

1964

Goldring Packing Co. v. H & M Cattle Co. et al : Brief of Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

GOLDRING PACKING CO., INC.

Plaintiff-Respondent,

vs.

H. & M. CATTLE Co., d/b/a

M. & M. DRESSED BEEF CO.,

and GREAT WESTERN
PACKING AND CATTLE
COMPANY,

Defendant-Appellant.

ED

MAY 4 - 1964

Case No.

10091

BRIEF OF DEFENDANT AND APPELLANT
GREAT WESTERN PACKING AND
CATTLE COMPANY

Appeal From The Judgment of The Third District
Court For Salt Lake City, Utah

Hon. Ray Van Cott, Jr., Judge

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IN THE SUPREME COURT
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STATE OF UTAH

GOLDRING PACKING CO., INC.
Plaintiff-Respondent,

vs.

H. & M. CATTLE Co., d/b/a
M. & M. DRESSED BEEF CO.,
and GREAT WESTERN
PACKING AND CATTLE
COMPANY,
Defendant-Appellant.

Case No.
10091

BRIEF OF DEFENDANT AND APPELLANT
GREAT WESTERN PACKING AND
CATTLE COMPANY

STATEMENT OF THE NATURE OF THE CASE

This is an action to determine the amount owed by the Goldring Packing Company to the Great Western Packing and Cattle Company for killing 8,151 ewes.

DISPOSITION IN LOWER COURT

The Jury found there was an oral contract to kill the ewes for fifty cents per head, and Judgment in favor of the Goldring Packing Company and against Great Western Packing & Cattle Company in the accounting was made and entered in the sum of \$20,377.50. Thereafter, the lower court denied the motion of the Great Western Packing & Cattle Company for a new trial.

RELIEF SOUGHT ON APPEAL

The Great Western Packing & Cattle Company wants the judgment of the lower court vacated and a new trial upon the issue of what was the fair and reasonable value of the service of Great Western Packing and Cattle Company to Goldring Packing Company in killing the ewes.

STATEMENT OF FACTS

During the litigation it was stipulated and agreed that if Goldring Packing Company obtained a judgment against H & M Cattle Company, it would be entitled to a judgment against Great Western Packing and Cattle Company in a like amount. Hence, the liability of Great Western Packing and Cattle Company is to be determined by the liability of H & M Cattle Company.

On October 10, 1961 Goldring Packing Company filed its original complaint claiming it had a *written contract* with the H & M Cattle Company requiring H & M Cattle Company to kill ewes for 50 cents per head, (R. 111). All defendants answered this allegation saying the written contract only required them to kill lambs for fifty cents per head and did not require them to kill ewes at that price, (R. 12). In May of 1963 Goldring Packing Company filed an Amended Complaint again claiming a written contract to kill ewes for 50 cents per head (R. 70). Again the defendants denied the written contract requiring ewes to be killed for 50 cents per

head. Exhibit 5 is the written contract, and it also was attached to the complaint.

The written contract shows on its face that when it was signed in August of 1961, the parties changed the word "sheep" to "lambs" and that this change was noted by Max Goldring, president of the Goldring Packing Company who placed his initials "MG" in the lefthand margin opposite the name change, and that likewise, the various individual indemnitores, which Goldring Packing Company required as a condition to doing business with the H & M Cattle Company, also acknowledged the changing of the word "sheep" to "lambs" in paragraph 2 of the written contract.

At the pretrials it was agreed by counsel and the court in January of 1964 that ewes were not lambs (*A ewe is a female sheep that has given birth to a lamb*), and the court took the position that under the written contract, Great Western Packing and Cattle Company was not required to kill ewes for 50 cents per head. Thereafter, at the pretrial in January of 1964, 26 months after the original law suit was instituted, plaintiff for the first time introduced the contention that Goldring Packing Company had an oral contract with H & M Cattle Company requiring ewes to be killed for fifty cents per head and introduced the issue of an oral contract into the law suit. (R. 88). The Amended Pretrial Order shows that two issues were to be presented. First, there was an issue as to whether

or not there was an oral contract, and second, there was an issue if there was no oral contract, what was the fair and reasonable value of the services of Great Western Packing and Cattle Company in killing 8,151 head of ewes for Goldring Packing Company (R. 91-92)?

The burden of proving the oral contract was on the Goldring Packing Company, and to prove the alleged oral agreement, Mr. Henry Hendler, the general manager of the Goldring Packing Company from Los Angeles, California, was called as a witness. Mr. Hendler testified that in May of 1961 he came to Salt Lake from Los Angeles. He stated (R. 166) that he was invited to come to Salt Lake City by Ray McFarland at the McFarland Packing Company or whatever company was operating the plant at the time. Mr. Hendler said he had been requested by Ray McFarland to serve on the board of a company (R. 167) to be organized to take over the operation of the McFarland plant, and he said that in May of 1961 after looking over the deal, he decided he did not want to serve on the board of directors of the company (R. 169) but that he would like to have the group kill sheep for him (R. 169). Mr. Hendler never did testify as to who the group was that he made the offer to.

In May of 1961 when the alleged conversation took place at the McFarland plant (R. 168), the McFarland plant was operated by the McFarland

Packing Company. Ray McFarland, the person to whom Henry Hendler was speaking, was an employee and officer of McFarland Packing Co.

Mr. Ray McFarland testified (R. 203) that a group was trying to be organized to take over the operation of the plant. He said the company or group to be organized was Ralston Purina Company, the Goldring Packing Company, H & M Cattle Company, Mink, Inc., and McFarlands. He stated that at the time he talked to Mr. Hendler, he was representing a group which had not yet stated a name (R. 204).

When Great Western Packing and Cattle Company was formed August 4, 1961, Goldring, McFarlands, Ray McFarland, and Ralston Purina were not a part of the new company. Mr. McFarland, (R. 207) testified that he was not an employee of Great Western or H & M, and that he was never hired by either of them to negotiate contracts (R. 208).

