

1948

Hawaiian Equipment Company, Limited v. The Eimco Corporation : Brief of Appellant

Utah Supreme Court

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

HAWAIIAN EQUIPMENT COMPANY,
LIMITED, a corporation,

Plaintiff and Respondent,

vs.

THE EIMCO CORPORATION, a
corporation,

Defendant and Appellant.

Case No.
7188

BRIEF OF APPELLANT

FILED

JUN 14 1948

CLERK, SUPREME COURT, UTAH

WILLIS W. RITTER
JESSE R. S. BUDGE

Attorneys for Defendant
and Appellant

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action to recover damages for the refusal of defendant to accept and pay for certain personal property alleged by plaintiff to have been sold to defendant.

The pertinent allegations of the complaint are:

“2. That plaintiff and defendant entered into an agreement in writing as follows: That on or about August 8, 1946, the defendant offered and agreed to purchase from plaintiff, and

on or about August 9, 1946, the plaintiff accepted said offer and agreed to sell to defendant, certain goods known and designated as *pneumatic* scaling hammers and *chipping* hammers for the price and upon the terms and conditions hereinafter alleged. (Italics ours)

“3. That the quantity and description of said scaling hammers and chipping hammers, which defendant agreed to purchase from plaintiff, as aforesaid, are as follows:

Scaling Hammers

418	Mokel K-1	Ingersoll-Rand Co.
1250	Model FC	Chicago Pneumatic Tool Co.
140	Model MM	Independent Pneumatic Tool Co.
4	Model “Super”	Keller Co.
1	Model A	Dallet Co.
<hr/>		
1813	Total	

Chipping Hammers

708	Model # 2	Master Pneumatic Tool Co.
188	Model # 2	Chicago Pneumatic Tool Co.
92	Model #200	Ingersoll-Rand Co.
22	Model #2	Keller Co.
<hr/>		
1004	Total	

“4. That defendant agreed to pay plaintiff for each of said scaling hammers the sum of Seventeen Dollars and Fifty Cents (\$17.50), and for each of said chipping hammers the sum of Twenty-four Dollars (\$24.00), f.o.b. Honolulu, Hawaii, making a total purchase price of Fifty-five Thousand Eight Hundred and Twenty-three Dollars and Fifty Cents (\$55,853.50), which defendant agreed to pay plaintiff for said goods.”

It is alleged that defendant repudiated said agreement and refused to accept said goods, and plaintiff claimed as damages the difference between the price it is alleged defendant agreed to pay and the amount plaintiff was able to realize from the sale of said goods to other persons. Defendant answered with a general denial, a plea of the Statute of Frauds, and also set up several special defenses not necessary to be considered.

Prior to sending said cablegrams, appellant had certain telephone conversations with respondent to the effect that the United States Government was offering for sale in Honolulu certain surplus tools consisting of pneumatic chipping hammers and scaling hammers. According to appellant's evidence, respondent represented that ninety per cent of said tools were of Ingersoll-Rand manufacture (Rec. p. 233), and appellant indicated it was interested in these tools at fifty-five per cent of government costs (Rec. 105, 234-5) and promised to cable a bid (Rec. 234). "Exhibit A" was thereupon transmitted. It reads:

"Reference hammers bid maximum 24 dollars each scalers \$17.50 each Honolulu. Will take all."

Appellant intended by said cablegram that respondent should make a bid to the government for said hammers at not to exceed the maximum prices designated (Rec. 234-235 and 260), but respondent claims that said cablegram was an offer to buy from respondent. The result of such divergent understanding of the purport of said cablegram will appear in our argument.

There was a verdict and judgment for the plaintiff. This appeal is from said judgment.

ASSIGNMENT OF ERRORS

1. The court erred in overruling appellant's objection to the introduction in evidence of "Exhibit A." (Rec. p. 85).
2. The court erred in overruling appellant's objection to the introduction in evidence of "Exhibit B." (Rec. p. 86).
3. The court erred in overruling appellant's objection to the introduction in evidence of "Exhibit C." (Rec. p. 86).
4. The court erred in overruling appellant's objection to the introduction in evidence of "Exhibit D." (Rec. p. 89).
5. The court erred in refusing to grant appellant's motion for a directed verdict. (Rec. p. 326).
6. The court erred in overruling appellant's motion for new trial. (Rec. p. 62).

ARGUMENT

According to the foregoing allegations of the complaint, there was an *offer* by the appellant and an *acceptance* by the respondent which constituted the *written contract*, whereby appellant agreed to buy *certain specified quantities of certain models, of certain makes of scaling hammers and certain specified quantities, models and makes of chipping hammers*. That is the contract alleged to have been entered into, and as the value of the goods

was upwards of \$500.00, and as no part of the goods was accepted, it is, of course, a contract "*some note or memorandum*" of which is required to be in writing under Section 81-1-4 Utah Code Annotated. Under said statute, such "*note or memorandum in writing of the contract*" must be "*signed by the party to be charged*,"—in this case the appellant.

The only writing required or that is competent, as a compliance with said statute is one "*signed by the party to be charged*," and although it may be alleged that the contract between the parties is "in writing" any writing signed by the party *not* sought to be charged can be entirely disregarded as immaterial in defining the terms or conditions of the contract. Its only significance, and the only effect it can have (assuming it to be formally sufficient) is to operate as an acceptance of the terms and conditions of the offerer as contained in the "*memorandum*" signed by him.

In *Bailey v. Leishman*, 32 Utah 123, 89 Pac. 78, it is held that under an allegation that the contract was *in writing*, the acceptance could be shown by parol because the "*memorandum in writing of the contract * * * signed by the party to be charged*" is the particular writing which must embody all the terms of the contract.

See also 27 C.J. p. 277, Sec. 334 and cases cited.

1. THE COURT ERRED IN ADMITTING IN EVIDENCE "EXHIBIT A." (Rec. 85.)

The contract relied on being within the statute of frauds, all its terms must be contained in the "*memorandum in writing of the contract*" signed by "the party to be

charged” and the statement of the terms must be complete, definite and certain. “Exhibit A” (the offer) is ambiguous and is too uncertain and indefinite to meet these requirements.

Said “Exhibit A” is in words and figures as follows:

“Reference hammers bid maximum 24 dollars each scalers 17.50 each Honolulu. Will take all.

