff said there was no contract, there was simply an "order". Why and where is the difference?

The pigs feet transaction illustrates the real method of business followed by not only the litigants, but by the packing industry. The packing house is dependent on the supply from the farms; and packing houses do

not blindly guarantee delivery. They ship what they can in the absence of strict agreement. Plaintiff ordered 5000 pounds of pigs feet and got 1798 pounds. He didn't mind the difference in price either. Plaintiff ordered 30,000 pounds of boneless mutton in the first deal and got 27,700; in the second transaction, he ordered 30,000 lbs. and got 6,635 and he didn't mind the change in the price. In no case did plaintiff bother with procurring a firm committment at the outset. There cannot be implied an acceptance of a contract to ship 30,000 pounds of mutton without also implying the same for the pigs feet, and the court cannot imply a contract for the pigs feet because Mr. Moses specifically said there was not such. (R. 62)

The only way to treat the transactions is as a "divisible offer requesting a series of acts to be given from time to time. If an offer is of this divisible character, it may be revoked not only before any acceptance but also as to any portion of the offer still unaccepted even after acceptance of some of the series of transactions proposed by the offer" says *Mr. Williston* at page 163 of Volume 1 of his revised edition on contracts.

The honorable trial judge made a conscientious effort to arrive at the true practice of the defendant and the industry. The crux of the case is probably contained in the last three pages of the record. Mr. McFarland testified in response to a question from the court concerning what he had told the salesman as follows:

". . . the salesmen including Basolo "are to

go out and try to find a market for our merchandise and never to oversell our production. Now, salesmen can go out and offer this merchandise, and if the buyer accepts the salesman's offer, he comes back to the plant for confirmation."

Q. By the court: And you always confirm it if you have got it on hand?

A. We confirm it by either filling the order or rejecting it.

Q. By the court: If you have it on hand, do you ever reject?

A. Well, if there is orders ahead of it, we probably would reject it. First orders come first. It is handled the same throughout the country. (R. 108).

It is clear that Mr. MaFarland is testifying that he insists on confirmation of all orders; that the salesman must communicate the order to him, and that he confirms it "by either filling the order or rejecting it." In other words, he insists that his act of filling the order, on the one hand, constitutes a confirmation of which he alone has the jurisdiction. On the other hand, if he fails to ship, he may thus reject the proferred order. In neither case does he necessarily communicate any words to the intending purchaser. He ships, or he fails to ship.

Now the question is, and it was raised by the court at page 109, what are the rights of the intending purchaser during the interim? "Do you just keep him dangling by the hook until you decide whether or not you are going to fill his order?" To which Mr. McFarland answered:

> "Well, usually two or three days later or within a reasonable time if the salesman finds out the order isn't filled, he will go back and try to apologize, as is being done most of the time." (Due to shortage of product.)

This means that McFarland treats the order as available to him to accept or reject after it has been communicated to him by the salesman; that the act of acceptance or "confirmation" may consist of simply shipping the merchandise, or that the act of refusal may consist of a failure to ship the merchandise, in which case, the salesman might or might not return to the customer and state he was sorry but the order was rejected. Is it an improper procedure? Does this handling of orders violate the law of contracts? Has the intending purchaser been unfairly dealt with? The answer is no. 1 Williston on Contracts, Rev. Ed. 193.

It is clear from pages 109 and 110 of the record that the honorable trial judge made his decision, later reflected in the findings, (R. 6), that the salesman in such a situation, had the authority to make a present sale; that the sale was and is consummated by the salesman even before the offer is communicated to the plant; that the plant has no right or power to confirm, accept or reject, but that it is committed by the salesman to supply the subject of the order as agreed by the salesman; that otherwise the purchaser will be left dangling."

This is the only way to explain the findings and decision of the trial court in this case. He found in

effect that Basolo had absolute authority, and that all of defendant's many salesmen acting similarly to Basolo had authority to commit the plant without confirmation. This interpretation brings a flood of law suits to the packing house business! (R. 109).