Mr. McFarland said at the time he negotiated the contract with Mr. Hendler in May of 1961, he had in mind the group (R. 206), but that Great Western Packing and Cattle Company, McFarlands, himself, Ralston Purina and Goldring were not a part of it.

Returning to Mr. Hendler, he testified that in May of 1961 he had a conversation with Mr. Ray McFarland at the McFarland plant in Salt Lake City. Present at the time of this conversation were

Mr. Morgan, Mr. Hodson, and Mr. Thayer. Mr. Hendler said that the entire agreement was made at the May meeting (R. 184-195).

The subject of the price for which ewes were to be killed was introduced to the jury by Mr. Saperstein as follows (R. 171):

Q. And just to be certain that you indicated to the jury, sir, at what price did they agree to kill sheep for you?

A. Fifty cents per head.

MR. BERRY: Your Honor, I object to that question as calling for a conclusion. I think the question should ask what the officers said; I don't think he should ask what they agreed to.

THE COURT: I think that is correct.

MR. SAPERSTEIN: I think that is right. I will withdraw it and re-state it. What did you say to them with respect to the price that you expected to pay for their slaughtering of the sheep?

THE WITNESS: We came to an agreed price.

MR. BERRY: Your Honor, I object to that as being a conclusion. He can say what the people said, but not that they came to an agreement.

THE COURT: Well, just indicate what was said.

THE WITNESS: Fifty cents a head for sheep, plus edibles and inedibles; and three dollars for cattle, plus inedibles.

MR. SAPERSTEIN: What response did any of the other gentlemen make to that proposal of yours?

THE WITNESS: There was a complete agreement.

MR. BERRY: Your Honor, I object to that as not being an answer to the question, and a conclusion, and not a statement of what they said, and I move that it be stricken.

THE COURT: Mr. Hendler, just a minute. Listen to me and maybe I can help you.

THE WITNESS: All right.

THE COURT: These lawyers object to your arriving at the conclusion that the jury is called upon to make. In other words, the jury is going to determine whether fifty cents was the amount to be paid, and in order for you to answer these questions without objection just tell what was said by these people, and not your conclusion.

THE WITNESS: All right. Ray McFarland who was the spokesman for the group, accepted this, and said that would be fine with them, and the rest of them all either kept quiet or agreed and accepted it (R. 171-172).

On cross examination (R. 182) Mr. Hendler testified:

Q. Now, as I understand, along in May of 1961 you had a telephone conversation with Ray McFarland?

A. Yes.

Q. He, at that time, I think, was presi-

dent or one of the officers of McFarland, Incorporated?

A. No, I don't know what his office was. He spoke to me as the principal of a group that was custom killing at the plant of McFarland, Incorporated.

Q. Let me ask you this: Were you asked to serve on the Board of Directors of McFarland?

A. No; it was a company that they had recently formed, a firm called a name like Universal Enterprises, or some name rather similar to that.

Q. Some company that Mr. McFarland was forming?

A. Ray McFarland, Mr. Hodson, Mr. Morgan and Mr. Thayer, I believe.

Q. And this conversation, I think, was that you were to get 10,000 shares of stock in that company to be a director, was it not?

A. And tell them how to run the business.

Q. And tell them how to run the business?

A. Yes, sir.

Q. And this happened in May of 1961?

A. In approximately that time.

Further, Mr. Hendler testified (R. 184) :

Q. You are not relying upon a conversation at some other time or place other than in that meeting?

A. No; that is the only deal that was

made, right in that room. I mean, it is hard to pinpoint it exactly. I spent a couple of times there but we finally came to the agreement where I said to them and they said to me and we had a complete meeting of the minds.

Q. This was in May of 1961?

A. Around that period, yes.

Q. And it was Mr. Ray McFarland who spoke up and said he would kill these ewes for fifty cents?

A. The group agreed among themselves and discussed it with me, and I discussed it with them.

Q. But to answer my inquiry: Which one person?

A. I don't remember which one of them; they were all speaking to me at that time; each one had a little something to say.

Exhibit 2 was offered and received into evidence over the objection that it was hearsay and that no foundation had been laid to show that the person who prepared the exhibit had authority to set prices for H & M Cattle Company (R. 175). Further, objection was made to the admission of this exhibit upon the ground that it was immaterial (R. 177) and the court received this exhibit which showed an isolated instance of a billing from H & M to Goldring Packing Company.

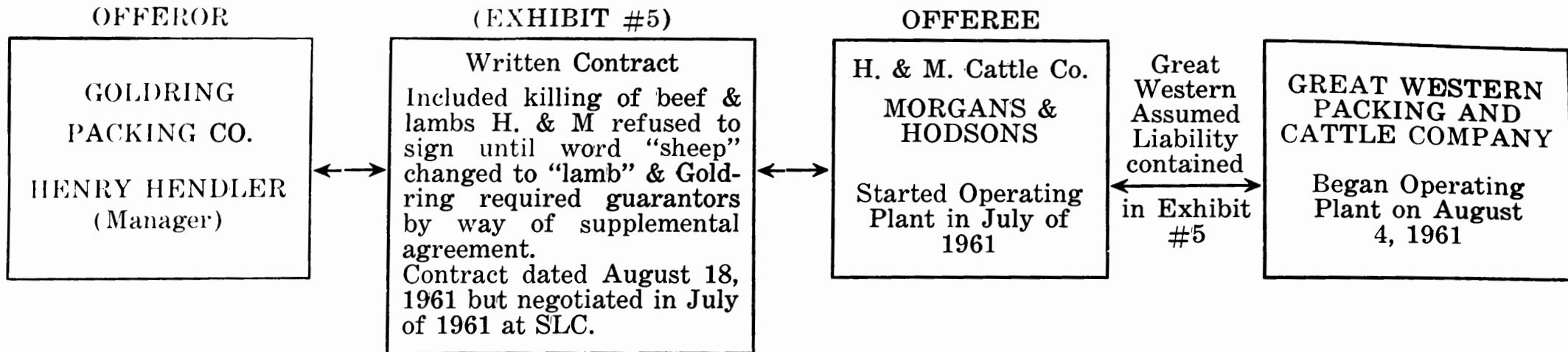
At the conclusion of the plaintiff's presentation of evidence on an oral contract, Jerry Morgan and Leonard Thayer were called as witnesses, and they testified that there was no conversation in May of 1961 with Henry Hendler with regard to the cost (R. 214 & R. 245) of the price of killing sheep, but that all conversations occurred in a subsequent meeting in late June or early July just prior to the preparation of the written contract (R. 244). Further, they stated they said they would not kill ewes for 50 cents per head, and it was for that reason that they changed the word, "sheep" to "lambs" before signing the agreement.

