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Kimball Elevator Company, Inc. v. Elevator Supplies Company, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

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Clerk, Supreme Court, Utah

KIMBALL ELEVATOR COMPANY,
INC., a corporation,
Plaintiff and Respondent,

— vs. —

ELEVATOR SUPPLIES COMPANY,
INC., a corporation,
Defendant and Appellant.

Case No.
8066

BRIEF OF RESPONDENT

ANDREW JOHN BRENNAN,
*Attorney for Plaintiff and
Respondent.*

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IN THE SUPREME COURT of the STATE OF UTAH

KIMBALL ELEVATOR COMPANY,
INC., a corporation,

Plaintiff and Respondent,

— vs. —

ELEVATOR SUPPLIES COMPANY,
INC., a corporation,

Defendant and Appellant.

Case No.
8066

BRIEF OF RESPONDENT

This is an action between an elevator company and an elevator parts supplier.

The record of facts and circumstances surrounding the issues is rather voluminous due to the long course of dealings between the parties out of which the cause of action arose.

The plaintiff, Kimball Elevator Company, has operated in Utah since 1922, first as an individual or partnership and later as a corporation (R. 228). It maintained a business association with the defendant, Elevator Supplies Company, which may be seen at the Medical Arts Building, Salt Lake City, March 2, 1926, and with the installation of three passenger elevators at Hotel

Utah, Salt Lake City, in 1930 (R. 230). These installations made by the plaintiff company, included a flash-light signal system and night bell furnished by the defendant (R. 230, 269). On the Hotel Utah and the Medical Arts, as on all other elevator projects, the defendant quoted on certain equipment to the plaintiff and the plaintiff installed or performed the elevator work (R. 271).

THE FACTS

Thus, from 1926 the plaintiff did business with the defendant corporation, purchased elevator supplies in the defendant's line of manufacture, and on jobs of any size conferred at the job site with Mr. Roy C. Smith, the defendants area district manager (R. 272).

World War II caused material shortages in many phases of our domestic economy. The elevator business was not excepted. One of the consequences was an attempt by many buildings to keep obsolete or worn machines in sufficient repair to operate until a complete overhaul or "modernization" could be secured and the latest safety features installed.

Elevator "modernizations" are designed to increase speed and safety of operation. The hand lever, controlled by an operator, for starting, speed of movement and stopping, is not seen in a modern type. Instead, the passengers entering the elevator call out their floors. The operator pushes corresponding buttons on the operating panel. As the car rises it stops automatically at each of these floors, the doors opening of themselves as the elevator reaches exactly the level of the floor. On the other hand a person on an upper floor may signal an

approaching elevator. By pressing a button he registers the number of his floor and the car stops automatically without the aid of the operator. The operator has nothing to do but close doors for it is the closing of the doors which releases the starting mechanism and starts the car automatically.

Following the close of the War and the lifting of material restrictions, new construction surged and every major hotel and public service building in the intermountain country considered plans to “modernize” its passenger elevators. The plaintiff and the defendant companies worked together to secure this business. The plaintiff company acted as the original contractor taking responsibility for elevator renovation and the overall job. The defendant company, a *supplier* as its very name designates it to be, furnished and proposed to furnish to the plaintiff certain relay, signal and other electrical equipment. The defendant corporation has never acted as an original contractor until September 27, 1950, when it contracted to repair the elevators at the Hotel Utah, under contract price \$79,274.00, later increased to \$85,554.00 (R. 235-256).

Defendant did not manufacture the master controls which operate the hoisting motors, it furnished relay controls — commonly referred to as the signal system and trade named “synchron control,” “collective — selective,” “duplux selective,” etc. The relay system registered all passenger calls from hall buttons on a relay panel, which transferred or relayed the call to the “controls” which reduce the speed as the elevator entered the zone of the call (R. 274).

A complete job required control equipment beyond the signal systems engineered by the defendant company. Therefore plaintiff purchased the necessary control panel from other elevator companies, such as Murphy Elevator Company, whose representatives were introduced to plaintiff by defendant (R. 276) because the relay control manufactured by defendant worked in conjunction with the control panel manufactured by Murphy Elevator Company (R. 274-275).

In keeping with the arrangement of the three companies, defendant would furnish the signal relay equipment, Murphy Elevator Company the controls, Kimball the elevator work, thereby being able to compete with any company in the field (R. 280), and whereby proposals were made to various and innumerable buildings and firms.