The evidence in the last portion of the record shows that the court was impressed with what it felt was an apparent injustice to the intending purchaser; that the court did not intend to leave him "dangling on the hook." It is clear that the trial court did not agree that McFarland should have the option when it received information about the offer from the intending purchaser to accept or reject, nor that the acceptance could be in the simple form of a shipment of the goods, and a refusal to accept by a failure to ship.

What is the law of facts?

Does not the hat salesman from the New York hat factory come to the Salt Lake haberdashery and take an order for ten hats and communicate it to the factory? It takes 3 days for the order to be sent to the factory, and a day to get to the man who must coordinate production of the plant with distribution. Does the plant man have an option to say to himself, or to his organization alone, "yes, we will ship the ten hats", or "no, we do not have the hats, we will ignore the order?" Certainly the haberdasher must wait a reasonable time. The cases hold that that salesman, in the absence of specific authority, does not make a contract. The Salt Laker has made an offer.

If the hats are shipped within a reasonable time, the act of shipment constitutes an acceptance, and an executed unilateral contract results. If the manufacturer does not ship within a reasonable time, (and no communication of acceptance is required), the offer automatically dies. Is it of any consequence to the liability situation that the salesman returns and says: "My company can't handle your business?" The answer is no.

Unilateral contracts come into existence not by agreements, but by the act of an offeree in response to the offer of the offeror. No words need be said by the actor. *Henderson v. Barber,* 85 So. 35; 1 *Willis ton* on Contracts, Rev. Ed. 193. The words all come from the person to whom the action is directed. Had the company written "We accept the order and will ship" a bilateral contract would result. Had Basolo been told by McFarland that the offer was accepted and Basolo had communicated it, there would have been a binding bilateral contract. From all that appears in the record, Moses did not inquire further after the phone conversation with Basolo on October 28th, as to the acceptance of the plant, (R. 45), so that on this point no binding bilateral contract could come into existence.

Clearly Basolo had no power to make a contract. McFarland did not accept the offer as made, but made a counter-offer, part at least of which was communicated to Moses for Moses admitted he had re-

ceived the house order Exhibit 9 which stated among other things delivery "as available". (R. 69). The shipments were made by the plant on the basis of the counteroffer. Every shipment made was less than the 3000 pounds minimum in the rejected offer. (Exhibits 1 to 7). In behalf of the shipments the price was higher. The shipments amounted to a series of unilateral contracts.

It is clear the defendant never intended to bind itself to minimum shipments. The only evidence thereof are the words of the agent testified to by Moses, who was biased. Everything in the collateral fact situation compels the conclusion that the business was intended at the time as an "as available" transaction. As such, the offer must be looked at as a divisible offer requesting a series of acts, the shipment of the first, not constituting an acceptance of the whole. *Williston* says it is possible to make such divisible offer, as follows:

> "If an offer is of this divisible character it may be revoked not only before any acceptance, but also as to any portion of the offer still unaccepted even after acceptance of some of the series of transactions proposed by the offer. *1 Williston on Contracts, Revised Ed. 163.*

In the example of the hat salesman, if the offer was for ten hats each month for 6 months, the salesman clearly not having authority to make such a contract, and the company started to fill the orders by sending the first full order, would it not follow, from

the authority quoted from Williston, that the offer was divisible and could be withdrawn, or rejected by either party as to the future installments not yet accepted?

Williston takes the other side of the problem for analysis as to the power of the offeror to revoke mid-way in a series of acts, or one act taking some time to perform. He states that the courts, in order to avoid the hardship resulting from a revocation mid-way in performance, will interpret the contract as being bilateral. But he seems to say that where the situation is clearly unilateral involving a long extended performance the offeree having begun performance, that still the offeror may withdraw the offer since the whole transaction is still optional with the offeree. *1 Williston, Rev. Ed. 165.*

The *Restatement* of contracts states that:

> "A revocable offer contemplating a series of independent contracts by separate acceptances may be effectively revoked so as to terminate the power to create future contracts, though one or more of the proposed contracts have already been formed by the offeree's acceptance." *1 Restatement of Contracts, 52.*

In this case, the lack of product forces the conclusion that a series of independent contracts for separate acceptances was contemplated.

