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

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

W. P. WOOLDRIDGE,
Plaintiff and Respondent,

vs.

C. L. WAREING,
Defendant and Appellant.

No. 7644

BRIEF OF RESPONDENT

FILED

APR 27 1951 DAN S. BUSHNELL,
Attorney for Plaintiff and
Clerk, Supreme Court, Utah Respondent.

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The statement of facts made by the appellant in certain particulars is argumentative, misconceives the pleadings and is based upon suppositions and exhibits not admitted into evidence. Only the more important ob-

jections will be called to the attention of the court.

At the top of page 2 of the appellant's brief the appellant states, "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 " with two specific firms. The pleadings will disclose that the first count is for the reasonable value of services rendered; whereas, the second count is based upon a specific contract to divide the net profits from the sale of Vogt tube-ice machines and supplemental equipment. There were only two sales to which the contract could be applied. (Tr. 1-3)

The paragraph commencing at the bottom of page 3 of the appellant's brief states that the only matters involved on the appeal relate to the two firms to which a sale was consummated, and that the other evidence pertaining to all of the miscellaneous contacts made by the plaintiff which did not result in a sale is immaterial. In the paragraph commencing at the bottom of page 5 and on the top of page 6 the appellant again states that the evidence of the miscellaneous contacts which did not result in sales need not be analyzed. In brief answer to the above references, which all seem to be argumentative conclusions drawn by the appellant and not a concise statement of the facts, such evidence is essential to show

the relation of the parties and to aid the court in its determination of the amount to be awarded out of the funds received from the contracts which did result in sales. A salesman on commission basis must receive from actual sales made a sufficient amount to average out the contracts which did not result in sales.

The second complete paragraph on page 7 sets out the contract amounts and the amount paid for materials and relies on exhibits 4 and 5 which were not admitted in evidence on the grounds that they were self-serving statements. (Tr. 404) In that paragraph it is also stated that the appellant paid the sum of \$2,000 to Cramer Machinery Co. since he was compelled to divide the commission with said company. The court excluded the evidence concerning the appellant's relations with the Cramer Machinery Co. (Tr. 457-459)

The last paragraph commencing on page 7 states that the testimony showed that the respondent was to receive an additional \$300; and then the appellant states as follows:

"While it is not entirely clear, apparently plaintiff claims the promise to pay the additional \$300 was to pay for a trip to Las Vegas."

After making this assumption in the statement of the case, the appellant then proceeds to make an argument on this question and as to the power of the court to consider the issue of expenses. The evidence does not support the assumption made. (Tr. 144)

Since the points argued by the appellant primarily deal with the sufficiency of the evidence, and since

answering them requires a complete review of the evidence, the respondent only wishes to make a brief statement of the facts of the case at this time.

The parties to the above entitled action until shortly before the action was commenced were and had been friends commencing in the years 1927 to 1930 at which time they shared an apartment. (Tr. 42-43) Both men have continuously engaged in the profession of being sales representative for industrial firms. (Tr. 40-42) Prior to August, 1943, the parties discussed the possibility of jointly representing the Henry Vogt Machine Co. for the purpose of selling tube-ice machines on the Pacific Coast which had been the respondent's home for some time. (Tr. 43, 46) This possibility was investigated, discussed and developed during the war years. (Tr. 46-47)

In the summer of 1947 the appellant met with the respondent in San Francisco (Tr. 48-49) and made contacts concerning the sale of Vogt tube-ice machines. (Tr. 51) Beginning in the summer of 1947 until the latter part of 1948 numerous contacts were made by the respondent individually and jointly with the appellant in an attempt to sell Vogt tube-ice machines as is reviewed in Point II herein.

From these contacts four major contracts were secured. One was with the American-Arabian Oil Co. (file-Ex. C) which involved a contract price of \$12,410. (Tr. 97) From this contract the appellant paid to the respondent the sum of \$546.99, being 50% of the commission paid to the appellant by the Henry Vogt Co. (Tr. 98) A second contract was entered into with a firm in Venezuela

(File-Ex. B) as the result of the conjunctive efforts of the respondent, the appellant and Mr. C. E. DeLamar. The contract price in this case was \$25,678, (Tr. 98) and the respondent received directly from the manufacturer \$1,058.90, being one-third of the commission paid by the Henry Vogt Co. (Tr. 98) The third major contract was made with the J. J. Crosetti Co. of Watsonville, California, in the total amount of \$125,000. (Ex. D) The total amount of the resale discount or commissions was \$11,861.80, which does not include \$8,215.37 allowed to appellant for engineering services and expenses. (Ex. P-8, 9, 10 & Tr. 343) The fourth contract was made with the Guy F. Atkinson Co. of San Francisco being in the total amount of \$126,000. (Ex. I) The resale discounts and commissions amounted to \$12,342.35, not including \$8,579.00 allowed by appellant for his engineering services and other expenses. (Ex. P-1, 2, 3, 4, 5; Tr. 334)

In the last two mentioned sales the contracts were made with the Wareing Engineering and Sales Co. as an independent contractor who then resold the equipment to the purchasers; which arrangement is to be distinguished from the first two mentioned sales wherein the sales were made direct by Vogt Machine Co. (Tr. 98-99) In the last two mentioned sales, because the appellant was the independent contractor in computing the amount of the contract, he made an allowance (in excess of \$8,000 for each job) over and above the resale discounts and commissions to compensate him for such additional engineering services, time and expenses as might be required of him in generally supervising the installation

of the equipment. An erection engineer was furnished by Vogt Co. on both of the latter two jobs, whose services were paid for according to the terms of the contract by the purchasers. (Tr. 434)

The respondent maintained that he was entitled to either one-half of the resale discounts and commissions upon an implied in fact contract based upon the two previous jobs; or in the alternative, that he was entitled to the reasonable value of his services which amount should be 50% of the resale discount and commissions. (Tr. 1-3) The appellant maintained that he paid the respondent \$1500 as full settlement on the Crosetti sale. (Tr. 10) As to the Guy F. Atkinson contract, the appellant maintained that the respondent performed no services at the request of the appellant and that he did not agree to pay respondent anything for services rendered. (Tr. 10, 11; 498)

The court found as to the Crosetti sale that there was a dispute between the parties as to the amount to be received by the respondent and that this dispute was settled by the payment of \$1500 and an agreement to pay an additional \$300. (Tr. 26) As to the Guy F. Atkinson contract, the court concluded that the respondent had rendered valuable services to the appellant at his request, which services were worth the reasonable sum of \$4,000.-00. (Tr. 25)

RESPONDENT'S STATEMENT OF POINTS

POINT ONE

THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT THERE WAS NO CONTRACT AND THAT THE RESPONDENT WAS ENTITLED TO RECOVER FOR THE REASONABLE VALUE OF HIS SERVICES. (Reply to appellant's Point One.)

POINT TWO

THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S JUDGMENT AND AWARD ON QUANTUM MERUIT OF \$4,000.00 FOR SERVICES RENDERED BY THE RESPONDENT FOR THE APPELLANT IN THE SALE TO GUY F. ATKINSON CO.; AND, THEREFORE, THE JUDGMENT WAS NOT RENDERED AS A RESULT OF BIAS AND PREJUDICE. (Reply to appellant's Points Three, Four and Six)

POINT THREE

THE COURT PROPERLY AWARDED INTEREST COMMENCING ON AUGUST 28, 1949, ON THE COMPENSATION OWED TO THE RESPONDENT FOR SERVICES RENDERED IN THE SALE TO GUY F. ATKINSON CO. (Reply to appellant's Point Five)

CROSS ASSIGNMENT OF ERROR

POINT FOUR

THE COURT ERRONEOUSLY FOUND THAT A DISPUTED CLAIM HAD BEEN SETTLED AS TO THE AMOUNT OF COMPENSATION TO BE PAID TO RESPONDENT ON THE J. J. CROSETTI SALE. (Reply to appellant's Point Two)

POINT FIVE

THE COURT EITHER MISCONCEIVED THE RULE OF

DAMAGES TO BE APPLIED OR MISAPPLIED THE PROPER
RULE TO THE FACTS OF THIS CASE.

ARGUMENT

POINT ONE

THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT THERE WAS NO CONTRACT AND THAT THE RESPONDENT WAS ENTITLED TO RECOVER FOR THE REASONABLE VALUE OF HIS SERVICES. (Reply to appellant's Point One.)

Before reviewing the evidence as required in reply to appellant's argument, the respondent concedes that there was no evidence of an express agreement to pay a particular amount. The count in the complaint seeking to recover on the terms of a contract was based on the grounds that an implied in fact contract for one-half of the commissions could be shown from the conduct of the parties. At the commencement of the transactions pertaining to the sale of Vogt equipment, the appellant agreed to give the respondent 50% of any commissions received from the sale of Rathbun-Jones' products which the appellant was authorized or would be authorized to sell. (Tr. 191) The appellant further divided the commissions 50-50 with the respondent on the sale to the American-Arabian Oil Co. and the Venezuela sale. (Tr. 98) The appellant referred to these sales when assuring respondent that he would be treated fairly.

