

1951

# R. M. Birdzell v. Utah Oil Refining Company : Brief of Respondent

Utah Supreme Court

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J. T. Hammond, Jr.; Grant A. Brown; Attorneys for Defendant;

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## Recommended Citation

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

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**R. M. BIRDZELL,**

*Plaintiff (Appellant),*

**vs.**

**UTAH OIL REFINING COMPANY,**  
a corporation,

*Defendant (Respondent).*

} Case No.  
7749

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**BRIEF OF RESPONDENT**

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**FILED**

DEC 21 1951

**J. T. HAMMOND, JR.,**  
**GRANT A. BROWN,**

~~Clerk, Supreme Court, Utah~~

*Attorneys for Defendant (Respondent).*

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

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R. M. BIRDZELL,  
*Plaintiff (Appellant),*

vs.

UTAH OIL REFINING COMPANY,  
a corporation,  
*Defendant (Respondent).*

} Case No.  
7749

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**BRIEF OF RESPONDENT**

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**STATEMENT OF THE CASE**

Appellant's statement of the case, insofar as complete, is substantially correct. However, Appellant does not set forth all of the facts, as disclosed by the record, which we believe are necessary for the determination of this case.

On December 15, 1936, Respondent Utah Oil Refining Company held under lease from the Western Pacific Railroad Company a parcel of real property located at Wendover, Tooele County, Utah, upon which it had constructed a service station building, complete with underground tanks, pumps and related facilities. On the said date Respondent subleased the service station premises and facilities to Appellant R. M. Birdzell for a period of one year. Thereafter, as the need arose, new subleases of the service station premises and facilities were entered into between Appellant and Respondent, the last of such subleases being for a term of one year and dated December 31, 1941 (Record page 29-a). This sublease provided that, should lessee for any reason hold over after the expiration of the term of the lease, the tenancy of the lessee thereafter would be for subsequent periods of 30 days each. This last sublease was terminated and cancelled by mutual agreement between Appellant and Respondent on January 10, 1949 (Record page 30).

The lease covering the service station premises between Respondent Utah Oil Refining Company and the Western Pacific Railroad Company had expired on December 31, 1947, and it was not until January 18, 1950, that a new ten-year lease was negotiated between the parties, said new lease relating back to January 1, 1949.

Sometime prior to December 29, 1947, Appellant and Respondent entered into negotiations for a new sublease of the service station premises and facilities, providing Respondent was successful in securing a new lease covering the property from the Western Pacific Railroad Com-

pany. At this time Appellant was occupying the service station premises and facilities under a month-to-month tenancy, as provided in the sublease dated December 31, 1941, between Appellant and Respondent, as aforesaid (Record page 29-a).

On December 29, 1947, Respondent, by letter directed to Appellant, stated the terms and conditions under which it was willing to sublease the premises to Appellant for a term of ten years, providing it was successful in securing a new lease from the Western Pacific Railroad Company (Record page 24). For the convenience of the Court, this letter is set forth verbatim:

"December 29, 1947

"Mr. R. M. Birdzell

"Wendover, Utah.

"Dear Mr. Birdzell:

"We hold the premises occupied by our Station No. 511 at Wendover, Utah, under a lease from the Western Pacific Railroad Company, which expires December 31, 1947.

"At the present time we are negotiating with that company for a lease of these premises for a further term of ten years commencing January 1, 1948, but have not as yet concluded such a lease. In the event that we make a new lease with that company for a term of ten years, we shall be willing to sublease the premises to you for the unexpired term of such lease pursuant to a written lease to be entered into between us which will include all applicable and appropriate terms of the standard form of lease we now use in leasing service station property to others, and in addition the following terms:

"1. That the lease shall be subject to all terms and conditions of the lease with Western Pacific Railroad Company and that you shall comply strictly with each and every of such terms and conditions.

"2. That you shall occupy and use the leased property and operate the service station thereon in all respects in strict conformity with rules, regulations and instructions from time to time issued by the company and to the entire satisfaction of the company. And that you will make a special effort to keep the rest rooms in a clean and sanitary condition.

"3. That you shall not sublease the premises in whole or in part or allow the same to be occupied or used by another without the prior written consent of the Company.

"4. That, in the event the lease between the company and the railroad company shall be terminated pursuant to the terms and conditions thereof prior to the expiration of the term thereof, the lease between the company and you shall thereupon be immediately terminated, effective upon the date of such prior termination.

