

1952

R. J. Daum Construction Company v. Thomas B. Child and C. W. Child : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

R. J. DAUM CONSTRUCTION
COMPANY, a corporation,
Plaintiff and Appellant,

vs.

THOMAS B. CHILD and C. W.
CHILD, co-partners doing business
under the name and style of Thomas
B. Child and Company,
Defendants and Respondents.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	PAGE
Statement of Facts	1-11
Statement of Points Relied Upon	12-13
Argument	13-33
Point I.—The facts which were stipulated require a finding and conclusion as a matter of law that the offer of the defendants had been accepted by the plaintiff and that a contract between the parties had come into existence prior to the refusal of the defendants to proceed.....	13-20
Point II.—The transmittal of the subcontract form was a confirmation of the previous acceptance of the offer and the subcontract form was but the written memorial of the contract so created.....	20-21
Point III.—The subcontract form submitted to defendants was not a counter offer or rejection of defendants' proposal	22-25
Point IV.—The defendants are estopped to deny the existence of the contract.	25-28
Point V.—If the acts of the parties as stipulated were not conclusive as a matter of law, the intention of the plaintiff to accept the offer of the defendants and the sufficiency of the acts and conduct of the plaintiff to convey such intention to the defendants were for the jury, and the granting of defendants' motion to dismiss was error	28-30
Point VI.—The entry of the judgment of dismissal without findings or conclusions, and without a motion for summary judgment and notice thereof was error.....	30-33
Conclusion	34

INDEX OF CASES AND AUTHORITIES

Calumet Ref. Co. v. Star Lub. Co., 64 Utah 358, 230 Pac. 1028	21, 25
Colby v. Klune, 178 Fed. (2d) 872.....	33

TABLE OF CONTENTS — *Continued*

	PAGE
Ehret Magnesium etc. Co. v. Gothwaite, 149 Fed. (2d) 829....	23
Northwestern Engineering Co. v. Ellerman, 10 N.W. (2d) 879 (N.D.)	26
Pierce v. Ford Motor Co., 190 Fed. (2d) 910.....	32
Raff Co. v. Murphy, 147 Atl. 709 (Conn.).....	17, 20, 22
Thornton v. Pasch, 104 Utah 313, 139 Pac. (2d) 1002.....	13, 28
Restatement of the Law, Contracts, Chap. 3, section 36.....	21
Restatement of the Law, Contracts, Chap. 3, section 90.....	26
Utah Rules of Civil Procedure, Rule 12, 12(c).....	30
Rule 16	33
Rule 52, 52(c)	30
Rule 56, 56(c)	30
Rule 56(d)	31

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No. 7790

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an appeal from a judgment entered December 5, 1951 dismissing the action upon the motion of the defendants (Record p. 60). For convenience the parties will be referred to as they appeared in the court below.

The motion to dismiss was made at a pre-trial hearing called by the Judge to whom the case had been assigned for trial by jury. No jury was called or empaneled. No Findings of Fact were made or signed by the Judge or waived by the plaintiff, nor was any opinion rendered by the Judge.

THE PLEADINGS

The Complaint (Record pp. 1-2) alleged that the defendants had made an offer to the plaintiff to furnish all labor and materials necessary for the completion of the brickwork on firewalls at the Utah General Depot, Ogden, Utah, according to plans and specifications for the total of \$91,392.00. That relying upon that bid the plaintiff submitted a bid to the Government to do the entire work specified in the plans for a flat sum and was awarded the contract upon that bid. That the plaintiff accepted the defendants' offer, that the defendants repudiated the contract and refused to perform and that plaintiff was required to do the work which defendants had offered to do on its own account at a cost to it in excess of \$79,000 over defendants' bid.

The Answer of the defendants (Record pp. 3-5) admitted the offer, but denied that the plaintiff's bid to the Government was made in reliance thereon and denied that plaintiff had accepted it. They alleged that the plaintiff tendered to defendants a form of contract which varied from their bid in material respects. The Answer also denied the damage claimed.

PROCEEDINGS

At the instance of the defendants, the deposition of R. C. Riding, the superintendent of the plaintiff and the individual by whom all negotiations on behalf of the plaintiff in connection with the contract were carried on, was taken January 20, 1951. On the same date the deposition of Mr. Thomas B. Child, one of the defendant

partners and the individual by whom all negotiations on behalf of the defendants were carried on, was taken at plaintiff's instance. (These depositions are incorporated in the Record as a separate document of 118 pages and given Record page numbers beginning at page 102.)

Thereafter the case was assigned for trial without a jury upon demand of the plaintiff and was later transferred to the jury calendar on motion of the defendants (Record pp. 6-10). It was assigned to Judge Lewis of the District Court for trial during September, 1951. Judge Lewis called the case for pre-trial, and after pretrial conference he entered an order in which the parties were directed to file a written stipulation (of facts) before September 14th (Record pp. 11-12).

No stipulation was entered into by the parties until September 29, 1951 when the stipulation found at pages 14 to 29 of the Record was signed by counsel for both parties and submitted to Judge Lewis. This stipulation was used as a basis for the facts agreed upon by counsel at the subsequent pretrial before Judge Ellett (Record pp. 30-55). Those agreed facts as well as those upon which no agreement was reached will be stated below.

