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W. P. Wooldridge v. C. L. Wareing : Brief of Appellant

Utah Supreme Court

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Dan S. BUshnell; Attorney for Plaintiff and Respondent;

Llewellyn O. Thomas; Elias Hansen; Attorneys for Defendant and Appellant;

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In the Supreme Court

of the State of Utah FILED

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W. P. WOOLDRIDGE,

Plaintiff and Respondent,

vs.

C. L. WAREING,

Defendant and Appellant.

Clerk, Supreme Court, Utah

No. 7644

BRIEF OF APPELLANT

Appealed from the Third District Court of Salt Lake County
Hon. A. H. Ellett, Judge

Dan S. Bushnell
Attorney for Plaintiff
and Respondent

Llewellyn O. Thomas
and
Elias Hansen
Attorneys for Defendant
and Appellant

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In the Supreme Court of the State of Utah

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Hon. A. H. Ellett, Judge

STATEMENT OF CASE

The plaintiff brought this action against the defendant to recover for the reasonable value of work, labor and services alleged to have been performed for the defendant at his request for the purpose of selling Vogt Tube Ice Machines and supplemental equipment and services in the summer of the year 1947 and continuing until the latter part of 1948. In his complaint plaintiff alleges a second cause of action which

is likewise for the value of work, labor and services performed for the defendant for the purpose of selling Vogt Tube Ice Machines and supplemental equipment and services commencing in the summer of 1947 and continuing until the latter part of the year 1948. The difference between the two alleged causes of action is that in the first alleged cause of action the claims are for services rendered in an attempt to secure contracts with numerous persons and corporations, while in the second alleged cause of action the claim for compensation is limited to services rendered in the alleged assistance rendered by the plaintiff to the defendant in securing a contract from Guy F. Atkinson Company of San Francisco, California, for the installation of an ice plant at the McNary Dam, which was constructed in the State of Oregon, and also for assistance alleged to have been rendered by the plaintiff to the defendant in securing a contract for the installation of a Vogt Tube Ice Machine for J. J. Crosetti Company at Watsonville, California. No claim is made by the pleadings, nor is there any evidence which shows or tends to show that the plaintiff did anything toward the actual construction of either of the installations. In the second cause of action plaintiff alleges that the defendant agreed to pay plaintiff one-half of all commissions received from sales which were made possible by the services of the plaintiff. R. 1 to 3. By his answer the defendant denied generally the allegations of the complaint, and alleges that plaintiff has been paid in full for his services. R. 10 and 11. The trial court found "that the plaintiff performed services for the defendant at his request in contacting Guy F. Atkinson Company for the purpose of selling a Vogt Tube Ice Machine and through the joint efforts of both the plaintiff

and defendant a contract for the sale and installation of a Vogt Tube Ice Plant at McNary Dam was negotiated with Guy F. Atkinson in the sum of \$126,000.00; that the reasonable value of the services performed by the plaintiff in contacting the Guy F. Atkinson Company is \$4,000.00; that there was no contract between the parties as to these services and therefore the plaintiff cannot recover under the second count of the complaint.”

The trial court further found that “Plaintiff also assisted the defendant in the selling and supervising of the installation of a Vogt Tube Ice Machine to the J. J. Crosetti Company. The parties hereto settled a dispute as to the amount of compensation to be paid for this job for the sum of \$1,800.00, \$1,500.00 of which has been paid.”

As a conclusion of law, the court concluded that the plaintiff is entitled to a judgment against the defendant for services rendered in the sum of \$4,300.00, plus interest at the rate of six percent from the 28th day of February, 1949. R. 25-26.

Judgment was entered in favor of the plaintiff and against the defendant in conformity with the Findings of Fact and Conclusions of Law. R. 26-A.

Defendant prosecutes this appeal from the judgment so rendered.

There is a vast amount of evidence and numerous exhibits which have but little, if any, bearing upon the questions presented for review. The only matters involved on this appeal relate to the contract with Guy F. Atkinson Company

and J. J. Crosetti Company. It is made to appear without dispute that defendant entered into a contract with each of such companies to install and did install a Vogt Tube Ice Machine. Plaintiff's claim for compensation for services alleged to have been rendered in the other matters mentioned in his first cause of action were, by the court, denied. No cross appeal has been taken from the judgment in such particular and therefore we need not be concerned with such matters, except possibly as the evidence with respect thereto may shed some light on the matters involved on this appeal.

The plaintiff and defendant were old acquaintances and some years ago, in about 1926 or 1927, had resided in the same rooming house in Rochester, New York. At that time, Mr. Wareing, the defendant, was representing, as a salesman, the Ingersoll-Rand Company and the plaintiff, Mr. Wooldridge, represented, as salesman, the National Tube Company, and they both had a customer, Haverstack & Company. Tr. 42. Later the plaintiff moved to San Mateo, near San Francisco, California, and the defendant moved to Cleveland, Ohio. The defendant became interested in and familiar with the Vogt Tube Ice Machine. Plaintiff and defendant kept up a correspondence and occasionally visited together. Tr. 44-47. Numerous letters were marked and admitted as evidence, but only a very few of these letters shed any light on the matters involved on this appeal and therefore we shall direct the court's attention to only those letters and other exhibits which we deem material to the questions presented on this appeal.