Although the court may have found such an implied in fact contract, at the request of appellant Finding of Fact No. 3 was modified by interlineation to provide that

there was no contract and recovery could not be had on Count 2 of the complaint.

The respondent doesn't contend that this Finding of Fact was error but concedes that there is "some competent evidence" in support of such finding. The appellant, however, after having the court by interlineation make such a finding now asserts in Point One of his argument that there was an express agreement to pay what the appellant deemed fair and just. Authorities are then cited by appellant to the effect that such a contract is not in fact a contract at all since the term, to pay what one chooses to pay, is illusory. The respondent does not contest the rule of law announced by the authorities cited by appellant, but rather states that such rule of law supports the finding of the court that there was not a contract between the parties. However, in view of the authorities cited by appellant, he asserts that since the payment was made in accordance with said agreement (not found by the court) the appellant is not entitled to seek compensation. The appellant states on page six of his brief in the first complete paragraph, "There is no evidence of a contract between the parties to this controversy as to the compensation, if any;" also at page eleven of appellant's brief it is stated that there was no definite agreement and that the appellant would not cite any of the numerous authorities which would support the holding of the court that there was no contract.

The very authorities cited by the appellant in point one hold that where a contract cannot be found because it is too indefinite or is illusory, that compensation on

quantum meruit can be recovered. For instance, the annotation in 92 A.L.R. 1396, 1406 states as follows:

“And it would seem that the general rule is that when a contract expressly or impliedly reserving in the promissor the right to determine the compensation to be paid for goods or services has been performed by the promisee, recovery of the reasonable value of such performance may be had either in an action on the contract in which recovery is measured by a quantum meruit or on a quantum meruit action alone. (See Subd. II C. 5, *infra*)

“Particularly does this seem to be true where the express or implied reservation on the part of the promissor is coupled with the provision that the payment to be made shall be ‘reasonable,’ ‘fair,’ ‘right,’ ‘good,’ etc.”

All of the evidence cited under point one by the appellant only substantiates the court's findings of no contract, and in addition points out that the appellant denied that he agreed to pay the respondent any amount for services rendered in the sale to Guy F. Atkinson Co. Also see Tr. 498.

No claim is asserted and the evidence is that no payment was made to respondent for services performed in the sale to Guy F. Atkinson, Co. for the McNary Dam job. However, point one of appellant's argument states first that there was an express agreement to pay plaintiff (respondent) whatever defendant (appellant) deemed fair; and second, defendant (appellant) had done so (paid what he deemed fair), and that plaintiff (re-

spondent) is wholly without right to recover any additional compensation. It is obvious that this phase of point one even if validly asserted can have no bearing with regard to the McNary Dam sale for which the \$4,000 was awarded by the court.

While the evidence does not show a specific, express contract, it is sufficient to sustain the court's finding to that effect; and it is sufficient to show that the services performed by the respondent were not considered as a gratuity by either party, and therefore, the respondent should be permitted to recover the reasonable value of the services performed.

POINT TWO

THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S JUDGMENT, AND AWARD ON QUANTUM MERUIT OF \$4,000.00 FOR SERVICES RENDERED BY THE RESPONDENT FOR THE APPELLANT IN THE SALE TO GUY F. ATKINSON CO.; AND, THEREFORE, THE JUDGMENT WAS NOT RENDERED AS A RESULT OF BIAS AND PREJUDICE. (Reply to appellant's Points 3, 4, & 6)

The appellant's Points Three and Four challenge the sufficiency of the evidence to sustain the award of \$4,000.00 as the reasonable value of services performed. Appellant's Point Six challenges the sufficiency of the evidence to support the entire judgment. Since these points all are concerned with the sufficiency of the evidence and in effect call for a review of the entire case, the respondent shall not discuss each point separately, but will review the evidence generally.

In reviewing the sufficiency of the evidence on ap-

peal, to sustain the findings of the trial court, it is fundamental that the judgment will be affirmed if there is "any competent evidence upon which the trial court could base the judgment." Having this rule of law in mind the respondent shall review the evidence which is far more than adequate to sustain the judgment. A complete review of the sufficiency of the evidence can only be obtained by reading the entire transcript coordinated with the files of correspondence introduced as exhibits; however, the respondent respectfully submits the following summarized abstract of the evidence.

PRELIMINARY

The respondent is a graduate engineer, licensed as a professional engineer in the State of California for mechanical engineering. (Tr. 40-41) Since his graduation from college in 1924 he has continuously been associated with industrial firms. (Tr. 41) For 16 years he was associated with the U. S. Steel Corporation, more particularly with the Columbia Steel Co. of San Francisco. At the time he resigned in 1940 he was the company's sales manager for the San Francisco district. (Tr. 41) The respondent has resided on the Pacific Coast since 1932, more particularly in the San Francisco Bay area. (Tr. 43)

Prior to August 13, 1943, the appellant suggested to the respondent that while on a trip to Washington, D. C., respondent should inspect the tube-ice equipment at the New Statler Hotel. (Tr. 43) A letter dated August 13, 1943, written by the respondent to the appellant com-

ments on his visit and inspection of the tube-ice equipment at the Statler Hotel and states as follows:

“I really think that if you can get something sewed up on a West Coast deal, that now would be the time to do it. Personally, I am very enthusiastic and feel that the machines have all sorts of possibilities.” (Ex. A, #2)

Another letter dated Sept. 8, 1944, written by the respondent to the appellant states as follows:

“I have never forgotten the several discussions that you and I had regarding the tube-ice. With the end of the war at least assured within a reasonable time, I hope that your plans are materializing to do something with this. I feel that there is wonderful opportunity and no better place to put it across than the Pacific Coast. Do let me hear something from you regarding this.” (Ex. A, #4)

In addition to these letters there is evidence that the parties had numerous discussions concerning the possibility of selling Vogt tube-ice machines in the western states. (Tr. 47) In the summer of 1947 the appellant called the respondent concerning a trip he was going to make to California. (Tr. 47-48) Arrangements were made by the parties to meet each other in San Francisco, and at that meeting the appellant informed the respondent that he had resigned from the Ingersoll-Rand Co. and intended to engage in the sale of Vogt tube-ice machines, particularly for the purpose of packing fresh

vegetables which were to be shipped east. (Tr. 50) On this trip the appellant gave to the respondent literature concerning Vogt tube-ice machines and suggested that the respondent make himself acquainted with the material therein contained. (Tr. 50-51)

On September 5, 1947, the respondent wrote a letter to the appellant (Ex. A, #7) wherein he acknowledged receipt of additional information, stated that he had studied the same, requested 50 additional copies of the bulletins and indicated that he had already gone to work on the sale of the equipment. He also asked for other specific information and stated in addition as follows:

“Clancy, in order to get some idea as to how to allocate my time I wish you would give me something definite about the commission or earnings I can make by working with you. You know I am sold 100% on tube-ice and working with you is something I have looked forward to for a long time. I am also confident now that I can really help put the product over in California.

“I would also like to suggest that you notify Vogt that I am working under you so that they will know what we’re doing.”

The correspondence introduced as exhibits show that the Vogt Co. knew of the association of the parties hereto, and between Christmas and New Year’s Day, 1947 the appellant introduced the respondent to the officers of the Vogt Co. and took the respondent through the plant at Louisville, Kentucky. (Tr. 104)

During the month of September, 1947, the appellant again went to San Francisco and the parties hereto

jointly made contacts upon the St. Francis, Fairmont and Mark Hopkins Hotels as well as the Standard Oil Co. regarding Vogt tube-ice machines. (Tr. 50-52)

MISCELLANEOUS CONTACTS

ST. FRANCIS HOTEL

A letter of Sept. 5, 1947, (Ex. A, #9) reports on a call made upon the manager of the hotel. A letter of Sept. 9, 1947 (Ex. A, #10) requests additional information and reports on an additional contact. The letter of September 13, 1947 (Ex. A, #12) is from the respondent to the St. Francis Hotel, a copy of which was sent to the appellant. In addition to the letters the respondent testified that he probably made between eight and ten calls on the personnel of the hotel in an attempt to effectuate a sale. (Tr. 53)

PACIFIC BREWING AND MALTING CO.

The parties jointly contacted this prospective client. (Tr. 62) A letter of October 3, 1947 (Ex. A, #13) is a copy of a quotation made by the appellant to the Pacific Brewing and Malting Co., a copy of which was sent to the respondent by appellant.