Meanwhile the case had been transferred to Judge Ellett, who called a pretrial conference on October 16th. At this conference *counsel for defendants refused to agree that the evidence as recorded in the depositions and stipulation might be considered and weighed by the court for the purpose of determining as a matter of law whether a contract had or had not been entered into by the parties* (Record pp. 31-34) In addition, the plaintiff

withheld its consent that the judge might *weigh* the evidence and decide the case as a trier of the facts (Record pp. 52-3). Trial by jury was not waived by either side.

At the close of the pretrial conference the plaintiff moved for an order holding the case for trial on the question of damages, the defendants moved to dismiss and the court set a date for argument (Record pp. 52-53). The arguments were heard October 20th and the court took the motions under advisement (Record p. 58). On October 26th, according to the entry in the register and the entries on the page prepared for the minutes of the court (Record p. 59) which on November 28th were still unsigned and bore no record of having been seen or approved by the Judge, he decided the motions (Record p. 61), denying the motion of the plaintiff and granting the motion to dismiss. On December 5, 1951, a formal order dismissing the action was signed by the Judge and entered by the clerk (Record p. 60).

THE EVIDENCE

The facts, both conceded and disputed, before the court at the time of the motions are as follows:

The Government issued an Invitation to contractors to submit bids for the construction of firewalls in certain buildings located at the Ogden General Depot, Ogden, according to plans and specifications which had been prepared therefor (Stipulation, Record pp. 15, 35). The specifications called for the erection of twelve brick walls in four different buildings and the installation of *rolling* steel firedoors in each wall and for an alternate bid for

the work in case the Government should decide to install the firedoors later and brick in the doorways in the meanwhile (See Exhibit A, including Invitation for Bids and Bid Form included therein). Subsequently the Government issued an Addendum to the specifications which called for an alternate bid for the construction of the walls and the installation of *sliding* steel firedoors instead of rolling doors, and the bids for the work if the doorways were bricked in (See Exhibit B, Addendum No. 1 and Bid Form included). In the Bid form accompanying Addendum No. 1 the bid for rolling doors was designated as Schedule I and the bid for sliding doors designated as Schedule II. The bids were to be opened June 22, 1950 at 2 P.M.

Section SC-1 of the Special Conditions of the Specifications referred to in the Invitation for Bids (Exhibit A) provided:

“The contractor will be required to commence work under this contract within ten (10) calendar days after date of receipt by him of written notice to proceed, to prosecute said work with faithfulness and energy, and to complete the entire work ready for use not later than one hundred twenty (120) days after the date of receipt of the said notice to proceed. The time stated for completion shall include final cleanup of the premises.”

Section SC-16 of the Special Conditions provided:

“In case of failure on the part of the contractor to complete the work within the time fixed in the contract or any extensions thereof, the con-

tractor shall pay the Government as liquidated damages the sum of Fifty (\$50) Dollars for each calendar day of delay until the work is completed or accepted."

The plaintiff, a contracting corporation, intended to submit a bid for the work and on June 20th Mr. Riding, its superintendent, called Mr. Thomas B. Child, a member of the defendant partnership long engaged in masonry and brickwork construction, and asked if they wished to submit a bid to do the brickwork on the project. Mr. Child said he would if he could see the plans and specifications, so Mr. Riding delivered and left with Mr. Child a set of the plans and specifications (Exhibit A) and discussed the proposed work with him. Mr. Riding did not give Mr. Child a copy of the Addendum No. 1 at this time or at all (Record pp. 36-38; Stipulation paragraphs 4, 5 and 6; Record p. 15).

Mr. Child telephoned to the plaintiff a proposal to do the brickwork called for on the morning of June 22nd (Record p. 37; Stipulation paragraph 7, Record p. 16), and on the following day confirmed it by letter (Record pp. 39, 43; Stipulation paragraphs 7-8; Record p. 17). Mr. Riding received the telephone bid, used the quotation in figuring the plaintiff's bid to the Government and submitted it before the time set for the opening (Record p. 41). The plaintiff was the low bidder (Record p. 17).

Shortly after the bids to the Government were opened but before the contract had been awarded, Mr. Riding told Mr. Child that the defendants' bid had been the lowest bid for the brickwork that plaintiff had received

and that he had used Child's bid in figuring plaintiff's bid. He also told Mr. Child that plaintiff's bid to the Government had been low and that when they got fixed up with the contract the defendants could expect to get a contract for the brickwork (Record p. 42, Stipulation paragraph 12, Record p. 17).

One week after the bid opening, the plaintiff was awarded the contract on the basis of the Government's acceptance of plaintiff's bid of \$190,392.00 for the entire job with the installation of *rolling* steel doors on Schedule I of plaintiff's bid (Record pp. 40-41; Stipulation paragraph 16; Record p. 19), which was the identical work specified in the plans and specifications delivered to Mr. Child as above stated (see Exhibits A and B). (Note: The reference to Schedule II on page 41 of the Record is erroneous.)

On July 3rd according to Mr. Riding (Deposition p. 20), but Mr. Child thought it was earlier (Deposition p. 98), Mr. Riding called Mr. Child and asked him if he would rather set the reinforcing steel as his work progressed or have Daum Company or some other subcontractor set it. Mr. Child told him that he would rather place it himself provided the steel was cut, bent and designed properly.