In about October, 1945, Mr. Wareing ceased working for Ingersoll-Rand because of ill health and he later went into

business for himself, devoting his time in promoting the Vogt Tube Ice Machine, with which he had been interested since around 1936, with his headquarters at Salt Lake City, Utah. In January and July, 1946, Mr. Wareing went to California and made contacts with respect to the use of the Vogt Tube Ice Machine in the vegetable packing business, and then had no business contacts with plaintiff. In August, 1947, he told Wooldridge what he had been doing and that he, Wareing, believed that there were great possibilities for the sale of the tube ice machines on the coast in connection with the packing of fresh vegetables along the coast. Tr. 50, 350-352. Mr. Wooldridge testified that at the time of the first visit to the coast, Mr. Wareing left with him certain literature and suggested that he, Wooldridge, become acquainted with the Vogt Tube Ice Machine. Tr. 51. The plaintiff and defendant talked over the matter of forming a corporation for the purpose of selling Vogt Tube Ice Machines in which defendant would give plaintiff an interest, but no such corporation was ever formed. Tr. 161-162.

When defendant, Wareing, made a later trip to California, he suggested to plaintiff, Wooldridge, that they make some investigation and call upon prospective purchasers of the Vogt Tube Ice Machine. Tr. 51. Plaintiff testified at considerable length touching calls made by him and the defendant on various hotels, firms and individuals who might be interested in the purchase of a Vogt Tube Ice Machine.

In light of the fact that the plaintiff testified that he did not expect to be paid for time that he spent in an attempt to sell Vogt Tube Ice Machines that did not result in making a

sale (Tr. 215) and the further fact that the court did not allow the plaintiff any compensation for such efforts, no useful purpose will be served by an analysis of testimony touching the efforts made by the parties to secure sales which did not materialize. Suffice it to say that the plaintiff was engaged in selling machinery and equipment for various manufacturers on the Pacific coast and he continued to carry on as a salesman in connection with his efforts in assisting the defendant to sell the Vogt Tube Ice Machine. Tr. 254.

There is no evidence of a contract between the parties to this controversy as to the compensation, if any, that should be paid to the plaintiff for any services that he might render in connection with the sale of the Tube Ice Machine. The court so found. R. 25.

The testimony of the plaintiff is that the defendant would

“do the fair and square thing.” (Tr. 56-57 and 150), and that defendant

“didn’t agree to give me anything” (for his services). Tr. 281.

It is made to appear that of the various persons, firms and corporations that were contacted by the parties to this controversy in their efforts to sell Vogt Tube Ice Machines, only four contracts were secured. Two of the contracts, one with the American-Arabian Oil Company and the other called the DeLamar-Venzuela contract, were amicably settled, each of the parties receiving one-half of the profits derived from the sales. It should be noted that each of said contracts was merely for the sale of the specified articles and that no engineering

or other work was required of either of the parties to this controversy in connection with such sales. Tr. 93 to 99.

The other two contracts which forms the subject matter of this controversy were: one was with J. J. Crosetti, shown in Exhibit "D"; the other contract with Guy F. Atkinson Company shown in Exhibit "I."

The contract price for the Crosetti job was \$125,000.00 of which amount \$105,317.99 was paid for materials. See Exhibit "4." The contract price for the McNary Dam was \$126,000.00. There was paid for the materials on that job the sum of \$105,850.65 and \$2,000.00 was paid by defendant to the Cramer Machinery Company with whom the defendant was compelled to divide any commission that he might make on the deal. See Exhibit 5. While the trial court refused to receive as evidence Exhibits 4 and 5, the information contained in those exhibits will be found on pages 416 to 420 of the Transcript.

The sum of \$1,500.00 was paid by the defendant to the plaintiff on the Crosetti contract. According to the testimony of the plaintiff the defendant promised to pay an additional \$300.00. Tr. 145. While it is not entirely clear, apparently plaintiff claims the promise to pay the additional \$300.00 was to pay for a trip to Las Vegas. In connection with the claimed promise to pay \$300.00, the evidence of both plaintiff and defendant is to the effect that each was to pay his own expenses while engaged in the solicitation of contracts for the sale of the Vogt Tube Ice Machines. Tr. 164-165. So far as appears, neither of the parties to this litigation kept an account of the expenses incurred while engaged in soliciting

contracts for the sale of the Vogt Tube Ice Machines. That being so, the Trial Court and this Court are powerless to grant any relief to either of the parties by reason of their having been put to expenses in soliciting contracts for the sale of Vogt Tube Ice Machines.

The evidence in this case is somewhat voluminous, consisting of 473 pages of the transcribed testimony, together with numerous exhibits. A discussion of all the testimony would probably tend to confuse rather than to clarify the questions which divide the parties to this controversy. In the course of this Brief, we shall, therefore, undertake to discuss only those portions of the evidence which shed light on the questions which the defendant and appellant seeks to have reviewed by this Court.

DEFENDANT AND APPELLANT RELIES UPON THE FOLLOWING POINTS FOR A REVERSAL OF THE JUDGMENT APPEALED FROM:

POINT ONE

The evidence, when viewed most favorably to plaintiff, shows that by the express agreement between the plaintiff and defendant the defendant had a right to pay the plaintiff whatever he, defendant, deemed fair and proper for the services of plaintiff, and defendant having done so, the plaintiff is wholly without right to recover any additional compensation.

POINT TWO

The Trial Court erred in making its Finding that "The parties heretofore settled a dispute as to the amount of com-

pensation to be paid for this job (J. J. Crosetti Company job) for the sum of \$1,800.00," and likewise erred in entering judgment in favor of the plaintiff and against the defendant for \$300.00 as the balance owing on the J. J. Crosetti job R. 26 and 27.

POINT THREE

The Trial Court erred in making its Finding "That the reasonable value of the services performed by the plaintiff in contacting the Guy F. Atkinson Company is \$4,000.00," and likewise erred in rendering a judgment against the defendant and in favor of the plaintiff for services rendered in connection with the McNary Dam job for the sum of \$4,000.00.

POINT FOUR

Even if the defendant is obligated to pay the plaintiff something for services in connection with the procuring of the contract touching the McNary Dam job, the evidence does not support an award to exceed a fractional part of \$4,000.00.