Not only were negotiations made through formal written proposals but also by word of mouth with building management and representatives. Mr. Roy C. Smith, district manager of the Elevator Supplies Company, frequently accompanied Daniel W. Connole, plaintiff's manager, to the job sites and on some occasions talked elevators with the building owners or engineers. Together with Connole, Roy C. Smith visited the Medical Arts Building, Salt Lake City (R. 282-283), and as shown by Exhibit "R", in April of 1946, at the instance of the plaintiff, one of the members of the Board of Directors of the Medical Arts Building while in San Francisco, California, was shown various relay control systems in operation, in which equipment furnished by defendant had been installed (R. 284). As shown by the evidence

presented to the Court and jury (Exh. "Y", R. 294), Roy C. Smith of the defendant conferred with plaintiff in regard to the visit to San Francisco of the member of the board of directors of Medical Arts Building.

At no time did the plaintiff company receive or request quotations on systems competitive to that furnished by the defendant (R. 302-303).

The Synchron System of Elevator Supplies was further explained at Salt Lake City to the board of directors of the Medical Arts Building by Mr. Connole of the respondent company and Mr. Roy C. Smith of the appellant company, both orally and by "cuts" or illustrations (R. 285), as to the efficient manner in which this system would handle passengers in the elevators, as proposed (Exh. "S").

Alma J. Janke, managing engineer at the Medical Arts Building, stated that he became acquainted with Roy C. Smith of defendant company (R. 444) when Smith would drop into the Medical Arts Building with Connole. It was then contemplated that the elevators would be modernized and the job was discussed (R. 445). Mr. Connole suggested that Janke go to New York and Louisville, Kentucky to see defendant's synchron control equipment. Later, following his trip, Janke stated the equipment was installed under Mr. Connole's supervision (R. 417).

At the same time the Murphy Elevator Company was also quoting Kimball on the price of the material it would furnish (Exh. "T" and "U", R. 289).

Upon receipt of the data from the Elevator Supplies

Company and the incorporation of all estimates the plaintiff made its proposal, June 28, 1947, to the Medical Arts Building for the modernization of two elevators and the supply of one new and complete machine (Exh. "V", R. 290). Plaintiff secured the job, supervised the completion of the installation and Kimball threshold name plates were installed upon the cabs (Exh. "W", R. 291).

Later Mr. Connole and Mr. Roy C. Smith brought Jerry Smith of the Hotel Utah over to the Medical Arts Building to see the job in operation (R. 449). Janke stated that there had been some discussions between him, Mr. Connole and Mr. Roy C. Smith of the defendant that he would be employed in installing equipment at the hotel if Connole got the Utah Hotel contract (R. 451).

Some technical electrical engineering was required whereupon Roy C. Smith of the defendant corporation advised Kimball to contact Charles M. Henker of the Pacific Elevator and Equipment Company of San Francisco, California.* He was engaged by Kimball for final tuning of the control systems on the Medical Arts (Exh. "X", R. 293).

Kimball Elevator name plates were on the cabs at the Medical Arts Building before modernization and also afterwards.

While the job at the Medical Arts Building was under consideration and negotiation and the actual letting of the contract and work was accomplished, there were many other jobs under consideration which required the joint attention and cooperation of the parties.

On October 2, 1947, plaintiff received proposals from

the Murphy Elevator pertaining to the Belvedere Apartments, Salt Lake City, Utah, which included Elevator Supplies Company door operator, cab door hangers, hatch door hangers, hatch doors, signal equipment, indicator lanterns, upper flow flash light annunciator. The bid to the Belvedere Apartments management was made by Kimball (Exh. "Z", R. 300).

The Utah Childrens Hospital or "Polio Hospital" at the University of Utah was engineered, estimated and bid upon in the same fashion. Kimball forwarded specifications to both Murphy Elevator Company and the Elevator Supplies Company. For this job the Kimball Elevator Company included in its bid to the State the use of the Elevator Supplies Company signal system, referred to as "directional collective control," and also car position indicators and door operators. At no time did the plaintiff company receive or ask for quotations from any other company on similar equipment (Exh. AA, R. 302).