(a) It contains no statement of either the quantities, kinds, model or makes of either kind of hammers as alleged in the complaint or at all, and particularly no statement that they were to be “pneumatic” scaling hammers or “chipping” hammers. The description of the property is so incomplete and inadequate that it could not possibly be identified without parol evidence.

(b) The words “Will take all” are ambiguous and uncertain. They might mean “all plaintiff had in stock” or “all plaintiff could buy” or “all plaintiff might elect to sell.” Therefore, the quantity or number of either kind of hammer is uncertain and could be made certain only by parol.

(c) The words “bid maximum” do not import an offer to buy. The only reasonable meaning of such words is that of an instruction or authorization to make bids on behalf of the sender of the cablegram. Does the word “bid” ordinarily mean “offer?” If so, it cannot well be given that meaning when used in connection with the word “maximum.” How can these words be construed as an offer by appellant to *buy* for 24 dollars and 17.50 respectively? The statement of an “offer” to buy must

be so clearly expressed as to exclude any other construction. It must not be subject to construction as an authorization of respondent to bid on behalf of appellant for property offered for sale by the surplus property agency of the government. "Exhibit A" does not meet this test. The phrase "bid maximum" bears no other reasonable construction than that it authorized respondent to bid on behalf of appellant and to obtain the property (not specifically identified) as cheaply as possible, but in no event to bid above the maximum prices stated. Appellant did not cable "we bid 24 dollars each scalers 17.50 each." It cabled "bid maximum." Why use the word "maximum" if appellant was making an offer to respondent? The word "maximum" cannot be disregarded. This is a commercial transaction between traders and it is a well established rule that in construing this class of contracts every word must be taken into account.

In *National Bank of Commerce v. Lamborn*, (C.C.A. 4th Ct. 1924) 2 Fed. (2d) p. 23, the buyer bought a quantity of sugar under a contract which contained this term, "shipment to be made * * * from Java by steamer or steamers to Philadelphia." The sugar was loaded on a vessel bound for Philadelphia. It developed engine trouble whereupon another vessel containing the same quality and quantity of sugar loaded at Java and destined for New York was diverted by the seller to Philadelphia, and there tendered to the buyer within the time stipulated by the contract. The buyer refused acceptance. The court said:

“It is a mercantile contract, and merchants are not in the habit of placing in their contracts stipulations to which they do not attach some value and importance.”

Further in the opinion the court again says:

“We in the past have had more than one occasion to hold that in mercantile contracts the courts must give effect to every term in the bargain the parties have chosen to make, and are not at liberty to speculate whether they did or did not attach importance to something they wrote. As, for example, in *The Mahattan*, 284 F. 310, we accepted as settled law that a purchaser of grain to be shipped by one ship could not be required to take it if it came in another, and that we could not inquire whether every possible purpose of the buyer would not be as well served by that which was brought in the substitute. From much which was said by the tribunals which have heretofore passed upon the obligation of buyers to accept sugar from the *West Cheswald*, it would seem that it is at least possible that their conclusions were influenced not a little by their natural desire to prevent purchasers on a rapidly falling market from escaping from a bad bargain, by taking advantage of a variation from the terms for which they in fact cared nothing. Such considerations have much less weight in construing and enforcing the agreements of business men than the courts may properly give to them when they are called upon to deal with contracts of a less strictly mercantile character. In this respect we can add nothing to what has been so forcibly said in the quotations made from Mr. Justice Gray in this country and from Lords Cairns and Blackburn in England. Our examination of the

cases which in this country and across the water have put a definite interpretation on the meaning of the word 'shipment,' as used in contracts of the character of that with which we are here concerned, has convinced us that the instant case is not distinguishable from them, and is governed by what the Supreme Court there said."

The court in that case, anticipating that at first blush, since the sugar was the same as to quality and quantity, the ruling might appear strained, offered this illustration in order to demonstrate the danger of speculating as to whether a given term used in a mercantile contract may be deemed to be material or not: Suppose, said the court, the buyer had insured his shipment against loss of profits, would a policy of insurance covering a shipment of sugar loaded on a vessel from Java destined for Philadelphia be good on a similar shipment loaded on another vessel from Java destined for New York and diverted to Philadelphia? There was no insurance on the shipment in this case, but the court only used the illustration for the purpose of demonstrating that terms employed in a mercantile contract must be given effect without speculation as to whether the merchants employing the terms deemed them to be material or not.

In *Waggoner Refining Co. v. Bell Oil & Gas Co.*, (Okla.) 244 Pac. 756, the buyer ordered a number of tank cars of gasoline, and in the printed portion of the purchase order it was recited that the seller in filling shipping orders should show the buyer as the shipper, There was testimony that the parties did not treat this

term as material and that it was disregarded in prior shipments. The court said:

“This is what is denominated as a mercantile contract, and courts are not permitted to speculate as to the meaning of terms employed in such contract, nor to attempt to determine why certain terms are used; and the courts are bound to give effect to the terms which the parties have chosen for themselves. *Filley v. Pope*, 6 S. Ct. 19, 115 U. S. 213, 29 L. Ed. 372.

“As said by the court in the case of *National Bank of Commerce v. Lamborn et al.* (CCA) 2 F. (2d) 23, 36 ALR 509:

“‘In construing mercantile contracts, courts must give effect to every term, and are not at liberty to speculate whether the parties did or did not attach importance thereto’.”

It follows that the court must give effect to the word “maximum;” and when it does, the only construction possible is that instead of the cable being an offer to buy, it is in effect an authorization by appellant to respondent for the latter, as agent, to submit a bid to the Surplus Property Office, Which “bid” should not exceed the maximum price stated in the defendant’s cable.

But should we assume that the words or terms used in a “memorandum” are subject to more than one meaning, said “memorandum” is, by as strong a reason and because of such ambiguity, insufficient as the basis for a contract. As we have previously stated, the statement of an “offer to buy” must be so clearly expressed as to exclude any other construction. The memorandum is in-

sufficient to satisfy the statute of frauds unless the "offer" is an offer to buy to the exclusion of an offer to enter into any other relationship. The "memorandum" is insufficient if the offer is ambiguous and can be interpreted as well to be an instruction to an agent to make a bid to someone else. The following two authorities so hold:

In *Kervin v. Biglane*, (Miss.) 110 So. 232, the written memorandum was as follows:

"For the consideration of one dollar (\$1.00)
I hereby give O. J. Biglane option on Lots 1 and 2."