MARIN-DELL MILK CO.

Letter of November 14, 1947 (Ex. A, #15) is a quotation to this prospective customer, a copy of which was sent to respondent. Respondent made follow-up contacts to this client on Nov. 18 and Dec. 3, 1947. (Tr. 62, 63)

MAJOR DISTRIBUTING CO., Salinas, Calif.

On Oct. 7, 1947, the parties contacted the owner of the company concerning a sale of the equipment. (Tr. 64) A letter of Nov. 21, 1947, is a quotation to that client. (Ex. A, #21) This letter was sent after a follow-up contact by both parties made on Nov. 5 and 6, 1947. At both calls the respondent furnished the transportation from San Francisco to Salinas, approximately 100 miles. (Tr. 64) The respondent made an additional contact on Nov. 21, 1947. (Tr. 65-66)

SECURITY WAREHOUSE AND COLD STORAGE CO.

A letter dated Nov. 28, 1947 (Ex. A #23) is a request to the Henry Vogt Machine Co. concerning tube-ice equipment. This letter was in turn forwarded to the appellant along with a reply letter sent by the Henry Vogt Machine Co. to the Security Warehouse and Cold Storage Co. dated Dec. 1, 1947. (Ex. A #24) Upon receipt of these letters the appellant forwarded them to the respondent and requested that he make a contact upon this company in an attempt to sell them a Vogt tube-ice machine. (Tr. 70-71) Numerous calls were made on this client both by the parties jointly and by the respondent individually. (Tr. 72) A letter dated Dec. 10, 1947 (Ex. A #25) is a report to the appellant of a call made by the respondent concerning this client. The respondent made two additional follow-up contacts; one on Dec. 17, 1947 and the other on April 29, 1948. (Tr. 74)

HOLLISTER ICE CO.

The respondent made a call on Dec. 9, 1947, on the Hollister Ice Co. approximately 150 miles from San Francisco and makes a report of that contact to the appellant in the letter dated Dec. 10, 1947. (Ex. A #26, Tr. 75)

MODERN ICE AND COLD STORAGE CO.

Respondent called on this client on two occasions and reported the contact to the appellant in his letter of Dec. 10, 1947. (Ex. A, #27, Tr. 76)

J. H. POMEROY CO.

An inquiry was made by this client to the manufacturer; this information was transferred to Mr. Wareing who in turn forwarded the information to the respondent, and a contact was made by the respondent on Feb. 16, 1948, as requested by the appellant. (Ltr. Dec. 22, 1947, Ex. A, #28, Tr. 76)

NEW HOTEL, Salinas, California

The respondent made a call on the architect preparing the plans for the hotel, supplied him with information; and received from the appellant information showing computations for the preparation of a bid. (Ex. A, #29) From the pencil notations prepared by the appellant the respondent submitted a bid in a letter dated Feb. 2, 1948. (Ex. A, #31, Tr. 77-78) After the bid was submitted the respondent made other contacts concerning this job; however, the hotel was not built. (Tr. 79)

PACIFIC ISLAND ENGINEERS

The respondent made numerous contacts on this client and on one contact the appellant went with him and was introduced to some of the personnel. A letter of April 3, 1948 (Ex. A, #35) makes a report concerning one of the contacts.

WATSONVILLE EXCHANGE INC.

Both of the parties and the respondent individually called on the Watsonville Exchange Inc. located in what was known as the Salad Bowl; the owners became sufficiently interested that they desired to see a Vogt tube-ice installation, and arrangements were made to take them to Las Vegas in order that they might view the Davis Dam. These clients were picked up by the respondent in his automobile and he drove them to Las Vegas where they met the appellant. (Tr. 89)

Numerous other contacts of the same general nature as the ones set out herein were made by the respondent, some of which are as follows: Hugh Bern (Tr. 70); George Sandy (Tr. 84); Fred McKenna, representing the American Dairy of San Jose (Tr. 83); Miller and Juan (Tr. 85); Ltr., June 1, 1948 (Ex. A, #36) Andreas Sorrona & Co. (Tr. 85); Ltr. July 2, 1948 (Ex. A, #37) Swift and Co. (Tr. 86); Ltr. July 22, 1948 (Ex. A, #38); rough figures submitted by respondent, Bud Antle Co. (Tr. 87, Ex. A, #39) Salinas Valley Vegetable Exchange (Tr. 90); Farmers' Mercantile Co. (Tr. 90).

Numerous other contacts were made on prospective clients, but they were not sufficiently interested to make

it necessary to create a file showing contacts or to write letters concerning these contacts. (Tr. 90)

As indicated in the respondent's answers to the appellant's statement of the case, the appellant tended to discount this work on the grounds that the respondent testified that he did not expect to get paid unless a sale was effectuated. The court also seemed to take the position that these contacts have no bearing on the case. (Tr. 345) However, a salesman working on a commission basis must recover a sufficient amount from the sales made to offset the expenses and time incurred on the contacts which do not culminate in a sale. It is submitted, therefore, that this work and these contacts are important and should be considered when viewing the evidence where a sale was made in a determination of what should be the reasonable value of the services performed. This evidence is also important in establishing the relationship existing between the parties. Consistently, the appellant has taken the position that there were no arrangements between them wherein they would work together except that the respondent might be taken in if a corporation was formed. Throughout the entire record the appellant makes the contention that the respondent was "horning in;" that he was told not to do this work; that the appellant would take care of all of the Vogt equipment, and such other statements. However, anyone reading this file of correspondence could only come to the conclusion that these parties were working closely together in an attempt to make a sale. There is no indication in any of the correspondence that these con-

tacts and letters and the work being performed was being done officiously by the respondent and against the wishes of the appellant. On the contrary, there can be no other conclusion made but that the respondent did this work at the request and with the full knowledge of the appellant, and was encouraged and directed by the appellant to do this work.

VENEZUELAN and AMERICAN-ARABIAN OIL SALES

Exhibit B contains the file pertaining to the sale of what has been referred to as the Venezuelan job or contract. It also contains letters which report on other jobs which were progressing or contacts being made during the same period of time. The file will disclose that the contract was in the sum of \$25,678.00, and that the commission from making the sale was split three ways—equal shares being given to the parties hereto and to Mr. DeLamar who made the contacts in Venezuela. Each party received the sum of \$1,058.90 as his commission. (Tr. 97-98)

Exhibit C is the file on the Arabian-American Co. job or contract and discloses that the contract price was the sum of \$12,410.00, and that the commission was divided equally between the appellant and the respondent, each receiving the sum of \$546.99. These files are important to again show the nature of the relationship between the parties. For example, there are letters in these files dated Nov. 3, 8 and 10, 1948, written by the Henry

Vogt Machine Co. which are addressed to the respondent and a copy to the appellant, which indicates that Vogt still considered the parties to be associated as of a date which, as will be pointed out later, is quite some time subsequent to the termination of the relationship between the two parties. If as the appellant maintains there was no affiliation between the parties, it would appear that he would so notify the manufacturer who at this time considered them as working together. These files are also important to enable the court to consider the amount of work done and to consider the amount of compensation received as a guide in determining the reasonable value of the services performed by the respondent in aiding in the sale to the J. J. Crosetti Co. and the Guy F. Atkinson Co.

J. J. CROSETTI SALE

The contacts made to the J. J. Crosetti Co., Watsonville, California (approximately 100 miles from San Francisco) ultimately resulted in a contract. (Tr. 99) The first contact to this company was made by the respondent on October 11, 1947. (Tr. 100) The next contacts on Nov. 5th and 6th were made jointly by the parties hereto. (Tr. 100) A bid in the amount of \$125,000.00 was submitted in a letter dated Nov. 10, 1947. (Ex. D, No. 3) The client was again contacted on Nov. 21, 1947. (Tr. 101-102) Modifications of the terms of the contract are embodied in a letter dated Dec. 1, 1947. (No. 4, Tr. 102) On Dec. 20, 1947 information concerning the construction of the plant was forwarded

to the respondent by the appellant who requested that he send same on to the general contractor. (Ex. D, Nos. 5 and 6, Tr. 103)

Between Christmas, 1947 and Jan. 1, 1948 the appellant introduced the respondent to the officers of the Vogt Co. and took the respondent through the plant at Louisville, Ken. (Tr. 103) While at Louisville arrangements were made with the advertising department to secure literature and photographs. (Tr. 105; ltrs., Ex. D, Nos. 10, 11, and 12)

