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

Utah Supreme Court

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

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HAWAIIAN EQUIPMENT COM-  
PANY, LIMITED, a corporation,  
*Plaintiff and Respondent,*

vs.

THE EIMCO CORPORATION, a  
corporation,  
*Defendant and Appellant.*

Case No.  
7188

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**BRIEF OF RESPONDENT**

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AUG 13 1943

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**BRIEF OF RESPONDENT**

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I

**STATEMENT OF FACTS**

This is an action for breach of contract. As will appear from the argument, it is of the highest importance in reviewing this case that the Court have before it not only a statement as to the pleadings and exhibits received in evidence, as set forth by appellant, but the situation of the parties and surrounding circumstances when the contract was made, as disclosed by the evidence.

For convenience the respondent hereinafter will be referred to as "Plaintiff" and appellant as "Defendant."

The plaintiff, Hawaiian Equipment Company, Limited, is a corporation, organized and existing under the laws of the territory of Hawaii, with its principal office and place of business in Honolulu. It is engaged in carrying on the business of a dealer in machinery and equipment entirely within the Hawaiian Islands (R. 79, 80, 123 and 159). Sometime during the latter part of June or the early part of July, 1946, it came to the attention of Malcolm MacNaughton, president of Hawaiian Equipment Company, that certain pneumatic tools, known as chipping hammers and scaling hammers, stored in government warehouses at Honolulu in a section designated as "Salt Lake" and bearing classification numbers, were being offered for sale in Honolulu by the United States Government as surplus property and he had received reports from employees under him as to the kind, condition and approximate quantities of the tools, so far as revealed by an inspection of part of the tools and from information obtained from representatives of the government (R. 80, 81, 94, 95, 128, 159 and 212). Thereupon, MacNaughton communicated with Samuel T. Dickey, Vice President of Hawaiian Equipment Company, who was stationed at San Francisco, California. Dickey was requested by MacNaughton to ascertain whether there might be firms on the mainland which would be interested in purchasing this surplus equipment (R. 81, 158 and 159).

In compliance with MacNaughton's communication, Dickey endeavored to interest someone on the mainland in

the purchase of these tools (R. 159, 160). In this connection it should be pointed out that the government offering had to be acted on quickly; that there was no market in the Islands for any substantial part of these tools \* \* \* "not 10% of them" \* \* \* and that the Hawaiian Equipment Company had no facilities on the mainland whatsoever for marketing these tools (R. 80, 166, 167).

In the course of his efforts to interest someone on the mainland in the purchase of these tools, Dickey, on August 1, 1946, called The Eimco Corporation by telephone from San Francisco, California, and talked with its General Manager, Joseph Rosenblatt, at Salt Lake City, Utah (R. 160, 176, 227).

Dickey furnished Rosenblatt the information which he had received from MacNaughton, concerning the tools and inquired whether Eimco would be interested in purchasing them. Dickey pointed out that if Eimco were interested, it must act quickly. Rosenblatt responded that the matter would be taken under advisement and he would let Dickey know whether Eimco was interested (R. 160-162, 177-178, 186-187).

The next day, August 2, 1946, Rosenblatt telephoned from Salt Lake City to Dickey in San Francisco and advised that Eimco wanted the tools and would pay 55% of their original cost to the government f.o.b. Honolulu. Dickey advised that he would cable that offer to his Honolulu office, which he did (R. 161, 187-188).

On August 5, 1946, and after receipt of Dickey's cable containing Rosenblatt's proposal, MacNaughton put through a telephone call from Honolulu, Hawaii, to Eimco at Salt Lake City, and a conversation was had concerning these tools participated in by MacNaughton and also Jack Blades, a Sales Engineer for Hawaiian Equipment Company, and by Rosenblatt of Eimco (R. 82). Upon identifying himself to Rosenblatt and exchanging greetings, MacNaughton turned the telephone over to Blades (R. 105). Blades informed Rosenblatt concerning the government offering, identifying it, and advising that the same consisted of approximately 2800 tools, packed in two hundred boxes and located in government warehouses at Pearl Harbor. Blades told Rosenblatt that he had inspected some of the tools and that those examined by him were of various standard makes and in good condition and that representatives of the government had assured him that all of the tools were new and in good condition. Rosenblatt indicated that Eimco could handle all of the tools and might be interested in other surplus property (R. 123-127, 135, 141, 206-208).

When Blades concluded, MacNaughton took the phone and explained to Rosenblatt that he had received advise through Hawaiian Equipment Company's San Francisco office that Eimco was interested in purchasing the tools at about 55% of the original cost to the government, but that he could not accept this proposal, which came through Dickey, as a firm bid. Rosenblatt then affirmed Eimco's interest in the tools at about 55% of government cost and MacNaughton asked him to "confirm this interest definitely with a positive price indication by cable" (R. 82, 105, 111).

In this connection it is interesting to note that the original cost of these tools to the government was \$45.00 each for the chipping hammers and \$37.50 each for the scaling hammers, and figured at 55%, this amounts to \$24.75 for the hammers and \$20.625 for the scalers (R. 185).

In response to MacNaughton's request for a firm commitment at definite prices, Eimco, on August 7, 1946, cabled Hawaiian Equipment Company as follows:

"Hawaiian Equipment Company, Honolulu.

"Reference hammers bid maximum 24 dollars each scalers 17.50 each Honolulu will take all. Eimco".

(R. 84-85, Ex. A.)