Says the court:

"It is perfectly manifest to us that it cannot be said from a close scrutiny of this paper whether it is a contract to lease, to sell, or to purchase, and, if to lease, the time of the beginning and end of the lease contract is not therein shown; in other words, the paper is so indefinite, so vague and uncertain that no one can tell what was intended to be done by the parties at the time of its execution. Our court is committed to the doctrine announced in *Waul v. Kirkman*, 27 Miss. 823, wherein Mr. Justice Handy, as the organ of the court, said:

"The rule upon this point is well settled to be that the memorandum, in order to satisfy the statute, must contain the substantial terms of the contract expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. *Boydell v. Drummond*, 11 East 143 (and other authorities.) For other-

wise all the danger of perjury, intended to be guarded against by the statute, would be let in. And when reference is made in the memorandum to another writing, it must be so clear as to prevent the possibility of the paper being substituted for another. *L. Sug. Vend.*, 94; *Smith v. Arnold*, 5 *Mason (U.S.)* 416, *Fed. Cas. No.* 13,004.'

"Under the above-quoted rule, it certainly is a most essential element that the contract state or show in some manner whether it is a contract to sell or not, and whether a warranty deed or quitclaim deed was to be executed or not. These are just as essential elements as the purchase price.

"The bill herein undertakes to explain and supply these very essential elements of the contract, but the instrument itself is so uncertain as to be absolutely void, because, by no stretch of construction, from any language in the paper, can it be said that it is an offer to sell."

In *Osborne v. Moore*, (Tex.) 247 S. W. 498, the plaintiff offered in evidence a check for \$100 on which there was entered the following memorandum:

"To bind deal on one block and six room house on North Oak Street."

The defendant objected to the introduction of the check on the ground that the word "deal" might mean a purchase and sale, or it might mean a transaction of some other character. Says the court:

"A 'deal' between two parties includes any transaction of any kind between them and when applied to a transaction concerning a house or

block does not imply an agreement to sell or convey the same, and an endorsement on a check 'to bind deal' in relation thereto may refer to an agreement to sell or convey or it may refer to an entirely different kind of transaction, as an agreement to rent or lease the property.

"The promise to sell or convey being an important element of a contract, parol evidence is not admissible to prove it as the real kind or character of the transaction actually agreed on by the parties."

In *Williston on Contracts*, Rev. Ed., Vol. II, p. 1645, Sec. 575, the author says:

"The property to which a sale, or contract to sell, relates must be described in the memorandum with reasonable certainty. So, although the contract appearing in the memorandum seems to be complete upon its fact, if, in fact, there were additional terms, the memorandum is insufficient because the memorandum must state the essential terms of the oral contract."

and in Sec. 578, p. 1656, the author states:

"The same kind of question arises in regard to a description of the goods sold. They must be sufficiently described for reasonable identification. A distinction should be noticed between sales or contracts to sell specific goods, and contracts to sell goods of a certain kind. In a contract of the latter sort, a memorandum need be no more definite than the contract. If the contract is definite enough to be enforced, a memorandum which states the contract as it was made will be sufficient, while, on the other hand, if the memor-

andum is more general than the actual contract, the memorandum, though seeming good on its face, will be insufficient because not fully stating the contract the parties made. *Where, however, the sale or contract relates to specific property,* there can be no question about lack of definiteness in the contract itself so far as concerns the property to which the bargain relates; the question is wholly whether the memorandum sufficiently describes this property." (*Italics ours.*)

"Exhibit A" is manifestly insufficient as a "memorandum in writing of the contract" in view of its uncertainty and in view of its ambiguity (if it can possibly be construed as an offer to buy) and when it is so completely lacking in a statement of all the terms of the particular contract alleged in the complaint or of any contract.

The deficiencies and uncertainties in "Exhibit A" cannot be cured, nor can the provisions of said exhibit be supplemented either by "Exhibit B" or by parol.

In *Lewis v. Elliott Bay Logging Company*, (Wash.) 191 Pac. 803, the seller wrote:

"We let you have fir at \$7-10-13 delivered Everett or Seattle."

The buyer replied:

"Your letter of the twenty-sixth instant is received in which you agree to let me have the raft of fir logs, to be delivered in Seattle, by you at \$7.00, \$10.00, and \$13.00, * * * and I will take the fir logs as per your offer at the above prices."

Held no contract; that the acceptance in specifying "raft

of fir logs” could not render certain what was uncertain in the offer. Says the court:

“The first question to be determined is whether the letters referred to constitute a sufficient memorandum to satisfy the statute of frauds. One of the essentials of a memorandum under the statute is that it shall designate the subject matter of the contract.

“Considering, first, the letter signed by the appellant, there is no designation therein of the quantity, but the subject of the sale is referred to simply as ‘fir.’ The rule as stated in 1 Mechem on Sales, Sec. 437, is that—

“ ‘The note or memorandum must also show what goods were sold and in what quantities. This rule requires that the goods shall be set out either by name or by such description as will enable them to be ascertained without other recourse to parol evidence to identify the goods or apply the description of them.’

“(1) Under this rule it is necessary that the note or memorandum show in ‘what quantities’ the goods are sold. In 25 R. C. L. 648, the rule is stated substantially the same as in Mechem, and is as follows:

“ ‘In case of contracts for the sale of goods the memorandum must designate with reasonable certainty the subject matter of the sale, and where the sale is of a quantity of a commodity the quantity must be stated with reasonable certainty as well as its kind.’

“(2, 3) This rule requires that the quantity be designated in the memorandum. The letter written by the appellant, which referred to the

subject matter of the sale as 'fir,' did not sufficiently designate the quantity. The respondent, however, argues that the two letters should be considered together. It is true that where the *memorandum* consists of telegrams or letters they may be construed together, providing they are sufficiently connected by reference. In the letter of the respondent the quantity of the subject matter, namely, 'a raft of fir logs,' is for the first time designated. Under the authorities above cited this was one of the essentials of the memorandum.

"(4) The question then arise, the memorandum of the appellant by which it is sought to be charged not sufficiently describing the subject matter, can it be held upon the letter of the respondent which for the first time contains that essential term of the contract? Respondent cites a number of cases upon this question, all of which have been carefully read and considered, but none of them would sustain a holding that the appellant could be charged upon a memorandum which it did not sign, and which designated the quantity, where the writing signed by the appellant did not sufficiently designate the subject matter in that respect."

