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Contracts

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stitutional.[16] Awkward as the distinction might be, it nevertheless indicates the court's predisposition as to those who might seek habeas corpus on similar grounds.

The result of the holding in the *Olsen* case has been to leave Washington with a firearms statute on the books which lacks an enforcing proviso. In *In re Kahler v. Squire*,[17] the Washington court granted habeas corpus to the petitioner who was being restrained under a now void judgment and sentence based on the unconstitutional statute. An attempt was made to remedy this situation at the last session of the Washington State Legislature with the introduction of Proposed Senate Bill 169.[18] This bill was referred to the Judiciary Committee and, by resolution March 14, 1957, was "indefinitely postponed."[19]

It appears that the Washington court with the *Olsen* decision has departed from the normal rule favoring a constitutional interpretation when such an interpretation is readily available.

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CONTRACTS

Mutual Assent—Formation of Construction Subcontracts—Use of Subcontractor's Bid as Acceptance. In the recent case of *Milone & Tucci, Inc.* v. *Bona Fide Builders, Inc.*[1] the court held that the use of a subcontractor's bid by a general contractor in preparing his bid for the prime contract, did not constitute an acceptance of the subcontractor's bid.

The defendant and several other general contractors had been invited to bid competitively for the work of constructing four government buildings. General contractors by trade practice compute their bids according to offers which they receive from various subcontractors. The plaintiff, a subcontractor, telephoned the defendant and other general contractors and inquired whether they desired his bid on that portion

[16] 48 Wn.2d at 548, 295 P.2d at 326.

[17] 149 Wash. Dec. 194, 299 P.2d 570 (1956).

[18] That bill was designed to amend several sections of the Firearms Act. Section 6 of that bill, which was to delete the unconstitutional RCW 9.41.160, read as follows: "Any person convicted of committing a crime of violence when armed with a pistol, or who, having been convicted of a crime of violence, shall thereafter violate any of the provisions of RCW 9.41.010 through 9.41.160, shall be guilty of a felony and may be punished therefor by imprisonment in the penitentiary for not less than one year nor more than ten years. All other violations of the provisions of RCW 9.41.010 through 9.41.160 shall be misdemeanors and punishable as such under the laws of the state of Washington."

[19] See Legislative Record for the Thirty-fifth Session of the Washington Legislature (January 14-March 14) No. 8.

[1] 149 Wash. Dec. 354, 301 P.2d 759 (1956).

of the proposed work involving installation of water mains and sewers. Since he received favorable replies, the plaintiff submitted a bid on the installation work to both the defendant and to each of those other firms. The defendant also received bids on the installation work from other subcontractors; however, he used the plaintiff's bid figures in his own bid for the prime contract. After the prime contract was awarded to him, the defendant subcontracted with a firm other than the plaintiff for the performance of the installation work, although the plaintiff's bid figures on this work were the ones used to secure the prime contract.

The plaintiff then brought this action contending that the defendant, by using the plaintiff's bid, had formed with the plaintiff a contract implied in fact for the performance of the work; consequently, the defendant's failure to permit the plaintiff to do that work was a breach of the contract. The lower court gave judgment for the plaintiff and awarded him damages in an amount equal to the prospective profits the plaintiff would have made on the job.

On appeal, this judgment was reversed on the grounds that no contract had been formed. The court conceded *arguendo* that the plaintiff's bid was an offer to perform the specified work at the designated price; but it denied that the defendant's use of the bid was an act operative as an acceptance of the bid. The reason given was that the defendant's act, rather than indicating present assent, could properly be interpreted merely as an expression of an intention to accept the bid in the future. The former Washington decision in *Western Asphalt Co.* v. *Valle*,[2] upon which the plaintiff relied, was not regarded as requiring a contrary interpretation. The court added that the evidence of a trade usage to the effect that use of a subcontractor's bid creates an implied contract to form a later subcontract, was inadmissible to prove the existence of this contract.

A manifestation of mutual assent by the parties to an informal contract is necessary for the formation of such a contract, whether it be designated as "express" or "implied in fact."[3] An offer or an acceptance may be made wholly or partly by verbal or non-verbal conduct.[4] Whether conduct which manifests an intention constitutes an expression of assent, that is, an offer or an acceptance, depends primarily on the meaning to be given to that conduct. For the purpose of ascertaining that meaning, two principles of interpretation are ordinarily utilized.