Note the comments in the *Restatement* section above quoted:

a. An offer may propose several contracts to

arise at separate times. Such an offer is divisible, and the power to make an effective revocation continues pari passu with the continuing power to accept.

b. Where an offer contemplates a series of unilateral contracts, beginning performance of the consideration for any one of the series makes the offer for that one irrevocable.

It is here submitted that the trial court was wrong in inferring in the final pages of the transcript that the plaintiff in this case should not be left dangling; and that rather than achieve that result, it should be found that there was a contract from the time of the telephone conversation. It is submitted that the record shows that the court was influenced by what the defendant did after it got the offer, than it was by the actual or apparent authority of Basolo at the time. The findings are not a true reflection of the facts.

What the defendant did after it received the offer as communicated by Basolo is the important part of this case, and obviously involves serious legal problems. Clearly the offer as submitted was not accepted. A counteroffer was given for communication to plaintiff. Shipments began on the basis of the counteroffer. No shipments needed to be made if the manager did not wish to accept. This was obviously interpreted by the trial court as keeping the plaintiff dangling. It is submitted that such considerations should not have been the basis of the decision of the court as reflected in the transcript and in the findings.

The fact is that shipments began under an "as available" program. Clear deviations from the intending purchaser's rejected offer, characterized the shipments from the start. The plaintiff would now say he waived the defect in acceptance, and that there has been "a contract made because he is willing to disregard the defect in the acceptance" without communication with the offeree. Mr. Williston says to allow such is to violate a vital law of contracts.

> "Nothing is more fundamental than that in bilateral contracts both parties must be bound, or neither; and that in unilateral contracts the performance requested must be simultaneous with the creation of any obligation on the part of the promisor. To allow a waiver of a defect of an acceptance is virtually to say that the acceptance is binding on the acceptor, or may be treated as binding by the offeror (which amounts to the same thing) from the time when it is made though the offeror himself is still perfectly free to assert that the acceptance was defective, and though no estoppel forbids the acceptor from showing the true facts. In truth, a defective acceptance can only amount to a counteroffer, and the only way a contract can be formed is by acceptance of the counteroffer in the same way as if it were an original offer. *1 Williston on Contracts, Revised Ed. 292.*

Shipments made by defendant to plaintiff did not constitute any acceptance of any contract. No contract existed before shipment. Shipments made were on the basis of a counteroffer made by defendant that it would ship the scare product "as available". The

only binding contract created by the transaction was for plaintiff to pay for what he got, and this he did. To allow plaintiff to recover for the balance of mutton not shipped is wrong, unjust, and against the commerce and trade of a great established industry which for years has done business under a different understanding of contract.

Note now what Moses says about choosing the time for mitigating his damages:

> "We had been given assurance right on down the line that this mutton would be forthcoming. We had a reserve of mutton on hand all the time. We had assurance that as soon as the run came or whatever condition came about that they would fulfil their obligation, and only when it was at that time indicated to us that there was no intention of fulfilling this thing were we forced to then buy mutton, because aboct that time we were dangerously low in our supplies." (R. 72)

When was it that defendant "indicated to us that there was no intention of fulfilling this thing"? Mc Farland had only one phone conversation with Moses —that on January 9th. (R. 90) He wrote only one letter, January 15th. (Exhibit "D") Other letters were written, but not until long after the alleged purchase April 28th in mitigation. The plaintiff testified that there was a time indicated when the order would not be filled. That time was at the latest January 9th, or 15th. That was the time to mitigate the damages, not 4 months later. The price of mutton on the Chicago market during the

first week of January was 29½ cents. The price when plaintiff saw fit to mitigate was 36 cents. We submit this is quite a spread, and plaintiff knew all the time the price was rising. (R. 33, 58) Bona fide? No. It was a studied attempt from the time of the January phone call to torture a decent, ordinary transaction into a hurtful one, contrary to the understandings of the parties and to the trade. Someone decided in January to take advantage of the good intention of Mr. McFarland, as stated in his innocent letter of January 15th. Why did Mr. McFarland send 332 pounds to plaintiff on January 31 at 25 cents, if he knew he was stuck with a big contract for 24½, and why did Moses pay the bill for the overage?