Upon receipt of this cable on August 8, 1946, MacNaughton contacted the government and purchased the tools. On August 9, 1946, Hawaiian Equipment Company cabled Eimco as follows:

"Joseph Rosenblatt  
The Eimco Corporation  
Salt Lake City, Utah.

In accordance your cable Hawaiian Equipment Company sells you subject delivery from surplus approximately 992 chipping hammers 1836 scaling hammers 24 dollars and 17 Dollars each respectively f o b Honolulu preparing for shipment soon as possible. Will advise. MacNaughton".

(R. 86. Ex. B.)

Within half an hour or so after sending the above cable, MacNaughton sent a further cable to correct a typographical error, reading:

“Joseph Rosenblatt  
The Eimco Corporation  
Salt Lake City, Utah

Regret typographical error in cable scaler price should be 17.50 each Honolulu per your cable and not 17. MacNaughton.”  
(R. 87. Ex. C.)

On the same day MacNaughton mailed a letter of confirmation to Eimco, in which Eimco was asked for shipping instructions (Ex. D. R. 88-90, 101-102, 108).

No shipping instructions were given by Eimco as requested and Eimco refused to accept the goods and pay for them (R. 90). Under date of August 23, 1946, Eimco sent a cable to Hawaiian Equipment Company advising, among other things, that Eimco had no interest in the matter (Ex. E. R. 92).

Commencing about the date of receipt of Eimco's cable of August 23, 1946, and continuing for several months, up to about June of 1947, the parties, through their representatives, carried on negotiations looking toward the sale and disposition of these tools on some basis that would avoid any loss to them or litigation (R. 91-93, 114, 173). Nothing came of these negotiations. Thereafter this suit was commenced by Hawaiian Equipment Company to recover damages for breach of contract and upon a trial of such cause, the case was submitted to the jury on the issues made by the evidence under proper instructions by the trial court. A verdict was returned in favor of Hawaiian Equipment Company (R. 330-331).

## II ARGUMENT

The plaintiff's complaint alleges a written offer by defendant to purchase, and plaintiff's written acceptance thereof, and agreement to sell to the defendant, certain pneumatic scaling and chipping hammers. The undisputed evidence showing the situation of the parties and surrounding circumstances taken together with the exchange of cables (Ex. A. & B.) establish that Eimco agreed to purchase from Hawaiian Equipment Company the entire quantity of certain pneumatic tools known as chipping and scaling hammers, located in certain government warehouses under classification numbers and then being offered for sale by the government in Honolulu, the same being capable of positive identification as to make, kind and quantity.

The make, kind and quantity of these surplus tools, which constituted the subject of the contract as ascertained and identified, are pleaded, and the undisputed evidence proves that the tools particularly described in the complaint are the identical tools comprising the government offering and which defendant referred to and offered to purchase from plaintiff.

The principal issues and contentions relied upon by defendant to defeat this action were settled in the trial court and defendant now asks this court to upset the verdict and judgment of the lower court on the grounds that there is an insufficient memorandum to comply with the Statute of Frauds or assuming the memorandum sufficient, never-

theless, there was lack of mutual assent. The argument to follow will be devoted to the specific contentions of the plaintiff with respect to these general propositions.

1. DEFENDANT'S WRITTEN OFFER SATISFIES THE STATUTE OF FRAUDS BY STATING THE ESSENTIAL TERMS OF THE CONTRACT WITH REASONABLE CERTAINTY.

Defendant lays great stress upon the words in Exhibit "A" "Bid maximum," contending they show an agreement appointing plaintiff as defendant's agent with authority to purchase the goods at certain prices. The minutest search of the record in this case will fail to reveal that there was any serious effort to present, during the trial of this cause, any such issue to the effect that while the defendant denies it made a contract to purchase from plaintiff, still it admits making a contract appointing plaintiff its agent to acquire these goods from the government. That thought never entered the head of either party for the reasons which will hereinafter appear. When Eimco was being pressed to accept the goods, its response was it "had no interest in the matter" (Ex. E, R. 92). Surely that is not a response of a principal to an agent, who has been duly authorized to purchase merchandise on behalf of the principal.

The correct solution, of course, is to be found in the following circumstances. During the negotiations leading up to Eimco's telegraphic offer, Eimco had made a proposal through defendant's San Francisco office to buy from plaintiff at a certain percentage of the cost of the tools to the government. This didn't satisfy plaintiff's president, MacNaughton, as being an acceptable offer and he asked Rosen-

blatt to confirm Eimco's interest in these tools "definitely with a positive price indication by cable," and that is what Eimco did. Instead of couching its offer to buy at prices representing a certain percentage of government cost, it offered to buy at the best or highest price which it was willing to pay for the tools. This was a firm commitment and plaintiff acted on it. Furthermore, in the telephone conversation MacNaughton had with Rosenblatt, as quoted in a subsequent portion of this brief, MacNaughton explained to Rosenblatt precisely plaintiff's position in the transaction (R. 83).

In support of defendant's proposition that, "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 \* \* \*," defendant relies upon and quotes at great length a Circuit Court of Appeals decision in the case of *National Bank of Commerce vs. Lambourne, et al.*, 2 Fed. (2d) 23. Counsel for defendant in commenting on this case state, that the court "anticipating that at first blush, since the sugar was the same as the quantity and quality, the ruling might appear strained \* \* \*." The ruling was strained, but no more so than the contentions made by defendant in this case, and the reasoning of that case was repudiated and the decision reversed on the same points for which the Circuit Court decision is cited and relied upon by defendant. 276 U. S. 469, 48 Sup. Ct. 378, 72 L. Ed. 657. Such authorities are of no value to this court and could result only in

leading this court into the adoption of a refuted theory.