[2] 25 Wn.2d 428, 171 P.2d 159 (1946).
[3] RESTATEMENT, CONTRACTS § 20 (1932).
[4] *Ibid.* § 26.

The first principle is that manifestations of intention having reference to the formation of an agreement are given the meaning which the party making the manifestations should reasonably expect that the other party would give to them.[5] The second principle is that when manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the person from whom they proceed.[6]

This last mentioned principle is the basic explanation for the rule applied in *R. J. Daum Construction Co.* v. *Child*[7] and *Williams* v. *Favret*,[8] the decisions upon which the Washington court relied in the *Milone* case. The *Daum* and *Williams* cases were both suits by general contractors (offerees) against subcontractors (offerors) who had revoked their bids after the general contractors had used them and had informed the subcontractors of that fact by verbal reply. In each case the reply was held not to be an acceptance of the subcontractor's bid. The rule applied was that an unequivocal acceptance is necessary for the formation of a contract.[9] The rationale of this rule is that an offeror is entitled to know in clear terms whether an offeree accepts his proposal.[10] It seems clear that this rule operates primarily as a defense to an offeror who denies the existence of an alleged contract on the grounds that his offer was not accepted. Of greater significance, however, is the fact that this rule is no more than a specific formulation of the second principle of interpretation mentioned above, which advocates that equivocal manifestations be interpreted so as to operate more strongly against the person from whom they proceed.

Since in the *Daum* and *Williams* cases the manifestations of the offerees were ambiguous, and the offerors denied that they were acceptances, the unequivocal acceptance rule and its supporting principle of interpretation were correctly applied with the result that no acceptance was found in either case. In the *Milone* case, however, the offeror was asserting the existence of an acceptance of his offer rather than denying it. It would seem, therefore, that the unequivocal acceptance rule was not literally applicable to that situation although the supporting principle of interpretation was wholly applicable. If the Washington court had adverted to this principle which forms the basis of the unequivocal

[5] *Ibid.* § 233
[6] *Ibid.* § 236 (d).
[7] 247 P.2d 817 (Utah 1952).
[8] 161 F.2d 822 (5th Cir. 1947).
[9] RESTATEMENT, CONTRACTS § 58 (1932); WILLISTON, CONTRACTS § 72 (Rev. ed. 1936).
[10] RESTATEMENT, CONTRACTS § 58, comment *a* (1932).

acceptance rule, it might have interpreted the defendant's supposedly equivocal manifestation to operate more strongly against him, and concluded that his act expressed acceptance. According to this analysis, the *Daum* and *Williams* cases cannot be said to support fully the interpretation of the court in the *Milone* case.

Another point of interest in the *Milone* case is the fact that the court dismissed the evidence of trade usage with the statement that proof of usage and custom will not make a contract where none exists. To the extent that this statement means that usage cannot change a rule, specifically the rule requiring mutual assent for the formation of a contract, it is correct.[11] However, with respect to evidence of trade usage as an aid to interpretation, the statement is misleading. If the plaintiff in the *Milone* case had proved a definite trade usage with respect to the significance of a general contractor's act of using a subcontractor's bid, then that usage could have been used to define the meaning of the defendant's conduct.[12] That usage would have indicated the meaning which the defendant should reasonably have expected that the plaintiff would give to the defendant's act. Since both parties were engaged in the same occupation in the same locale, such a trade usage would have been operative in their transaction to the extent suggested.[13] However, the trade usage introduced into evidence in the trial court (use of a subcontractor's bid gives rise to an implied contract to form a later subcontract) was inconsistent with the theory of the plaintiff's case as presented on appeal, and for this reason the court was probably correct in disregarding it.

It is interesting to note that other courts have also been reluctant to give much weight to trade usage in litigation between general contractors and subcontractors when the question presented has been whether a contract had been formed.[14] In the majority of these few cases a trade usage has been proven by the general contractor (offeree) for the purpose of persuading the court to hold that the subcontractor's bid was irrevocable after the general contractor had acted in reliance upon it.[15] If a court were to give effect to a trade usage that subcon-

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[11] *Ibid.* § 249.

[12] *Ibid.* § 246 (a). See also, CORBIN, CONTRACTS § 555 at 127 (1951); 9 U. CHI. L. REV. 153 (1941).

[13] RESTATEMENT, CONTRACTS § 248 (1932).

[14] See Albert v. R. P. Farnsworth & Co., 176 F.2d 198 (5th Cir. 1949). *But see* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); *cf.* Harris v. Lillis, 24 So.2d 689 (La. App. 1946).