POINT FIVE

The Trial Court misconceived the evidence when it found that the last payment was made on the Guy F. Atkinson contract on February 28, 1949, R. 25, and erred in awarding interest on the amount found to be due from and after February 28, 1949.

POINT SIX

In light of the fact, as is heretofore pointed out, there is

no evidence to support the judgment, it would appear that such judgment was rendered as a result of the bias and prejudice of the Trial Court.

ARGUMENT

In our statement of the case we have heretofore directed the attention of the Court to the fact that prior to the defendant and plaintiff becoming associated together in connection with the sale of Vogt Tube Ice Machines on the Pacific coast, they had been friends and lived in the same rooming house; that the plaintiff had taken up his residence in California quite some time before 1947 when he and the defendant discussed the matter of attempting to sell Vogt Tube Ice Machines along the Pacific coast; that the plaintiff was engaged in selling machinery and equipment when the defendant first talked to the plaintiff about selling these machines in California; that defendant advised plaintiff he planned to form a corporation to take over the business of selling the machines, but this plan failed to materialize because Vogt people would not give defendant a written contract granting the right to sell such machines. According to plaintiff's testimony the plaintiff and defendant had conversations as to what plaintiff should receive for assisting in the sale of Vogt Tube Ice Machines, and the defendant said:

"that he didn't have any written arrangement with the Vogt people and that we had been practically life-long friends and did I trust him or not, and I told him, of course, I trusted him, and he would count on me—I could count on him to do the fair and square thing. Tr. 56.

Again on page 281 of the transcript the plaintiff testified that the defendant "didn't agree to give me anything." There is other testimony of the plaintiff that he and the defendant talked about 40 per cent. Tr. 281.

It will thus be seen that the parties did not come to any definite agreement as to what the plaintiff should be paid for such assistance as the plaintiff might render to the defendant in the sale of the Vogt Tube Ice Machines. In light of the fact that the Trial Court held there was not a contract, we shall not at this time cite any of the numerous authorities which support the holding of the Trial Court to the effect that there was no contract between the plaintiff and defendant touching the compensation that plaintiff should receive for assisting the defendant in the sale of the Vogt Tube Ice Machines.

It will be seen from the Findings and Conclusions that the Trial Court based its judgment on what it found to be the reasonable value of the services rendered by the plaintiff. R. 25.

It will be noted from the evidence in this case, viewed in a light most favorable to the plaintiff, that the defendant reserved the right to pay to the plaintiff for his services such an amount as he, the defendant, should deem fair and just. Such, according to plaintiff's evidence, was the purport of the arrangement had by plaintiff and defendant at the inception of their arrangement and such, according to plaintiff's evidence, was the repeated statement of the defendant after the plaintiff became interested in assisting the defendant in an attempt to

sell Vogt Tube Ice Machines. Tr. 56-57, 145-150, 191-192, 195, 213.

POINT ONE

THE EVIDENCE, WHEN VIEWED MOST FAVORABLY TO PLAINTIFF, SHOWS THAT BY THE EXPRESS AGREEMENT BETWEEN THE PLAINTIFF AND DEFENDANT THE DEFENDANT HAD A RIGHT TO PAY THE PLAINTIFF WHATEVER HE, DEFENDANT, DEEMED FAIR AND PROPER FOR THE SERVICES OF PLAINTIFF, AND DEFENDANT HAVING DONE SO, THE PLAINTIFF IS WHOLLY WITHOUT RIGHT TO RECOVER ANY ADDITIONAL COMPENSATION.

While the cases dealing with facts somewhat similar to the facts in this case are not all in harmony as we read the cases and other authorities where, as here, the promisor reserves the right to determine what he shall pay for services of a promisee, the weight of authority is to the effect that the promisee having rendered services under such circumstances may not be heard to complain merely because he is not satisfied with what the promisor determines to pay to the promisee, at least where the promisor acts in good faith. Among the cases and authorities which support such doctrine are: Restatement of Contracts, Sec. 32, "A statement by A that he will pay B what A chooses is no promise." In the case of *Corthell vs. Summit Thread Company*, 132 Me. 94, 167 Atl. 79, 92 A.L.R. 1391 at 1394 it is said: "If the contract makes no statement as to the price to be paid the law invokes the standard of reasonableness, and the fair value of the services or property

is recoverable. If the terms of the agreement are uncertain as to price, but exclude the supposition that a reasonable price was intended, no contract can arise. And a reservation to either party of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it, as it is termed, merely illusory." Williston on Contracts, Vol. 1, Sec. 37 et seq. See extended note 53 L.R.A. 288 et seq. 13 C. J. 266 and cases cited. Other cases which are cited in the case of *Corthell vs. Summit Thread Company* supra and which are to the same effect are *Gaines vs. Tobacco Co.*, 163 Ky. 716 SW 482; *Cauet vs. Smith*, 86 Misc. 99, 149 N. Y. S. 101, 103; *United Press vs. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, (53 L.R.A. 288;) *Varney vs. Ditmars*, 217 N. Y. 223, 111 NE 822, 823; *Ann. Cases 1916 B 758*. Other cases to the same effect where executory contracts are involved are *Fairplay School Twp. vs. O'Neal*, 127 Ind. 95, 26 NE 686; *Raisler Sprinkler Co. vs. Automatic Sprinkler Co.*, (Del.) 171 Atl. 214. Other cases where the promisee is bound by the reservations even if the contract is executed are: *In Lee's appeal*, 53 Conn., 363, 2 Atl. 758; *Crowell vs. Houde Engineering Corp.* (Mo.) 19 SW (2d) 516; *Donovan vs. Bull Mountain Trading Co.*, 60 Mont. 87, 198 Pac. 436; *Butler vs. Winona Mill Co.*, 28 Minn. 205, 9 NW 697; *Butler vs. Kemmerer*, 218 Pa. 242, 67 Atl. 332; *Mackintosh vs. Kimball*, 92 NYS 132. Other cases to the same effect are cited in the cases above cited.