The case of *Waggoner Refining Co. vs. Bell Oil & Gas Company* (Okla.) 244 Pac. 756, cited by defendant at Page 9 of its brief, which relies upon the Lambourne decision, concerns the application of the rule that where the seller is not willing and ready to abide by a material term of a contract, he cannot recover from the buyer. The court's attention, however, should be called to the fact that there is nothing in the reported decision indicating, as stated by counsel for defendant, that the term of the contract in question was contained in a printed portion thereof. Nor does a reading of the case disclose that the parties treated such term as immaterial as is defendant's version of the case. The court states:

"Plaintiff is not in a position to insist that the contract was not breached on its part in a material particular, by its refusal to show the defendant as shipper. The plaintiff evidently considered that portion of the contract as material, because the only reason it failed or refused to ship the gasoline as per shipping instructions, furnished in the telegram of defendant on June 30, was that it declined to ship the gasoline and show the defendant as shipper."

However, counsel argues that assuming the court does not adopt their construction of what was meant by defendant's cable, that is, an instruction to an agent to make a bid, (which agreement would not come within the Statute of Frauds) then, say counsel, the memorandum is ambiguous and, therefore, unenforceable because of the Statute.

The leading authority and author on contracts points out that even though all of the terms are included in a memorandum or offer, they may be written in such an abbreviated way or with such brief description of the property that it is not apparent to an uninstructed person what the meaning of the writing may be. Williston on Contracts, (Rev. ed., Vol. 2, p. 1650, Section 576). The general rule applicable to such cases is stated in the following authorities:

The Restatement of Contracts, Section 235, p. 324, reads:

“The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.”

The rule is stated in a leading Massachusetts decision as follows:

“While parole evidence is not competent to contradict or vary the terms of such a memorandum to show what is intended, we are of the opinion that the situation of the parties and the surrounding circumstances at the time when the contract was made, may be shown to apply the contract to the subject matter.” *New England Wool Company vs. Standard Worsted Company*, 165 Mass. 328, 332, 43 N. E. 122.)

In *Brewer vs. Horst-Lachmund Company* (127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240) the court held that a telegram by an agent to his principal, concerning purchase of hops, and the principals' telegram to the seller confirming the purchase constituted a sufficient memorandum for the Statute of Frauds, and states:

"If there was nothing to look to but the telegrams, the court might find it difficult, even impossible, to determine the nature of the contract or that any contract was entered into between the parties. But the court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all the circumstances under which it was made; and if, when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were the terms, then the court should not hesitate to hold the memorandum sufficient."

Cases applying the general rule above stated will be cited in subsequent portions of this brief, but in the light of the evidence introduced in this case when applied to the words in question, there can be no doubt as to what Eimco intended.

Should counsel for Eimco contend, however, that these words create a doubt or ambiguity, then in resolving such doubt or ambiguity, the court need apply only the well established rule that the language or words of a written contract are to be taken most strongly against the party using them. Our Supreme Court so held in *Jordan vs.*

*Madsen*, 69 Utah 112, 252 Pac. 570, which case involved an automobile dealer's contract, the language of which raised the question whether an automobile delivered to the dealer from the buyer was taken on a consignment for sale or was sold outright to the dealer at a stated price. In this case which was appealed from an order sustaining a demurrer to the complaint, the Supreme Court held that if there were any ambiguity, it was to be resolved against the dealer, who was the maker of the contract.

In the Idaho case of *Stone vs. Bradshaw*, 128 Pac. (2d) 844, a suit by a broker to recover commissions for the sale of ranch property, the memorandum involved contained the language: "I do not think the price is tuff. 35000 your com. 5 per sent." The opinion reads (pg. 847-8) :

"Respondents argue that the word 'plus' should be added to the language used in the letter to make it read 'I do not think the price is tuff. 35000 (plus) your com. 5 percent'. While upon the other hand, appellant argues that the word 'less' should be added and the letter should read 'I do not think the price is tuff. 35000 (less) your com. 5 per sent.'

"It will be remembered that the contract involved here was prepared, and transmitted to appellant, by respondents; that words were used in the contract concerning which doubt has arisen, and which are ambiguous and uncertain. In such circumstances the contract should be construed most strongly against the party preparing it or employing the words concerning which doubt arises. \* \* \*

"Testimony thus introduced merely defines or translates the language of the instrument. It does not vary or add to the terms of the writing and does not fall within the parol evidence rule. The testimony

is admitted for the purpose of ascertaining not only the meaning of the words used, but the intention of the parties as expressed in the writing. Here we are confronted with a dispute between the parties as to the meaning of certain language used in the contract. Conceding, but not admitting, that the words used are ambiguous and uncertain, and that different minds might well reach different conclusions as to their meaning, in such a situation evidence may be received to ascertain the real intention of the parties. Jones on Evidence, Vol. 2, 4th Ed., § 455."

The Supreme Court of Utah applied the same rule in *Boley vs. Butterfield*, 194 Pac. 129, in holding that where a lease of a grazing permit contained a latent ambiguity as to whether the permit was exclusive or in common with other parties, evidence as to the understanding of the parties at the time it was executed was admissible as it did not vary or alter the meaning but tended to explain the sense in which the terms of the instrument were understood. See also *Penn Star Mining Co. vs. Lyman*, 64 Utah 343, 231 Pac. 107.