The general contract was dated June 29, 1950 (Answer, Record p. 3) and under date of July 10, 1950 the Government issued its formal notice to the plaintiff to proceed and to commence work within 10 days after receipt of the notice as provided in Sec. SC-1 of the Specifications (Exhibit A). The notice to proceed was received

by the plaintiff at Inglewood, California on July 13 (Record p. 19).

On July 11th the plaintiff mailed from its office at Inglewood, California, to the defendants at Salt Lake two copies of a form of Subcontract Agreement dated the same day and signed by the plaintiff (Exhibit C). These were on printed forms, the blanks in which had been filled in with typewriting giving the date, the names of the parties, referred to as Contractor and Subcontractor respectively, a reference to the Government Contract and referred to the portion of the work to be done by the Subcontractor (defendants) as "Brickwork." Then there was inserted the following:

"Time is of the essence of this contract. General Contract to be completed within 120 calendar days. \$50.00 per day penalty thereafter. Sub-contractor to complete its work as scheduled."

The form also included Addendum 1 as part of the specification for the work to be performed. No other of the many blanks in the printed form were filled in except the price to be paid subcontractor for his work, \$91,392.-00, in payments equal to 90% of the work done by the subcontractor during the preceding month and the balance 10% to be paid within 35 days after completion and acceptance of the project by the Government.

These Subcontract forms were transmitted to the defendants with a letter dated July 11th requesting the defendants to sign and return one to the plaintiff (Record p. 44; Stipulation paragraph 19; Record p. 21). This

letter and subcontract forms were received by the defendants on or before July 13th and before the next conversation between the plaintiff and the defendants (Depositions, Riding p. 22, Child p. 100-101), on July 14th.

Meanwhile Mr. Child had told the Interstate Brick Company that he was expecting to sign up with the plaintiff for the job and had obtained the price of brick delivered at the job. Mr. Child testified that he had not placed an order for 1,200,000 brick but had just told them (the Brick Company) that he expected to get the job (Record, Deposition Child, page 109). Mr. Riding testified, however, that after the defendants had refused to go ahead with the work Mr. Child told him that he would turn over his order for brick on the project to the plaintiff and that he had on order 1,200,000 brick for this particular project (Deposition, Riding, pp. 26-27-28).

On July 14th Mr. Riding called Mr. Child by telephone to make an appointment to have Mr. Child go to Ogden with him and meet the other subcontractors there and go over the work and get his ideas how he would like to handle his part of the work. Mr. Child agreed to ride up with Riding at 9 o'clock the next morning and said nothing about having received the subcontract forms or having any objections to its terms or provisions (Deposition, Riding p. 21). Mr. Child said that in this conversation Riding wanted him to go over the job with him and that Child then told him they had received the form of contract and had decided not to sign the job up (Deposition, Child p. 99).

The following morning, July 15th, Mr. Riding called

on Mr. Child at his home when for the first time, according to Riding, Mr. Child told him that he and his brothers had met the night before and had decided not to go through with the contract because of the conditions following the outbreak of the war in Korea, that they had been losing men and because of the insertion in the subcontract form of the words "general contract to be completed within 120 calendar days" and "\$50.00 per day penalty thereafter." It was in this conversation that Mr. Child offered to turn over to the plaintiff his order for the 1,200,000 brick he had expected to use on the job (Deposition, Riding, pp. 22-28).

Mr. Riding offered to strike from the Subcontract form the clause "\$50.00 per day penalty thereafter" but Mr. Child still refused to go ahead (Deposition, p. 23). Mr. Child denied that Riding had offered to strike anything from the Subcontract Form and his version of the conversation at this time is contained in his Deposition at pages 100-103.

There is no evidence that the defendants had withdrawn their offer until after they had received the subcontract from the plaintiff or, according to plaintiff's testimony, before the meeting of Mr. Child and Mr. Riding on the morning of July 14th after Mr. Child had agreed to go to Ogden to lay out the work.

Under date of July 25th the plaintiff wrote the defendants a letter requesting them to advise plaintiff by 5 o'clock July 29th of their willingness to proceed to carry out the terms of their proposal in default of which

the plaintiff would make other arrangements for the performance of the work and hold the defendants responsible for the damages (Record pp. 26-27). The defendants replied by letter the following day, repeating their refusal to go ahead, saying:

“In the subcontract which you submitted to us under date of July 11, 1950 you added a material variance to our proposal in that you required the work to be completed within 120 calendar days and provided for a \$50 per day penalty thereafter and which was not contemplated in our original proposal.

“The writer discussed this matter with Mr. Riding about two weeks ago when he took up the form of the subcontract you submitted and explained to Mr. Riding that we would not accept the subcontract or execute it with the changes both as to the time limit and the penalties, and the writer explained further that because of present conditions and the changes in the labor market by reason of war conditions and our loss of employees that we would not execute any subcontract with you for this work.”

The defendants never did sign any contract to do the work and never did any work on the project (Record p. 46; Record p. 26; Stipulation paragraph 24) and after receipt of the defendants' letter of July 26th the plaintiff let a subcontract to Clark Ivory to do the work for \$95,000.00 (Record p. 49, Exhibit F). This contract was later abrogated (Record p. 54) and the work was ultimately completed by the plaintiff through other subcontracts.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

POINT I.