There are cases, which upon a casual reading, seem to take a contrary view, but upon a careful reading, most, if not all of such cases, are distinguishable in that in effect the

language used is a promise to pay a reasonable compensation. There is an annotation in 92 A.L.R. 1396 where the cases dealing with the question of when recovery may or may not be had on a promise which leaves the amount to be paid to the promisor's determination are cited and discussed. On page 1400 of 92 A.L.R. the following is stated to be the views of Woodward on Quasi Contracts:

"These variations (i.e. variations in court decisions) may, to some extent, be reconciled by resort to the theories propounded by Woodward on Quasi Contracts in which in Sec. 65 he says that, where the form or character of the promise leads to the conclusion that the plaintiff in a subsequent action thereon did not rely upon it as a contractual obligation, but trusted the fairness and liberality of the promisor, there is no contract, no misreliance upon a supposed contract, and consequently no legal obligation whatever."

In this case the evidence of the plaintiff makes it clear that each time he discussed the matter of compensation with the defendant, the plaintiff was in effect told that he must rely upon what the defendant determined should be paid. If the plaintiff was not satisfied with that arrangement, he was at all times at liberty to quit. To permit the plaintiff to now ignore the arrangement had between him and the defendant would be to permit the plaintiff to recover and require the defendant to pay for services without either an express or implied agreement to pay any amount other than what the defendant should determine.

There was a definite agreement as to the compensation that should be paid to plaintiff on the American-Arabian and DeLamar contracts and the amount agreed upon was paid.

Tr. 97-99. The sum of \$1,500.00 was paid by defendant and accepted by the plaintiff on the J. J. Crosetti job. According to plaintiff whenever he asked the defendant for a written contract defendant replied:

"He said that he didn't have any written arrangements with the Vogt people and that we had been practically life-long friends and did I trust him or not, and I told him, of course I trusted him and he said, well, then such a thing is not necessary. That he could count on me—I could count on him to do the fair and square thing." Tr. 56.

Plaintiff further testified:

"I told Mr. Wareing that he certainly had left me standing in abeyance as to where I stood on the Crosetti job—as far as commissions were concerned, and now we had successfully consummated another contract and I asked him if he wouldn't place in writing the things which he had told me many times, including up in that room at the St. Francis when he gave me the other check and at that time he had said that he had always treated me fairly and generously before, and I had fifty per cent of the commission on those jobs and I would continue to be treated fairly and generously in the same order—and he told me that now was no time to worry about things like that, that the important thing was to get the job going and for me not to worry that I was going to be treated fairly and honestly and I had already had a good indication of how he was doing that—so I put him on his plane and that was the last time I saw Wareing until this courtroom today." Tr. 149-150.

On Tr. page 192 plaintiff testified that he wanted something definite on the McNary job and he said to defendant:

"Are you going to pay me fifty per cent on this job?"

and he said: "I don't think you should have fifty per cent on this job." "Well," I says, "what per cent do you think I should have on a job like this?" "Well," he said, "I don't think you ought to have over forty per cent," and I said, "Well, my golly, you have paid fifty per cent on these other pobs we have worked together, and forty per cent, that means you would make sixty per cent, and that would be fifty per cent more than I am making," and he pointed out he was carrying certain financial responsibilities and everything else, and as far as he was concerned, why, he didn't think I ought to get over forty per cent, and I said, "how about giving that to me in writing?" and he said "no," I would have to trust him on that to do the fair thing, and I suggested—I suggested we have something written up in Watsonville, put the thing in writing, and he said I would just have to be satisfied with his sense of fairness."

Defendant denied this testimony. Tr. 507-509.

Again on page 281 the plaintiff testified that

"He (defendant) didn't agree to give me (plaintiff) anything."

There is some other testimony of the plaintiff to the same effect. The evidence of the defendant is to the effect that plaintiff was to be paid nothing on the McNary Dam job—was not in on it. We quote the following testimony of the defendant: (Tr. 393, 394).

Q. "Just tell us what happened.

A. At any rate, he (Wooldridge) requested—he drove me out there (Atkinson Company.) He was with me that day and wanted to be with me and was on his way home and wanted me to go out there. I said, "You can go along, but

don't want no talking. It is Wareing Engineering business. You solicit your own business." We got out there. We saw Mr. Jenks. He gave me approximately what they had in mind, and said, "Mr. Holt is going to manage it."

I saw Mr. Holt a few minutes and said, 'Mr. Holt, I won't be able to give you any firm price until next Monday. I have to check with my suppliers. Price of steel has gone up, and I have to check with Vogt people before I can give you a firm price."

Q. And that wasn't on August 10, was it?

A. That was on July 22.

Q. And did Mr. Wooldridge leave that Atkinson Company with you at that time?

A. Yes. He drove me down to the bus so I could go—bus station.

Q. At that time did you have any conversation with him respecting the McNary Dam job?

A. Yes.

Q. What was it?

A. He seemed to think—

Q. Just tell what the conversation was.

A. He said, "I think you ought to include me on it. You can pad the price on something when you make your quotation and include me."

Q. And what did you say?

A. I said the job had to be figured very closely with this Vilter pack ice competition. I couldn't do that. "I am co-operating with Cramer a hundred per cent. I have got to take care of Cramer, assume previous obligation."