On January 23rd the parties contacted the bank financing the project, the electrical contractor and the Farmers' Merc. Co. who was to supply a pump for the job. (Tr. 106) Prior to Feb. 4th the appellant requested that the respondent make a follow-up contact. This was done as reported in a letter dated Feb. 4th. (Ex. D, No. 9) The respondent on this trip contacted the general contractor, the electrical contractor and the Farmers' Merc. Co. who had not ordered the pump from the distributor. He also contacted the Shell Chemical Co. and made arrangements for the ammonia to be used in the plant. (Tr. 107-110) On Feb. 6, 1948 the respondent called on the Link Belt Co. to check on the progress of this equipment which was to be used in the conveying of the ice to be manufactured by the equipment. (Tr. 113) This contact is reported in a letter dated Feb. 7, 1948. (Ex. D, No. 16)

On Feb. 9th the appellant phoned the respondent and informed him that the equipment had been shipped on the 6th day of Feb. (Tr. 113)

During this time California was experiencing a drought which had seriously cut down the supply of electrical power and required the appointment of a special board which issued an order freezing any further installation of electrical power to industrial firms. The respondent reports in Tr. 114-118 concerning the contacts made in an attempt to secure an exception to this ruling. The report discloses that he contacted L. Harold Anderson, Vice-President of Pacific Gas and Electric Co. (Tr. 115) and Ernest Peterson, Industrial Power Engineer of P.G.&E. Co. (Tr. 115) A trip was also made to Santa Cruz, California to contact Alf Strong, Vice-President and General Manager of Coast Cities Gas and Electric Co. (Tr. 116) A call was also made on a Mr. Molke who was in charge of investigating hardship cases by the Power Conservation Committee. (Tr. 116) The Power Conservation Committee decided to make an exception and install the electrical power. (Tr. 118) The restrictions because of the drought were called off on April 8, 1948. This information was reported to the appellant by the respondent in a letter dated April 12, 1948. (Ex. D, No. 17) The written notation (Ex. D, No. 16) from Charles Grunsky was issued to the respondent with reference to a meeting to be held at the Crosetti plant in an attempt to determine if electrical power could be granted as requested. (Tr. 119)

At Tr. 121-124 the respondent reports on contacts made with regards to clearing up the water used to make the ice. It appeared that the machine was producing cloudy ice, contrary to the guarantee made in the

contract. At Tr. 124 the respondent reports on the contact made on the Wells Fargo Bank which was required in order to expedite the financing of the contract which would aid Crosetti to build the plant for the equipment.

GUY F. ATKINSON SALE (McNary Dam)

The Guy F. Atkinson Co. of South San Francisco, Calif. was the principal contractor and the sponsoring contractor of the McNary Dam built by the government. The respondent had been calling on this company since 1932 and was acquainted with Guy F. Atkinson, President; his son, George Atkinson and Mr. Holt, the Executive Vice-President of the company. The respondent had previously sold this client other equipment which respondent had represented. (Tr. 133)

Prior to the time the Guy F. Atkinson Co. was awarded by the government the contract for the McNary Dam, the company was a co-sponsor for the installation of the Harlan County Dam in Nebraska. The parties hereto in the early part of 1948 attempted to sell the Guy F. Atkinson Co. a Vogt tube-ice machine to be used in the Harlan Dam. Due to the atmospheric conditions at the dam site along with other considerations, the Vogt tube-ice machine was not selected for use in the construction of the Harlan Dam. However, it is submitted that although these earlier contacts did not result in a sale at that time, they were instrumental in the ultimate sale of the equipment to the Guy F. Atkinson Co. for use in the McNary Dam Project. Therefore, these

initial contacts which first acquainted the company with the parties hereto as representatives of the Vogt tube-ice machine are set out as follows:

On Feb. 10, 1948 respondent first contacted the Atkinson Co. regarding the Harlan Dam sale, at which time he discussed the matter at length with Mr. Holt and Mr. Atkinson and showed them photographs of the Muscoge Dam job where this equipment was in use. The photographs had been supplied to the respondent by the appellant. After that conference respondent telephoned the appellant, and then again contacted the Atkinson Co. on February 11th. (Tr. 173) On Feb. 18th and 20th the parties hereto jointly contacted the company. (Tr. 173) (Tr. 174) A bid was submitted for the Harlan Dam job on Feb. 25, 1948. (Ex. I, No. 6, Tr. 175) The parties hereto jointly contacted the company on Feb. 27th (Tr. 174), and on March 19th the respondent individually made a "follow-up" call. (Tr. 175) Other personal contacts were made by respondent on March 17th (Tr. 177); March 24th (Tr. 178, 179); April 12th, 21st and 30th, 1948. (Tr. 181) Letters were written to the appellant by respondent keeping him informed of the work being done and giving him other pertinent material; such as, the letter of March 24th in which the appellant received the necessary information to enable him to contact the concrete superintendent on the job in Nebraska, etc.

During the contact on April 12, 1948 the respondent secured from the company information concerning the proposed McNary Dam, a copy of which he forwarded

to the appellant. (Ex. I, No. 13, Tr. 183) On June 2nd or 3rd respondent was called by an employee of the Atkinson Co. and kept an appointment with the company at their request on June 4th, at which time he secured information for the purpose of submitting a bid on the McNary Dam job. (Tr. 183-4) The information obtained was immediately forwarded to the appellant as is shown in the letter of June 5, 1948. (Ex. I, No. 15) On June 13, 1948 the respondent called the appellant concerning the McNary Dam sale. (Tr. 184) The appellant wrote a letter to the respondent on June 26th informing him that he would be unable to mail the McNary Dam estimates to the various contractors until the following Tuesday or Wednesday; and also stated that it looked like a 150-ton plant. (Ex. I, No. 17, Tr. 185) On July 26th the appellant called the respondent by phone and gave him information concerning the bids submitted to the Atkinson Co., and in that conversation the appellant requested the respondent to contact the company on July 28th after a competitor had had a conference with the company. (Tr. 186) The respondent complied with the request of the appellant and contacted the company on July 28th. (Tr. 186-7) The results of this contact were reported to the appellant by the respondent by telephone after the meeting. (Tr. 188)

The respondent sent the appellant a telegram dated August 2, 1948 (Ex. I, No. 22) informing him that respondent had again contacted the Atkinson Co. at their request, and that the bid for the ice equipment would be decided upon later in the week. On August 5, 1948 the

respondent contacted the company, and again spent considerable time with them. The company objected to the escalator clause and the terms of payment. After this meeting the respondent called the appellant and informed him of their objections; later that night the appellant called the respondent and told him that the Vogt people would waive the escalator clause, etc. (Tr. 189) On the morning of August 11th the parties hereto submitted to the Guy F. Atkinson Co. a bid for the installation of Vogt tube-ice equipment for the McNary Dam. (Tr. 190) They were informed by the Atkinson Co. to come back later in the day and they would decide on the bid; in the meantime the respondent took the appellant to Watsonville concerning the J. J. Crosetti job. (Tr. 190) After returning from Watsonville, the parties went to the Atkinson Co. and were taken to Mr. Holt's office, who at that time confirmed the bid after discussions concerning the escalator clause and the rearrangement of the terms of payment. (Tr. 193) The bid as submitted is a letter dated August 10, 1948. (Ex. I, No. 26, Tr. 189)

On August 30th Mr. Holt called the respondent and requested that he secure information from the Nobel Co. who had been awarded the contract for the concrete batching plant. (Tr. 157) The respondent secured the information from the Nobel Co. as requested and sent a copy of his letter to the Atkinson Co. to the appellant. (Letter dated Sept. 1, 1948, Ex. I, No. 27)

The appellant maintained that the respondent should not have contacted the Noble Co. as requested by the

Guy F. Atkinson Co. and states that this was the "straw which broke the camel's back." (Tr. 398) It is obvious that the appellant only used this contact as an excuse and not the reason for terminating the relations of the parties. The parties both mentioned in their testimony their desire for making a sale which they referred to as a "show plant." After the sale to the Atkinson Co. it no doubt appeared to the appellant that he no longer needed a salesman to secure prospective clients. At this time units had been installed at the Davis Dam in Nevada, at Watsonville, California, and the McNary Dam unit was to be installed in Washington. Under these circumstances, the appellant felt that he was sufficiently established as the representative for the Vogt tube-ice machine, and in the future would be given an invitation to bid. This was the reason the relation was terminated and the Noble contact was the excuse.

In view of the testimony and written evidence concerning the Guy F. Atkinson sale it is inconceivable that the appellant still maintains that the respondent was informed not to contact the Atkinson Co. and that respondent was not included in this sale. All of the contacts made by the respondent were time-consuming; were made with the full knowledge or at the request of the appellant; and were motivated by the desire to make a sale at which time respondent would receive compensation for his time and efforts, not only for the job sold but also for the contacts which did not result in a sale.