At the conclusion of the plaintiff's case, the defendant, Great Western Packing and Cattle Company, moved to dismiss the claim of Goldring Packing Company based upon the oral contract upon the ground that as a matter of law, there was no oral contract (R. 210), and this motion was denied by the court (R. 212).

To summarize who was doing what and when, the following diagrams are included in the statement of facts as a guide.

DIAGRAM A ATTACK

ROUTE #1 ACTION BROUGHT ON WRITTEN CONTRACT
AND DEFENDED ON GROUND WRITTEN CONTRACT
DID NOT COVER KILLING OF EWES



DEFENSE WAS SUCCESSFUL AS PLAINTIFF ADMITTED A EWE WAS NOT A LAMB AND AT PRE-TRIAL JUDGE RULED ORAL EVIDENCE WOULD NOT BE ALLOWED TO MODIFY WRITTEN AGREEMENT TO CHANGE WORD "LAMB" TO WORD "SHEEP."

DIAGRAM B
DEFENSE

ROUTE #2

GREAT WESTERN PACKING & CATTLE CO. CLAIMED IT WAS
ENTITLED TO RECOVER THE FAIR AND REASONABLE VALUE
OF ITS SERVICES IN KILLING THE EWES,

GREAT WESTERN PACKING
AND CATTLE COMPANY



GOLDRING PACKING CO.
Mr. Hendler

DEFENSE NOT CONSIDERED AS JURY FOUND ORAL CONTRACT TO KILL EWES FOR FIFTY
CENTS PER HEAD.

DIAGRAM C

ATTACK

ROUTE #3

AT PRE-TRIAL TWENTY-SIX MONTHS AFTER FILING
OF COMPLAINT PLAINTIFF INTRODUCED FOR FIRST
TIME CLAIM OF ORAL CONTRACT

EXHIBIT #2

BILLINGS FROM H. & M.

Admitted over
objection it
was Hearsay

Mr. Couch not called.

Office Manager
mistakenly billed a few
ewes or sheep at
price of lambs and
offered to prove
truth of oral contract

July 1961

OFFEROR

OFFEREE

GOLDRING
PACKING CO.

MR. HENRY
HENDLER
(Manager)

OFFER MADE
IN CONVER-
SATION OF
MAY 1961

THE GROUP

Leonard Thayer
Ray McFarland
McFarland Packing Co.
Mink, Inc.
Ralston Purina
Vance Hodson
Wayne Hodson
Jerry Morgan
Roy Morgan
H. & M. Cattle Co.

H. & M. CATTLE CO.

Started Operation
of Plant
in July 1961

GREAT WESTERN PACKING
AND CATTLE CO.

STARTED OPERATION
OF PLANT
AUGUST 4, 1961

DEFENSE OF NO ORAL CONTRACT FAILED WHEN JURY FOUND OFFER MADE TO GROUP
WAS ACCEPTED BY H. & M. CATTLE COMPANY

The attached diagram shows that the original offer went from the offeror, Goldring Packing Company, in an oral conversation in May of 1961 to the offeree, the Group in May of 1961. The written agreement, Exhibit 5, is important because it shows that a new and different offer in writing was made to H & M Cattle Company and that this new offer which was accepted required in addition to other terms, guarantors from H & M Cattle Company.

Following the admission of Exhibit 2, Mr. Couch, the party who prepared the billing to Goldring Packing Company, was called as a witness, and he testified that he had no knowledge of the contract price between H & M Cattle Company and Goldring for the killing of ewes at 50 cents per head, and further said that he charged this amount because he needed money to meet the payroll and keep the doors open, and knew at least that much would be allowed, since they got that price for lambs. (R. 252-257).

The Great Western Packing and Cattle Company contended that the fair and reasonable value of their services in killing each of the 8,151 ewes was \$3.00 per head. To support this contention, they called as witnesses Abe Guss of the Granite Meat & Livestock Company, Fred Pickren of the Midvale Packing Company, and Irvin Guss of the Jordan Meat & Livestock Company, all of which testified that they had been in the business for many years and that the fair and reasonable value of the service

in killing a ewe was \$3.00 or more. Mr. Hendler, in rebuttal, testified that an excellent profit could be made for killing them at 50 cents each. However, this testimony was not considered by the jury, along with other testimony respecting the fair and reasonable value of the services in killing the sheep, because they answered the interrogatory (R. 130) saying there was an oral contract to kill the ewes for 50 cents per head.

ARGUMENT

POINT I.

AS A MATTER OF LAW NO ORAL CONTRACT WAS MADE, AS AN OFFER CAN ONLY BE ACCEPTED BY THE OFFEREE.

Great Western Packing and Cattle Company contends, *since H & M Cattle Company was not the Group* operating the plant in May, 1961, H & M Cattle Company received no oral offer to kill any ewes for Goldring Packing Company for 50 cents per head and did not accept any alleged offer.