The rule is thus stated in 17 *C.J.S.* p. 364:

"It is essential to a contract that the nature and extent of the obligation be certain. If an agreement is uncertain, *it is because the offer was uncertain or ambiguous to begin with*, for the acceptance is always required to be identical with the offer or there is no meeting of minds and no agreement. If the person to whom the offer is made sees the uncertainty and proposes a change which will make the agreement certain, this puts an end to the offer." (Italics ours.)

In *Worthheimer v. Klinger Mills*, (Ind.) 25 N. E. (2d) 246, the plaintiff alleged the contract to be in writing consisting of two letters whereby defendant agreed to sell certain timothy and clover seed, which it is alleged defendant failed to deliver. The memorandum (letters) relied on, described the seed as "100 Bags Full Timothy 1.50 per bu. 4 Bags White Blossom S. Clover 3.20 per bu." etc., but the letters did not state the number of bushels per bag, and there was no allegation or proof that under trade usages a bag contained any particular number of bushels. Held the offer was insufficient and that parol evidence could not be admitted to complete the contract by supplying the omission.

In *Stanley v. A. Levy & J. Zentner Company*, (Nev.) 112 Pac. (2d) 1047; 158 A.L.R. 76, the memorandum relied on signed by defendant was as follows:

"In reference to the purchase of International truck by B. F. Stanley of the city of Reno, we can assure you that he will have the hauling of 600 tons of wine grapes, the proceeds to be paid to you, less \$700 allowance for Mr. Stanley's operating expenses. For your information Mr. Stanley will be paid at the rate of \$6 a ton."

Held insufficient, in not stating whether the weight of the grapes transported would be computed on the net weight or on the gross weight of the grapes and containers, and that parol evidence was not admissible to overcome the uncertainty. Says the court:

"The question is as to its sufficiency as a note or memorandum to prevent the interposition of the statute. It is the consensus of judicial

opinion that such writing must contain all the essential elements of the contract. The substantial parts of the contract must be embodied in the writing with such a degree of certainty as to make clear and definite the intention of the parties *without resort to oral evidence*. *Manufacturer's Light & Heat Co. v. Lamp et al*, 269 P. 517, 112 A. 679; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154; *Mentz v. Newwitter*, 122 N.Y. 491, 25 N.E. 1044, 11 L.R.A. 97, 19 Am. St. Rep. 514; *Snow v. Nelson*, C.C., 113 F. 353; 25 C.J. Sec. 318; 25 R.C.L. 645, Sec. 276; 2 Williston on Contracts, Rev. Ed. 1619, 1622.

“The following formula is stated in Restatement of Law Contracts, Sec. 207:

“‘A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods or other subject-matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.’

“Tested by the rule stated it will be seen that the letter is deficient in several respects. For instance, it is alleged in the complaint and plaintiff sought to prove, that the weight of the grapes transported would be computed upon the gross weight of the grapes and boxes or their containers. This was contradicted by defendant, and Watt

testified that the \$6 per ton was to be paid on the net weight. Whether it was to be net or gross would have considerable bearing on the profits and was an essential element of which no mention is made in the letter. * * * We hold that the letter in this case does not take the agreement out of the statute of frauds."

In *Ellis v. Denver L. & G. R. Co.*, (Cal.) 43 Pac. 457, the memorandum, so far as material here, was as follows:

"I will deliver f.o.b. cars at Denver, Colo, you to pay the freight, and deduct it from the purchase price, forty thousand (\$40,000) dry red spruce ties 6½ to 8 inches thick, 6 to 9 inch face, 8 foot long, sawed ends, 15 per cent to be 5 to 6 inch face, ties to be 60 cents each, and culls 40 cents each. Dry and green white spruce same dimensions as above, 50 cents each. Red Spruce ties in sets at \$20.00 per thousand foot board measure."

Says the court:

"The circumstance that the number 40,000 is mentioned concurrently with the specification of red spruce ties does not operate to aid the contract and render it valid. The contract is to be taken as an entirety and indivisible, and whatever it contains must be taken to be parts of one and the same thing, and we must, from all its terms, be able to conclude what the parties had agreed respecting each mentioned item. *Scott v. Railway Co.*, 12 Mees. & W. 31; *Baker v. Higgins*, 21 N.Y. 397; *Clark v. Baker*, 5 Metc. (Mass.) 452. * * * All agree that the terms of the bargain must be so stated as to render it possible therefrom to gather what the parties have agreed to.

Tested by this very general rule, which is sufficient for our purpose, a simple inspection of the memorandum will demonstrate its insufficiency. We are unadvised by its terms what number of ties of the various descriptions were agreed to be delivered by the contracting party. If the 40,000 is referable only to the red spruce ties, then the agreement is absolutely silent as to what the parties contracted respecting the dry and green white spruce, and the culls or the sets or the lumber. If the number is to be taken as applicable to all the different varieties, we cannot ascertain what part of each the parties contracted for. There is the same difficulty with respect to the number of switch sets which were to be furnished, the number of culls which were to be delivered, and the amount of lumber which Dell was to supply. There was no agreement to supply a certain definite thing, or a certain number of articles of a particular description of the various sorts specified, nor did the railroad company agree to accept specific articles of a given number or quantity. If the company had brought suit against Dell for the specific performance of the contract, it would have found insuperable difficulty to furnish a basis on which the court could decree a performance. Under these circumstances, the other party must be subject to a like difficulty when he brings an action to recover damages for a failure to perform."

"A writing which does not specify the kind, quality or quantity of the property sold is insufficient. A general description of an article which may include several different kinds together with a statement of the quantity or number sold, is insufficient." 27 C. J. 274.

2. THE COURT ERRED IN ADMITTING IN EVIDENCE "EXHIBIT B." Rec. 86.)

Said "Exhibit B" (the acceptance) is conditional and not identical with the offer.

If, however, notwithstanding the omission to specify therein the property described in the complaint or to identify any particular property, and if notwithstanding it does not, in terms, commit defendant to a proposal to "buy" anything from the respondent—if notwithstanding these defects—"Exhibit A" can, by any possible construction, be held to constitute an offer to buy, no contract was entered into, because there was no acceptance. By "Exhibit B," relied on as the acceptance, respondent attempted to do just what the buyer attempted to do in the Lewis-Elliott Bay Logging Company case. It attempted to make certain that which was uncertain, by the statement:

"In accordance your cable Hawaiian Equipment Company *sells* you subject delivery from surplus approximately 992 *chipping hammers*, 1836 *scaling hammers* * * * f.o.b. Honolulu." (Italics ours.)