"5. That, in the event that you breach any term or condition of the lease or fail to comply therewith in any particular, the company shall be privileged to terminate the same with or without notice to you and immediately take possession of the leased premises.

"6. That you will pay your present account with us in full and thereafter pay cash on delivery for all merchandise purchased from us.

"It is impossible at this time to determine the amount of the monthly rental you shall be required

to pay under the terms of the lease. This will be determined by the Company after it has entered into the lease of the premises with the railroad company and will be based upon the amount of rent the company is required to pay to the railroad company.

"Yours very truly,

"UTAH OIL REFINING COMPANY

"/s/ A. G. Olofson."

The only response to this letter, as disclosed by the record, is a letter from Appellant to Respondent dated March 10, 1948, (Record page 28), which for the convenience of the Court is set forth verbatim:

"R. M. 'SPIKE' BIRDZELL

"Petroleum Products . . . Concrete Aggregate

"Wendover, Utah

"March 10, 1948

"Mr. B. G. Midgley

"Utah Oil Refining Company

"Salt Lake City, Utah

"Subject: FIRM LEASE—Station 511, Wendover, Utah.

"Dear Mr. Midgley:

"In lieu of my not being able to come in to the meeting with you regarding my pending lease I am writing.

"It is my understanding that the lease can be drawn as soon as acceptable terms are agreed upon.

"I would like to have the following privileges and provisions:

"1. That I be privileged and allowed to sublet:

- “(a) My garage building and business
- “(b) The cafe
- “(c) The lodge and cabins,

for my lease period. (This that I might be able to concentrate on the petroleum part of the business, and at the same time see that a high standard of operation is observed.)

“2. That I will accept and observe the lease provisions and rental increase made by the Western Pacific Railroad Company.

“3. That in the event of termination of my lease I shall be allowed to remove any and all personal property, and that I shall in no way damage, impair, or remove any company property.

“4. That every effort will be made to maintain a high standard of service operation with special concentration on our rest rooms.

“5. It is further understood that the company will build new rest rooms and improvements.

“With kindest personal regards, I am Sincerely yours,

“/s/ R. M. BIRDZELL.”

On December 29, 1947, Appellant was indebted to Respondent in the amount of \$4,202.69 for petroleum products purchased by Appellant from Respondent (Record page 26). By the 10th day of January, 1949, this indebtedness had increased to \$7,155.77, no part of which has been paid or tendered to Respondent (Record pages 26 and 27).

Prior to March 14, 1951, Respondent brought an action against Appellant in the Third Judicial District Court, Salt Lake County, State of Utah, seeking to collect the money due

and owing to it for petroleum products sold to and purchased by Appellant, as aforesaid. On March 14, 1951, judgment was rendered by the Third Judicial District Court in favor of the Respondent and against Appellant in the amount of \$7,124.12. No portion of this judgment has been paid or tendered to Respondent (Record pages 26 and 27).

On February 5, 1951, Appellant commenced the present action against the Respondent in the District Court of the Third Judicial District, Tooele County, State of Utah. On February 21, 1951, Respondent filed a Motion to Make the Complaint More Definite and Certain, and a Motion to Change the Place of Trial from Tooele County to Salt Lake County (Record pages 8 and 9). The Motion to Change the Place of Trial to Salt Lake County was granted on April 21, 1951. The Motion to Make the Complaint More Definite and Certain was denied on April 9, 1951 (Record page 4).

The Trial Judge, prior to denying the Respondent's Motion to Make the Complaint More Definite and Certain, required the Appellant to state and delineate his cause of action, which, as delineated, constituted an action for a breach of an oral contract to execute a ten-year sublease of real property (Record pages 39 and 40).

On June 20, 1951, Respondent, proceeding under Rule 56 of UTAH RULES OF CIVIL PROCEDURE, filed a Motion for Summary Judgment and supported its Motion with appendices and an affidavit, none of which have been controverted. Respondent moved for Summary Judgment for the reasons:

1. That the right of action set forth in the complaint of Appellant, as limited by the Order of the Trial Court, was based upon the alleged breach of an oral agreement to execute a ten-year sublease of real property; and that said oral agreement was void under the Statute of Frauds, to-wit, Section 33-5-3, Utah Code Annotated 1943; and .

2. That the complaint failed to state a claim against Respondent upon which relief could be granted.

(Record pages 19 to 30, inclusive.)