In May of 1961 in the conference room at the McFarland plant, Hank Hendler, the General Manager of Goldring Packing Company, made an oral offer to the McFarland Packing Company or *the Group* operating the McFarland plant.

At the time this oral offer was alleged to be made, Jerry Morgan, Roy Morgan, and Wayne Hodson of the H & M Cattle Company were present,

and allegedly heard the offer to the Group and remained silent.

Thereafter, in July of 1961 H & M Cattle Company argues that by taking over the operation of the plant the oral offer in May was accepted by H & M Cattle Company and that all ewes killed in July, August, and September of 1961 were killed pursuant to an acceptance of the oral offer made to the Group in May of 1961.

Great Western Packing and Cattle Company claims the only person or party who could have accepted the offer of Mr. Hendler in May was the Group operating the plant to whom the offer was made.

The Restatement of the Law of Contracts, Section 54, page 60 reads: "A revocable offer can be accepted only by or for the benefit of the person to whom it is made."

In Williston on Contracts, 3rd Ed. Sec. 80, it is stated:

"One of the necessary or essential elements of any proposed contract is the person with whom the contract is made. Accordingly, an offer made to one person cannot be accepted by another, even though the offeree purports to assign it. Nor does it make any difference whether it was important for the offeror to contract with one person rather than another * * *."

In *Paige vs. Faure* (1920) 229 N.Y. 114, 127 N.E. 898, it was held an option given a partnership

of two, one of whom thereafter assigned to the other, could not be exercised by the remaining partners, exercise of an acceptance of the option.

In *Dorsey vs. Strand* (1944) 21 Wash. 2d 217, 150 P. 2d 702, where a member of a committee selected to charter a plane endeavored to accept, the court held as a matter of law there was no acceptance of an offer, saying when an offer is made, it can be accepted only by the offeree, and if acceptance is to be manifested by doing of an act, such act must be done by the offeree or there is no contract.

In *Gates vs. Petri* (1957) 127 Ind. App. Ct. Rep. 670, 143 N.E. 293 where the record showed that the wife of the appellant Gates did not sign the acceptance of the offer or proposition, and there was no evidence that Bernard T. Gates was the agent of or authorized to sign for his wife, the court said an offer can be accepted only by the offeree, and that to constitute a valid contract, the minds of the parties must have met on the identities of the person with whom they are dealing. In the case at bar, the offeror's proposition was to the owners of the real estate described, and as both owners did not accept, an agreement did not occur. The court said the acceptance must meet and correspond with the offer in every respect, neither falling by or going beyond the terms proposed, but exactly meeting with them on all points.

In *Routzahn vs. Cromer* (1959) 220 Md. 65, 150 Atl. 2d 912, where the name of a purchaser was substituted after vendors agreed to sell and the change in purchaser was agreed to only by the husband seller, the court held the acceptance was unenforceable, saying that one of the necessary terms of any contract is the name of the person with whom it is made, and that consequently, an offer made to one cannot be accepted by another. Further, the court said a party has a right to contract with whom he pleases and that another cannot be thrust upon him without his consent.

In *Denver Truck Exchange vs. Perryman* (1957) 134 Colo. 586, 307 P. 2d 805, the court followed the general rule saying an offer can be accepted only by the one to whom it is made and that an offer made to Estlinbaum could only be accepted by him, and not Perryman.

In *Schneider vs. Pioneer Trust and Savings Bank* (1960) 26 Ill. App. 2d 463, 168 N.E. 2d 808, where the plaintiffs offered to purchase real estate from trustee of Bank, who was trustee for William Harmon, a sole beneficiary, and the beneficiary, Harmon, attempted to accept the offer as the owner, and where at all times trustee of Bank was unaware of negotiations, the court held that under the terms of the offer only the Trustee Bank could accept the offer and that as Bank did not, there was never a valid contract. The court said merely because Harmon had power to bring about the result contem-

plated in the offer does not constitute him an offeree, and that to constitute a contract by offer and acceptance, the acceptance must conform exactly to the offer.

In *Daru vs. Martin* (1961) 89 Ariz. 373, 363 P. 2d 61, where an offer was made to one Emanuel A. Perry but instead an attorney by the name of Daru endeavored to accept it, the court held he could not legally accept, saying:

“When an offer is made to a particular person or persons, the law is clear that no one else can accept the offer and it is not transferable to another. 13 C.J.S. 273 Contracts, Section 69, 17 C.J.S. Contracts, Section 40, Citing Cases. Neither is there any ambiguity in the offer which would allow any interpretation making plaintiff an offeree. The offer was made to Emanuel A. Perry, in care of Robert Daru (plaintiff). This wording definitely excludes plaintiff as a contracting party. Therefore, any attempted acceptance of vendor’s offer by plaintiff as a principal, either individually or with others, had no legal effect in binding vendor to a contract.

In *R. J. Daum Construction Co. vs. Child* (1952) 122 Utah 194, 247 P. 2d 817, and in *Williams vs. Espey* (1961) 11 Utah 2d 317, 358 P. 2d 903, this court stated an offer must be unconditionally accepted, saying to hold otherwise would make a contract where there was no meeting of the minds.

As the plaintiff did not prove or offer to prove an oral offer to H & M Cattle Company, it is sub-

mitted that as a matter of law H & M Cattle Company was not an offeree, and that under the facts of this case, there is no oral contract. Further, it is submitted that only the Group to whom the alleged oral offer of Mr. Hendler was made could accept to constitute an oral contract and a meeting of the minds.

POINT II.

AS A MATTER OF LAW THE NEGOTIATIONS SHOW THE PARTIES REJECTED THE ALLEGED MAY, 1961 ORAL OFFER.