The position of the appellant that the respondent had no connection with the sale to Guy F. Atkinson Co.

is all the more difficult to understand in view of the following testimony given by the Vice-President of that company, Mr. Arthur E. Holt. He stated that he was the company's sponsor for the McNary Dam job (Tr. 287); was in charge of purchasing the equipment (Tr. 296); and had known the respondent for 16 years as a salesman and representative of various companies, particularly steel companies. (Tr. 287) He first dealt with Mr. Wooldridge with relation to Vogt ice equipment in connection with the Harlan County Dam job early in 1948. (Tr. 288)

Parts of the testimony given by Mr. Holt pertaining to the association of the parties and the service rendered by the respondent is as follows:

MR. BUSHNELL:

“Q. Following these conversations which we have just mentioned, did you have any other conversations with Mr. Wooldridge during the course of these negotiations leading up to this contract of purchase?

A. Yes, many of them.

Q. How many would you estimate?

A. Oh, I don't know. He was probably in here twice a week for a month there at least, wanting to know if he could do things for us. He tried like the devil to get me to go down to Watsonville, I think, where they have got a tube machine down there, and to look at it. He wanted to show how perfect it worked and performed; but I never did take off time and go down there.” (Tr. 298)

That the parties jointly discussed the problems and terms of sale is shown by the following testimony of Witness Holt:

“A. Mr. Wooldridge said—I mean Mr. Wareing said he didn’t think that the factory would go for it, for the change in the terms; and I told him that they had to meet the terms, or they might as well call the deal off, because we never did business in that way; and so then Mr. Wooldridge and Mr. Wareing, they sat there and they discussed it back and forth; and whether they put in a call to the factory or not, I don’t know—whether they called the factory and asked them about the terms, because it was after six o’clock that evening that we were—that we finished this thing up.”
(Tr. 301)

The witness was asked if the bid as submitted by the Wareing Co. was the lowest bid, and in answering that question Mr. Holt stated that many factors had to be considered, not just the contract amount. His statement in part is as follows:

“* * * and also due to the fact that there had been a lot of stress placed on the salvage value of the Vogt ice machine equipment, as Mr. Wooldridge pointed out so many times; he said, ‘There are many different hotels that use this equipment in making their cocktail ice, and ice for freezing fish, and so forth;’ and he pointed out in Watsonville, that that probably was one of the greatest uses for this machine, was for the refrigeration of railroad cars, and so forth.

- “Q. You had other bids from other organizations for furnishing this machinery or similar machinery, did you not?
- A. Yes, there were probably, oh, five or six other outfits that gave us quotations. It was very competitive; very competitive.
- Q. Did Mr. Wooldridge contact you at any regular intervals in regard to selling the Vogt tube machine?
- A. Well, I can say that he certainly kept it alive in our minds all the time and wouldn't let it rest until the thing was consummated.
- Q. Who first put you in contact with Mr. Wareing and his product?
- A. Oh, that was Wooldridge away back in—when we were figuring Harlan Dam.” (Tr. 305)

The appellant attempted to show that the respondent played no part in the sale to the Atkinson Co. and cross-examined the witness as follows:

MR. THOMAS:

- “Q. And you considered that information was in connection with the contract executed by your company and C. L. Wareing?
- A. That's right. And it was after that contract that Mr. Wooldridge came in and told me—after he got this information, that Mr. Wareing said that he was out of the picture.
- Q. Well, when was that?
- A. Mr. Wareing never did tell me that Mr. Wooldridge was out of the picture until after quite—three or four months ago when he told me that.
- Q. Did he ever tell you that he was in the picture?

- A. No, but he led us to believe by every indication that he was in the picture.
- Q. What do you mean by 'every indication'?
- A. Well, every time he called, he had Mr. Wooldridge with him; and they both worked out their problems together and talked about them; and when Mr. Wareing (Wooldridge) offered his services, Mr. Wareing never said that 'he doesn't represent me.' " (Tr. 324)

The appellant, again attempting to show that the respondent had no connection whatsoever with this sale questioned the witness as follows:

MR. THOMAS:

- "Q. As a matter of fact, Mr. Holt, in these conversations you say you had with Mr. Wooldridge and Mr. Wareing, the fact is that Mr. Wareing was the one with whom you had the conversation, and not Mr. Wooldridge, isn't that correct?
- A. On what?
- Q. On the Vogt tube-ice machine?
- A. It was a combination of the two of them.
- Q. Well, did you find that Mr. Wooldridge had any information whatsoever that would be beneficial to you respecting this machine?
- A. Only his enthusiasm to sell it.
- Q. Only his enthusiasm to sell it?
- A. Yes, and—
- Q. The only thing."

MR. BUSHNELL: "I submit the witness is entitled to finish his answer.

- A. And his willingness to do anything he could

to get information or work with us in any way possible.

Q. What did he do?

A. He accompanied Mr. Wareing, and helped him to sell it.

Q. As a matter of fact, that was about all he ever did, wasn't it?

A. Well, except hound us to death here, wanting to know if we were going to use the Vogt tube-ice machine." (Tr. 322-323)

After reviewing Mr. Holt's entire testimony together with the rest of the evidence, there can be no doubt but what the services rendered by the respondent in connection with the Guy F. Atkinson Co. contract were valuable to the appellant, and were done with the full knowledge and consent of the appellant. The entire record of this and the other sales and contacts is too replete with documentary details, commencing at a time before the sales work had begun and continuing through all of the miscellaneous contacts, to support any conclusion other than that the parties associated themselves for the purpose of securing sales of Vogt tube-ice equipment. Respondent would have preferred a definite written agreement between the parties, and often requested that one be drawn up (Tr. 192), but had to be content with the assurances from his long-time friend that he would be "treated fairly and generously" (Tr. 150) (Tr. 143) and that appellant would do the "fair and square thing." (Tr. 56)

Although not all of the contacts and work involved therein could be expected to be recalled during a trial held two years after the incidents occurred, there is,

nevertheless, far more than "sufficient" evidence within the transcript and exhibits to sustain the judgment of the trial court.

POINT THREE

THE COURT PROPERLY AWARDED INTEREST COMMENCING ON AUGUST 28, 1949, ON THE COMPENSATION OWED TO THE RESPONDENT FOR SERVICES RENDERED IN THE SALE TO GUY F. ATKINSON CO. (Reply to appellant's Point Five)

The contract with the Guy F. Atkinson Co. provided for the sale of the equipment for the total price of \$126,000.00; the payments to be made, \$10,000.00 with order, \$60,000.00 when ready to ship and the balance 30 days after shipment. (Ex 0) The appellant received on August 12, 1948, \$10,000.00; on Dec. 8, 1948, \$60,000.00; and on Feb. 28, 1949, \$56,772.00. The date this final payment was made is the date the respondent claims that interest commenced to run. The appellant claims that the last payment by the Guy F. Atkinson Co. was on May 20, 1949. A payment was received on May 20, 1949, but that was not for the sale of the equipment; but, rather, for the services of the erection engineer. (Ex. R) This payment in no way affected either party. An invoice dated May 10, 1949, billed the appellant for the sum of \$2,155.83 for the erection engineers' services. (Ex. R) On May 18, 1949, the appellant sent Vogt a check in the sum of \$2,155.83 and on May 20th the appellant received \$2,155.83 from the Guy F. Atkinson Co. (Tr. 417) The

amount from the Atkinson Co. probably was received by the appellant before the 18th since the dates the appellant shows as having received payments were the dates that the checks were deposited at the bank. (Tr. 415)

The receipt of this amount from Guy F. Atkinson Co. and the payment to the Vogt Co. amounted to nothing more than a bookkeeping entry to the appellant and was not the final payment on the equipment from the sale of which the respondent was to receive compensation.

The appellant also claims that since the claim was unliquidated interest cannot be allowed. The authority cited by appellant, 47 CJS 27, states that the tendency of modern authority is to disregard the distinction of liquidated and unliquidated claims concerning payment of interest. An early Utah case (1907), *Fell v. Union Pacific Railway Co.*, 32 Utah 101, 88 Pac. 1003, 28 LRA (NS), states as follows:

“The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value * * *

The Court, therefore, properly awarded interest commencing on the 28th day of February, 1949, the date that the appellant received final payment on the sale of the equipment.

CROSS-ASSIGNMENT OF ERROR

POINT FOUR

THE COURT ERRONEOUSLY FOUND THAT A DISPUTED CLAIM HAD BEEN SETTLED AS TO THE AMOUNT OF COMPENSATION TO BE PAID TO RESPONDENT ON THE J. J. CROSETTI SALE. (Reply to appellant's Point Two)

The court found that "the parties hereto settled a dispute as to the amount of compensation to be paid for this job (J. J. Crosetti) for the sum of \$1800.00, \$1500.00 of which had been paid." (Tr. 26)

The appellant maintains in Point Two of his brief that the additional \$300.00 was claimed by the respondent for expenses incurred in taking a trip to Las Vegas and cites Tr. 134-135. It is submitted that the evidence does not support this contention made by the appellant. This testimony in no way mentions the trip to Las Vegas and a promise to pay for that particular trip. There is no question but what the appellant's theory is that the additional payment was to be for the trip referred to; however, as the evidence will show it is not so limited.