## 2. DEFENDANT'S WRITTEN OFFER TO PURCHASE SUFFICIENTLY DESCRIBES THE GOODS TO COMPLY WITH THE STATUTE OF FRAUDS.

Counsel for defendant argues at great length that the "memorandum" is insufficient to comply with the Statute, as it lacks certainty as to the property involved. The uncontradicted evidence establishes that defendant's telegraphic offer referred to the purchase of all the pneumatic scaling and chipping hammers then being offered by the government as surplus property at Honolulu, Hawaii, which the record shows were located in government warehouses, packed in 200 boxes bearing government classification num-

bers and, therefore, capable of exact identification as to quantity, models and makes (R. 126-128).

The general rule applicable to this point already has been referred to and authorities cited. (See Restatement of Contracts, Section 235. *New England Wool Company vs. Standard Worsted Company*, supra). It is based on the maxim: "id certum est quod certum reddi potest." The principle has been applied to contracts for the sale of goods in the following cases.

In *Bartlett-Heard and Cattle Company vs. Harris*, 28 Arizona 497, 238 Pac. 327, a telegraphic offer for the sale of heifers referred to them as "Lassen priced them to us at 80 dollars f.o.b. Phoenix" and also as "all the heifers you inspected." Held: "The necessity of parol evidence of all the cattle Lassen priced and of the ones Stonerod inspected does not make the memorandum insufficient."

*Northeastern Paper Company vs. Concord Paper Co.*, 214 App. D. 537, 212 N. Y. S. 218, holds that a contract for sale of all paper in rolls stored in seller's warehouse sufficiently describes the property if it may be ascertained and located by extrinsic evidence.

*Zimmerman Bros. and Company vs. First Nat. Bank*, 219 Wisconsin 427, 263 Northwestern 361, is an interesting case because of the similarity of the factual elements to the present case. In negotiations between the plaintiff and defendant for the purchase of safety deposit boxes by defendant, plaintiff advised defendant that plaintiff had located approximately 1600 boxes which could be obtained from a

receiver of a suburban bank. Defendant wrote to plaintiff:

“This will acknowledge your letter of June 26 and also confirm our conversation over the telephone. In reference to the Park Ridge safety deposit boxes, we will take the boxes.”

Defendant subsequently attempted to cancel the order but in the meantime plaintiff had committed itself to purchase the boxes from the receiver and after making an effort to dispose of the boxes without loss, but without success, plaintiff sued defendant to recover damages for breach of contract. Held that (pg. 361):

“The contention of the defendant that the memorandum disclosed by the letters is insufficient because the goods are not sufficiently described is equally untenable. No more is required than that there must be reasonable certainty. The descriptions need not be so minute and exact as to exclude the possibility that some other goods than those intended will also fall within the words of the writing.”

In *Williams vs. A. C. Burdick and Company* (Oregon) 125 Pac. 844, 126 Pac. 603, the court held that a contract for the sale of prunes was completed upon an exchange of certain telegrams, although the acceptance made reference to mailing a contract. The telegraphic offer and acceptance referred to an entirely different grade of prunes, but the court resolved this doubt without difficulty by reference to a subsequent letter of the parties which, while not constituting part of the contract, showed that the parties had in mind the same thing. The court says:

“Whether the ‘mailing contract’ referred to in the defendant’s telegram related to ‘thirties’ or to ‘30-40s’ cannot be determined from an inspection of the message. Any doubt on that subject, however, was resolved when the letter accompanying the contract reached New York by mail several days after the receipt of the defendant’s telegram.”

In considering the authorities cited by defendant, we might state that we have no quarrel with the general rules announced therein. The question is one of their applicability or application of those rules to this case. In a case such as *Kerbin vs. Bigland* and *Osborne vs. Moore*, cited on Pages 11 and 12 of defendant’s brief, the courts, of course, hold that where the memorandum omits essential terms of the contract or is so indefinite and vague that the court, even with the aid of extrinsic evidence as to the surrounding circumstances, cannot ascertain the intention of the parties the Statute is not complied with. While it might be argued that *Lewis vs. Elliott Bay Logging Company*, 191 Pac. 803, cited by defendant, is not strictly in harmony with the great majority of cases on this point, still the memorandum involved in that case makes no reference whatsoever to the quantity offered, whereas in the instant case, Eimco offered to “take all” the goods in question. In the *Lewis* case, the court says: “It should be noted that in appellant’s letter the subject of sale is referred to simply as ‘fir.’ There is no mention of the quantity.”

Cases such as *Worthheimer vs. Klinger Mills* (Ind.) 25, NE (2d) 246, represent that class of case where the quantity is stated in the memorandum in indefinite terms

such as "bags," "bales," "cars," etc., and the prices are stated in different terms of measurement such as "bushels," "pounds," etc., and having no relationship to the indefinite statement as to the quantity. In these cases the courts generally hold that the statute is not satisfied, in the absence of evidence of any common usage or custom or past dealings between the parties to show the sense in which such indefinite terms are used. See annotation 129 A. L. R. Page 1230. It will be noted that in this class of cases there is uncertainty as to both the quantity and price as one is dependent upon the other, and such uncertainty would have to be resolved by conflicting parol evidence. It is obvious that these cases are distinguishable from the case before this court as in this case the price per tool is specific and the tools involved as above demonstrated were capable of exact determination as to kind and quantity.