THE FACTS WHICH WERE STIPULATED REQUIRED A FINDING AND CONCLUSION AS A MATTER OF LAW THAT THE OFFER OF THE DEFENDANTS HAD BEEN ACCEPTED BY THE PLAINTIFF AND THAT A CONTRACT BETWEEN THE PARTIES HAD COME INTO EXISTENCE PRIOR TO THE REFUSAL OF THE DEFENDANTS TO PROCEED.

POINT II.

THE TRANSMITTAL OF THE SUBCONTRACT FORM WAS A CONFIRMATION OF THE PREVIOUS ACCEPTANCE OF THE OFFER AND THE SUBCONTRACT FORM WAS BUT THE WRITTEN MEMORIAL OF THE CONTRACT SO CREATED.

POINT III.

THE SUBCONTRACT FORM SUBMITTED TO DEFENDANTS WAS NOT A COUNTER-OFFER OR REJECTION OF DEFENDANTS' PROPOSAL.

POINT IV.

THE DEFENDANTS ARE ESTOPPED TO DENY THE EXISTENCE OF THE CONTRACT.

POINT V.

IF THE ACTS OF THE PARTIES AS STIPULATED WERE NOT CONCLUSIVE AS A MATTER OF LAW, THE INTENTION OF THE PLAINTIFF TO ACCEPT THE OFFER OF THE DEFENDANTS AND THE SUFFICIENCY OF THE ACTS AND CONDUCT OF THE PLAINTIFF TO CONVEY SUCH INTENTION TO THE DEFENDANTS WERE FOR

THE JURY, AND THE GRANTING OF DEFENDANTS' MOTION TO DISMISS WAS ERROR.

POINT VI.

THE ENTRY OF THE JUDGMENT OF DISMISSAL WITHOUT FINDINGS OR CONCLUSIONS, AND WITHOUT A MOTION FOR SUMMARY JUDGMENT AND NOTICE THEREOF WAS ERROR.

ARGUMENT

POINT I.

THE FACTS WHICH WERE STIPULATED REQUIRED A FINDING AND CONCLUSION AS A MATTER OF LAW THAT THE OFFER OF THE DEFENDANTS HAD BEEN ACCEPTED BY THE PLAINTIFF AND THAT A CONTRACT BETWEEN THE PARTIES HAD COME INTO EXISTENCE PRIOR TO THE REFUSAL OF THE DEFENDANTS TO PROCEED.

Thornton v. Pasch, 104 Utah 313, 139 Pac. (2d) 1002 was an action by a subcontractor against the principal contractor for breach of contract and damages. To establish the contract, the plaintiff relied upon certain acts and conduct of the defendant as evidencing his acceptance of an offer by the plaintiff to haul roofing material needed by the defendant in the performance of the general contract. The lower court had non suited the plaintiff and dismissed the complaint. On appeal this court reviewed the evidence and said:

“* * * It is clear that the instrument signed by the plaintiff was at least an offer to do the work in question in accordance with its terms but before it could become a binding contract the defendants

would have to accept the same or assent to its terms. This the defendants might have done by a written or oral statement to that effect. If the defendants had made such a statement the meaning of which was unambiguous, the interpretation thereof would have been a question of law for the court. Plaintiff does not rely on any such statement, but does rely on a series of acts and circumstances which he claims are a manifestation of defendant's assent to and acceptance of plaintiff's offer. * * *

“It is a well recognized rule of law that where a contract is not required to be in writing, mutual assent or the meeting of the minds may be proved by words spoken as well as by acts and conduct. Restatement of the Law of Contracts, Vol. 1, Chapter 3, Section 21 says ‘The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct.’

“‘17 C.J.S. Contracts, p. 373, sec. 41a * * * an acceptance need not be express or formal, but may be shown by words, conduct, or acquiescence indicating assent to the proposal or offer.’”

In the present case, the plaintiff, by acts and conduct communicated to the defendants, had clearly and unequivocally manifested its acceptance of their bid and thereby had created a binding contract prior to the refusal by defendants to proceed with the work.

(a) Mr. Riding solicited the bid from the defendants and supplied them with the plans and specifications to enable the defendants to intelligently figure their bid. He used the defendants' figures in preparing the plain-

tiff's bid to the Government, which bid upon opening was found to be low.

Mr. Child, who evidently was following the matter closely and knew that the plaintiff was the low bidder, called Mr. Riding up to see if he, Child, had the job (Child Deposition p. 97). Mr. Riding told him that his bid was low on the brickwork, that he had used it in figuring plaintiff's bid, that plaintiff's bid was low and that he expected to get the job. Mr. Riding said further (as quoted by Mr. Child) :

“You know how things are, it takes the Government quite a while to decide what they want, but I think after we have got fixed up for it we will give you a form of contract.”

We submit that this was the equivalent of a statement by the plaintiff that it had accepted defendants' bid conditioned only upon the Government awarding plaintiff the contract on the basis of the specifications upon which the defendants had bid.