Q. And what did he say to that?

A. Well, he didn't seem to like it very well. I told him, I said, "Bill how can you help me?"

He said, "I have been studying this concrete cooling."

I says, "You have got a little dangerous knowledge about it. I don't want you to be talking to the customer about these things. It might upset things. I don't care how well you know Mr. Holt," and I said, "another thing, if this job isn't sold already, the Vogt Ice is written in the specifications 85 per cent chipped ice and 15 per cent water. Mr. Cramer has done a wonderful job up there to make the engineers (Army) write that way." I said, "They have got to approve the plant. It says in the specifications Atkinson has to have the engineers (Army) approve it."

Q. Is that all the conversation that took place at that time?

A. That's all. I told him to stay away from the job. I would handle it from now on. I would call Mr. Holt on the phone Monday and would be back down to see him when necessary.

Q. In this letter that has been referred to dated June 29, state whether or not you told him in writing to stay away.

A. I did.

Q. And did ever you ask him to go over to the Guy F. Atkinson Company with you?"

A. I did not."

The foregoing evidence is not contradicted and there is nothing to justify the court to disbelieve such evidence.

Also, the uncontradicted testimony of Mrs. Wareing, wife of defendant, is that on June 15, 1948, at San Mateo, California, at the Benjamin Franklin Hotel, she was present and heard defendant talk with plaintiff. She testified: (Tr. 430)

A. "I heard him (defendant) say—he brought these letters out, and he said, "Bill, I told you to quit soliciting my business; stay away from it;" and then he had another letter there, and he said, "Here I see where you have been over to the Atkinson Company. I told you you are not in that. Mr. Cramer of Cramer Machinery Company is the only one in on that, and I can't take care of you. Now stay away from it."

POINT TWO

THE TRIAL COURT ERRED IN MAKING ITS FINDING THAT "THE PARTIES HERETOFORE SETTLED A DISPUTE AS TO THE AMOUNT OF COMPENSATION TO BE PAID FOR THIS JOB (J. J. CROSETTI COMPANY JOB) FOR THE SUM OF \$1,800.00," AND LIKEWISE ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT FOR \$300.00 AS THE BALANCE OWING ON THE J. J. CROSETTI JOB. R 26 and 27.

The Trial Court found that the parties had settled the amount of compensation that should be paid for the Crosetti job at \$1,800.00 of which \$1,500.00 had been paid. It is of course true that the plaintiff was paid \$1,500.00 on the Crosetti job. We, of course, do not and could not object to the finding as to the \$1,500.00 but there is a total absence of evidence that the parties agreed upon a settlement of the Crosetti job for \$1,800.00. The plaintiff does not claim any such settlement was made. What plaintiff did testify to was that when he complained about the cost of the trip to Las Vegas, the defendant said that he would send another check for \$300.00 to the plaintiff. Tr. 144-145.

The defendant testified that when the plaintiff complained about the trip to Las Vegas, the defendant said: "3250 miles at ten cents a mile, I say that is better than three hundred dollars isn't it? Well, I says, I will consider giving that to you but it would be charity if I do." Tr. 375. We have heretofore pointed out that it was agreed, according to plaintiff's testimony that each of the parties herein was to pay his own expenses connected with efforts to sell the ice machines. Tr. 164. That being so, there was no consideration for defendant's promise, even if he made a promise, to pay plaintiff \$300.00 toward his expenses in driving to Las Vegas.

POINTS THREE AND FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDING "THAT THE REASONABLE VALUE OF THE SERVICES PERFORMED BY THE PLAINTIFF IN CONTACT-

ING THE GUY F. ATKINSON COMPANY IS \$4,000.00," AND LIKEWISE ERRED IN RENDERING A JUDGMENT AGAINST THE DEFENDANT AND IN FAVOR OF THE PLAINTIFF FOR SERVICES RENDERED IN CONNECTION WITH THE McNARY DAM JOB FOR THE SUM of \$4,000.00.

EVEN IF THE DEFENDANT IS OBLIGATED TO PAY THE PLAINTIFF SOMETHING FOR SERVICES IN CONNECTION WITH THE PROCURING OF THE CONTRACT TOUCHING THE McNARY DAM JOB, THE EVIDENCE DOES NOT SUPPORT AN AWARD TO EXCEED A FRACTIONAL PART OF \$4,000.00.

It is of course elementary that one who seeks to recover the reasonable value of alleged services rendered has the burden of showing the monetary value thereof. The basis of fixing compensation is discussed and cases are cited in 2 Am. Jur., Agency, paragraph 311, where it is said, "In such cases it is sometimes said that the agent is entitled to the fair and just value of his services, determined in the light of the surrounding circumstances and in the light of what others receive for like services."

Even if, contrary to the authorities herefore cited in this brief, the defendant became obligated to pay the plaintiff the reasonable value of any services that the plaintiff may have rendered in connection with the securing the contract with Guy F. Atkinson Company for the construction of an ice plant at the McNary Dam, there is no evidence that such services were of the reasonable value of \$4,000.00, the amount awarded

to the plaintiff for services which plaintiff claims to have rendered in connection with the awarding of the contract to the defendant. The evidence of both the plaintiff and defendant is to the effect that the defendant was obligated to pay and did pay to Cramer Machinery Company \$2,000.00. Tr. 417, Ex. 5, also plaintiff's letter of June 5, 1948 being Ex. 2. Before the plaintiff had anything whatever to do with Guy F. Atkinson Company in connection with the McNary Dam, defendant was already obligated to deal with and take care of the Cramer Machinery Company out of any profits that might be made if the Guy F. Atkinson Company secured the general contract at the McNary Dam. The Cramer Machinery Company had correspondence with Guy F. Atkinson Company with respect to the Vogt Tube Ice Machine before the plaintiff knew that any such dam was to be constructed or at least before he had any contact with Atkinson concerning McNary Dam. See correspondence file of McNary Dam job, Ex. I, letter of plaintiff to defendant of June 5, 1948, Ex. 2, letter of defendant to plaintiff of June 26, 1948, in Ex. I, letter of Cramer Machinery Company to Guy F. Atkinson Company of June 14, 1948. Ex. 10, Wareing (defendant) bid to Guy F. Atkinson Company "at the request of Cramer Machinery Company and as a representative of the Henry Vogt Machinery Company, etc." Plaintiff's Ex. 1.