Respondent could not by using the word "sells" thereby import into the words "bid maximum" an offer to buy, or by specifying the number of each kind of hammer, make such specification a part of the "*memorandum in writing of the contract*," (Exhibit A) which is the only writing signed by appellant and by which appellant could be bound. By "Exhibit B," respondent attempts to amplify "Exhibit A," which is not permissible. It cannot be resorted to to supply deficiencies in "Exhibit

A." But even by "Exhibit B" none of the models or makes, or the quality of each kind, of hammer set forth in the complaint are mentioned. It does not constitute any proof of the alleged contract for the sale and purchase of the particular property described in the complaint.

Furthermore, again assuming that "Exhibit A" was an "offer," "Exhibit B" did not constitute an acceptance because it was not an *unconditional* acceptance. The statement:

"Hawaiian Equipment Company sells *subject to delivery from surplus.*" (Italics ours.)

undertakes to obligate respondent only on condition that delivery can be made or obtained from surplus. Suppose after the exchange of cablegrams respondent had declined to deliver any hammers on the ground that there was no "delivery from surplus," (whatever those words mean), and suppose appellant had undertaken to recover for respondent's breach of the contract in failing to deliver the goods, could appellant have recovered? Obviously not. Respondent would have claimed that its response was not an acceptance but, because of the condition, was nothing more than a counter offer which had not been accepted by appellant, and that there never had been a meeting of minds. An acceptance must in no respect be at variance with the offer, but must be identical with it and must be unconditional. As stated in 13 *C.J.* 281:

"An acceptance to be effectual must be identical with the offer and unconditional. Where a person offers to do a definite thing and another

accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is a kind of proposal and in neither case is there an agreement.''

The following are a few examples:

Where an offer was of the unexpired term of a lease and the acceptance was "subject to obtaining the assent of the lessor." *Putman v. Grace*, (Mass.) 37 N. E. 166.

Where offer was to sell coke tins at a certain price and the acceptance was by a telegram stating: "We accept your offer if full weight plates." *Kirwan v. Byrne*, 27 N.Y.S. 143.

Offer to sell land accepted "provided title is perfect. *Corcoran v. White*, (Ill.) 7 N. E. 525.

An acceptance of an offer to sell crude oil at 15° gravity with aded stipulation that it must be of that gravity at 60° farenheit'' does not create a binding contract. *Four Oil Co. v. United Oil Producers*, (Cal.) 79 Pac. 366.

An acceptance of an offer to sell land conditioned on approval of title by purchasers' attorney. *Richardson v. Warehouse Co.*, (N.C.) 26 S. E. (2d) 897.

Offer to sell land accepted with demand of delivery of "good and sufficient title." *Landrum v. Jordan*, (Okla.) 229 Pac. 182. *Flogel v. Dowling*, (Ore.) 102 Pac. 178.

An acceptance by seller, of offer to buy which stipulates that property is sold "subject to passageway rights,

party wall agreements etc.” *Lawrence v. Rosenberg*, (Mass.) 130 N. E. 189.

An offer to sell ice which does not specify time of payment contemplates payment on delivery, and an acceptance: “Will take the ice; commence loading Monday. Will weigh and settle promptly” is not an unconditional acceptance. *Rogers v. French*, (Iowa) 96 N. W. 787.

See also *Bell Clothes Shop v. Kamber*, 197 N.Y.S. 244.

In *Edwards v. Schawno*, 247 N.W. 465, the seller telegraphed to the buyer an offer to sell “one thousand bags of powdered milk.” The buyer telegraphed acceptance but added that the milk was to be of “first quality.” At the trial there was testimony introduced to the effect that in a long distance telephone negotiation preceding the telegrams of offer and acceptance, it was understood that the quality of the milk was to be “first class.” The court said:

“Undisputed evidence of correspondence and telegrams *held* to show no enforceable contract for sale of milk powder (St. 1931, Sec. 121.04 (1).

“After defendant’s offer to sell, plaintiff made counter offers which were not accepted by defendant, and the negotiations, therefore, never ripened into an enforceable contract;

“Purported acceptance of offer to sell, adding qualifications, amounted to counter-offer and did not complete contract.”

It is also pertinent to remark that there is nothing

in the "memorandum * * * signed by the party to be charged, indicating that it had any understanding of what was intended by "delivery from surplus." If the meaning of these words might have been shown by parol they could not be injected into the "memorandum" to make it read that appellant offered to buy "*if respondent could secure delivery from surplus.*" Furthermore, "Exhibit B" states that respondent "sells approximately 992 'chipping' hammers and 1836 scaling hammers." Does such language constitute an unconditional response to the words of "Exhibit A" when "Exhibit A" says nothing about "chipping" hammers and does not specify what quantity appellant offers to buy, or use any words from which, without parol evidence, the number of hammers of each kind could be determined? The meaning of the words "Will take all" is so uncertain as to require parol evidence, which is not permissible.

There is yet another reason why there was no contract in this case. "Exhibit A" fixes maximum price "Honolulu." "Exhibit B" says "f.o.b. Honolulu." Free on board what? "Exhibit A" says nothing about "f.o.b." If appellant intended to accept delivery at Honolulu, not free on board any transportation line, which is the only construction that can be placed upon the word "Honolulu," and if respondent had placed the merchandise on board some line of its own choosing and a loss occurred, would appellant have sustained such loss, when it had not specified f.o.b. in its so-called offer? The uncertainty about delivery is clearly apparent from "Exhibit D" for the respondent states therein:

“We are doing everything possible to move this equipment to you as soon as possible. *Our presumption is you want it sent to Eimco Corporation, Salt Lake City.*” (Italics ours.)

Nothing in “Exhibit A” suggesting shipment to Salt Lake City. Nothing more than delivery at Honolulu can be read into “Exhibit A.” Respondent also says in “Exhibit B:”

“We consider this exchange of cables above mentioned and this confirming letter the equivalent of delivery.”

Why? Because respondent realized it had no authority to make delivery f.o.b. any line, and as no place of delivery in Honolulu was specified by appellant, respondent attempted to declare a sort of constructive delivery. The uncertainty as to the quantity of tools is likewise apparent from “Exhibit D,” for respondent states:

“Will give you final account of exact number of tools shipped.”