This was not mitigation. It was plotting. It was taking advantage of a rising market. Plaintiff had the burden of proof that he did mitigate, that he used reasonable effort. It would have been easy for plaintiff to have bought lower than 34 cents, but he came into court having failed, yet asked and received from the trial court, judgment based on a failure to follow good conscience and the statute.

We come now to an aspect of the record where possibly the lack of good conscience is a little more in evidence. Mr. Moses testified that when he did not get the 3000 pounds expected in the second shipment (Nov. 15, exhibit 3) he made purchases in the open market. (R. 51) He testified that he did what he could to keep his supply coming. (R. 31) "We made what

purchases we could in the open market". (R. 51) "We might have bought small amounts" from others. (R. 63) Then when he testified about the large purchase on April 28th, he testified: "This was a purchase — this was the first purchase of a quantity, sizeable quantity, since the time we had been dealing with McFarland". (R. 31, 63)

Mr. Moses reluctantly testified that he "might have" bought quantities of the product from other shippers in both December and January. (R. 63) Was it not his duty to come into court and prove the amounts of these purchases? Was there not a studdied attempt to conceal them and thus take advantage of the rising market? That was not quite the clean hands that might have been shown. Yet the court below wholly disregarded these purchases. However, the court itself was quite interested in asking about the reserves, regularly carried at about 150,000 pounds. At the "first part of 1948", Moses said they were down to as low as seventy thousand pounds. (R. 73) He also testified that they were "dangerously low" at the time defendant refused to ship. This would mean, in terms of the time defendant actually refused, in January, that that was the time to buy, not four months later when the market had advanced from 29½c to 34c. To this defendant, the difference amounts to $1285.00, and to the conscience of the situation is important, to say the least.

It is submitted that plaintiff has failed to comply with the law of mitigation, and that defendant has been

injured thereby, as a result of the error of the trial court in requiring plaintiff, as a condition of recovery, to disclose the true state of facts as to purchases made. The very least this court should do is to remand, and require plaintiff to bring into court from California his full records of purchases and disclose what boneless mutton purchases were made between November 8, 1947 (Exhibit 2), when the first shortage appeared, and April 28, 1948, when the alleged mitigation purchase was made. (Exhibit "H")

Carlon v. Benting, 70 S.E. 923; 154 N.C. 530.

Denio Milling v. Malin, 165 P. 1113; 25 Wyo. 143.

Western Cooperate v. Colussi, 231 P. 1.

4. DEFENDANT AT NO TIME RATIFIED THE ALLEGED CONTRACT MADE BETWEEN PLAINTIFF AND THE SALESMAN BASOLO.

The findings of the court are to the effect that a binding contract was entered into between the litigants at the time of a telephone conversation between the salesman Basolo and plaintiff on or about October 28, 1947. (R. 6) That was the testimony of the plaintiff. What the parties did after that telephone conversation is of no consequence according to the findings.

Out of caution, defendant wishes to bring to the attention of the court the relevant facts subsequent to

the above conversation to prove that there could be no ratification.

The Restatement of Agency, at page 197, defines Ratification as follows:

> "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."

It is elsewhere shown herein that defendant shipped certain quantities of boneless mutton, the quantities being shown on exhibits 2 to 8 inclusive. A schedule of such shipments appears on page 35 of this brief. Such shipments did not nor could they constitute a ratification.

All of the shipments were made by defendant under the belief that they were on an "as available" basis. Defendant did not have a copy of the plaintiff's alleged purchase order. (R. 95) It did have the house order which stated among other things that the shipment was to be as available. (Exhibit 9, page 4) It did not know of the writing of exhibit "B" until 7 months later. (R. 95). It did not know that Basolo had not communicated its refusal to accept the offer as orginially made. McFarland shipped on an "open order." (R. 89, 101) Shipments were at "no set price." (R. 101) The billings were 3 orders for 24½ cents (Exhibits 2, 3, 4), 2 orders for 24 3/4 cents (Exhibits 5 and 6), and the final order for 25 cents

(Exhibit 7). Plaintiff accepted the shipments and paid for them.