When plaintiff wrote the letter of June 5, 1948, Ex. 2, to defendant, he knew that Cramer Machinery Company was in on the McNary Dam job. Plaintiff wrote that Cramer offered to engineer the entire job and said "he would give Atkinson anything that they wanted, etc." Shortly after the

plaintiff wrote said letter to defendant the defendant on June 26, 1948, informed the plaintiff about the necessity of getting some information from the Cramer Machinery Company before he could make up his estimate and in that letter he told the plaintiff:

“Please do not call on any of the contractors unless I instruct you to do so.” Plaintiff’s Ex. I.

Notwithstanding such instructions, the plaintiff continued to horn in on the deal with Atkinson Company. This correspondence was had long before the contract for installing the Vogt Tube Ice Machine was let on August 10, 1948. See Contract which is a part of Ex. I.

Moreover, there is no evidence and no inference that may reasonably be drawn from any evidence which shows or tends to show that \$4,000.00 is a reasonable amount to be awarded for any services that may have been rendered by the plaintiff in connection with securing the contract for the installation of the Vogt Tube Ice Machine at the McNary Dam. Plaintiff seemed to get some comfort out of the fact that defendant split his commission, share and share alike, which he received from the American-Arabian and DeLamar contracts. In both of these contracts there was no engineer or other work to be done by defendant. While in the McNary Dam job the defendant was required to do and did install the entire job and was required to and did assume the entire responsibility of financing the same. The plaintiff makes no claim and he offered no evidence that he undertook any of that responsibility. If plaintiff’s evidence and the inference that may be reasonably drawn therefrom are given full force and effect, the most

that the same shows is that he accompanied the defendant when he called upon the Guy F. Atkinson Company when the attempt was being made to include the Vogt Tube Ice Machine in the contract for installing at the McNary Dam. It should be noted that the plaintiff was also trying to sell to the Atkinson Company some other materials for which he was agent. That the defendant was obligated to spend much time and was put to much expense in installing the tube ice machine in the McNary Dam is established without conflict in the evidence. Indeed that such was the fact would seem self-evident, independent of the evidence. See Tr. 417-418. There is no evidence to the contrary.

The plaintiff made a futile attempt to show what is the reasonable value of services such as those which plaintiff claims to have rendered in connection with the defendant securing the contract to install the Vogt Tube Ice Machine at the McNary Dam. Plaintiff called Aldon J. Anderson and attempted to have him qualify as an expert witness. Tr. 219. Anderson testified that he owned and operated the Equipment Supply Company at Salt Lake City, Utah, and handled machinery, tools and equipment of various types. He testified that when someone sells products which were handled by the witness it was the usual thing to split the commission share and share alike. Tr. 222-225. It was quite apparent that the testimony of Mr. Anderson, even if competent generally, was wholly valueless in sustaining plaintiff's contention when applied to the facts in this case. The crux of his testimony is that when a bid is made for a product one price is charged F.O.B. factory and another price when the article is to be

installed. That when the machinery is to be installed the sale price includes all costs incident to the job; that the cost of installation is deducted before you arrive at the net profit and only the net profit is divided fifty-fifty. Tr. 229. Obviously one could not remain in business very long if a salesman was paid one-half of the sale price of an article including the cost of installing the same where such cost is very substantial as was the case in the McNary Dam job. Apparently the Trial Court sensed the dilemma when he took over the examination of the witness and sought to elicit from him whether or not there was any custom or practice as applied to facts similar to those involved in the installation of the Vogt Tube Ice Machine in the McNary Dam, and the witness, after some hedging, replied:

“Well, I would prefer not to say that I am fully informed on that particular point.” Tr. 232.

No attempt was made by the plaintiff to state what was the reasonable amount to be paid for the supervision and installation of the Vogt Tube Ice Machine by defendant, and there is nothing in the evidence which shows that the testimony of the defendant in such particular is not worthy of belief. While Exhibit 5 was not received in evidence, such Exhibit serves as a summation of the uncontradicted testimony of the defendant, which will be found in Tr. 410-417.

John A. Sanford, witness called by defendant, corroborated the testimony of defendant in that one who sells machinery without installing same is not allowed by the manufacturer more than 5 per cent of the cost of machinery as

commission. Tr. 422, 423; also testimony of defendant Tr. 339-340.

According to all of the testimony, when viewed most favorably for the plaintiff, no more than 5 per cent of the cost of the Vogt Tube Ice Machinery was payable as a commission for the sale of that machinery, only a part of which plaintiff upon any theory could claim. The Cramer Machinery Company was paid \$2000.00 as a commission for services rendered by that company in making the sale. Of the machinery sold only \$80,105.40 of the total price was represented by the products of the Henry Vogt Machine Company. It will be seen that by his complaint before it was amended, the plaintiff sought compensation for services rendered in assisting in the sale of the Vogt Tube Ice Machines. All of plaintiff's evidence is directed to the recovery of compensation for assistance claimed to have been rendered in the sale of these tube ice machines. Apparently the defendant had the sole agency for selling the products of the Ingersoll-Rand Company, with whom he had been connected for many years, which went into the construction of the McNary Dam. The product of that company which was sold amounted to \$25,745.25. So far as appears, the plaintiff rendered no assistance in the sale of the Ingersoll-Rand Company products. Thus the plaintiff's evidence would not support a commission to exceed a portion of \$4,103.06 for the sale of all of the material that was purchased from Vogt Company on the McNary Dam job. Cramer Machinery Company was paid \$2,000.00 which would leave \$2,103.06 for commission to be divided between the parties to this action. It will be noted that the Trial Court awarded

the judgment to the plaintiff for services rendered in the sale of the Vogt Tube Ice Machine.