### 3. PLAINTIFF MADE AN UNQUALIFIED ACCEPTANCE OF DEFENDANT'S OFFER.

Defendant raises, for the first time on appeal, the contention that the words "subject delivery from surplus" contained in "Exhibit B," imported a new term and rendered the acceptance conditional. Again we make no quarrel with the rule illustrated by the cited cases to the effect that an acceptance which imports a new term renders it conditional and is at most a counterproposal. As stated by Williston:

"A conditional acceptance is in effect a statement that the offerree is willing to enter into a bargain differing in some respect from that proposed in the original offer." (Williston on Contracts Rev. Ed. Volume 1, Section 77.)

The obvious answer to defendant's contention is that the words in question import no new term nor propose a bargain differing in any respect from that intended by Eimco and fully understood by both parties. Rosenblatt's cable refers to "hammers" and "scalpers." The negotiations pending between the parties concerned solely certain pneumatic tools then being offered for sale by the government as surplus at Honolulu, and which it was understood that defendant would acquire from the government and sell to Eimco upon receipt of a firm commitment. The words relied upon as rendering the offer conditional simply state what was the understanding of both parties and clearly implicit in the offer.

Exhibit "B" states in part: "In accordance your cable Hawaiian Equipment Company sells you \* \* \*." Can there be any clearer statement of the acceptance of an offer in accordance with the terms thereof? But, defendant contends that the words following, "subject to delivery from surplus" resulted in obligating "respondent only on condition that delivery can be made or obtained from surplus." In other words it is contended that "subject to delivery from surplus" amounted to a statement that the acceptance would not be effective until a certain contingency happened, namely, the acquisition of the tools from the government. Assuming for the purpose of argument, the correctness of this construction, still this would not preclude a binding contract. Eimco immediately acquired the goods upon receipt of the offer. In such a case, Williston states the rule to be as follows:

“Where there is an acceptance which adopts unequivocally the terms of the offer but states that it will not be effective until a certain contingency happens or fails to happen, then if neither party withdraws and the delay is not unreasonable, a contract will arise when the contingency happens.” (Williston on Contracts, Rev. Ed. Volume 1, Section 77-A.)

We submit, however, that the correct rule as applied to this case is contained in the following statement by the same author:

“Sometimes an acceptor from abundance of caution inserts a condition in his acceptance which merely expresses what would be implied in fact or in law from the offer. As such condition involves no qualification of the acceptor’s assent to the terms of the offer, a contract is not precluded.”

In *Shea vs. Second National Bank of Washington*, 133 Fed. 2nd 17, it was held:

“Generally, an acceptance is not inoperative as such merely because it imposes a condition, if the requirement of the condition would be implied from the offer though not expressed therein.”

In *Frederick Raff Company vs. Murphy*, 110 Connecticut 234, 147 Atlantic 709, the defendant, a sub-contractor, submitted to plaintiff, the contractor, a bid on plumbing to be included as part of plaintiff’s bid on the whole job, and plaintiff after learning of the award to him of the contract through the newspaper, telephoned the defendant that he had been awarded the contract and when officially notified, he would notify defendant. However, the defendant at-

tempted to revoke before official notice was received by the contractor. The court held it was a binding acceptance by the contractor and stated :

“That both offer and acceptance to become effectual only in the event that the plaintiff’s bid was actually accepted and the contract awarded to it, did not detract from the mutuality of their undertaking: The defendants had no right to withdraw from their agreement after the plaintiff had accepted their bid, though the contract had not yet been awarded to it.”

Under the same argument to the effect that the acceptance was conditional and again for the first time on appeal, defendant contends that while the offer fixes the place of delivery at Honolulu, the acceptance by adding the words “f.o.b.” rendered it conditional. This contention is so clearly beyond any issue raised by the pleadings, the evidence, or brought to the attention of the trial court, it should be entirely ignored. The fact is that both parties understood that the sale was f.o.b. Honolulu. The goods were being purchased by Eimco for resale on the mainland at a profit. The abbreviation “f.o.b.” has a well defined business meaning of which many courts take judicial notice and as applied to this case meant that plaintiff would deliver the goods sold at Honolulu on board a vessel without charge to Eimco. (See annotation in 16 A. L. R. 597.)

What possible new proposal rendering the acceptance conditional can be found in the statement that plaintiff would pay the charges for handling the goods until they were put on board a vessel for shipment to Eimco? When

plaintiff confirmed its acceptance by letter mailed the same day (Exhibit D) and asked defendant for shipping instructions, did plaintiff reply to the effect that it refused to be bound because it understood that the goods were to be delivered at Honolulu and that defendant and not plaintiff was to pay the handling expenses in putting them on board ship?

In concluding his argument that the acceptance was conditional, counsel for defendant say: "This is not a case in which appellant welched from a bargain as respondent attempts to establish."

May we state that there is nothing in this record indicating that we have claimed anything beyond the fact that Eimco breached a bargain entered into with Hawaiian Equipment Company. Any implications contained in the word "welch" beyond that are purely counsels' conception of the situation. But, opposing counsel say not only did Eimco not "welch" from a bargain, but plaintiff's "action smacks of bad faith." May we respectfully ask the court's indulgence for a brief glance at the record?