Ratification of the original offer, if accepted by Basolo, is not offirmed by the above acts. The above acts are foreign to the offer as made. They constitute new and additional ingredients. For ratification to take place on the telephone order, there would have to be shipments of 3000 pounds and billings at 24½ cents weekly. All of the above acts were done in ignorance of any committment by the salesman, if any was made by him, concerning the deliveries. The authorities are unanimous in holding "that there can be no ratification by acquiescence, silence or failure to repudiate, unless the principal has full and complete knowlege of all the material facts attending the the unauthorized transaction." 2 Am. Jur. 190.

The Utah Supreme Court has said:

> "It is also well recognized that in order that a ratification of an unauthorized act or transaction of an agent or of another may be valid and binding, it is essential that the principal or the person making the ratification had a full knowledge at the time of the ratification of all material facts and circumstances relative to the unauthorized act or transaction; also that an intention to ratify is essential and which must be shown either by an express or by an implied ratification."
>
> *Jones v. Mutual Creamery* 17 P. 2d, 256, 259

In order to have an acceptance by shipping, the

terms of the order must be complied with. Deviations as to amount, terms, price, are fatal.

Miller Bros. Hat Co. v. A. D. Smith 201 NYS 476

Senner & Kaplan v. Gera Mills 173 NYS 265

Frick & Lindsay v. Johnson 115 At. 837

We now come to the events occuring in January after all but the final shipment had been effected. It appears that on or a few days before January 9, 1948, plaintiff telephoned defendant and discussed the order. Let it be recalled that boneless mutton was a seasonal item with defendant.

Moses testified that he phoned to appeal for the product ordered, that he had "made a deal for shipments of not less than 3000 pounds and that our needs were 5000 pounds, and it was agreed that 5000 pounds would be the attempted amount shipped." (R.28)

Mc Farland reported to plaintiff that "there was nothing available at the present time but he would do all he could to get going on this to the best of his ability." (R. 28) Note plaintiff quotes the general manager pretty close to the latters theory of the transaction throughout. Mc Farland says by phone he will get going to the "best of his ability". Then Moses writes the letter of January 9, (Exhibit "C",) in which he outlines the terms of his offer to purchase from the salesman, and asks defendant to stress a point toward the minimum shipment, stating that

his supplies are "very acute". Does this mean he was about out?

Plaintiff then wrote Exhibit "D", the letter of January 15, and therein stated he would do his utmost to complete the transaction. Which transaction may we ask? The transaction he had talked about with his salesman wherein he had told the latter that he would ship as available, but that no committment could be made as to minimums? (R.88) Order No. 7001. Exhibit "A", was not before Mc Farland when he wrote the letter. Only a memory of his conversation with Basolo was in his mind. It cannt be doubted that in answering the letter, McFarland had in mind the open order basis, and that he had been doing the best he could, and would continue to.

McFarland told Moses at this time there was no more mutton available, "The sheep had all gone to the winter desert. If we could find any additional sheep we would bone them out and ship them as they showed up on the market." (R. 91) It might be 6 weeks before another shipment, but it was impossible to make shipments. Moses told McFarland he had a contract. McFarland answered he did not, that shipments were being made on an open order as available as fast as we could accumulate it." (R. 91)

Neither the pleadings, nor the findings allege or find that there was ratification, and none need be argued. However, it will no doubt be suggested

by plaintiff. It is submitted that here, there is no evidence of ratification. The verbal testimony of McFarland flatly repudiates acknowledgement of any contract. It is apparent that he is still doing his best to keep the business of this firm on the basis he agreed upon. He cannot find the product, and Moses so testified that McFarland so stated on January 9th. That McFarland wrote the letter, Exhibit "D", still stating he would do his best is no ratification. He stated: "it is almost impossible to obtain any mutton to bone". This is not the language of ratification. It is the language of a gentleman trying to make good his promise that he would send all available. This he faithfully did, sending no product to any other customer. (R. 103)

Note that he made one additional shipment, Exhibit 7, after the phone call and letters, consisting of 332 pounds at 25 cents. Can this be evidence of ratification? Still a deviation of quantity and price! But plaintiff accepted it.