(b) The conditional acceptance of plaintiff's bid was made final upon the happenings of the condition. The Government accepted plaintiff's bid on Schedule I, that is, for the walls and installation of rolling steel fire doors. That this was the type of construction and installation upon which the defendants had bid is apparent from (1) the specifications, Exhibit A, (2) the terms of plaintiff's bid (R. p. 16) and stipulation (R. p. 40-41) and (3) the letter from the Army Engineers dated June

29, 1950 and set out in paragraph 16 of the stipulation (R. p. 19).

(c) While we recall no admission in the record of when Mr. Child first learned that the contract had been awarded to the plaintiff, it is reasonable to assume that he knew of it very shortly thereafter. He was sufficiently interested in the job to call up Mr. Riding just after the opening "to see if he had the job" because "I had heard—it was general conversation you know—that I was the low bidder" and had Mr. Riding's promise to give him the contract as soon as they (plaintiff) "got fixed up with the job."

(d) On July 3rd Mr. Riding called him about setting the reinforcing steel. There was no occasion for Mr. Riding's doing this unless the defendants were to do the work and Mr. Child certainly so understood it. He answered that he would "put it in as he went along with his brickwork, provided it was all bent, cut and designed properly" (Deposition Riding p. 20). Mr. Child already had Riding's assurance that they would get the job when the Government contract was awarded to plaintiff, and there could be no misunderstanding about the terms since Mr. Child's letter of June 23rd was definite as to the work to be done and as to price, and it was the only offer the defendants had made to the plaintiff.

We submit that these conversations and communications evidenced a complete meeting of the minds of the respective parties without any possibility of misunderstanding by either. Both of them understood that the

defendants were to do the brickwork in accordance with their offer.

That Mr. Child so understood it is evidenced by the fact that he notified the Brick Company that he expected to sign up with Daum for the job and had ordered the necessary brick, 1,200,000 brick.

There is not the slightest evidence in the record that the defendants had changed their minds or that the offer had been withdrawn until July 15th, when they repudiated the contract and refused to proceed with the work. This was over two weeks after the condition upon which plaintiff had accepted the offer had been fulfilled and the plaintiff had become bound to the Government under a contract for a price which it had submitted in reliance upon the defendants' offer.

The situation here is practically identical with that upon which the Connecticut Supreme Court passed in the case of *Raff Co. v. Murphy*, 147 Atl. 709. In that case the plaintiff Raff Co. intended to bid on a contract which called for plumbing and heating, but since plumbing was out of its line, asked Murphy if he was interested in submitting a figure for the plumbing. Murphy agreed to do so on condition that Raff would not obtain figures from any one else to do the work and would give him the job if Raff secured the contract. These conditions were accepted by Raff. Murphy then submitted by telephone a bid of \$14,300.00 and Raff asked him to confirm the bid by letter, which Murphy agreed to do but did not, and there was no written memorandum of the agreement of the defendant Murphy to do the plumbing work. Raff

incorporated Murphy's bid in its bid to the owner and submitted it. Raff's bid was accepted and immediately he informed Murphy of that fact and told him that immediately upon receipt of official notification he would notify him. Murphy expressed his pleasure and appreciation but two days later he called on Raff and said there had been an error in his bid and that he couldn't go through with the contract. Raff told him that he was sorry but that he had accepted Murphy's bid in good faith and was obliged to carry out his contract with the owner and expected Murphy to abide by his bid.

Upon receipt of formal notification of acceptance of Raff's bid, he advised the defendant and mailed him an order to install the plumbing for \$14,085.00, which was the amount of Murphy's bid less the defendant's proportionate share of the bond required from Raff by the owner. Murphy failed to perform and Raff secured another contractor to do the work at a cost of \$4,200.00 more than Murphy's bid.

Upon this state of facts the lower court awarded Raff judgment for the excess of cost to do the work over Murphy's bid and the Supreme Court affirmed, saying:

"The defendants contend that no contract ever came into existence between the parties. When the defendants submitted their bid to the plaintiff, to be incorporated by it in its joint bid for the heating and plumbing work, they made an offer to do that plumbing work for the sum named, conditioned upon the ultimate awarding of the contract to the plaintiff. When the plaintiff in the same telephone conversation requested a

confirmation of the bid by letter, and when, later, having incorporated the defendants' bid in its own, it heard that the bid had been accepted, and telephones the information to the defendants, and stated that upon receipt of formal notice of the award of the contract to it it would notify them, there was an acceptance of the defendants' offer and a sufficient communication of that acceptance to constitute a binding contract. In case of a bilateral contract, acceptance of an offer need not be express, but may be shown 'by any word or acts which indicate the offeree's assent to the proposed bargain.' Amer. Law Inst. Restatement, Contracts, p. 68.

"That both offer and acceptance would 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. 2 Williston, Contracts, § 666. Nor did the fact that the plaintiff, in sending them the order to proceed with the work, made a deduction from the amount of their bid, representing a portion of the cost of the bond it had to file, affect the rights of the parties. The contract relationship had already been created, and, if the plaintiff had no right to make this deduction, as upon this record we must assume it did not, the effect would be merely that it attempted an alteration in the terms of the contract ineffective because not assented to by the defendants, and the defendants could have proceeded with the work and claimed the full price agreed upon. *Barlow Brothers v. Lunny*, 102 Conn. 152, 128 A. 115; *C. & C. Electric Motor*

Co. v. D. Frisbie & Co., 66 Conn. 67, 94, 33 A. 604.”