Plaintiff filed suit for breach of contract. Defendant filed an answer under oath which reads like a treatise on defenses to breach of contract (R. 7-10). Defendant denies first that it entered into a contract. It then pleads the statute of frauds. It claims further a breach of warranty, which it abandoned at the trial, and also fraud on the part of plaintiff which has been resolved by the verdict of the jury. Doubtless, anticipating that these defenses might be of no avail, defendant further pleads and offers to prove that admitting it entered into a contract, nevertheless it was

acting in this transaction as a disclosed agent for Charles M. Weinberg's company at Los Angeles, California, known as the Brown-Bevis Equipment Company, or, if this defense fails, then asserts defendant, Mr. Joseph Rosenblatt may have made a contract but he had no authority to act for the Eimco Corporation of which he was general manager, therefore, Hawaiian Equipment Company will have to look to Rosenblatt personally for any damages suffered in this transaction. Still further, says defendant, if the above ideas on agency are not acceptable to the court and it isn't established that Eimco was acting as agent for Weinberg's company, or that Rosenblatt had no authority to deal for Eimco, defendant has in reserve a further defense viz: that Eimco did not offer to buy from Hawaiian Equipment Company—it merely appointed Hawaiian Equipment Company as its agent.

Defendant's ingenuity was not exhausted by the above propositions as it has brought forth some new ideas on appeal such as the assertion that the acceptance was conditional because it imported an entirely new term in the bargain contrary to what was intended by defendant. And, in conclusion, and should the above contentions be not sustained, nevertheless, claims defendant, plaintiff's action in promptly acting on defendant's offer and laying out in cold cash approximately \$46,000 in reliance thereon and its prompt acceptance by cable as clearly required by the offer "smacks of bad faith." We submit that as to this accusation the record speaks for itself.

#### 4. THERE WAS A MEETING OF MINDS ON ALL THE ESSENTIAL TERMS OF THE CONTRACT.

At the outset we desire to bring to the court's attention clearly the precise propositions argued and relied upon by defendant in the concluding part of its brief as they are stated and we understand them, and as they will be answered in the argument to follow.

Point "5" of defendant's argument is that: "The court erred in refusing to direct a verdict for appellant and in refusing to grant appellant's motion for new trial," and as a ground therefor, it is stated: "These assigned errors go to the same question as the errors in admitting in evidence Exhibits "A" and "B", and also as to the question of the insufficiency of the evidence to sustain the verdict, one of the grounds of the motion for new trial." Since, as pointed out by defendant, these assigned errors go to the same questions which already have been argued, there is no reason for reiteration of our points and authorities on said propositions.

Point "6" of defendant's argument is that: "The evidence shows that as a matter of law there was no contract as there was no meeting of minds." If, as contended, the evidence affirmatively shows as a matter of law there was no contract as there was no meeting of minds, then, of course, the trial court should have directed a verdict for defendant, as this suit is founded on contract.

In the first place we wish to call the court's attention to the fact that the pleadings nowhere support the contention

that Hawaiian Equipment Company was acting as agent for Eimco in these transactions. It is stated under oath in defendant's answer:

"That the defendant was at all times, in the transactions *alleged in the complaint*, the agent for Brown-Bevis Equipment Company of Los Angeles, California, and that the fact that defendant was so acting as agent was at all times, known to the plaintiff herein." (R. 9.)

This defense, which was unavailing, and for that matter not argued in this court, nevertheless, is absolutely inconsistent with defendant's present contention and counsel realized this in his carefully worded ground for a directed verdict, which is the only ground embodying its contention that there was no meeting of the minds. Note the exact words of counsel on this point:

*"Conceding that said two cables constituted an offer and acceptance to buy and sell, they did not result in a valid contract, because there was no meeting of the minds."* (R. 327.)

If the cables constituted an offer and acceptance to buy and sell wherein was there no meeting of the minds? We have hereinabove demonstrated that Exhibits "A" and "B", when considered in the light of the circumstances under which they were made as required by the authorities are definite and certain as to the essential terms of the bargain, namely, the parties, the goods, the prices and the place of delivery. Nothing would be gained by rearguing this subject.

If, as has been argued, Exhibit "A" standing alone appears ambiguous, the answer is that no ambiguity remains when the evidence surrounding its making is considered, as it is proper to do. This is supported in the Utah Supreme Court decision cited by defendant, *Tynge vs. Constant-Lorraine Investment Company*, 47 Utah 330, 50 Utah 1, in which telegrams concerning an option for the sale of real estate described the same as "property West side State Street" and the court said "It was competent to aid the ambiguity by extrinsic evidence which the parties were permitted to do." However, this decision is not an authority for the proposition that if, as claimed by defendant, the language of the written offer, standing alone, is obscure or ambiguous, then the court, as a matter of law and without resort to extrinsic evidence, must hold there is no contract as there is no meeting of the minds. To be logical that is the position that defendant must take, no matter how untenable, because when the extrinsic evidence herein referred to is applied to the cables, it not only does not show as a matter of law that Exhibit "A" was intended as an agency contract, but affirmatively shows that it was intended by defendant and understood by plaintiff as an offer to purchase and this is conceded by defendant in predicating his request for a directed verdict on the ground that there was no meeting of the minds.

We have already called attention to the well settled rule of construction which requires that if the words "bid maximum" are ambiguous as claimed by defendant, then the language used by defendant must be taken most strongly against it. However, there is no need to rely entirely on

this rule of construction as the record contains affirmative evidence showing that there was no misunderstanding by the parties as to the meaning of Exhibit "A" and this being so appellant cannot maintain its assigned error that there was no meeting of the minds as a matter of law.

This is the evidence: Hawaiian Equipment Company was a dealer in machinery engaged in buying and selling it at a profit which was known to defendant (R. 86, 158). This was the purpose of its organization and there is no evidence that it had ever acted in the capacity of broker or factor. The telegram (Exhibit A) was sent as the result of a request made to Eimco for a firm bid to Hawaiian Equipment Company and with a full explanation of the latter's position in the transaction.