There had been, of course, no written contract whereby appellant bound itself to buy the number to be thus ascertained by the final account or to buy the particular numbers, names and models alleged in the complaint or any specified number or kind. There had been no number ascertained when “Exhibit B” was sent (respondent used the word “approximately”) or when the “memorandum” was signed, and resort to parol would have been necessary to explain the meaning of “Will take all.”

This is not a case in which appellant welched from a bargain, as respondent attempts to establish. It is rather a case where respondent attempted to fasten on appellant an obligation which it was never appellant's intention to assume. When respondent received the cable "bid maximum," with what haste it replied: "Hawaiian Equipment Company *sells* you" etc., not property respondent owned; not property which had been segregated or identified; not property, the quantity of which had been determined (quantity was to be determined on final account—See "Exhibit D"), but property which respondent intended to acquire. However, respondent played safe. If it obtained the property, it would insist there was a *sale*, make a large profit above what the government was quoting the price of hammers. (See "Exhibits 1, 3, 4 and 5".) If it did not obtain the property, it could say: "Our response to your offer was that we sold you *subject to delivery from surplus*;" therefore, we only obligated ourselves conditionally.

From May 16, 1946, the Surplus Property Office of the Department of Interior in Honolulu had advertised to the public these hammers for sale at fixed prices of \$18.00 for chippers and \$15.00 for scalers. (See Exhibit 3). Anyone could have bought them through June, July and August at these prices. This, Hawaiian Equipment Company did not disclose to Eimco.

Moreover, on August 5, 1946, the Surplus Property Office opened these goods to negotiated sale for prices other than the foregoing fixed prices. (See Exhibits 4 and 5). It was in this situation that Hawaiian Equip-

ment hurried over to Surplus and bought for the fixed prices of \$18.00 and \$15.00 (See Exhibit 1), and then sent "Exhibit B" attempting to thrust upon Eimco a contract to buy them at \$24.00 and \$17.50; whereas, Eimco thought they were instructing Hawaiian Equipment Company to bid for Eimco and to get the goods as cheaply as possible.

This action smacks of bad faith when respondent so precipitately attempted by "Exhibit B" to absolutely bind appellant to buy while only conditionally binding itself to sell and deliver. Did not the words "bid maximum," suggest something different from "offer to buy?" How easy it would have been by further exchange of cablegrams for respondent to make definite and certain just what appellant intended rather than to hastily reply to the cable "bid maximum," "Hawaiian Equipment Company *sells*." "Exhibit B" is an acknowledgment that "Exhibit A" did not say enough. If it clearly contained an offer to buy, respondent could have replied: "Your offer accepted." But with intent to commit appellant to a sale and to make certain the kind of a contract to which it wished to bind appellant, respondent cabled: "Hawaiian Equipment Company *sells*," and then it hedges with the words "subject delivery from surplus." It is too apparent from Exhibits A and B that there never was a valid contract between the parties.

3. THE COURT ERRED IN ADMITTING IN EVIDENCE "EXHIBIT C." (Rec. 86.)

This exhibit could not possibly constitute a part of the contract. It is not a part of respondent's so-called acceptance and was immaterial.

4. THE COURT ERRED IN ADMITTING IN EVIDENCE "EXHIBIT D" (Rec. 89).

This letter does not purport to be a part of any contract, but is a mere *confirmation* of the cablegrams between the parties after the so-called offer and acceptance had been transmitted. We assume respondent will claim nothing more for it. It could not, of course, aid or amplify the insufficient "*memorandum*" or in any way bind appellant by its explanations about the necessity for making a "physical count" of the hammers or about "steamer space," or respondent's "presumption" or by the statement that appellant's "purchase of this equipment was on an f.o.b. Honolulu basis." Neither could appellant be bound by respondent's statement that it considered the cablegrams and the letter (Exhibit D) "the equivalent of delivery." If no contract resulted from "Exhibits A and B," "Exhibit D" was not competent to create one. Said exhibit was immaterial for it could in no wise constitute a part of the so-called contract, all the terms of which were required to be embodied in some written memorandum "*signed by the party to be charged.*" This exhibit was, therefore, improperly admitted.

5. THE COURT ERRED IN REFUSING TO DIRECT A VERDICT FOR THE APPELLANT AND IN REFUSING TO GRANT APPELLANT'S MOTION FOR NEW TRIAL. (Rec. 326, 62.)

These assigned errors go to the same question as the errors in admitting in evidence "Exhibits A and B"

and also to the question of the insufficiency of the evidence to sustain the verdict, one of the grounds of the motion for new trial.

If "Exhibits A and B" were improperly admitted, of course, plaintiff had no case and the authorities we have cited support that contention. Without these exhibits, or even with them, there was likewise a failure to prove the allegations of the complaint. *Sec. 104-14-2, U.C.A.* contains, among others, the provision:

"Where * * * the allegation of the claim * * * to which proof is directed is unproved, not in some particular or particulars only but in its general scope and meaning, it is not to be deemed a case of variance, but a failure of proof."

We again make reference to the allegations of the complaint:

"That plaintiff and defendant entered into an agreement in writing as follows: that *on or about August 8, 1946, the defendant offered and agreed to purchase from plaintiff, and on or about August 9, 1946, the plaintiff accepted said offer and agreed to sell to defendant certain goods known and designated as pneumatic scaling hammers and chipping hammers for the price and upon the terms and conditions hereinafter alleged.*" (Italics ours.)

Then follows a specification of the quantities, models and makes of scaling hammers and a like specification as to chipping hammers.

If, as we have shown, respondent must necessarily rely on "Exhibit A" as the "*memorandum in writing*

*of the contract * * * signed by the party to be charged*” for proof of *all* the terms of the contract, of course, it is apparent that said “Exhibit A” is no proof whatever of the contract alleged in the complaint. The contract alleged is not proved even if “Exhibit B” could be resorted to to amplify “Exhibit A”, which is not permissible. Even with said Exhibits, there is a complete failure of proof. Without them, if the court erred in admitting them, respondent has not the semblance of a case, for said exhibits are insufficient as an offer (“memorandum in writing of the contract”) or as an acceptance, and therefore, there was no contract. It obviously is unnecessary to further argue so self-evident a proposition.