The trial court on the 9th day of August, 1951, entered its final Judgment in the matter (Record page 31), in which it found that Appellant's cause of action was based upon the alleged breach by Respondent of an oral agreement between Appellant and Respondent, providing for a ten-year sublease of real property; that, inasmuch as neither the said agreement nor some adequate note or memorandum thereof was in writing, subscribed by the Respondent, the oral agreement was void under the Statute of Frauds, to-wit, Section 33-5-3, Utah Code Annotated 1943; and, therefore, the Respondent was entitled to Summary Judgment against the Appellant of no cause of action. The Trial Court thereupon entered its Judgment accordingly (Record pages 35 and 36).

It is from this Judgment that Appellant is appealing.

#### POINT INVOLVED

IS THE LETTER OF DECEMBER 29, 1947, A  
SUFFICIENT NOTE OR MEMORANDUM TO

SATISFY THE STATUTE OF FRAUDS, TO-WIT, SECTION 33-5-3, UTAH CODE ANNOTATED 1943?

## ARGUMENT

### I.

THE LETTER OF DECEMBER 29, 1947, IS NOT A SUFFICIENT NOTE OR MEMORANDUM TO SATISFY THE PROVISIONS OF THE STATUTE OF FRAUDS, TO-WIT, SECTION 33-5-3, UTAH CODE ANNOTATED 1943.

### A.

The letter of December 29, 1947, did not contain all of the essential and material terms and conditions of a valid lease.

Section 33-5-3, Utah Code Annotated 1943, provides:

“Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.”

It has been universally held that a note or memorandum, sufficient to satisfy the requirements of the Statute of Frauds, must be one that contains all of the terms of the bargain necessary for a complete contract without the aid of parol evidence.

With particular reference to leases, this rule is well stated by the commentators of A. L. R. in 16 A. L. R. 2d. 624, as follows:

“Assuming that a single writing, or several writings taken together, otherwise meet the requirements of the statute of frauds as to signature, identification of the parties, and description of the premises to be leased, the requirements which the memorandum relied on must meet to satisfy the statute as to terms and conditions of the lease are, as stated by the New York Court of Appeals (*President Street Corp. v. Bolton Realty Corp.* (1949), 300 N. Y. 63; 89 N. E. 2d. 16; 16 A. L. R. 2d. 617; *infra*, Section 4), ‘clear in theory and not peculiar to a contract for the lease of real property. The parties must have reached final agreement on all essential terms of a valid contract, without reservation of any such term for future negotiation, and those terms must be embodied in a writing.’ In other words, the memorandum relied on to establish a lease agreement must embody all the essential and material parts of the lease contemplated to be thereafter executed with such clarity and certainty as to show that the minds of the parties had met on all material terms so as to effect a complete and valid lease with no material matter left for future agreement or negotiation.  
\* \* \*

“The rule is well established, without dissent, that a memorandum of agreement for a lease, in order to satisfy the statute of frauds, must contain all of the essential and material terms and conditions of a valid lease.

“This general rule is supported directly or indirectly by all the cases in this annotation.”

In *Stanley v. A. Levy and J. Zentner Company*, 60 Nev. 432, 112 Pac. 2d. 1047, the Court stated at page 1053 of 112 Pac. 2d.:

“The letter was written by defendant’s authorized agent and there is not controversy over its being

addressed to a third party. 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. 1. Lamp et al.*, 269 Pac. 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."

To the same effect see *Harriet Michelson v. James E. Sherman*, 310 Mass. 774, 39 N. E. 2d. 633; 25 Ruling Case Law, paragraphs 276 and 277; Annotation 153 A. L. R. 1112, 1113; American Law Institute, Restatement, Contracts, Vol. 1, Section 207.

The Supreme Court of the State of Utah recognized this principle in the case of *Collett v. Goodrich*, 231 Pac. 2d. 730, in which the Court stated on May 16, 1951, at page 732:

"The written memorandum which is relied on to satisfy the statute of frauds must contain all the essential terms and provisions of the contract. *Hawaiian Equipment Co. v. Eimco Corp.*, Utah, 1949, 207 Pac. 2d. 794; *Block v. Sherman*, 109 Ind. App. 330, 34 N. E. 2d 951. The memorandum must show what the contract was, and not merely note the fact that some contract was made, *Patterson v. Beard*, 227 Iowa 401, 288 N. W. 414, 125 A. L. R. 393."