Great Western Packing and Cattle Company contends, as a matter of law, the complaint, stating an action upon a written contract, the Pretrial Order and Exhibit 5 show the parties did not make an oral contract in May, 1961. At the pretrial for the first time, the plaintiff contended it had a cause of action upon an oral contract. Until then its theory of recovery was based upon a written contract or upon a dispute as to what was the fair and reasonable value of the service of H & M Cattle Company in killing the ewes in question.

The written agreement of August, 1961 is a rejection of any oral offer of May of that year.

Since the Goldring Packing Company had its attorneys prepare the written agreement of August, 1961 and its president signed and accepted the change in the agreement showing that it covered merely the killing of lambs and not ewes, it is undisputed that a new and different offer was com-

municated to the H & M Cattle Company than had been given originally to the Group operating McFarlands in May.

In the Restatement of the Law of Contracts, Section 41, page 49, it is provided:

“Revocation of an offer may be made by a communication from offeror received by offeree, which states or implies that the offeror no longer intends to enter into proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer.”

As the written offer and agreement made between Goldring Packing Company and H & M Cattle Company required as an additional condition of H & M Cattle Company to making an agreement that it get the personal indemnity of the various indemnitors, it appears that an additional condition was attached to making a deal with H & M Cattle Company than what was attached to making a deal or agreement with the Group operating McFarlands in May, 1961.

Further, it would appear that the refusal of H & M Cattle Company to sign the written agreement to kill ewes or sheep for 50 cents per head would have been a communication of a rejection to the oral proposal in May, 1961, and such a rejection would have destroyed the original May offer as a matter of law.

In *Hargrave vs. Heard Investment Co.* (1940)

56 Ariz. 77, 105 P. 2d 520, the court held when one with whom another offers to enter into a contract on certain terms declines to accept such terms, but offers a counter proposition, then the original offer loses its effect and may thereafter be accepted by the offeree only when renewed by the offeror.

It is submitted that the refusal to sign the written agreement to kill sheep for 50 cents per head was a rejection of the May offer, as this agreement was signed in August after being discussed in June and July, and constituted a rejection as a matter of law, and that thereafter, as a matter of law, there is no evidence to show the offer was ever orally renewed.

As a general rule, parties are not continued to negotiate and bargain and then insist that original offer remains open for acceptance.

In *Drennan vs. Star Paving Company* (1958) 51 Cal. 2d 409, 333 P. 2d 757, the Supreme Court of California held a general contractor could not reopen bargaining with a subcontractor and at the same time continue a right to accept the original offer of the subcontractor. The California court said:

“It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept

the original offer. See *R. J. Daum Construction Co. vs. Child*, Utah, 247 P. 2d 817, 823,
* * * ”
.

In order to convert an offer into a contract, there must be an acceptance of the offer before it is withdrawn. Continued existence of an offer until accepted is necessary to make possible the formation of a contract. Further, in *Drennan vs. Star Paving Company*, Supra, the California court said that if knowledge of facts inconsistent with the continuance of the offer is brought home to the offeree, the offer cannot be accepted.

In *Hoover Motor Express Company, Inc. vs. Clements Paper Company*, (1951) 193 Tenn. 6, 241 S.W. 2d 851, where prior to acceptance of a written offer, the offeror, by telephone, told the offeree that he didn't think he would be going through with the proposal and that he had other plans in mind, the court held the offeree had knowledge the offer was withdrawn and was no longer continuing, and an attempted acceptance hereafter was ineffective to form a binding contract.

The continued bargaining between Goldring Packing Company and H & M Cattle Company in July and August of 1961 shows as a matter of law the May offer, even if it could be construed to be made to H & M Cattle Company as an offeree, was not open for acceptance. It is submitted that since the memorandum agreement of August, 1961 (Exhibit 5) shows Goldring was bargaining in July and

August for a written agreement containing the additional conditions as follows,

1. To make H & M Cattle Company its agent to purchase cattle for Goldring.
2. To make H & M Cattle Company obligated to slaughter cattle for \$3.00 per head.
3. To make H & M Cattle Company sell beef for Goldring.
4. To make H & M Cattle Company guarantee certain beef prices as provided weekly by Goldring to H & M Cattle Company.
5. To make H & M Cattle Company hold Goldring Packing Company harmless from all claims of every nature.
6. To provide that H & M Cattle Company furnish fire and extended coverage insurance to Goldring Packing Company.
7. To make H & M Cattle Company provide indemnitors to guarantee its ability to perform with Goldring,

that as a matter of law, the dealings of the parties after May, 1961 show a rejection of the May offer by both parties concerned, and there was no meeting of the minds on any oral agreement. Definitely, the future dealings of the parties in July and August show the oral offer of May, 1961 was not unconditionally accepted.

From the conduct of the parties, it is obvious that if anything, the May oral offer was a preliminary offer only, and that thereafter, it was not seriously considered by Goldring Packing Company

or H & M Cattle Company until it was definitely learned at the time of the Pretrial a ewe could not be construed to be a lamb.

POINT III.

THE CONDUCT OR SILENCE OF H & M CATTLE COMPANY, OR ITS OFFICERS, AT THE MAY, 1961 CONFERENCE, AS A MATTER OF LAW, DID NOT MAKE AN ORAL CONTRACT.

No where in his testimony did Mr. Hendler say the H & M Cattle Company or any one of its representatives said they would kill sheep or ewes for 50 cents a head. He did, however, imply H & M Cattle Company accepted his offer to the Group because the officers of H & M Cattle Company were present when he made the offer to the Group.

In this appeal H & M Cattle Company contends that since an oral offer was not made to it as offeree, the silence or conduct of its officers at the meeting in May of 1961 did not constitute an acceptance of an oral offer.