The only other possible evidence of ratification consists of letters written after the date plaintiff claims he went into the market to "mitigate" his damage, and therefore, the letters are irrelevent. The letter of June 7, Exhibit "G", explains Mr. McFarland's position long ofter the transaction, but the disposition to do the best he can with a short supply item is clearly in evidence. The lack of authority of the salesman is in plaintiffs own exhibit.

It is submitted that there is no evidence if ratification.

II

THE PLAINTIFF WAIVED HIS RIGHT TO DAMAGES FOR THE DEFICIENCIES IN THE FIRST FIVE SHIPMENTS:

If the honorable court should disagree with our contentions and find as did the lower court that a binding contract was made between the parties, then we submit the proposition that even if such were true, the plaintiff, by his acts of acceptance, without notice to the defendant of any deficiencies or breach or any complaint whatsoever until January 9, 1948, waived his rights to the deficiencies in the shipments and is estopped to now recover damages for them.

Utah Code Section 81-3-9 states as follows'' In the absence of express or implied agreement of the parties acceptance of the goods by the buyer shall not discharge the seller from liability in damages, or other legal remedy from breach of any promise or warranty in the contract to sell or the sale. But if after acceptance of the goods the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor.''

This is identical to Sect. 49 of the Uniform Sales Act, also the Law of California.

A similar statement of the law is repeated in

the the American Law Institute Restatement of Contracts' number 412:

> "Discharge of a Sellers Duty After Buyers Acceptance of Goods."
>
> "Under a contract for the sale of goods, the failure of the buyer, after acceptance of goods tendered as performance of the contract, to give notice to the seller of the latter's breach of any promise of warranty, within a reasonable time after the buyer knows or has reason to know of such breach, discharges the seller's duty to make compensation." 2 Restatement of Contracts 777

The Courts uniformly hold under such statutory provisions requiring notice of breach of warranty that as a pre-requisite to a recovery for a breach of warranty the purchaser must give notice to the seller of such breach within a reasonable time after he knew, or under the circumstances, should have known of the breach.

> *Truslo & Fulle, v. Diamond Bottling Co.* 71 ALR 1142, with full annotation, 1149; 112 Conn. 181; 151 Atl 492.

Williston in his treatise on the law of Sales Sec. 484-B states in regard to this section of the Sales Act applied to deferred delivery. "It might be urged that the seller needs no notice in case of delivery delayed beyond date expressly fixed in the contract, for he must be aware that he is violating the provisions of the contract, but though he knows this he does not know whether the buyer is willing to accept deferred

delivery as full satisfaction, and in any event the words of the Statute seem plain."

3 Williston on Sales, Rev. Ed. 41

In the *Diamond Bottling Co.* case, *supra,* the reason for such notice is stated as follows:

> "The purpose of the provision requiring such a notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach that the former may govern his conduct accordingly."

Here, plaintiff knew he had dealt in a critical item, available elsewhere to him, but possibly not to the defendant. With the rising price situation also known to the plaintiff, it was clearly his duty to notify defendant as the shipments came in short of his expectations, and not delay for a month. Thus his failure to timely complain, if there be found a contract, amounts to a waiver of a right to receive the balance of the weekly shipment.

III

PLAINTIFF DID NOT PROPERLY MITIGATE DAMAGES: THE JUDGEMENT FOR MONEY IS EXCESSIVE.

If there was a contract and it was violated for failure to deliver meat, plaintiff by law may enter the market and purchase, charging defendant the difference between the contract price and the market price in which he bought. However, for him to do this, there are steps he must follow, and this

we submit he has failed to do.

The law is generally stated in 46 Am. Jur. 830 as follows:

> "The general rule that a party injured by breach of contract is not entitled to recover from the delinquent party damages which he could with reasonable effort or expense have avoided is applicable in actions by the buyer for the seller's breach with respect to delivery, and under this rule the buyer may recover only the damages he would have suffered if he had obtained elsewhere goods like those the seller has failed or refused to deliver."
> *Warren v. Stoddard* 105 U.S. 224.