See also *Campbell v. Nelson*, 125 Pac. 2d., 413; *Hawaiian Equipment Co. v. Eimco Corp.*, 207 Pac. 2d. 794.

With this principle in mind, we respectfully invite the attention of the Court to the letter dated December 29, 1947, upon which Appellant exclusively relies to overcome the requirements of the Statute of Frauds.

It is the position of Respondent that this letter in two principal particulars fails to embody all of the essential and material terms of the sublease contemplated between the Respondent and Appellant, namely,

(1) The terms and conditions of the contemplated lease between Respondent and the Western Pacific Railroad Company were not contained in the letter of December 29, 1947; and

(2) The amount of rental, and the time and manner of payment, were not provided in the letter dated December 29, 1947.

(1)

Paragraph numbered 1 in this letter states:

“1. That the lease shall be subject to all terms and conditions of the lease with Western Pacific Railroad Company, and that you shall comply strictly with each and every of such terms and conditions.”

The terms and conditions of the proposed lease with the railroad company had not been agreed upon at this time, and consequently could not be specified and agreed upon by Appellant and Respondent. The terms and conditions of the lease with the railroad company could well have

been so arduous that they would have made the operation of the service station by Appellant impracticable, or even impossible, and if such was the case, it is our position that Appellant would not have been legally obligated to enter into a lease agreement with Respondent.

Respondent submits that this paragraph of the letter, in and of itself, casts such uncertainty as to the terms and provisions of the proposed sublease as to cause the letter to be insufficient to satisfy the requirements of the Statute of Frauds.

(2)

The last paragraph of said letter to which we particularly invite the Court's attention provides:

"It is impossible at this time to determine the amount of the monthly rental you shall be required to pay under the terms of the lease. This will be determined by the company after it has entered into the lease of the premises with the railroad company and will be based upon the amount of rent the company is required to pay to the railroad company."

In other words, the rental to be paid by Appellant had not been agreed upon, nor was a rental in any amount specified in the offer. Further, neither the time nor manner of payment of rental was provided. The entire question of the amount of rental and manner of its payment was necessarily left open for further negotiations between the parties, inasmuch as prior to the conclusion of the negotiations then in progress between Respondent and the Western Pacific Railroad Company, the amount of rental Respondent would be required to pay the railroad company would not be established, and the amount of rental Appel-

lant would be required to pay the Respondent, under its sublease, could likewise not be determined.

In the case of *Rohan v. Proctor*, 61 Cal. App. 447, 214 Pac. 986, the Court stated at page 988 of 214 Pac.:

“It may be stated as settled law that a memorandum of agreement for a lease which is required to be in writing, in order to satisfy the statute of frauds, must contain all of the essential and material parts of the lease which is to be executed thereafter according to its terms, and particularly must contain three essentials in order to establish its validity under the statute of frauds. These are: First, a definite agreement as to the extent and boundary of the property to be leased; second, a definite and agreed term; and third, *a definite and agreed rental, and the time and manner of its payment* \* \* \*” (Italics supplied.)

See also *Enlow v. Irwin*, 80 Cal. App. 98, 251 Pac. 658. *Levin v. Saroff*, 54 Cal. App. 285, 201 Pac. 961

In the case of *Carlson v. Bain*, 116 Colo. 526, 182 Pac. 2d. 909, the Supreme Court of Colorado stated at page 911, of 182 Pac. 2d.:

“\* \* \* We have said that ‘Under the authorities, to create a valid contract of lease but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and bounds of the property leased; second, a definite and agreed term; and, third, *a definite and agreed price of rental, and the time and manner of payment*. These appear to be the only essentials; \* \* \*” (Italics supplied.)

The Supreme Court of the United States, in the case of *Grafton v. Cummings*, 99 U. S. 100; 25 Law Ed. 366, stated at page 368 of 25 Law Ed.:

“In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold, and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. \* \* \*”

In the recent case of *Sohio Petroleum Company v. Bran-*  
*nan*, 235 Pac. 2d 279, the Supreme Court of Oklahoma on  
 May 22, 1951, stated in paragraph 2 of the Syllabus of the  
 Court, the following:

“To relieve an oral contract of the inhibitions  
 of the statute of frauds, the written note or memoran-  
 dum thereof must be complete within itself, or by  
 reference to other instruments in writing, as to all  
 essential provisions of the oral agreement. *Omission*  
*of exact terms of consideration is a fatal defect.*”  
 (Italics supplied.)