[15] For a discussion of such irrevocable offers in the construction industry see Schultz. *The Firm Offer Puzzle*, 19 U. CHI. L. REV. 237 (1952).

tractors ordinarily do not revoke their bids after notice of their use, then the present rule that an offer is ordinarily revocable until accepted, would be qualified to a considerable extent. For this reason, the courts in such cases have generally declined to attach much significance to such a usage, although one court has held a subcontractor's bid irrevocable on the theory of promissory estoppel.[16] If such a result should be obtained hereafter in Washington, then a subcontractor in light of the *Milone* case, could not be said to occupy an enviable position under the law.

One of the more significant aspects of the decision in the *Milone* case is that it has disspelled some existing misapprehensions with respect to the decision in the *Western Asphalt* case. That case was also a suit by a subcontractor against a general contractor who refused to permit the subcontractor to perform the offered work after his bid had been used in securing the prime contract. The plaintiff there had submitted the only bid received by the defendant, and had submitted that only at the explicit request of the defendant. At the trial the plaintiff contended that his submission of a bid was a service rendered for which the defendant, by his request, could be deemed to have promised to pay.[17] In sustaining the grant of a new trial after a verdict for the defendant, the supreme court held that the question of whether the defendant had in fact agreed to pay for the service rendered, was properly left to the jury.

The plaintiff in the *Milone* case relied greatly upon that decision; however, as the court pointed out, he had failed to recognize the unusual facts in that case which distinguished it readily from the present situation. There the general contractor had requested the plaintiff's bid, while in the instant case the plaintiff's bid was unsolicited. Moreover, the theory of the plaintiff in the *Western Asphalt* case was that use of the bid was a receipt of services[18] while in the present case the plaintiff apparently contented that the use of the bid constituted an exercise of a power of acceptance created by the bid itself. According to the court's interpretation of the plaintiff's offer in the *Milone* case, accept-

[16] Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943); *cf.* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941). *Contra,* Baird Co. v. Gimbel Bros., 64 F.2d 344 (2nd Cir. 1933).

[17] The Western Asphalt case has been criticized on the basis that the decision should have been placed on quasi-contractual principles rather than on principles of mutual assent. Notes, 22 WASH. L. REV. 139 (1947); 42 ILL. L. REV. 259 (1947).

[18] Submitting such figures is usually an act of making an offer and is not an act of rendering "service" as such. If one were a mere professional estimator and not a subcontractor the case could well be otherwise. See Stubner v. Raymond, 17 La.App. 216, 135 So. 676 (1931).

ance by the defendant would have formed the subcontract itself with the respective obligations to perform and pay for the work being conditional upon receipt of the prime contract. The defendant's obligation, under that analysis, would have been to pay for the performance of the work offered and not for the service of making an offer.[19]

The decision in the *Milone* case clarifies Washington case law to the extent that it places the *Western Asphalt* case in a less misleading perspective. On the other hand, the decision indicates the necessity for reflecting carefully upon the rationale of the fundamental rules of mutual assent before applying those rules to a given situation.

JOHN A. HAMILL

Bailment Contracts—Destruction of Chattel—Effect of Promise to Return in Good Condition. In *St. Paul Fire & Marine Ins. Co.* v. *Charles H. Lilly Co.*, 48 Wn.2d 528, 295 P.2d 299 (1956), *D* had rented an earth moving machine from Air-Mac Co. under a written contract of bailment. The writing stated that *D* agreed to "keep and maintain said personal property in good mechanical condition during the term of this agreement... and upon termination thereof to return to... [bailor]... the same in good mechanical condition, save and except the usual wear and depreciation as may be caused by reasonable use and wear thereof." Through no fault of *D*, the machine was destroyed by fire. Air-Mac Co. collected the money on the fire insurance policy covering the machine and assigned its claims to the *P* insurance company. Relying on *Metropolitan Park District of Tacoma* v. *Olympic Athletic Club*, 42 Wn.2d 179, 254 P.2d 475 (1953), *P* brought an action against *D* on the written contract contending that *D*'s promise to return the machine in good condition amounted to a covenant to stand as an insurer of the machine.