Plaintiff and defendant carried on correspondence relative to elevators to be installed or modernized for the Mountain Fuel Supply Company at Salt Lake City. As of September 15, 1948 plaintiff submitted a bid on the project in which plaintiff specified and included, were it a successful bidder, automatic "directional collective control" with and without attendant, and variable voltage control with automatic two-way leveling to be furnished on an installed basis by the defendant company (Exh. "BB", R. 305).

The parties contacted each other concerning an elevator project known as the Continental State Bank of

Boise, Idaho, and on September 2, 1948, the defendant company furnished the plaintiff a proposal covering synchron control, with "cuts" or illustrations and photographs of the material and an estimate sheet which set forth such work as would be done by the Murphy Elevator Company (Exh. "CC", R. 306).

Later the parties worked out an alternate proposal on the Boise job and plaintiff bid to install a synchron control unit and an L. D. M. operator with safety-edge for the doors, door arms, interlocks and hangers,—all to be furnished by defendants (Exh. "DD", R. 307).

The Idaho State Hospital, Blackfoot, Idaho, came up for bid. Plaintiff secured specifications and forwarded copies to the Murphy Elevator Company and to the defendant. Plaintiff thereafter included collective selective control as manufactured by the Elevator Supplies Company in its bid (Exh. "EE", R. 509).

The parties also attempted to secure the contract on the Idaho State Hospital at Pocatello. This was a complete new elevator with variable voltage selective control, as was always done, Kimball forwarded the specifications on this project to the Elevator Supplies Company and the Murphy Elevator Company. Murphy Elevator and defendant submitted cost quotations to Kimball setting forth the number of erection hours which would be required at the job site (Exh. "FF", R. 311). Cuts furnished by Murphy Elevator Company reflected the Elevator Supplies equipment to be used. These cuts were handed by Kimball to the architects of the project (Exh. "GG", R. 312).

The cooperation of both companies on the elevator construction job at the new Shriner's Hospital, Salt Lake City is shown by the exhibit "HH" (R. 313), wherein Mr. Dan W. Connoles on December 18, 1947 addressed a letter on behalf of plaintiff to Elevator Supplies Company, Inc., at San Francisco, California, enclosing specifications on the job. Defendant in turn communicated with the Murphy Company, with a copy to plaintiff, proposing to furnish and install collective selective control, electric door operators and signals. Upon receipt of the overall information Kimball bid the job to the general contractors on the project (R. 313-314).

Prior to the submission of the foregoing mentioned bid, (at the request of Roy Smith, District Manager of the defendant company), on or about December 21, 1948, the W. S. Tyler Company and the Dahlstrom Company quoted Kimball on the doors and cabs (Exh. "II", R. 314).

On October 22, 1946, the plaintiff company secured a contract for the installation of signal equipment and door closers, at the Walker Bank Building, Salt Lake City, on four passenger elevators and issued an order thereon to the Elevator Supplies Company (R. 354). Thereafter, the Walker Bank Building decided to completely modernize the elevators and entered into a cancellation agreement (Exh. "FFF") with Kimball. Plaintiff protected the defendant on the job by insisting that as a condition to the cancellation *the defendant be awarded* the supply of electrical power door operators (R. 356). The contract for modernization was later awarded in part to Kimball Elevator and in part to Otis

Elevator Company and Elevator Supplies furnished the door operators.

Roy C. Smith also substantiated Connole in canceling with Walker Bank. Kimball made the arrangement and requirement that Otis would use Elevator Supplies equipment (R. 909).

Upon receipt from the architects of specifications for elevators in the Ben Albert Apartments to be constructed at Salt Lake City, the Kimball Elevator Company forwarded copies to Elevator Supplies Inc. and to the Murphy Elevator Company, whereupon quotations were returned dated August 30, 1949, including directional collective control and L. D. M. Door operators manufactured by the defendant corporation. (Exh. "JJ", R. 316-317) (Admitted R. 334).

The manager of the defendant company for this area, Roy Casper Smith, would in many instances accompany Mr. Connole of Kimball to the job site and together confer with the management (R. 318).

Another typical project worked upon by the parties was the Latter Day Saints Primary Hospital at Salt Lake City. November 7, 1949, the defendant quoted to plaintiff on installation of directional collective control. Cuts of this equipment were furnished plaintiff to be shown the architects.