Since the contract relationship had already been created between the plaintiff and defendants here, the sending of the subcontract form, if it contained terms which the plaintiff had no right to add, and we contend it did not, would be merely an ineffectual attempt to make an alteration not agreed upon by the defendants, and the defendants could have held the plaintiff to the terms of the offer and acceptance. See *Raff v. Murphy*, supra.

POINT II.

THE TRANSMITTAL OF THE SUBCONTRACT FORM WAS A CONFIRMATION OF THE PREVIOUS ACCEPTANCE OF THE OFFER AND THE SUBCONTRACT FORM WAS BUT THE WRITTEN MEMORIAL OF THE CONTRACT SO CREATED.

Under Point III we will show that the subcontract form did not add to or vary the terms or conditions of defendants' offer. It clearly was not intended by the plaintiff to be a rejection of the offer. Nor could it be reasonably interpreted by the defendants as a rejection. Mr. Child did not construe it as a rejection of his offer for when Mr. Riding called him up on July 14th and asked him to go to Ogden to lay out the work, Mr. Child agreed and made an appointment to go the next day and said nothing about the subcontract form which he had received or that they were not going to go on with the work. Mr. Riding's request was certainly no evidence that the plaintiff had rejected the offer, but is

consistent only with a belief that the deal had been closed.

Rather, the subcontract form was intended as mere memorial of operative facts already existing within the meaning of the *Restatement of the Law of Contracts*, Chapter 3, Section 26.

“Mutual manifestations of assent that are themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof;
* * *

and the comment thereto:

“* * * It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then fulfilled all the requisite for the formation of a contract.”

See *Calumet Ref. Co. v. Star Lub. Co.*, 64 Utah 358, 230 Pac. 1028.

The subcontract form was a written confirmation of the prior acceptance of the defendants' offer, the terms of which had been previously expressed and necessarily implied in defendants' letter of June 23rd and Mr. Riding's promise of the same date.

POINT III.

THE SUBCONTRACT FORM SUBMITTED TO DEFENDANTS WAS NOT A COUNTER-OFFER OR REJECTION OF DEFENDANTS' PROPOSAL.

The contract had already been made. If the terms contained in the sub-contract form or the letter of transmittal added to or changed the terms of the agreement, it was ineffectual. As stated by the Connecticut Court in *Raff Company v. Murphy*, *supra*:

“Nor did the fact that the plaintiff, in sending the order to proceed with the work, made a deduction from the amount of their bid, representing a portion of the cost of the bond it had to file, affect the rights of the parties. The contract relationship had already been created, and, if the plaintiff had no right to make this deduction, as upon this record we must assume it did not, the effect would be merely that it attempted an alteration in the terms of the contract ineffective because not assented to by the defendants, and the defendants could have proceeded with the work and claimed the full price agreed upon. *Barlow Bros. v. Lunny*, 102 Conn. 152, 128 Atl. 115; *C & C Electric Co. v. Frisbie & Co.*, 66 Conn. 67, 94, 33 Atl. 604.”

However, the subcontract form did not add to or change the terms of the existing contract or the offer of the defendants. The only points in the subcontract form to which the defendants voiced any objection at the time of their refusal to proceed were the words “*Time is of the essence of this contract. General contract to be completed within 120 calendar days. \$50.00 per day penalty thereafter. Subcontractor to complete his work as scheduled.*”

These words certainly did not enlarge the obligations of the defendants over those included in their

written offer. The words "General contract to be completed within 120 calendar days" are merely a statement of fact, of which the defendants had notice when they computed their bid (see SC-1 of the Specifications). The same is true of the penalty for delay (see SC-16 of the Specifications). They knew that these conditions would be imposed upon the plaintiff if it was successful in obtaining the contract, and of course when they offered to

"furnish all labor and materials necessary for the completion of the brickwork * * * according to plans and specifications"

they knew that time would be of the essence of their subcontract *Ehret Mag. Mfg. Co. v. Gothwaite*, 149 Fed. 2d 829.

The phrase "\$50.00 per day penalty thereafter" does not purport to impose such penalty upon the subcontractor. The appropriate place in the subcontract form to accomplish this, if that had been the intention of the plaintiff, would be in the second paragraph of the section Second of the subcontract form, and this was left blank.

Later, during the taking of the depositions, the questions asked by counsel for the defendants indicated that the words "Subcontractor to complete his work as scheduled" imposed an additional burden upon the defendants or the making of some schedule for doing the work which had not been included in the offer and therefore left open something for further negotiation and

agreement. This contention, however, is absurd. When the defendants made their bid they knew that completion of the project required other work to be done by others, some of which had to be done before the brickwork on any of the walls could be commenced, and other work which could not be done until after the brickwork on a wall was completed. This was a schedule of work which the defendants proposed to follow when they offered to do it according to plans and specifications.