On the other hand, if the defendant is awarded and allowed to deduct the costs of installatoin, to which he is in all fairness entitled, there would be \$1,243.88 net profit (being the difference between \$128,927.83 received by defendant and \$127,683.95 paid out by defendant) available for division between the parties to this action. (Tr. 410-417 and plaintiff's expert witness Anderson who testified that only net profits should be divided 50-50 with employer and salesmen in his employ, and he further said: "Yes, and I have that arrangement with two other fellows who are only doing occasional work for us, incidental to their other activities." Tr. 229.)

It is obvious that if the \$4,000.00 awarded to the plaintiff is affirmed, the plaintiff will receive a commission on the labor performed and expenses incurred and paid by defendant in installing the ice tube machine and other equipment in the McNary Dam, and in addition thereto the defendant will be compelled to assume the burden of paying for the services of the Cramer Machinery Company. It is submitted that the evidence fails to support any such a result.

POINT FIVE

THE TRIAL COURT MISCONCEIVED THE EVIDENCE WHEN IT FOUND THAT THE LAST PAYMENT WAS MADE ON THE GUY F. ATKINSON CONTRACT ON FEBRUARY 28, 1949, R. 25, AND ERRED IN AWARDING INTEREST ON THE AMOUNT TO BE DUE FROM AND AFTER FEBRUARY 28, 1949.

The evidence does not show that Guy F. Atkinson Company paid up the entire amount of the contract on McNary Dam on February 28, 1949. On the contrary the last payment was not made until May 20, 1949. Tr. 417. Moreover, the claim of plaintiff was unliquidated and as such the plaintiff in any event was not entitled to interest until the amount of the claim was fixed. See 47 C.J.S. Page 28, paragraph 19 and cases therein cited including Dick vs. Essary (Okla.) 203 P. (2) 715.

POINT SIX

IN LIGHT OF THE FACT, AS IS HERETOFORE POINTED OUT, THERE IS NO EVIDENCE TO SUPPORT THE JUDGMENT, IT WOULD APPEAR THAT SUCH JUDGMENT WAS RENDERED AS A RESULT OF THE BIAS AND PREJUDICE OF THE TRIAL COURT.

Under this heading we do not wish to repeat what has heretofore been said, but we do wish to emphasize the fact that the evidence wholly fails to justify a finding that plaintiff is entitled to recover \$4,000.00 for such services as he claims to have rendered in securing the contract with Guy F. Atkinson Company. We again direct the attention of the court to the testimony of plaintiff's witness, Aldon J. Anderson. He testified as follows: (See Tr. 228 and 229).

"By Mr. Thomas. Now, you mentioned that where you take a—or give a quotation involving one price f.o.b. factory and other price installed, you determine what the engineering charges would be and the costs of other hazards and give your bid having all those items in mind. Is that correct?

A. Yes.

Q. Now, those hazards would include any expenses that you would incur incident to the installation of this, would they not?

A. Oh, yes, that's true.

Q. And they would also include any unforeseen expenses. Suppose you prepared a bid and a quotation for the installation of this machinery, Mr. Anderson, and something in addition to that was incurred. You would have to pay the expense, wouldn't you?

A. If you do not allow enough in your bid for contingencies, why, you pay it anyway.

Q. You have got to pay it anyway. Now, after all those items are deducted, including the cost of the machinery, that would be your profit. Is that correct?

A. All costs incident to the particular sale project should be considered and deducted, computed and deducted before you would arrive at your net profit, if that's what you mean.

Q. That's what I mean. And then you say you would split fifty-fifty with your salesman that net profit. Is that correct.

A. That's what we do every month, and sometimes the firm absorbs telegraph and telegrams and long-distance calls and entertainment perhaps, and other instances where it is a tight deal we put that in as part of our costs before we can divide the commission."

Apparently the Trial Court was not satisfied with this testimony and himself took over the examination of this wit-

ness and asked the following questions to which were given the following answers: (Tr. 229-232).

"THE COURT: Wait a minute. Let me interrupt. We are not talking about men you hire. I thought what we were talking about was where you split a profit with somebody that is not in your employ, where you get some outside help to make a sale. That is what I want to know, what the custom is. I am not talking about an agreement you make with your own employees, and that won't help me. Is there a custom regarding strangers so to speak, you and the Salt Lake Hardware or you and John Doe joining your efforts together to make a sale? What is the custom about splitting your profits between you and a stranger, or is there such a custom?

A. Well, answering that, the story I was just in the middle of here—

Q. (By the Court) First tell me—

A. —answers that.

Q. Is there a custom in this community?

A. In our experienec there is what I would say is a custom, yes.

Q. What is that custom? Without telling me a specific example, what is the custom for splititng the fee?

A. Well, our custom—

Q. I don't mean yours alone. What is the custom in the community generally?

A. Why, I would say more often than not it is fifty-fifty,

but that's like answering the question, "How would you dig a trench?" You have got to say what size of a trench it is or what sort of material is to be removed.

Q. Well, hardly that. If there isn't any custom on the question we are asking, we are not getting anywhere. I have got to know if there is a custom here between the Salt Lake Hardware and John Doe, who may help Salt Lake Hardware place a sale.