Held, for *D*, four judges dissenting, reversing the first decision reported in 46 Wn.2d 840, 286 P.2d 107 (1955). The promise to return the chattel in good condition, standing alone, was ineffective to enlarge the common law liability of the bailee for the loss or destruction of the machine. The court approved the rule that a promise by the bailee to stand as insurer of the bailed chattel will never be implied from the language in the writing, but will be recognized and enforced only when an agreement to that effect has been clearly and explicitly expressed. The language in the instant case appeared to the court to be primarily a reiteration of the duties ordinarily imputed to a bailee by law in absence of an agreement to the contrary. Moreover, the language here failed to indicate clearly either that *D* had assumed an insurer's liability, or that both parties had even contemplated the possible destruction of the machine.

In reaching this decision, the court expressly overruled the following decisions insofar as they may indicate that this jurisdiction has adopted a contrary position: *Metropolitan Park District of Tacoma* v. *Olympic Athletic Club*, 42 Wn.2d 179, 254 P.2d 475 (1953); *Bratt v. Poole*, 105 Wash. 565, 178 Pac. 638 (1919); *Alaska Coast*

[19] The theory that a contract could be formed, the obligations of which were conditional upon the formation of another contract between one of the parties and a third person has caused some courts to regard one of the promises as illusory, with the result that no consideration was found. Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943); Meacham v. Pederson, 70 Wash. 479, 127 Pac. 114 (1912). *Contra*, Frederick Raff Co. v. Murphey, 110 Conn. 234, 147 Atl. 709 (1929); *cf.* Scott v. Moragues Lbr. Co., 202 Ala. 312, 80 So. 394 (1918).

Co. v. *Alaska Barge Co.*, 79 Wash. 216, 140 Pac. 334 (1914); *Locomotive Exchange* v. *Rucker Bros.*, 106 Wash. 278, 179 Pac. 859 (1919).

Pensions—Pension Statutes as Imposed Obligations of a Contractual Nature. The case of *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956), was an action by a former city policeman for an increase in his statutory pension. *P* began employment with the *D* city's police force in 1925. At that time a statute provided, inter alia, that a policeman for a first class municipality was eligible for retirement with a life pension after twenty-five years of service. The statute fixed the pension rate at one-half of the salary attached to the rank held by the retiring policeman for the year immediately preceding retirement. The pension fund was to be composed of compulsory non-refundable contributions by the members of the force, and matching funds contributed by the municipality. However, in 1937 this statute was amended. As amended it provided for various additional fringe benefits, but changed the formula for ascertaining the maximum pension payable to any retiring member. Under this amended formula no member could receive more than $125 per month (which in 1947 was an amount equal to one-half of the monthly salary of a police captain), and in no case were the member's contributions to exceed an amount equal to 2% of the salary rate at which the maximum pension was payable. In 1943 *P* was made a captain at a salary of $370 per month, yet his pension contributions were deducted as if his salary were only $250 per month. This was the proper procedure under the 1937 statute. In 1950 *P* retired and was awarded the maximum pension payable under the 1937 statute, $125 per month. *P* then began an action to compel *D* city to increase his pension to $185 per month, which amount was the proper amount as calculated under the statute in force in 1925 when *P* began work. *P* contended that his pension rights were to be determined by this 1925 statute, and that the 1937 amendment was void as to him.

Held, for *P*. The payments provided for by either statute were not gratuities, but were deferred compensation for services. The 1925 statute was therefore regarded as imposing upon the city an obligation of a contractual nature, and imparting to *P* a correlative right, both of which accrued at the time *P* began employment. The 1925 statute was thought to be part of *P*'s contract of employment; consequently, the 1937 amendment was held void as to *P* apparently on the ground that it violated the constitutional prohibition against state laws impairing the obligations of contracts. Following various California decisions, the court stated that the right to a pension, though conditional, accrues at the time employment is begun, and that subsequent legislation is ineffective to alter that right *unless* such legislation is reasonably necessary to maintain the flexibility and integrity of the system.

The dissenting opinion questioned the existence of any contract of employment, and maintained that even if one were presumed, *P* could be deemed to have assented to its modification since he acquiesced in the diminution of his contribution to the fund.

A critical discussion of the conflicting theories utilized by various courts to resolve similar statutory pension problems may be found in 56 COLUM. L. REV. 251 (1956).

CREDITORS' RIGHTS

Redelivery Bond—Waiver of Rights. In the recent case of *Adams v. Thibault*,[1] the court held that posting a redelivery bond by an attachment defendant who successfully defends against the court action of the attaching plaintiff does not waive the right to recover for wrongful attachment.

[1] 149 Wash. Dec. 22, 297 P.2d 954 (1956).