In 17 C.J.S. Contracts, Section 41, it is stated that as a general rule silence does not constitute an acceptance of an offer. In 17 C.J.S. Contracts, Section 41, it is provided:

“As a general rule, mere silence does not constitute an acceptance of an offer. Silence alone does not give consent, even by estoppel, since there must not only be the right, but the duty, to speak before the failure to do so can estop a person afterward to set up the

truth, particularly where the silence or inaction has an uncertain or ambiguous meaning and the parties have reasonable differing views as to what the fact meant. It is otherwise if the relationship of the parties, their previous dealings, or other circumstances are such as to impose a duty to speak; and, if in such a case the offeree is silent or his inaction conveys but one reasonable meaning, intentional assent on his part is not a requisite.

“An offer made to another, either orally or in writing, cannot be turned into an agreement merely because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offeror cannot prescribe the conditions of the rejection so as to turn silence on the part of the offeree into an acceptance, unless the offeree has previously agreed that silence shall be so construed. Thus, it has been said that silence will not amount to the acceptance of an offer unless it is expressly so agreed.

“In like manner, mere delay in accepting or rejecting an offer cannot make an agreement, unless the circumstances are such as to impose a duty to reply.”

It is submitted, as a matter of law, since the offer was made to the Group, and not to H & M Cattle Company, that its officers, although members of the Group, had no duty to speak up or affirmatively reject the offer.

In *Switter vs. Thompson* (1960) 225 Ore. 614,

358 P. 2d 267, where the plaintiff was silent when one of the defendants made an offer to pay plaintiff for his interest in a mine, 1/20th of interest of the defendants in royalties from mine for a period of five years, the court held silence did not constitute an acceptance where there was no showing of any right to demand some action by the plaintiff, even though plaintiff received and accepted a check. Further, the court said in *Suitter vs. Thompson*, *Supra*. an acceptance of an offer by silence can only arise when circumstances existing are such that a duty arises requiring the offeree to speak, and a duty to speak can only arise when offeror has a right to demand some action on the part of the offeree.

What right did Goldring Packing Company have to demand of H & M Cattle Company after the May conference that it kill ewes for 50 cents per head?

It would appear that since it had no right to demand from H & M Cattle Company that it kill ewes for 50 cents a head, there would be no duty to speak on the part of H & M Cattle Company.

In *Macy vs. Day* (1961) Mo. App., 346 S.W. 2d 555, the court held to make a valid contract, the parties must have a distinct intention, common to both, and without doubt in difference, and their minds must meet upon the assent to the same thing in the same sense at the same time.

It is submitted that since H & M Cattle Com-

pany was not operating the plant in May that the intention of its officers to assent to the offer of Mr. Hendler did not occur.

In *Kimball Elevator Company vs. Elevator Supplies Company* (1954) 2 Utah 2d 289, 272 P. 2d 583, where an action was brought for breach of an alleged agreement not to compete in bidding, and where the jury returned a verdict for the plaintiff, and where both parties had been in the business for years, and where it had been the practice of Kimball to subcontract from Elevator Supplies Company, and where in the past, Kimball had accepted Elevator Supplies Company's bid, and where Kimball's manager requested a sub-bid from Elevator Supplies Company for modernizing elevators at the Hotel Utah, and bid was furnished, and where thereafter, the Hotel Utah requested a bid directly from Elevator Supplies Company, and thereafter that bid was accepted, and where after, when the plaintiff did not get job, it claimed first that Elevator Supplies Company owed it a commission for helping it get the job, and second, that when this was rejected, it had a cause of action for breach of an implied agreement not to compete, and where witness for the plaintiff said *it was his impression* that second bid was check bid only and would be higher, naturally, as it was out of San Francisco, and where this testimony was objected to as an impression rather than a fact, and where the court said the testimony was improperly admitted because the witness was

giving impressions, not fact, and where this court said:

“Even if this testimony had been elicited in such a manner to be competent, that is a statement made by Roy Smith, at best it would have shown only that he knew that the plaintiff wanted Elevator Supplies to make a check bid, but would have fallen far short of amounting to a promise that his Company would do so.

“It is of course conceded that a contract may be made out even though there be no express words formally stating it, and that the promise may be inferred wholly or in part from such conduct as justifies the promisee in understanding that the promisor intended to make it. Nevertheless we fail to see how, taking all of the evidence and every reasonable inference that may fairly be derived therefrom in the light most favorable to the plaintiff, as we are obliged to do, a finding that Elevator Supplies made such promise in the instant case can be supported. Likewise, we find no circumstances here from which it could be reasonably concluded that silence or inaction with respect to such request amounted to an acceptance.”

It appears that the testimony of Mr. Hendler in May of 1961 merely shows that his Company wanted sheep killed for 50 cents per head and that the action or inaction on the part of the H & M Cattle Company officers at the meeting fell far short of amounting to a promise to kill sheep, even though he was under the impression they agreed, as after all, the test of a true interpretation of an accept-

ance is not what a party making it thought it meant or intended it to mean, but what reasonable persons in the position of the parties would have thought it meant, *Ray vs. William G. Eurice & Brothers* (1952) 201 Md. 115, 93 Atl. 2d 272.

POINT IV.

THE LOWER COURT ERRED PREJUDICALLY IN ADMITTING HEARSAY EVIDENCE.

The truth of the statement that Goldring Packing Company was asserting at the trial was that in May of 1961 it made an oral contract with H & M Cattle Company to kill ewes for 50 cents per head.

Goldring Packing Company's direct oral evidence showed an oral agreement was made with the Group operating McFarland's plant, but showed no direct oral agreement with H & M Cattle Company. To bridge the gap between the Group operating the plant and H & M Cattle Company, Goldring Packing Company offered, and the Lower Court received, Exhibit 2. This exhibit consisted of seven billings from H & M Cattle Company to Goldring Packing Company in which it billed a few ewes or sheep at 50 cents per head.