THERE WAS NO MEETING OF MINDS

There is however, yet another reason why the court erred in refusing appellant’s motion for a directed verdict and in overruling appellant’s motion for new trial. The evidence affirmatively shows there was no contract because there was no meeting of minds on what was intended by the cablegram, “Exhibit A”. The words “bid maximum” are clearly indicative of an authorization of plaintiff to bid for and on behalf of defendant, as stated by Joseph Rosenblatt. He testified:

Q. Did you tell, did you Mr. Rosenblatt, in that conversation, tell, in the last conversation with Mr. Blades and MacNaughton, tell them you were buying from them?

A. I did not tell them I was buying from them. They didn’t offer me anything.

Q. What did you tell them?

A. I told them we would get a bid which they could submit to surplus." (Rec. 260) (See also Rec. 234.)

If, for the sake of argument we assume that respondent, *in good faith* interpreted the cablegram as an offer to buy (which we regard as an entirely erroneous interpretation), this is proof of its ambiguity. The minds of the parties did not meet and there was, therefore, no contract, and the court, as a matter of law, should have so held. The applicable rule of law is that when the parties have a different understanding as to the meaning of ambiguous language, or of language which may be given more than one construction, there is no contract, since the minds of the parties have not met.

In his treatise on Contracts, Williston states the rule as follows:

"Though it is true that a party to a contract is bound by his express language, and cannot contradict the meaning of his words by denying that he intended this meaning, he is not bound by the interpretation which may be placed on ambiguous language unless he was himself blameworthy in permitting the ambiguity, or even then if the other party to the transaction is equally blameworthy in not detecting the ambiguity. If every word and every act had but one permissible meaning, it would never be necessary in considering the formation of contracts to inquire into the intent of the speaker or actor; but since this is not the case, if an expression, in view of the circumstances under which it was used, may fairly

mean either of two things, each party is at liberty to attach his own meaning, at least unless he was in some way responsible for the other party's mistake. This result has been summarized in the Restatement of Contracts: (Sec. 71).

“ ‘Except as stated in Secs. 55, 70, the undisclosed understanding of either party of the meaning of his own words and other acts, or of the meaning of the other party's words and other acts is material in the formation of contracts in the following cases and in no others:

“ ‘(a) If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract only in the event that the other party attaches to them the same meaning.

“ ‘(b) If both parties know or have reason to know that the manifestations of one of them are uncertain or ambiguous and the parties attach different meanings to the manifestations, this difference prevents the uncertain or ambiguous manifestations from being operative as an offer or an acceptance.

“ ‘(c) If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other act from being operative as an offer or an acceptance.’

“Such an error in language may relate to the object to which the apparent agreement relates, to the person with whom it was made, or to any of its terms.” *Willison on Contracts*, 298-301.

See Anson on Contracts, p. 156; Williston on Sales, Sec. 5; 12 Am. Jur., p. 518, (Sec. 21 Contracts); Holmes, The Common Law, p. 309; 6 Eng. Ruling Cases, p. 200-201; Pollock on Contracts, pp. 504, 505; Pomeroy on Contracts, Sec. 251; Kerr on Fraud and Mistake, 5th Ed. pp. 548, 549 and cases cited.

The famous leading case on the point is the early case of *Raffles v. Wichelhaus* (1864), 2 H & C 906. There the parties supposedly agreed for a charter party "Ex Peerless" to sail from Bombay to England. It subsequently became apparent that there were two ships named Peerless, one of which sailed from Bombay to England in October, the other which sailed in December. One of the parties had contracted with reference to the ship having the early sailing date, the other in good faith knew only of the latter. The court held that since each party was mistaken as to what the other party believed, and inasmuch as there was a latent ambiguity in the alleged agreement, each was entitled to insist upon his own interpretation of the agreement, and neither could enforce the contract against the other. There was no meeting of the minds and hence nothing for the court to enforce. The principle of this case has been followed repeatedly by English and American courts. The facts in this case are repeated as an illustration to Sec. 71 of the Restatement, and the case itself has been repeatedly cited and followed by text writers and judges in this country.

Another famous case is *Falck v. Williams* (1900) Appeal Cases 176. Here plaintiff and defendant had

been engaged in an exchange of messages in code through a third person acting as broker. A cypher telegram was sent without punctuation as an alleged acceptance of previous offers. The meaning of the telegram depended upon whether one particular word was read with the words that preceded or followed it. Interpreted one way the communication referred to a shipment of shale from Sidney to Barcelona; the other interpretation had reference to shipping copra from Fiji to Europe. The parties differed in their interpretation and the court held that since there was no reason why one meaning was more certain than the other, and since in good faith the same ambiguous language could reasonably be interpreted in two different ways, there was no contract.

American decisions are squarely in line with *Raffles v. Wichelhaus*, supra. In *Cile v. Cavanagh* (1869), 103 Mass. 356, 4 Am. Rep. 560, there was an agreement for the sale of a certain lot on "Prospect Street, Waltham." There were two streets in Waltham known as Prospect Street. The jury was instructed that if the parties had in mind different streets there could be no contract and the appellate court affirmed the decision.

In *Winnemucca Water and Light Company v. Model Gas Engine Works*, (1913), 179 Ind. 542, 101 N.E. 1007, an action was brought to recover part of the purchase price on a contract for the sale of an engine from appellee to appellant, and for damages for alleged breach of guarantee. Among the specifications of the engine was the following: "Horse power developed at 275 R.P.M. 150 actual horse power." It appeared that only

as high as 125 horse power was attained at the place where performance was expected. Plaintiff claimed that 150 horse power working efficiency was guaranteed; defendant claimed that the guaranteed horse power was subject to the deductions of loss of horse power from friction, and that it was so understood in the trade. The court held, as to the meeting of the minds,

“If it (the case) resolved itself into the situation that one of the parties means and intends one thing, and the other party means and intends another, it is manifest that the first element of a contract, the mutual meeting of the minds of the parties is lacking, and there is no contract.”

In *Indiana Fuel and Supply Company v. Indianapolis Basket Company*, 41 Ind. Appeals 658, 84 N.E. 776, which was a suit on an alleged agreement for the sale of a certain kind of coal described as “Indiana Egg,” the offeror thought the coal was to be screened only once; the offeree expected that it was to be screened twice. Both interpretations were reasonable, since the two kinds of coal were both known to the industry by the same name. Held, there was no contract because the language used was susceptible to two meanings.

In *Mummerhoff v. Randall*, 19 Ind. Appeals 44, 40 N.E. 40, the stenographer of an alleged offeror made an error in transcribing and the offeree thought the writer was offering to sell potatoes at 35c per bushel instead of 55c, as the former dictated. The court held there was no contract, since there was no meeting of minds.