The insertion of the words "including Addendum 1" was also intimated to be a variation from the bid. Addendum 1 is the addendum which provided the plans and specifications for the work in the event that the Government elected to use sliding doors instead of rolling doors. We doubt that the substitution of sliding doors would have required any change in the brickwork, but it is immaterial here if it did because the defendants had bid on the plans and specifications for the rolling door construction and this was the type that the Government chose. The only change in the specifications for the brick work made by Addendum No. 1 was the addition to 3-05 of the Technical Provisions of the sentence "Masonry shall not be started until concrete foundation has been in place at least 7 days." In reality this is no change, since Section 2.06 of the Technical Provisions in the original specifications required the contractor to keep concrete continuously wet for a period of seven days. Moreover, even if this were a change it is trivial since it could delay the commencement of defendants' work on the first wall only and the defendants knew

when they bid that they couldn't start until the concrete foundations had set. Any delay occasioned by the requirement that they be in place not less than seven days would be a delay occasioned by a delay upon the part of the contractor (plaintiff) or some other subcontractor for which the defendants would not be responsible.

The other printed provisions of the subcontract form are provisions which the plans and specifications implied, or which would normally be implied in the offer of the defendants to do the work in part performance of the general contract.

Taken in its entirety, the provisions of the subcontract form do not modify the contract already made nor incorporate other provisions not inherent in the offer and acceptance. Had the contract not come into existence previously, the subcontract form and letter of transmittal could be construed as an unqualified acceptance of defendants' offer.

Calumet Ref. Co. v. Star Lub. Co., 64 Utah 358, 230 Pac. 1028.

POINT IV.

THE DEFENDANTS ARE ESTOPPED TO DENY THE EXISTENCE OF THE CONTRACT.

The contract was made, and the defendants are estopped to deny it, where the plaintiff, in reliance upon defendants' offer, used the offer in figuring its bid to the Government and was awarded the contract and thus assumed a burden which it would not have

assumed but for defendants' offer, and injustice can only be avoided by the enforcement of the promise.

The defendants knew that their bid for the brickwork was low, that the plaintiff had used it and relied upon it in figuring its bid and knew that the plaintiff's bid was low and plaintiff would probably be awarded the contract. Under these circumstances, especially when coupled with the promise by the plaintiff to give defendants the contract for the brickwork when it got the contract, the defendants are estopped to deny the existence of the contract.

This rule of law is formulated in the Restatement of the Law of Contracts in Chapter 3, Section 90 as follows:

“A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”

The application of this rule to facts somewhat analagous to those in the present case is found in *Northwestern Engineering Co. v. Ellerman*, 10 N.W. (2d) 879 (N.D.) which was an action by the prime contractor against the subcontractor for breach of contract. In that case the parties had executed a written subcontract, but the defendant contended that it was void for lack of consideration, and the trial court agreed. On appeal the case was reversed with an opinion reading in part as follows:

"We are inclined to agree with respondents' contention and find that the agreement is without the customary elements of a valid consideration. Is this fatal to appellant's action? The pleaded facts disclose that knowing of appellant's intention and desire to place a bid on the airport project, the respondents promised to enter into a binding contract to do the specified work at a fixed price, this promise was not withdrawn, and relying upon the promise, the appellant submitted its bid to the government, as contemplated in the agreement. Obviously it would seem unjust and unfair, after appellant was declared the successful bidder and imposed with all the obligations of such, to allow respondents to then retract their promise and permit the effect of such retraction to fall upon the appellant. Other courts have been confronted with somewhat similar situations to that which now confronts us. The result has been that there has arisen in the law a doctrine often referred to as 'promissory estoppel.' Williston on Contracts, Revised Edition, p. 494. While the appellant has not based its argument for a reversal upon this doctrine by name, nevertheless, we believe that the argument advanced by appellant has as its basis the principle of this doctrine. The doctrine finds expression in Section 90 of the Restatement of the Law of Contracts, as follows: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'

* * *

"* * * We are of the opinion, therefore, that

the defendants in executing the agreement made a promise which they should have reasonably expected would induce the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise."

POINT V.

IF THE ACTS OF THE PARTIES AS STIPULATED WERE NOT CONCLUSIVE AS A MATTER OF LAW, THE INTENTION OF THE PLAINTIFF TO ACCEPT THE OFFER OF THE DEFENDANTS AND THE SUFFICIENCY OF THE ACTS AND CONDUCT OF THE PLAINTIFF TO CONVEY SUCH INTENTION TO THE DEFENDANTS WERE FOR THE JURY, AND THE GRANTING OF DEFENDANTS' MOTION TO DISMISS WAS ERROR.

As stated above, there was no actual trial. A jury had been demanded by the defendants and they had refused to waive it or to permit the court to weigh the evidence as the trier of fact on the issue of a contract *vel non*.

If the admitted facts are not such as to warrant the court to hold as a matter of law that a contract did exist, as we have contended under Points I and II hereof, they nevertheless presented facts, conceded and disputed, from which a jury could properly find that the offer of the defendants had been accepted by the plaintiff.

In this respect the case is similar to that considered by this court in *Thornton v. Pasch*, 104 Utah 313, 139 Pac. (2d) 1002, (*supra*). There at the close of plaintiff's case, the court took the case from the jury and granted de-

fendant's motion for a non suit on the grounds that there was no evidence that a contract had been entered into. In holding that this was error and remanding the case for new trial, the court said:

"The question of whether defendants did accept or assent to plaintiff's offer is a question of fact. The evidence being circumstantial, if there was any substantial evidence from which defendants assent or acceptance could have been inferred, then the case should have been submitted to the jury."