The defendant, Great Western Packing and Cattle Company, objected to this exhibit being received by the Lower Court on the ground the exhibit was hearsay to prove the truth of an oral contract made in May of 1961, but the exhibit was received by the Lower Court over Great Western Packing and Cattle Company's objection. Thereafter,

plaintiff's counsel used the exhibit to argue that if a few ewes or sheep were billed out at 50 cents a head, it certainly was true that there was an oral contract made in May.

Mr. Dennis W. Couch, the man who prepared the billings in Exhibit 2, was available as a witness, and after the admittance of Exhibit 2, he was called and testified that he was employed during July, August and September at the McFarland Plant, receiving his pay check from McFarland's, and that he was employed as an office manager and collections manager, and that he prepared the second, third, fourth, and fifth billings of the seven billings in Exhibit 2. He said that he had billed the sheep out at 50 cents only because he knew that was the figure he was going to get, and that he needed money, as they were short on working capital to meet the payroll. Further, he testified that he had not received any specific instructions to bill ewes at 50 cents a head, but knew this was the sum they were getting for lambs, and then on his own, without any authorization, he billed a few ewes at 50 cents, saying he knew they would be allowed at 50 cents a head but did not know how much more on the ewes. He also said that he knew there had to be a difference in the price between killing ewes and lambs, but that he did not know whether or not there was a contract covering the killing of ewes, but that he did know there was a contract for the killing of lambs at 50 cents per head.

In the Handbook of the Law of Evidence by Charles T. McCormick at page 460, hearsay evidence is defined as follows:

“With these warnings, the following is proposed. Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such evidence being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court asserter.”

The principal reason for excluding hearsay is namely, the want of the right of confrontation in cross examination to determine the credibility of the out of court declarant.

In this particular case, if Mr. Saperstein had had to produce Mr. Couch as his witness and on cross examination it had been shown that he did not know of any oral contract to kill ewes for fifty cents, his credibility as to the price would have made his testimony valueless.

Of course, if the billings had been offered to prove a written agreement in July to kill ewes for 50 cents, no one would contend that would be hearsay to prove a written agreement.

There are many instances of the exclusion of written statements as hearsay when offered in court as evidence of the truth of an asserted fact.

In *Heil vs. Zahn* (1947) 187 Md. 603, 51 Atl. 2d 174, where a suit was brought by a nurse against

a decedent's estate for services, the decedent's written directions to his executors stating that he owed no debts was excluded as hearsay.

Doctors written medical reports on their findings as to treatment and examinations are generally held to be hearsay, and in *Dier vs. Dier* (1942) 141 Neb. 685, 4 N.W. 2d 731, where in a divorce suit the report of an investigator, acting at the request of the court pursuant to statute, of interviews with parties, report was used, and circumstances where the party offering the report offered to produce for cross examination the investigator and the persons interviewed, the court held, nevertheless, the use of the report was hearsay and error.

In *Russell vs. Ogden Union Railway & Depot Company* (1952) 122 Utah 107, 247 P. 2d 257, where an action was brought by an employee for alleged wrongful discharge by the Railroad, and where the employee's statement contained in the transcript given in the hearing before the Railway's assistant superintendent a statement that the employee had been too sick to apply for leave of absence, it was held that the use of the report was hearsay and inadmissible as proof of illness.

In Montana in *Shillingstad vs. Nelson* (1963) 141 Mont. 412, 378 P. 2d 393, where the court at the request of plaintiff's counsel admitted a written medical report of an examination made by defendant's doctor over objection, the court held admission of the medical report was hearsay and not within

the rule of an exception to the hearsay rule, and that it was prejudicial error to admit the report where the doctor was not called as a witness.

In *Gifford vs. York* (1950) 145 Me. 397, 74 Atl. 2d 878, where the court excluded a receipt given by a third party purporting to cover a commission for sale of property, the court held excluding the receipt was not error because it was hearsay, particularly where the party giving the receipt was in the courtroom and not called as a witness.

In the principal case, Mr. Couch was available as a witness.

In *Hunter vs. Totman* (1951) 146 Me. 259, 80 Atl. 2d 401, where the court refused to admit inventory notebook in a case where the seller sued the buyer of potatoes and where seller's claim was based on inventory in notebook kept by a person who had no personal knowledge of number of barrels of potatoes from seeing either slips or tickets, the court held it was reversible error to admit the inadmissible notebook, and in granting a new trial said:

"Our court has decided that where the entries in a book of accounts do not itemize the transactions recorded, and comprise the details of several transactions, the book is not admissible as independent evidence. *Putman vs. Grant*, 101 Me. 240, 63 Atl. 816. Statements of the plaintiff himself or of third persons, such as invoices, bills of lading or protests, are not admissible. *Paine vs. Maine Mutual Marine Insurance Co.*, 69 Me. 568."

In *Nalder vs. Kellogg Sales Co.* (1957) 6 Utah 2d 367, 314 P. 2d 350, where trial court admitted profit and loss statements, this court reversed the trial court for committing prejudicial error saying the exhibit was not shown to have been prepared, nor was it presented by a person competent to do so who was subject to cross-examination; nor was it based on records or other data available for examination, other than the exhibit herein mentioned. Further, in *Nalder vs. Kellogg Sales Co.*, Supra., the court said the correct rule was stated in *Sprague vs. Boyles Brothers Drilling Co.*, 4 Utah 2d 344, at page 352, 294 P. 2d 689 at page 694.

In *Sprague vs. Boyles Brothers Drilling Co.* (1956) 4 Utah 2d 344, 294 P. 2d 689, the court said regarding admission of numerous work sheets:

“It has been held, and we believe the ruling to be a salutary and expedient one, that where original book entries, documents, or other data are so numerous, complex or cumbersome that they cannot be conveniently examined by the trier of fact, or where it would materially aid the court and parties in analyzing such material, that a competent person who has made such examination may present such evidence. This is subject to the limitation that the evidence must be shown to be developed from records, books or documents, the competency of which has been established, and the records must be available for examination by the opposing parties and the witnesses subject to cross examination concerning such evidence.”