The respondent maintains that the payment of \$1,500.00 was only a payment on account until such time as the appellant could examine his books and a final settlement be made. The appellant also agreed to pay an additional \$300.00 because of the expenses incurred by the respondent until such time as a final settlement could be made.

The evidence concerning the payment of the \$1500.00 and the agreement to pay an additional \$300.00 is as following: (Tr. 143, Wooldridge, respondent)

"A. Mr. Wareing handed me the check, and when he handed it to me, I looked at it, and I said, 'What is this for, expenses?' 'Well,' he says, 'can't be serious about that.' 'Well,' he said, he says, 'you know, I have had a lot of expenses on this job, and I still haven't been reimbursed by Crosetti Company for Mr. Haynes' services, and I am liable to get stuck on that, and that's running over three thousand dollars, and you just—this will have to do for now.'

I said, 'but golly, I certainly expect my share of the commission from all your past promises of treating me fair. You always pointed to these DeLamar and the Am.-Arabian Oil jobs as examples of how you would continue to treat me, in spite of the fact you wouldn't give a written contract,' and in that same discussion point out—"

MR. THOMAS: "Well, what—

Q. Just say 'I said' and 'He said.'

A. Mr. Wareing said, 'Well, I haven't,' he says, 'I haven't any written contract with the Henry Vogt Machine Co. I merely have Mr. Heuser's word for it; and, as I have told you many times before, you will just have to go along on my sense of fairness and generosity, which has been already exhibited by these other things, and we will see what we can do when the job is all finished.'

And at that time I said, 'Well, I certainly—I haven't had any money for a long time, and I have put out an awful lot of money. My expenses have run over fifteen hundred dollars up to now on this thing, and I cer-

tainly badly need some money,' and he says, 'Well, to help you out,' he says, 'I'll send you a check for another three hundred dollars, which will take care of you for now.'"

(Tr. 145, Wooldridge, respondent)

"A. Mr. Wareing says, 'I don't know,' he says; 'I have got to sit down and figure out what all my expenses are in this job, and I have still got this money out, and Crosetti has had a bad season in the lettuce and can't pay it today, and I don't know when I am going to get it.' And I told him I was sure he would get it, and he was agreed that he felt sure he would because he felt, as we both did, that Crosetti was an honorable man, but until that money came in he couldn't do any more right now, and I would have to be satisfied for the time being with this fifteen hundred dollars."

(Tr. 371 Wareing, App.)

"A. * * * so Wooldridge said, 'How much money am I going to get on this Crosetti job?'

I said, 'Bill, I won't know until the job is over with, and I can balance my books and see what the picture is. If I have to pay this escalator clause, I will probably lose my shirt.'

(Tr. 372 Wareing, App.)

"A. 'Well,' he said, 'I need some money pretty bad,' and he said, 'How much are you going to give me?'

I said, 'Bill, I just arrived from Louisville, was only in Salt Lake City a half day, and am down here, so I haven't got my books

with me; got to wait until I get to Salt Lake and figure.'

'No' he said, 'I got to have—'

I said, 'Do you want—I will settle it right now for fifteen hundred dollars.'

Q. What did he say?

A. He didn't like it.

Q. What did he say?

A. He said, 'That isn't anywhere near enough.' but he never told me how much he wanted.

* * *

(Tr. 373 Wareing App.)

"Q. All right. Now, did you have any further conversation with him respecting this fifteen hundred dollars?

A. Yes. He came to my hotel room at the St. Francis Hotel July 19th after I returned from Watsonville.

Q. And what was the conversation?

A. Well, he was very much disturbed, and he told me his financial—

Q. Just tell the conversation.

A. 'Well,' he said, 'I'm in bad financial shape, and my oldest daughter is going away to college, and I have got to have some money.' That fifteen hundred dollars wasn't enough.

Q. What did you say?

A. Well, I said I would rather wait until I got back to Salt Lake, and 'I will send you a check then after I have actually got my figures down on paper.'

He said, 'I want it right now.'

I said, 'You want it right now? This is a settlement then right now.' I said, 'Crosetti stills owes me \$4,000.00, and I have promised the bank I will keep servicing that job until it is working okeh.'

He said, 'Give me the \$1500.00,' and I wrote it."

The appellant maintains that he had in mind paying the respondent not in excess of 20%. His testimony concerning this is as follows:

The appellant after referring to the proposed \$1500.-00 said, "As near as I can tell right now, that is about twenty per cent of my net earnings, the way I figured out in my head before balancing the books." (Tr. 373)

Again at Tr. 494 the appellant testified as follows:

MR. BUSHNELL:

"Q. Did you promise to pay him anything?"

WAREING, App.:

"A. Yes.

Q. What did you promise to pay him?

A. On June 17 he asked me—he said, 'Can't you tell me something?' I said, 'Bill, it wouldn't be in excess of twenty per cent of the net profit.' * * *

Q. Each to stand their own incidental expenses?

A. Yes. He had—he asked me the same day, 'Should I submit an expense account to you?' I said, 'No. I never wanted you to keep an expense account. You are not on expense account with me.' "

It is submitted that the appellant's profit on the J. J. Crosetti sale, not including expense items as listed at Tr. 416-417, shows a net profit of \$20,059.37 computed as follows:

Gross Receipts \$128,702.76

12/12/47	Henry Vogt Machine Co.....	\$22,178.50
2/ 2/48	Henry Vogt Machine Co.	22,178.50
2/17/48	Ingersoll-Rand Co.	12,119.00
3/26/48	Ingersoll-Rand Co.	8,240.43
4/15/48	Ingersoll-Rand Co.	172.70
5/12/48	Ingersoll-Rand Co.	3,981.40
5/25/48	Henry Vogt Machine Co.	22,178.50
6/12/48	Ingersoll-Rand Co.	566.20
7/ 8/48	Henry Vogt Machine Co.	13,307.10
8/17/48	Calgon, Inc.	18.30
8/30/48	Henry Vogt Machine Co.	3,702.76

 108,643.39

 \$ 20,059.37

Twenty per cent of this amount would be \$4,011.87.

The appellant was very meticulous in writing on the bottom of his checks the purpose for which the check was issued. More particularly, in dealing with the respondent the appellant had been careful concerning this point. At Tr. 495 the appellant testified as follows:

MR. BUSHNELL:

“Q. I hand you a check dated December 18, 1948, in the sum of \$546.99, and ask you to identify it.”

MR. WAREING, App.:

“A. That’s a check that was sent to Wooldridge on the Arabian-American Oil instead of commission.

Q. On the bottom of it it says, ‘Payment in full commission Vogt C-7905’?

A. That's right."

In discussing the \$1500.00 check the appellant testified: (Tr. 497)

"Q. Why didn't you write on the bottom of it 'Full Payment'?

A. He was in a hurry, Mr. Wooldridge. We were having quite a discussion, and I was sitting at the desk. He was sitting in the hotel. I stepped around and wrote the check and handed it to him like that. I forgot to say 'Payment in Full' on it. The understanding was that it was payment in full. That was our discussion. I said, 'I will wait until I get back to Salt Lake to write you a statement. If you insist on having it, it is full settlement. It is full settlement because, after all, our agreement is officially you are not to be paid until all my money is.' "

It should be noted in the last quotation the appellant stated "Our agreement is officially * * *." However, throughout the entire case the appellant took the position that there was no agreement concerning the compensation respondent would receive. Likewise in view of the discussion and dissatisfaction shown by the respondent concerning the \$1500.00 payment, it would appear only reasonable that a person as meticulous as the appellant was in writing upon the checks the purpose for which they were issued, that if he actually intended at that time that the check was for final payment that he would protect himself by placing on the check that it was in full payment.

The situation, then, at the time of the payment of the \$1500 was as follows:

1. The appellant had not had an opportunity to examine his books;

2. He had not received approximately \$4,000.00 still owing from the Crosetti Co., and there was a possibility that he would have to absorb approximately \$7,000.00 because of the escalator clause;

3. The appellant had stated on at least two occasions that he was going to give the respondent only about 20% of the net profit; (which would amount to \$4,011.87)

4. At this time the appellant could not afford to terminate his relationship with respondent since the Guy F. Atkinson Co. contract had not been secured; and

5. The check was made out with no indication that it was payment in full.

Under the above circumstances it is only logical that appellant would make a conservative payment, one that would be only a portion of what he intended to pay at such time as the account would be settled in full.

The first two items above were obviously given as reasons by the appellant why payment in full could not be made at that time.