In *Cage v. Black*, 97 Ark. 613, 134 S.W. 942, defendant offered plaintiff 200 sacks of rice "\$5.75 FOB." Plaintiff understood the price was per sack. Defendant understood that the price was per barrel. There was evidence that both measures were used in the trade. Held there was no contract. In this case, however, the court decided that when the plaintiff accepted the rice after learning of defendant's intention, a contract came into being at that time upon the terms understood by defendant.

In *Snoderly v. Bower*, 30 Ida. 484, 166 Pac. 265, a written agreement provided that certain hay was to be measured according to the "Government Rule." Held, that evidence could be introduced to disclose the fact that there were several rules known as the "Government Rule," and that the parties did not intend the same thing, and that inasmuch as the minds of the parties did not intend the same thing, and that inasmuch as the minds of the parties did not meet as to what "Government Rule" was to be employed, no contract existed.

In a Minnesota case, X showed plaintiff a lot which he told plaintiff that defendant wanted to sell. The lot X showed to plaintiff was in fact not owned by defendant, although it was on the same street as another lot which defendant did own. X was simply mistaken as to the identity of the lot. Plaintiff and defendant agreed orally for the sale of a lot, each referring to a different one. Held, no contract existed since the minds of the parties never met. Citing *Raffles v. Wichelhaus*, supra,

and *Gile v. Cavanagh*, supra. *Strong v. Lane* (1896), 66 Minn. 94, 68 N.W. 765.

In *Peerless Glass Company v. Crockett Tinware Co.*, (Cal.), 54 Pac. 101, the seller giving terms stated that the "freight allowance" was 74c under the belief that he was answering an inquiry concerning the freight rates. The buyer understood the term to mean an allowance of 74c per 100 pounds from the invoice price. The California Supreme Court held that the buyer was not entitled to any reduction, there having been no contract because of the failure of the meeting of the minds of the parties.

In *Tyng v. Constant-Lorraine Inv. Co.*, 47 Utah 330, the plaintiff in good faith believed he was contracting to buy, and to receive a warranty deed for, a lot on State Street in Salt Lake City 55 x 165 feet. Defendant intended to sell 53½ x 165 feet by warranty and 1½ x 165 feet by quit-claim deed. Plaintiff sought return of \$1000.00 paid by him on the purchase price and asked the court to instruct the jury that if they found there was a misunderstanding between the parties and no meeting of minds, then there was no contract and defendant should return the money. The trial court refused to submit this question to the jury, and for that reason the case was reversed. Says the court:

"As to the plaintiff's understanding of the ambiguity, and in what sense he regarded the contract, there are two views: One is, that he understood and regarded it in the sense that the defendant understood it and as tendering by its conveyance, whatever property was owned by it on

the west side of State Street. If so, then the minds of the parties met; then did the defendant tender a deed in accordance with the agreement; and then was there no breach and no obligation to return the \$1,000. The other view is, that the plaintiff understood the ambiguity to mean a conveyance by warranty of fifty-feet. If so, then the minds of the parties did not meet; then was there no contract; and then was the plaintiff entitled to a return of the \$1,000 paid by him, not on the theory of any breach of contract, but of money had and received."

Upon the retrial, the issue of whether the minds of the parties met was submitted and the jury found for the plaintiff. On the next appeal (50 Utah 1, 8) this court remarked:

"If, as the jury found, the minds of the parties did not meet upon some essential elements, then it must follow that no contract was entered into by the parties, and hence the defendant retains the \$1000.00 of plaintiff's money without right or authority of law."

It is not difficult to apply the rule in these cases to the case at bar. The words "bid maximum" can, and we think ought to be interpreted to mean "you bid maximum on our behalf," and that is what appellant meant (See Rec. 260.) Respondent, we think, erroneously, interpreted the words to mean "defendant bids," disregarding the word "maximum." Therefore, it affirmatively appears from the evidence that there was no meeting of minds.

May we in conclusion summarize:

(a) If there is an enforceable contract in this case, it must be found in the two cablegrams, Exhibits A and B. Defendant's cablegram, Exhibit A, was sent August 7, 1946, plaintiff's, Exhibit B, on August 9, 1946, and these cablegrams constitute the alleged "agreement in writing" and are the alleged offer and acceptance referred to in paragraph 2 of the complaint. (Rec. p. 1). There is no "memorandum" other than Exhibit A signed by appellant and as before stated, the sale involves goods of a value in excess of \$500.00.

(b) The "memorandum" must set forth an offer to buy. It does not do so. The statement of the offer to buy must be so clearly expressed as to exclude an interpretation that any other than an offer to purchase is intended. It must not be subject to the construction that it is an instruction to respondent to bid, on behalf of appellant, for property offered for sale by the government. "Exhibit A" does not meet this test, for its phraseology clearly implies an authorization to respondent to bid on behalf of appellant, and to obtain the property (without specification) as cheaply as possible, but in no event to bid above the maximum prices stated. The term "bid maximum" bears no other reasonable construction. Appellant did not cable: "bid" or "offer"; it cabled "bid maximum". The word "maximum" cannot be disregarded in this, a commercial transaction.

(c) The "memorandum" lacks certainty as to the

property involved. It contains no description of the quantities, models or makes alleged in the complaint or any quantities, makes or models.

(d) Even if "Exhibit A" is an offer (which we deny), the alleged acceptance "Exhibit B" is not an unconditional, but a conditional acceptance, "on delivery of property from surplus."

(e) "Exhibit B" attempts to amplify and to inject new terms by specifying (approximately) the number of each kind of hammer importing the word "pneumatic" and the word "chipping" when appellant had used no such terms.

(f) Even if "Exhibit A" is an offer, "Exhibit B" attempts to inject a new term by the statement "f.o.b. Honolulu" when no such proposal was included in or justified by "Exhibit A".

(g) Appellant asserts that "Exhibit A" is not an offer to buy and that it could not, in good faith be so regarded. If however, the court should hold that it could be so construed, we contend that it is also subject to being construed as an authorization to bid on behalf of appellant and being ambiguous and appellant intending one thing and respondent in good faith (if it acted in good faith) intending another, there was no meeting of minds and therefore no contract.

We respectfully submit that the motion for directed

verdict should have been sustained and that the judgment should be reversed.

Respectfully submitted,

WILLIS W. RITTER
JESSE R. S. BUDGE

**Attorneys for Defendant
and Appellant**