To the same effect, see *Wardell v. Williams*, 62 Mich.  
 50, 28 N. W. 796; *O'Donnel et al. v. Lutter et al.*, 68 C. A.  
 2d. 376, 156 Pac. 2d. 958; *Stanley v. A. Levy and J. Zentner*  
*Company*, supra; Annotation, 30 A. L. R. 1166; Page on  
 Contracts, Vol. 1, paragraphs 87, 88 and 89; 49 Am. Jur.  
 354; Elliott on Contracts, Vol. 5, paragraph 4550.

It is submitted that inasmuch as the letter dated De-  
 cember 29, 1947, (1) did not contain the terms and condi-  
 tions of the contemplated lease between Respondent and  
 the Western Pacific Railroad Company, and (2) did not  
 provide for the amount of rental, and the time and manner

of payment thereof, it is not a sufficient note or memorandum to satisfy the Statute of Frauds.

B.

The letter of December 29, 1947, was not intended by the Respondent, nor considered by the Appellant, as a memorandum evidencing a complete agreement of a ten-year sublease of the service station premises.

It is the position of the Respondent that the letter dated December 29, 1947, was nothing more than an invitation to Appellant to enter into negotiations with Respondent for a sublease of the service station premises. We submit that the letter of December 29, 1947, clearly substantiates this position. In effect, the letter states that in the event Respondent is able to secure a ten-year lease of the service station premises from the Western Pacific Railroad Company, it would be willing to sublease the premises to Appellant for the unexpired term of the lease with the railroad company, pursuant to a written lease to be entered into between Respondent and Appellant, and that, among other provisions, the written lease would include all of the applicable and appropriate terms of the standard form of lease used by the Respondent and, in addition, be subject to all the terms and conditions of the Lease between Respondent and the Western Pacific Railroad Company. It should be noted at this point that the terms and conditions of the lease with the railroad company were not known, as this lease was, on December 29, 1947, in the process of negotiation. Also, what terms of the standard form of Re-

spondent's lease would be applicable and appropriate were not specified. In view of these circumstances, it was clearly not the intention of the Respondent to set forth in this letter the terms of a complete sublease agreement between itself and the Appellant.

We further maintain that the record is equally clear that Appellant did not consider the letter dated December 29, 1947, as a memorandum embodying all the terms and conditions of a complete and legally enforceable contract. In fact, the record discloses that Appellant was not in agreement with the provisions set forth in the said letter of December 29, 1947, and some two months later, to-wit, on March 10, 1948, Appellant directed a letter to Respondent, in which he stated:

"It is my understanding that the lease can be drawn as soon as acceptable terms are agreed upon."

and then proceeded to outline certain of the provisions which he desired (Record page 28).

It appears unescapable to Respondent that Appellant did not consider the letter of December 29, 1947, as representing a memorandum containing all of the essential provisions of a completed sublease agreement between the parties, and that on March 10, 1948, negotiations with respect to a written sublease covering the service station premises were then in progress.

For the purpose of this Brief, we have treated the letter as the most it can possibly represent and that is, an offer by Respondent to Appellant, stating the terms and conditions

under which Respondent would be willing to give a ten-year sublease covering the service station premises to Appellant. Treating the letter as an offer from Respondent, the record is likewise clear that it was never accepted by the Appellant.

The letter from Appellant to Respondent dated March 10, 1948, in addition to stating in effect that acceptable terms for a sublease had not been agreed upon, was not an unqualified acceptance of Respondent's offer of December 29, 1947. To the contrary, Appellant's letter set forth conditions in direct conflict with the offer. As examples of this fact, the Court's attention is invited to paragraph numbered 3 of the offer which provided that Appellant could not sublease the premises, in whole or in part, or allow the same to be occupied or used by another without the prior written consent of the Respondent. Appellant's letter of March 10, 1948, states in paragraph numbered 1 that he wants the privilege of subletting the garage building and business, the cafe, the lodge and cabins for his lease period.

Also, the Court's attention is invited to paragraph numbered 5 of Appellant's letter dated March 10, 1948, which states:

"It is further understood that the company will build new rest rooms and improvements."

This statement is entirely foreign to anything contained in Respondent's offer.