If respondent had actually intended the \$1500.00 as payment in full under these circumstances, he would certainly have secured a written acknowledgement of payment in full to protect himself inasmuch as the sum was relatively less than he had paid respondent on former jobs and the respondent was dissatisfied with the amount. It would appear to be incumbent upon appellant to make

such a condition clear by writing upon the check "Payment in Full," thus making clear to the respondent the terms upon which the sum was offered.

In considering the credibility of the testimony of the appellant, which is the only testimony or evidence that the check was made as payment in full, the attention of the court is directed to a few of the inconsistencies in appellant's testimony:

The appellant testified that he received a telephone call on June 4th concerning the Guy F. Atkinson Co. bid for the McNary Dam and told the respondent as follows:

(WAREING, App.)

"A. I told him he had no business going near the Atkinson Co. or the Kaiser Co. either; that I knew all about the job, * * *" (Tr. 381)

However in a letter dated June 5th that respondent wrote to the appellant, respondent refers to the telephone call of the previous evening and gives in detail all of the necessary information for the purpose of submitting a bid to the Atkinson Co. The letter also states,

"Please let me know when I can expect your quotations. I should prefer to deliver them in person. If you decide to bring them over please advise when to expect you." (Ex. I #15)

The oral testimony of the appellant is completely inconsistent with this written document sent in the normal course of business transactions.

The appellant testified that on June 15th he told the respondent that he should not have contacted the Guy F. Atkinson Co.; that respondent was not "in on

the McNary Dam." (Tr. 386) However, on June 26th the appellant wrote the respondent and stated:

"Dear Bill: A hurried note to tell you I won't be able to mail the McNary Dam estimate to the various contractors bidding this job until next Tues. or Wed. * * *

Bids will not be opened until July 20th and everything is under control now. Looks like 150 ton plant." (Ex. I #17)

The appellant stated concerning the discussion at the time of the payment of \$1500.00 as follows:

"I had previously had a discussion with Mr. Wooldridge in my room at the hotel on July 19 telling that we were through so far as any business relationship was concerned, and he wasn't included on McNary Dam; * * *" (Tr. 392)

However, on July 26 the appellant called the respondent by phone, gave him information concerning the bids submitted to the Atkinson Co., and requested that he contact the company on July 28th. (Tr. 186) On August 2nd respondent sent the following telegram to appellant:

"Saw Atkinson today. Awarded batching plant Noble. Holt expects no decision tube-ice for week. He and Jenks want to see me later this week. Will advise.

BILL WOOLDRIDGE"
(Ex. I #22)

The exchange of telephone calls between the parties

hereto regarding the escalator clause (Tr. 189) referred to under Point Two of this brief occurred on August 5th; and on August 10th the parties jointly received the written contract from the Guy F. Atkinson Co. (Tr. 193)

Although the appellant testified that the relationship of the parties was terminated on July 19th at the time of the payment of the \$1500.00 check, the undisputed testimony and written evidence of the business transactions thereafter refutes the appellant's testimony. This testimony is further refuted by the later testimony of the appellant that the relationship was terminated in September, 1948. (Tr. 398, 400)

In reviewing the entire testimony concerning the services rendered by the respondent, not only in connection with the Crosetti job, which is substantial, but also having in mind all of the other contacts made by the respondent at the request and with the knowledge of the appellant, it is unreasonable to believe that the respondent would have accepted the sum of \$1500.00 as payment in full if that had been the condition upon which it was finally tendered. It is also unreasonable in view of the fact that the respondent had received \$546.99 as commission on a \$12,410.00 sale and \$1,058.90 commission on a \$24,678.00 sale; neither of which entailed any considerable amount of work and expense in comparison with the amount of work and expenses involved in the Crosetti sale.

It was error for the court to conclude that the claim in regards to the J. J. Crosetti sale had been settled for

the sum of \$1800.00, \$1500.00 of which was paid, under the circumstances herein mentioned. The amount which the respondent should have received and should now be awarded is one-half of the resale commissions as computed and discussed under Point Five of this brief.

POINT FIVE

THE COURT EITHER MISCONCEIVED THE RULE OF DAMAGES TO BE APPLIED OR MISAPPLIED THE PROPER RULE TO THE FACTS OF THIS CASE.

The court found as follows :

“That the plaintiff (respondent) performed services for the defendant (appellant) at his request in contacting Guy F. Atkinson Co. 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 the Guy F. Atkinson Co. in the sum of \$126,000.00.”

The evidence as reviewed under Point Two of this brief amply supports this finding of fact made by the court. However, the respondent maintains that the sum of \$4,000.00 awarded by the court for these services is not sufficient in view of the evidence and rule of damages which should have been applied in this case.

If this court finds in favor of the respondent on Point Four of this brief the compensation to be allowed the respondent for services rendered in the sale to the J. J. Crosetti Co. would also be controlled by the rules concerning the measure of compensation now discussed.

The fundamental rule of damages in cases of this nature is set out in the general texts as follows:

2 Am. Jur. 244 Agency Sec. 311 AMOUNT OF COMPENSATION.

“In the absence of any agreement, the law implies a promise on the part of the principal to pay what the services are reasonably worth. 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.*” (italics added)

58 Am. Jur. 518 WORK AND LABOR Sec. 10.

“Moreover, what others receive for like services may properly be considered. Indeed, in the last analysis, this is a proper criterion.”

Also see :

35 Am. Jur. 497 MASTER AND SERVANT
Sec. 64;

2 Restatement of Agency 1035 Sec. 443, comment (d).

The evidence in this case as to what others receive for like services is as follows :

Aldon J. Anderson testified that he is the owner and operator of the Equipment Supply Co., a firm engaged in industrial sales work; that he had been in this profession for approximately five years; that prior to this time he had been with the U. S. Smelting & Refining Co. for about 10 years. He stated that the Equipment Supply Co. represented clients as a distributor, a dealer or as a commission agent; and that he was familiar with the ar-

rangements concerning industrial sales generally. (Tr. 219-220)

The witness was asked this question :

“Q. Now, in your present business and profession, is there any custom or usual practice as to the payment of compensation, as to what compensation will be paid where you have joint efforts? By that I mean you working in conjunction with possibly a distributor or other selling agent where there has been no prior agreement or understanding as to the amount of compensation which will be paid. You may answer that ‘Yes’ or ‘No.’

A. Yes.

Q. What is that custom or practice?”

After an interchange between the court and counsel, the witness answered as follows :

“A. Well, where we work as—where we render sales service—qualification-sales service for a distributor who has control of a given line, and we find a prospect or work on a prospect, endeavoring to show them why they need and should buy this equipment, we find in more often than not that in the event the sale is made partially or entirely as a result of our efforts, I would say the custom is that we would receive fifty-fifty split; and in some cases where we are the distributor and someone handling other lines, say they have an opportunity to sell equipment that we have the distribution of, well, we split our discount or commission with them in the event they can make a sale for us; and in both cases

more often than not it's a fifty-fifty split."
(Tr. 221, 222)

The court questioned the witness concerning the custom and informed him that evidence of specific examples would not be helpful, stating:

"* * * 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." (Tr. 320)

John A. Sanford, the appellant's expert witness, who had been with Ingersoll-Rand Co., the appellant's former employer, for 34 years testified as follows:

MR. THOMAS:

"Q. Is there any such custom pertaining to a salesman who is not connected with the company?

A. Yes, there is. If he might sell something, the custom would be to pay him a casual dealer's discount because in that case he draws no salary. He draws no expense account, and he in that case would get five per cent casual dealer's discount." (Tr. 425)

Exhibit P will disclose that the resale discount or

commission received by the appellant by the Vogt Co. was ten per cent and that most of the resale discounts or commissions received by the Ingersoll-Rand Co. was 10%. A casual dealer's discount of 5% is substantially the same as testified to by witness Anderson when he testified that the commissions would be split 50-50. The witness (Sanford) further testified as follows:

MR. BUSHNELL:

"Q. Did I understand you correctly to say that the custom was to pay a person who is not associated with the company but who helps to secure a sale for his sales effort, and which you distinguished from an enterpreneur, the commission of five per cent?

A. That's quite general. That's customary.

Q. And that's five per cent of the contract price. Is that right?

A. Five per cent, yes; five per cent of the price of the equipment, not of the contract." (Tr. 428)

The prior conduct of the parties hereto indicates that they also considered the payment of 50% of the resale discount or commission was fair compensation. When the parties first associated themselves for the purpose of selling Vogt tube-ice machines the appellant testified as to a conversation as follows:

"A. I told Mr. Wooldridge that I felt he knew these people very well. When he was with Columbia Steel Company, he had been selling pipe and knew all these people very well, and

I said, 'This Rathbunm-Jones, I can get in touch with them. I think I can get a commission from them because I have known them for a long time, but they will quote the job, and whatever commission I get, I will give you fifty per cent of it.' * * *” (Tr. 354)

In the Venezuelan sale as well as the sale to the American-Arabian Oil Co., as previously discussed, the commissions were divided equally. The amount paid was also approximately 5% of the cost of the equipment. The appellant distinguishes the Crosetti sale and the McNary sale since they were not just sales of equipment but rather were handled by the appellant as an independent contractor who resold to the purchaser. The respondent does not claim any portion of the amount computed by the appellant for his engineering services and expenses which in each of the two sales exceeds the sum of \$8,000.00.