In the principal case it is submitted, since Mr. Couch admitted he had no knowledge of an oral contract to kill ewes or sheep for 50 cents per head, that any evidence contained in the billings was not developed from a competent source, and that as a matter of law, the billings should have been excluded. Further, since Mr. Couch testified he didn't know the terms of the contract or if there was a contract for killing ewes (R. 258) and said he never received any specific instructions about killing ewes or billing for killing ewes (R. 254), and did not know of the arrangements between the parties for killing ewes, it would appear that the billings in Exhibit 2 were not written within the scope of his authority to speak or write for H & M Cattle Company, and it is submitted they were not admissible as admissions of a representative nature.

In *John C. Cutler Association vs. De Jay Stores* (1955) 3 Utah 2d 107, 279 P. 2d 700, where an objection was made on the ground the answer would be hearsay when a witness was asked what was the amount of the bid, this court sustained the exclusion of the testimony as hearsay, since there was no proper foundation for its admission.

POINT V.

THE CONCLUSION OF A WITNESS IS NOT COMPETENT EVIDENCE TO PROVE AN ORAL CONTRACT.

To prove the oral contract Mr. Saperstein, the attorney for Goldring Packing Company, did not

ask Mr. Hendler what he said or what was said to him by officers or employees of H & M Cattle Company. Rather, he asked for Mr. Hendler's conclusion as to what the agreed price was and a proper objection was made (R. 171). Repeatedly, Mr. Hendler tried to testify they agreed or there was a complete agreement, but he never did state what was said. In fact, Mr. Hendler said Mr. McFarland, who was not an officer or employee of the H & M Cattle Company engaged to make contracts, did most of the talking and that they accepted individually and collectively, and said he could not specifically say that Mr. Morgan said yes, and the others did not say anything, saying that he did not know. Whenever Mr. Hendler was asked a question about what was said as to the price, he would just say that they agreed among themselves, giving his conclusion. The only individuals Mr. Hendler recalled saying anything to him on the price were Mr. Leonard Thayer, the president of McFarlands Incorporated at the time of the conference in May, and Mr. Ray McFarland, another officer of McFarlands. With regard to Mr. Jerry Morgan, this question was asked (R. 188).

Q. You don't recall specifically of Mr. Jerry Morgan saying he would kill these for fifty cents?

A. No, I can not remember that far back so far as the individuals are concerned.

In this appeal the Great Western Packing and

Cattle Company contends the testimony of Mr. Hendler merely showed his state of mind or conclusion, and that it was not competent to prove an oral contract because he admitted he did not know what Jerry Morgan or any other representative of the H & M Cattle Company said about the price for killing ewes.

It was quite evident at the trial when Mr. Saperstein abruptly changed the subject of conversation from over-time kill on Saturday to the agreed price for killing sheep, that he wanted to get a conclusion out of Mr. Hendler before a timely objection could be made by defendant's counsel (R. 174). The question starting at the top of page R. 174 was like this:

Q. Belonged to the Goldring Packing Company, is that correct?

A. That is correct; and we sold them locally here to a company called Summerhays.

Q. Was there any conversation at this time with respect to any charges for overtime kill or Saturday kill?

A. Not at that time.

And now comes the quick question asking for a conclusion:

Q. And just to be certain that you indicated to the jury, sir, at what price did they agree to kill sheep for you?

And a very quick answer:

A. Fifty cents per head.

MR. BERRY: Your Honor, I object to that

question as calling for a conclusion. I think the question should ask what the officers said; I don't think he should ask what they agreed to.

Further, the record shows that he always said there was an agreement or they agreed, and never said what, and of course, each time I objected, the jury felt I was being unfair in not letting Mr. Hendler give his conclusion or state of mind, and it is submitted the jury is always prejudiced against the objector because it does not understand the reasoning behind the taking of the objection, and does not realize that as a matter of law on appeal you will lose on the record if you don't take the objection, and merely thinks, "That lawyer has got something to hide, so let's not let him do it."

In *Kimball Elevator Company vs. Elevator Supplies Company* (1954) 2 Utah 2d 289, 272 P. 2d 583, where the witness for the plaintiff testified that it was his impression second bid was check bid only, and an objection was taken as to his conclusion or impression, as it was called, our court said the witness' testimony was improperly admitted because the witness was giving an impression and not a fact, and that the testimony was not elicited in a competent manner.

In *Dansak vs. Deluke* (1961) 12 Utah 2d 302, 366 P. 2d 67, where proper testimony was objected to upon the ground that it would be hearsay, and where the offer of proof was as follows:

"Mr. Pace, I will state that Mr. Kenyon

will testify. He had examined and satisfied himself in talking to the men in this corporation they were transferring all of their legal obligations of Mr. Lewis Deluke for Lucy Deluke, signing her property to the corporation, and he advised there was no problem in the transaction, and he advised his client to go ahead with this agreement.”

This court said the proper proof was properly excluded, as it merely showed a state of mind and did not definitely state the facts sought to be proved.

It is proposed that the testimony of Mr. Hendler was not elicited in a competent manner to prove an oral contract, and that no oral contract was proven because he failed to state facts showing Mr. Jerry Morgan or any other individual representing H & M Cattle Company would kill ewes for 50 cents a head.

CONCLUSION

The judgment of the Lower Court should be reversed and a new trial should be granted solely upon the issue of what was the reasonable value of the service of Great Western Packing and Cattle Company in killing the ewes for Goldring Packing Company.

Respectfully submitted,

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I hereby certify that on this day of
....., 1964, I mailed two copies of
this Brief by United States mail, postage prepaid,
to Herschel J. Saperstein, Louis M. Haynie, and
Barker and Ryberg, Attorneys at Law, at the ad-
dresses shown on the cover of this Brief.

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