A few days prior to MacNaughton's request for a firm bid at positive prices, Rosenblatt phoned plaintiff's San Francisco office and advised plaintiff's representative stationed there, Samuel T. Dickey:

"Q. Now, what else did Mr. Rosenblatt say to you on that occasion?

A. That is all. It was a very short conversation. He said, 'We want the chippers and scalers. We offer 55 per cent of their cost to the, original cost to the government, f. o. b. Honolulu.'

And I said, 'Fine; I will cable that out to my office today, my Honolulu office today.'" (R. 188.)

On direct examination Rosenblatt testified concerning his conversation with Dickey:

"Q. Now, Mr. Rosenblatt, will you tell the court and jury what Mr. Dickey said to you on the occasion

of that telephone call?

A. Well, when Mr. Dickey called he introduced himself as being with the Hawaiian Equipment Company.

He said he had heard from his people in Honolulu, that the government was offering a quantity of pneumatic tools out of surplus, and he asked me if we would be interested in buying them." (R. 229.)

MacNaughton's testimony, which stands uncontradicted in the record, discloses that on August 5, 1946, two days before Eimco's cable, MacNaughton advised Rosenblatt, during a telephone conversation, as follows:

"A. I also explained to him what our position in the transaction would be.

Q. What, if anything, did you say in that explanation?

A. Namely, that we wanted to get a positive price from him, and that, if we were able, the Hawaiian Equipment Company, to purchase the tools for less than that price, the difference between what he gave to us and what we had to pay the Government would represent our profit in the transaction.

He said that was all right, that he would confirm the price by cable, which he did within a day or two." (R. 83.)

As a part of defendant's cross examination regarding the same matter, MacNaughton testified:

"A. I identified myself, as soon as I came on the phone, and turned the phone over to Mr. Blades. When Blades was through with his conversation, I then came on the telephone and explained to him in

some detail our position in this business, that we were getting a bid from him for these tools, from him, as representing the Eimco Corporation, for these tools; we were going to take that bid, and then if we could buy the tools from the government for anything less than that bid, the difference between those two prices represented our profit.

Mr. Rosenblatt indicated that that was all right, indicated an interest in the tools at about 55 per cent of government cost.

We asked him if he would confirm this interest definitely with a positive price indication, by cable, and the matter was concluded and the cable came two days later, or three days." (R. 105.)

After the exchange of cables and letters of confirmation, the record shows that the next communication sent by Eimco to Hawaiian Equipment Company was Eimco's telegram of August 23, 1946, which reads:

"Salt Lake City, Utah, August 23rd.

MacNaughton

Hawaiian Equipment Co Honolulu

Rosenblatt vacationing refer your letter August 9th to Weinberg Brown-Bevis Company in accordance Rosenblatts letter to you August 7th Eimco Corporation itself has no interest this matter. (Signed) Eimco". (R. 92, Exhibit A.)

It must be remembered that if Exhibit "A" was a direction from a principal to an agent to make an offer on behalf of the principal it required no acceptance other than the acquisition of the goods from the government at the prices specified. Is it reasonable to suppose that during subsequent

negotiations of the parties continuing for several months and looking toward the sale and disposition of these tools to avoid loss or litigation, that Eimco offered to take them off its alleged principal's hands for the price paid to the government plus an agent's commission (concerning which latter the record is silent) ? (R. 91-93, 114, 173).

Of course, the answer to all these questions is that Exhibit "A", when read in the light of the evidence, was sent in response to plaintiff's request for a firm commitment and simply meant and was intended to mean that Eimco offered to purchase the goods from Hawaiian Equipment Company, and that the price offered by Eimco was \$17.50 each for the scaling hammers, and \$24.00 each for the chipping hammers (and not 55% of the original cost to the government as had been indicated by Eimco in previous negotiations.)

There is no point in lengthening this brief by taking up and discussing each case cited by defendant under this subject, as they stand for the rule illustrated by the famous *Raffles* case, which holds that when the extrinsic circumstances are applied to the express language of the contract and it is rendered ambiguous because equally applicable to two different subjects, then, if it is further established to be the fact that both parties intend in good faith to contract with reference to different subjects a contract is precluded, as there is a lack of mutual assent. However, it should be noted that if, in such a case, the fact is established that both parties intend to contract with respect to the same subject, then, regardless of the latent ambiguity, a contract

results.

An interesting comment on the Raffles case is found in *Williams vs. A. C. Burdick & Co.* (supra) which reads as follows:

“Thus a text-writer in discussing this subject and referring to the case of *Raffles v. Wichelhaus*, 2 H. & C. 906, says: ‘The defendant agreed to buy, and the plaintiff agreed to sell, a cargo of cotton, “to arrive ex Peerless from Bombay”. There were two such vessels sailing from Bombay, one in October; the other in December. The plaintiff meant the latter; the defendant the former. It was held that the defendant was not bound to accept the cotton. It is commonly said that such a contract is void, because of mutual mistake as to the subject-matter, and because, therefore, the parties did not consent to the same thing. But this way of putting it seems to be misleading. The law has nothing to do with the actual state of parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct. If there had been but one “Peerless,” and the defendant had said “Peerless” by mistake, meaning “Peri” he would have been bound.’” Holmes’ Com. Law. 309.