A. Well, I cannot say, Judge, what the Salt Lake Hardware general policy is except so far as I have come in contact with it.

Q. That won't help. Specific cases won't help unless you are sufficiently acquainted with what you do, what the Salt Lake Hardware and what other distributors and dealers do as to make a custom. If there isn't any custom that would be followed by people who have no specific agreement, it won't help here.

A. Well, I think I can say this truthfully, that in the absence of written arrangements or contractual agreements, oral or written, when party A permits party B to sell with them or for them because of influence or contacts, the usual or customary thing would be to split the profits.

Q. There is a custom here for that?

A. Yes, I have observed that to be in effect quite often.

Q. All right.

A. And I believe that to be more often than not the custom.

Q. Now, would there be a custom if party A contracted to install some heavy equipment and go to the expense of engineering it, planning it, and supervising the installation of it, and then for a net profit that might be made, is there a custom here regarding A and B when B might have helped that sale?

A. Well, I wouldn't want to say that I know what the general custom would be with respect to that specific question.

Q. All right.

A. But I have had a good deal of contact with conditions quite like that.

Q. Well, your specific examples wouldn't help me. Unless there is a custom among all dealers here or the majority of them dealing in a thing like that—

A. I believe this is a custom, that no reputable concern or large industrial company in this area would reject the sales assistance which would result in or help to obtain the result of a sale if they were confident that the second party, the helping party, was dependable, experienced, and could intelligently present the proposed sale.

Q. I think that's right, but I was just wondering if you could help—

A. Then on that basis the customary plan would be to encourage and permit and work with them on that arrangement and divide fifty-fifty, with the possibility in an individual case of making maybe allowances for hazards, which wouldn't be a customary thing but might be a special consideration.

Q. I am not talking about what would be a fair thing. I just want to know does it happen enough so that you can say it is a custom in this community for dealing with problems like that.

A. Including installations?

Q. Yes.

A. Well, I would prefer not to say that I am fully informed on that particular point."

John A. Sanford, witness for defendant, testified there was no custom for dividing fifty-fifty with a salesman the resale discount granted by a manufacturer to one installing a plant. Tr. 424-425. The testimony of this witness was not entirely clear and the following further proceedings were had in an effort to show the reasonableness of defendant's engineering charges on McNary Dam job: (Tr. 427).

Q. I will give you a hypothetical case, Mr. Sanford.

THE COURT: You won't need to on that basis because I have sustained his objection.

MR. THOMAS: Well, on the ground that it is indefinite?

THE COURT: Just generally.

Q. Mr. Sanford, I will ask you whether or not a charge of five per cent is a reasonable charge by an engineer—

THE COURT: You don't need to answer that question. You are just beating your gums on that, Mr. Thomas. I'm

not going to let this witness answer about that. I have ruled it is immaterial.

MR. THOMAS: I will submit it.

THE COURT: It's already been submitted, and I am trying to get you off of it. I have ruled.

MR. THOMAS: Well, I understood that the other was on the ground of indefiniteness, if Your Honor please, but—

THE COURT: I can't help your understanding. I have sustained the objection to that on any other ground that you can think of. I don't want to hear it."

Notwithstanding the plaintiff was permitted to go into various and numerous conversations and alleged contracts with prospective purchasers of Vogt Tube Ice Equipment, for which plaintiff finally conceded he was not entitled to compensation without sales, Tr. 213 and 214, the Trial Court seemed to be very much peeved, if not right down insulting, when counsel for defendant sought to illicit evidence contrary to that offered by plaintiff. This is well illustrated by the following:

"THE COURT: He (Wareing) is probably paying Mr. Thomas on a per diem here, and if he pays more than a half day he's getting rooked because this case was a half-day case; but if he wants to prolong it, I don't blame Mr. Thomas for charging him. He is down here. He can go ahead. You may answer:

MR. THOMAS: Are you intimating, Your Honor, that I am prolonging this over half day?

THE COURT: I say this man is helping. I think it is a half-day case. I think you gentlemen should have stipulated last Monday on this, let me read it and have it come in, and let these men testify what their arrangements were, but you didn't do that. Go ahead. If this witness wants to talk a long time, I don't think you are working for nothing. If he wants to hire his lawyer, go ahead."

The uncontradicted evidence of defendant is that he received from Atkinson Company on his contract on McNary Dam \$128,927.83 and paid out (including his engineering fee) \$127,683.95. Tr. 417-418. This leaves a net profit on the project of \$1,243.88. Plaintiff makes no claim that he performed any services whatever other than in connection with securing the contract from Guy F. Atkinson. Also, plaintiff well knew that the expenses of installing the plant were properly deductible before there would be any profit to divide. Tr. 145. It was the defendant who assumed all the risk, paid all the expenses and furnished all the know-how in the installation of the plant at McNary Dam. Notwithstanding the plaintiff was told not to contact the prospective contractors on the McNary Dam and notwithstanding the plaintiff knew that the Cramer Machinery Company was entitled to a commission that must be paid on any contract that Guy F. Atkinson might secure for the construction of part or all of the McNary Dam, (see plaintiff's letter Ex. 2, Tr. 281, and uncontroverted testimony of defendant Tr. 389, 391, 440-445), the plaintiff kept horning in on defendant's negotiations, undoubtedly for the sole purpose of having something upon which he might have a claim for compensation. Under such circumstances,

we submit that the defendant was fully justified in contending that the plaintiff was wholly without right to any further compensation.

We submit that the judgment should be reversed and the Trial Court directed to enter a judgment in favor of the defendant no cause of action and for his costs.

Respectfully submitted,

Llewellyn O. Thomas
and
Elias Hansen
Attorneys for Appellant