After stating the substance of the evidence, the court said:

"(This evidence) indicates that the defendants considered the matter to be closed and was sufficient evidence from which defendant's acceptance and assent to plaintiff's offer might reasonably be inferred. This should have been submitted to the jury."

The instant case is stronger, since here the plaintiff has had no opportunity to elaborate the facts elicited upon depositions taken for discovery, or to counter such adverse inferences as presumably the court did draw from the testimony of the witnesses given by deposition. The court had only this testimony and the admissions and statements of counsel taken at pretrial and it will be noted that in several instances the two witnesses were in disagreement as to what was said in the different conversations between Mr. Riding and Mr.

Child, and in the dates when they occurred. For example, if the conversation relative to the placing of the reinforcing steel took place after the contract with the Government had been signed, as Riding testified, and after Child knew of the award of the contract to the plaintiff, an inference of acceptance or manifestation of acceptance might be drawn; where if the conversation occurred before then a different inference might be drawn. Similarly if, as testified to by Mr. Riding, Mr. Child had ordered the brick for the job, the jury might reasonably infer that he knew that the offer had been accepted. The credibility of the two witnesses on this and other points in which their testimony was in conflict was for the jury.

POINT VI.

THE ENTRY OF THE JUDGMENT OF DISMISSAL WITHOUT FINDINGS OR CONCLUSIONS, AND WITHOUT A MOTION FOR SUMMARY JUDGMENT AND NOTICE THEREOF WAS ERROR.

Under the Rules of Civil Procedure the only situations in which judgments of dismissal may be entered without findings and conclusions by the court are

- (1) Where findings are waived (Rule 52(c))
- (2) On motion under Rule 12, and
- (3) On motions for summary judgment under Rule 56.

Findings are required in all other cases (Rule 52).

In the instant case the record is barren of any waiver of findings by either party.

The order of dismissal cannot be construed as a judgment rendered upon a motion for summary judgment under Rule 56, or upon a motion for judgment on the pleadings under Rule 12(c). No such motion was ever made by either party. No notice of such a motion was ever made by either party as required by Rule 56(c) and notice was not waived, intentionally at least, by the plaintiff.

Moreover, and most important, the matters shown in the pleadings, depositions and admissions on file show very positively that there remains *genuine issues as to material facts* relating to question of the existence or non existence of a contract between the parties (see Rule 56(c)). The court made no order "specifying the facts that appear without substantial controversy." (See Rule 56(d)).

We are certain that the plaintiff did not understand or consider the pretrial as a hearing upon a motion for summary judgment and are reasonably confident that neither the defendants nor the court so considered it.

The motions made by the parties partakes more of the nature of a motion for dismissal after the presentation of plaintiff's case (Rule 41(b)), but in such case the Rule requires the court to make findings as provided in Rule 52(a), and no findings were made.

The use of the summary judgment as a means of expediting trials and the caution with which its use should be exercised has been frequently expressed in decisions in the Federal Court. One of the most recent is that of Judge Parker in the case of *Pierce v. Ford*

Motor Co., 190 Fed. (2d) 910 beginning at page 915 in which he says:

“From what we have said, it is clear that there were issues in the cases for a jury to decide, and it was error to enter summary judgments for defendant for that reason. It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented. We had occasion to deal with the undesirability of disposing of cases on motions for summary judgment where there was real controversy between the parties in the recent case of *Stevens v. Howard D. Johnson Co.*, 4 Cir., 181 F. 2d 390, 394, where we said: ‘It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. The motion for summary judgment, authorized by rule 56 Federal Rules of Civil Procedure, 28 U.S.C.A., which in effect legalized the “speaking” demurrer, has an important place * * * in preventing undue delays in the trial of actions to which there is no real defense; but it should be granted only where it is perfectly clear

that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. See *Westinghouse Electric Corp. v. Bulldog Electric Products Co.*, 4 Cir., 179 F. 2d 139, 146; *Wexler v. Maryland State Fair*, 4 Cir., 164 F. 2d 477. And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. *Paul E. Hawkinson Co. v. Dennis*, 5 Cir., 166 F. 2d 61; *Detsch & Co. v. American Products Co.*, 9 Cir., 152 F. 2d 473; *Furton v. City of Menasha*, 7 Cir., 149 F. 2d 945; *Shea v. Second Nat. Bank*, 76 U.S. App. D.C. 406, 133 F. 2d 17, 22. As was said by Mr. Justice Jackson, speaking for the Supreme Court in *Sartor v. Arkansas Nat. Gas. Co.*, 321 U.S. 620, 627, 64 S. Ct. 728, 88 L. Ed. 967: "Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." " "

See also the opinion of Judge Frank in *Colby v. Klune*, 178 Fed. (2d) 872 (2nd Cir.) and the cases cited in the footnotes to that opinion.

It should be noted also that the matters submitted to the court here had been submitted at a pretrial conference called by the court and authorized by Rule 16. That Rule does not contemplate a trial of the issues nor its conversion into a summary trial and disposition of case by the court as a trier of fact.

CONCLUSION

We respectfully submit that the judgment be reversed and the case be remanded for trial in accordance with the Rules of Civil Procedure.

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