The appellant in his brief as well as at the trial emphasized the risks incurred by him and the amount of time and expenses required in engineering the installation of the equipment. The evidence is that the terms of payment to be made by the appellant were coordinated with the time that payments would be received by the appellant from the purchasers. (Tr. 435-436) The money for the Crosetti sale was paid into escrow. (Tr. 501) Before taking the Guy F. Atkinson Co. contract without the escalator clause the appellant had the Vogt Co. agree that the sale to him would not include such a clause. (Tr. 501)

Both of the contracts contained the following:

“Vogt Co. will furnish one erection engineer to superintend the erection of the equipment specified. Purchaser to pay for his services at the rate of \$25 per eight-hour day, based on a 40-hour week, plus transportation fare, traveling time & expenses, with time and one-half for overtime and double time on Sundays and holidays.” (Tr. 434, Ex. I #25, Ex. D #2)

Mr. Harris Haynes, the erection engineer for the Muscogee Dam and Gibson Dam installations was sent to supervise the installation at both the Crosetti and McNary Dam sales. (Tr. 434)

The appellant also maintained that he spent considerable time preparing layouts and specifications. A letter dated Dec. 20, 1947, from the Henry Vogt Machine Co. concerning the Crosetti sale states as follows:

“Enclosed are 3 prints of drawings M-7783-1 illustrating the ammonia piping for the 4 48-A-300-10 tube-ice freezers covered by the above order. * * *

We will forward you detailed drawings of the condensers and receivers shortly.” (Ex. D #5)

A letter dated Sept. 13, 1948, concerning the McNary Dam sale sent by the Henry Vogt Machine Co. to the appellant states as follows:

“We have made a combination ammonia piping and foundation layout drawing and as you request we are sending one print of this drawing * * *

"Other instructions and other blueprints pertaining to this job will be sent you in the next day or so. * * *

"We note from your letter that you have asked Ingersoll-Rand to send us a compressor drawing for the 10½ x 13 compressor * * *" (Ex. S)

In view of this information it is submitted that the sum of approximately \$8,000 which was allowed on each of the sales was sufficient to compensate the appellant for the engineering services, etc.

According to the appellant he received a profit of \$734.08 (Tr. 414) on the Crosetti sale and a profit of \$1,243.88 (Tr. 417) on the Guy F. Atkinson Co. sale. He computed his expenses commencing with Sept., 1947, until July, 1948, for the Crosetti sale and then commenced with Aug., 1948, until Sept., 1949, for the McNary Dam sale. The Crosetti sale was not made until Dec., 1947, and the work was finally completed on the McNary sale prior to May 10, 1949. (Ex. R) However, the appellant charged to these two jobs all of the expenses incurred during this period of time, including other jobs sold by appellant. (Tr. 505) Besides the sums allotted for his engineering services, appellant also allowed himself for rent and secretarial services the sum of \$1800.00 on the Crosetti sale (Tr. 414) and the sum of \$2100.00 on the McNary sale (Tr. 411) although his office is in his home and his wife performed any needed secretarial work. The appellant also claims traveling expenses in the sum of \$10,219.97 in connection with the

Crosetti sale (Tr. 410) and the sum of \$7,485.29 on the McNary sale. (Tr. 412) A further claim as an expense of \$400.00 is made in connection with the Crosetti sale, paid to R. G. Owen who testified that this payment was completely unexpected and gratuitous. (Tr. 245)

The respondent maintains in this cross-assignment of error that the evidence and proper rule of damages would compel the trial court to allow the respondent one-half of the resale discount or commissions. Under this contention the respondent would receive on the Crosetti sale \$5,930.90; and the appellant would receive \$5,930.90 (one-half of the commissions) plus \$8,215.37 for engineering services and expenses, making a total payment to the appellant of \$14,146.27. On the Guy F. Atkinson Co. sale the respondent would receive \$6,171.17, one-half of the commission; and the appellant would receive \$6,171.17, his share of the commission, plus \$8,579.00 for engineering service and expenses making a total payment to the appellant of \$14,750.17. The computation of these amounts are as follows:

J. J. CROSETTI SALE

RECEIPTS
(Tr. 416-417)

12-18-47	..\$ 31,250.00
2-3-48	..... 31,250.00
5-28-48	.... 31,250.00
7-6-48	..... 31,250.00
4-28-49	.... 1,500.00
5-27-49	.... 500.00
9-6-49	..... 500.00
10-6-49	.... 1,202.76

COST OF EQUIPMENT AND
SERVICES OF ERECTION
ENGINEER

12-12-47	Ex. E....\$ 22,178.50
2- 2-48	Ex. E.... 22,178.50
2-17-48	Ex. G.... 12,119.50
3-26-48	Ex. G.... 8,240.43
4-15-48	Ex. G.... 172.70
5-12-48	Ex. G.... 3,981.40
5-25-48	Ex. E.... 22,178.50
6-12-48	Ex. I.... 566.20
7- 8-48	Ex. E.... 13,307.10
8-30-48	Ex. F.... 3,702.76

Total Cost of
Equipment & Services.....\$108,625.59

Resale Commissions

Ex. P-8	.....\$ 702.60
Ex. P-9	..... 2,202.00
Ex. P-10	..... 85.80
Tr. 343	..... 8,871.40

Total commissions.....\$ 11,861.80
Engineering services
and expenses 8,215.37

TOT. RE-
CEIPTS \$128,702.76..... \$128,702.76

Respondent:

1/2 of commissions..\$5,930.90
Amt. received
from Appellant 1,500.00

BAL. OWING\$4,430.90

Appellant:

1/2 of commissions..\$ 5,930.90
Engineering
services 8,215.37

\$14,146.27

McNARY DAM SALE

(Guy F. Atkinson Contract)

RECEIPTS (Tr. 417)		COST OF EQUIPMENT AND SERVICES OF ERECTION ENGINEER (Tr. 417)	
8-12-48	....\$ 10,000.00	8-11-48	.....\$ 10,000.00
12-8-48	.... 60,000.00	12- 8-48	..... 60,000.00
2-28-49	.... 56,772.00	2-25-49	..... 10,105.40
5-20-49	.... 2,155.83	11-27-48	..... 1,085.45
		2-28-49	..... 24,659.80
		5-16-49	..... 2,155.83
		<hr/>	
		Total Cost of Equipment and Services	
		Resale Commissions	
		Ex. P-1	
		Ex. P-2	
		Ex. P-3	
		Ex. P-4	
		Ex. P-5	
		<hr/>	
		Total commissions	
		Engineering services and expenses	
		<hr/>	
TOT. RE- CEIPTS			
Respondent:		Appellant:	
1/2 of commissions..		1/2 of commissions..	
		Engineering services	
		<hr/>	
		TOTAL.....	

The theory or rule of damages applied by the trial court is not known. There is no evidence mentioning the sum of \$4,000, or which would enable a computation of this amount, as the reasonable value of services rendered by the respondent in the sale to the Guy F. Atkinson Co. Neither the proper rule of damages nor the

evidence in this case can support an award except for one-half of the commissions. It was error as a matter of law for the trial court, in view of the evidence in this case and the rule of damages to be applied, not to allow the respondent one-half of the commissions on the sales made. This is the minimum that should be allowed as a fair and reasonable compensation in view of the above comparisons, and the fact that additional sales have been and will be made possible by these original contracts which the plaintiff aided in procuring, thus establishing the defendant as a sales representative of this equipment in the western states.

CONCLUSION

The evidence in this case construed with the proper rule of damages is more than ample to sustain an award of one-half of the resale commissions to the respondent from the sales made to the J. J. Crosetti Co. and the Guy F. Atkinson Co. A fortiori the evidence is sufficient to sustain an award of a lesser amount as contested by the appellant.

The judgment of the trial court should be modified by this Honorable Court allowing the respondent the additional sum of \$4,430.90 with interest commencing July 6, 1948, (Tr. 416, date of final payment on equipment) for services rendered in the Crosetti sale; and the sum of \$6,171.17 with interest commencing Feb. 28, 1949 (Tr. 417) for services rendered in the sale to Guy F. Atkinson Co.

Respectfully submitted,

DAN S. BUSHNELL,

Attorney for Plaintiff and Respondent.