Furthermore these cases are not authority for defendant’s argument that if the expressed language as contained in the offer (Exhibit A) appears obscure when unaided by extrinsic evidence, then as a matter of law there is no contract. But, defendant is driven to this untenable position because, as pointed out above, when the court is placed in the position of the parties and reads Exhibit “A” in the light of their knowledge and the attendant circumstances,

the evidence does not show, as defendant assigns error: "That as a matter of law there was no contract as there was no meeting of the minds," but discloses that both parties intended a contract of purchase and sale, and not one of agency.

In concluding this subject, we wish to call attention to a fundamental judicial principal that where the evidence considered as a whole manifests an intention of the parties to arrive at a bargain, a construction will be given to the transaction, if possible, which will establish a valid contract rather than defeat one.

In *Dick vs. Voggt* (Okl.) 162 Pacific 2d 325, it is said:

"Peculiarly applicable to the facts disclosed by the record in this case is the first paragraph of the syllabus to the case of *Schoene v. Hicks et al.*, 162 Okl. 294, 23 P. 2d 170: 'In determining the question of the existence of a contract, the court will consider the acts, conduct, and statements of the parties as a whole, and, if it appears that there was a meeting of minds on all of the essential elements of the contract, and an intention on the part of both parties to enter into a contract upon clear and unequivocal terms, and one of the parties in good faith has acted in reliance upon the alleged contract, the court should construe the facts to constitute a contract rather than to defeat one.' "

In *Schoene vs. Hicks et al.*, 162 Oklahoma 294, 23 Pac. 2d 170, which is cited in the above case, it is stated:

"In the interest of sound business policy the courts have laid down the following rule: 'In determining whether the facts present the elements of a

contract, if a bona fide intent on both sides to come to a definite agreement is shown, it should be construed, if possible, to constitute an agreement rather than to defeat one.' Neilson & Kittle Canning Company v. F. G. Lowe & Co., 149 Tenn. 561, 260 S. W. 142. See, also, Empire Rubber Manufacturing Company v. Morris, 73 N. J. Law, 602, 65 A. 450; 13 C. J. 114."

The same rule was applied by this court in *Allen vs. Bessinger and Company*, 62 Utah 226, 219 Pac. 539, which upheld a contract where the plaintiff offered to furnish a copy of the official report of certain Interstate Commerce Commission's proceedings and defendant's response to the offer was that: "We will be interested in your official report of the definite changes in the handling of freight, and would ask that you put our name down for a copy of same."

### III CONCLUSION

We have endeavored, as we should, to confine our argument to the errors assigned and points argued by defendant, and in summarizing we will do the same.

1. Defendant's first point is that the court erred in admitting Exhibit "A" as not setting forth the essential terms of the contract with the certainty required by the Statute of Frauds. Under the authorities, the court, in considering Exhibit "A", must place itself in the position of the parties, and, having done so, Exhibit "A", in the light of the situation of the parties, their knowledge and the attending circumstances, states the essential terms of the contract with reasonable certainty.

2. Defendant, for the first time, on appeal, makes the contention that plaintiff's acceptance, as contained in Exhibit "B", is conditional as importing new terms not contained in the offer. The acceptance was unequivocal, and the so-called "new terms" were not new, but implied in the offer and an integral part of the bargain as understood by both parties, and, therefore, under the authorities, did not render the offer conditional. We have also called the court's attention to the fact that, though we accept the strained construction of defendant, that the acceptance was not to become effective until the happening of a contingency, namely, the acquisition of the goods from surplus, nevertheless, a contract is not precluded and came into existence upon defendant's obtaining the goods from the government.

3. Defendant assigns as error the admission of Exhibit "C" which is merely the correction of a typographical error in Exhibit "B" to which it refers and which was sent a half hour or so after Exhibit "B". Exhibit "B", having been properly admitted, there can be no question as to the admissibility of Exhibit "C".

4. Error is assigned in admitting Exhibit "D" because it was merely a confirmation of the cablegrams between the parties after the offer and acceptance had been made. Nothing more is claimed for it, but to that extent it was competent and material for consideration by the trial court.

5. Inasmuch as appellant's assignment of error to the court's refusal to direct a verdict for defendant and grant a new trial is stated to be repetitious of the same questions

raised by the above assignment of errors respecting the admission of Exhibits "A" and "B", we will so treat it in this summary.

6. Defendant's concluding assignment of error is that "The evidence shows that, as a matter of law there was no contract as there was no meeting of minds," the argument being that the words "bid maximum" contained in Exhibit "A", "are clearly indicative of an authorization of plaintiff to bid for and on behalf of defendant." We have directed the court's attention to the fact that this point also, is raised for the first time on appeal because counsel, in his request for a directed verdict for lack of meeting of minds predicates it on the concession "that said two cables constituted an offer and acceptance to buy and sell" (R. 253). However, we have shown further that Exhibit "A", when aided by extrinsic evidence as was proper under the decisions of this court and other jurisdictions, was intended by defendant and understood by plaintiff as an offer to buy and not as an appointment of plaintiff as agent. In this connection it has been shown that the words "bid maximum" were nothing more than Eimco's response to Hawaiian Equipment Company's request for a firm commitment at positive prices, as Hawaiian Equipment Company did not care to deal in the matter of price on the basis of a certain percentage of the original cost to the government, as had been the basis of Eimco's previous proposals during the preliminary negotiations.

We respectfully submit, therefore, that the errors assigned to the proceedings had in the trial court are without

basis in law as announced by the decisions of this court and the authorities generally, and the verdict and judgment of the lower court should be affirmed.

Respectfully submitted,

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