This same principle is found in the Uniform Sales Act, a part of the Utah and the California law as follows:

> "* * * where * * * the seller wrongfully refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery * * *
>
> "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market price or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."
> Utah Code Annutated, 1943, 81-5-5

Thus under the statute, plaintiff may possibly recover. However, he has the burden of showing compliance. He must purchase the goods in the market, if

they are available at the time of the failure to deliver, or at the time of the refusal to deliver. This he did not do, but did it months later during a time of rising market. It is submitted he did not mitigate his damages. He accentuated them by what he did.

According to the theory of the plaintiff there was a failure to ship ordered mutton at the rate of a minimum of 3000 pounds per week beginning November 8, 1947.

The first shipment was deficient 149 pounds; the second 2,916 pounds; the third 1800 pounds; the fourth 2600 pounds; the fifth 2336 pounds; and the sixth 2668 pounds. Between the fifth and sixth shipment three weekly shipments were missed entirely. Thus the defendant failed to deliver a total of 21,459 pounds in these shipments and yet the plaintiff did not attempt, so he pleaded and proved, to mitigate this default until approximately three months after the last shipment. During all this time, the plaintiff did not contact the defendant about these deficiencies until January 9, 1948.

Now checking with the statute, was there a supply of product available to plaintiff during the times of the deficiency? Plaintiff himself testified that it was "always available to him." (R. 41) He stated that he might have purchased elsewhere in both December, 1947, and January, 1948. (R. 63) He stated that at the time he contracted with defendant the product was available at the same price elsewhere. (R. 46)

On pages 67 Moses said that meat was not in short supply and that "there was plenty of it available."

When the meat is available, there is a time limit set in the statute when he must buy, to wit, "at the time fixed for delivery, or at the time of the refusal to deliver." If plaintiff had the contract he claimed he had, there was a deficiency right from the first shipment to the last. The time to make the purchase, in true mitigation of the damage, was when the individual shipments came in short. With the market rising, he stood by and allowed it to rise, instead of entering the available market open to him and cutting down the loss to plaintiff. Plaintiff should have purchased in mitigation beginning with November 8th the difference between mutton received and the 3000 pounds expected.

It will be argued that defendant by his statements on the January 9th phone conversation, and by the letter, Exhibit "D", encouraged plaintiff to still hope for the product, after the several breaches. It is submitted that this is not an answer to the law requiring plaintiff to enter the market at the time of the refusal to deliver. It is defendant's testimony undisputed, and corroborated by the plaintiff, that no mutton was available to the defendant. He told plaintiff plainly by phone that no product was available (R. 28), that it would be "weeks" before any would be possible of shipment (R. 57). He wrote also in Exhibit "D", "it is almost impossible to obtain any mutton

to bone .. . there are no sheep coming to market". Moses testified that on January 9, he was aware that defendant was "tightly pressed" and that McFarland "told me he had no more supply at that time." (R. 56) That was the time for plaintiff to enter the market.

McFarland told plaintiff he would still do his best, that there was a possibility that some herds might be culled in the future, but this was clearly speculative. (Exhibit "D") This was the final time the alleged contract was repudiated. Mc Farland testified that in this phone conversation he told Moses there was no firm contract, but only an open orded. (R. 91) This was also a time when defendant "refused to deliver", if it is not deemed that there was a refusal at the time of the alleged short shipments.

CONCLUSION

It is submitted that the lower court erred in entering its findings that there was a contract between the parties for the reason that:

1. The salesman had no authority to make a contract, and that in fact he made no contract.

2. That defendant had the right to accept or reject any orders submitted, and that here it rejected the offer, and gave a counteroffer to ship as available. Full and faithful performance was effected thereunder.

3. The shipments made by defendant did not convert the former offer into an acceptance.

4. There was no ratification.

5. Even though the court finds there was a contract, the judgment is far in excess of what should be because the plaintiff did not properly mitigate his damages.

Defendant prays that the court reverse the judgment below. The least this court should do is remand with instructions to require plaintiff to produce his evidence of purchases so as to meet his burden of proving a true mitigation of damages.

Respectfully submitted,

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