We submit that Appellant's letter of March 10, 1948, can represent nothing more than a counter-offer and thereby terminated Respondent's offer of December 29, 1947.

This offer was not renewed, nor was Appellant's counter-offer accepted by Respondent.

It is a settled principle of the Law of Contracts that, in order to form a contract, the offer and acceptance must express assent to one and the same thing. The acceptance of the offer must be substantially as made; there must be no variation between the acceptance and the offer. An offer imposes no obligations until accepted according to its terms, without qualification or departure.

In the case of *Candland v. Oldroyd et al.*, 67 Utah 605, 248 Pac. 1101, the Supreme Court of the State of Utah stated at page 1102 of 248 Pacific:

"It is a recognized principle or rule of contracts that an offer to do a certain thing or sell a particular article, conveyed to another by letter, with the offer accepted by the one to whom the offer is addressed, such offer and acceptance is a completed contract and one binding upon the parties. In order for there to be a completed contract by offer made by letter and acceptance, the acceptance must agree wholly with the offer made. As expressed by the court in *Potts v. Whitehead*, 23 N. J. Eq. 514:

" 'An acceptance, to be good, must of course be such as to conclude an agreement or contract between the parties. And to do this it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.' "

In the case of *William E. Iselin v. United States*, 271 U. S. 136, 70 Law Ed. 872, Mr. Chief Justice Taft stated at page 874 of 70 Law Ed.:

“It is well settled that a proposal to accept, or an acceptance upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. *Beaumont v. Prieto*, 249 U. S. 554, 63 L. Ed. 770, 39 Sup. Ct. Rep. 383; *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376, 377, 7 Sup. Ct. Rep. 168; *First Nat. Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822, 825; *Carr v. Duval*, 14 Pet. 77, 82, 10 L. Ed. 361, 364; *Eliason v. Henshaw*, 4 Wheat. 228, 4 L. Ed. 557.”

See, also, *Eliason et al. v. Henshaw*, 17 U. S. 225, 4 Law Ed. 556; *Steve Todorovich v. Kinnickinnic Mutual Building & Loan Association*, 238 Wis. 39, 298 N. W. 226; *American Law Institute Restatement, Contracts*, Vol. 1, paragraph 60; *Thompson on Real Property, Permanent Edition*, Vol. 8, page 480, paragraph 4559.

In another regard Respondent maintains that it is clear that Appellant did not accept Respondent's offer of December 29, 1947. The Court's attention is invited to paragraph numbered 6 of the letter dated December 29, 1947, which provides:

“6. That you will pay your present account with us in full and thereafter pay cash on delivery for all merchandise purchased from us.”

As has been stated, it is uncontroverted that, as of the date of the letter, the Appellant was indebted to the Respondent in the sum of \$4,202.69 for petroleum products sold by the Respondent to the Appellant, and no part of this indebtedness has ever been paid or tendered (Record page

26). The condition contained in paragraph numbered 6 of the letter dated December 29, 1947, results in the offer being one for an unilateral contract that could only be accepted by the performance of an act by the Appellant, namely, the payment or tender of payment of said indebtedness. This was not done. In support of this well established principle of the Law of Contracts, we invite the Court's attention to the case of *Hartzell v. Choctaw Lumber Co. of Delaware et al.*, 22 Pac. 2d. 387, wherein the Court stated in the Syllabus by the Court:

"In order that an offer and acceptance may result in a binding contract, the acceptance must be absolute, unconditional, and identical with the terms of the offer, and must in every respect meet and correspond with the offer; and any qualification of or departure from those terms invalidates the offer."

Also, to Williston on Contracts, Revised Edition, Vol. 1, paragraphs 67 and 73, pages 191 and 209. In paragraph 73, it is stated:

"In order to make a bargain, it is necessary that the acceptor shall give in return for the offeror's promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other can be given."

See also, 12 Am. Jur., paragraphs 43 and 44, page 537.

We submit that inasmuch as the Respondent's offer of December 29, 1947, was not accepted by the Appellant, it does not evidence a meeting of the minds of the parties and cannot constitute a memorandum of the terms and condi-

tions of a contract between the parties, sufficient to satisfy the Statute of Frauds.

We respectfully submit that the Trial Court did not err when it rendered Summary Judgment for Respondent.

Respectfully submitted,

J. T. HAMMOND, JR.,  
GRANT A. BROWN,

*Attorneys for Defendant (Respondent).*