So that Elevator Supplies and Murphy would not duplicate the work, they tell Kimball Company:

"We have included an extra copy of our proposal in case you want to send this to Murphy so that they can check to see there is no duplication" (Exh. "KK", R. 320).

Kimball Elevator Company thereafter submitted a bid specifically including Elevator Supplies equipment in its proposal. Kimball did not receive or ask for quotations on similar equipment from any other company (R. 321), and as was customary, at the request of Roy C. Smith of the Elevator Supplies, the Tyler Cab Company and the Dahlstrom Company each submitted quotations on cabs for the L. D. S. Primary Hospital from district offices in San Francisco to the plaintiff company at Salt Lake City (Exh. "LL", R. 322).

The development of the Medical Center at the University of Utah commenced with the Cancer Research Building and the plaintiff and defendant companies were interested in the elevators (R. 322). Plaintiff secured specifications and sent copies thereof to defendant at San Francisco. Murphy Elevator Company quoted on its portion of the job, and the Dahlstrom and the Tyler Cab Companies at the request of Roy C. Smith, district manager of the defendant company, submitted a bid to Kimball on the cabs (Exh. "MM", December 12, 1949, R. 323). The plaintiff placed a bid which included and specified the directional collective equipment manufactured by the defendant corporation. Plaintiff did not seek nor receive proposals on similar systems from any other company or source.

The Memorial Building erected by Daughters of Utah Pioneers at Salt Lake City was considered by the parties and on May 31, 1949, the Elevator Supplies Company submitted its proposals on the electric door operators and sheave hangers for the hydraulic passenger elevator Kimball proposed to erect (Exh. "NN", R. 325).

On June 5, 1947, plaintiff also bid on the Price Hotel at Price, Utah, specifying defendant's directional collective relay system and Murphy Elevator Company's controls (Exh. "K", R. 277). The construction of the foundation had been completed and then the work stopped. Interest was revived and again the companies, appellant and respondent, corresponded efforts to secure the job. As shown by Exhibit "OO" (R. 326), defendant and Murphy Elevator equipment was designed to propose and obtain a complete new elevator.

"Cuts" or illustrative plates of the equipment of Murphy Company with defendant's material in place were furnished for display and for use in making quotations to customers (Exh. "PP", R. 328).

Daniel W. Connole, of the plaintiff company, and Roy Casper Smith of the defendant company, together visited the Dooley Building at Salt Lake City prior to August 3, 1948 (R. 331). This elevator modernization included as a portion of the work a complete collective selective button type control with electric operators and automatic leveling on both elevators. Pictures and mimeographed engineering sheets were furnished the plaintiff company by the Elevator Supplies for type of car switch panels and selectors as manufactured by defendant. These photographs were taken to the Dooley Building management by the plaintiff company (Exh. "SS", R. 335-336). Specifications had been prepared by a firm of architects at Salt Lake City on the entire job (Exh. "QQ" and "RR"). Quotations were made to the plaintiff by the defendant, and the Murphy Elevator Company also quoted on its portion of the work.

The files of the Kimball Elevator Company also show that the elevator planned in the Annex of the Rogers Hotel at Idaho Falls was worked upon by the parties to this action. Specifications were forwarded to defendant by plaintiff and, as shown by exhibit "TT", car door operators, car door hangers and signal annunciators were proposed by the defendant and a bid made to the management by plaintiff (R. 336).

Prior to October, 1946, plaintiff company had been conferring with the management of the Continental Bank Building for some time (Exh. "VV", R. 340). Elevator Supplies Company proposed to Kimball for complete synchron control in modernization of the four elevators at that building. As time developed, on May 4, 1949, another proposal was forwarded and the Murphy Elevator Company gave its estimate on its equipment, together with defendant and plaintiff on the job. The Dahlstrom Metallic Door Company made estimates from its home office (Exh. "XX") and furnished cuts of cabs (R. 341).

In the latter part of 1948 or early '49 Dan W. Connole of the Kimball Elevator Company, Roy C. Smith of Elevator Supplies Company and Charles W. Henker of the Pacific Elevator and equipment Company visited the Continental Bank Building and "talked" elevators with the owners, engineers and management of the bank building (R. 342). The trio discussed in detail modernization of the elevators by use of Elevator Supplies and Pacific Elevator equipment (R. 343). As a result of this conference, an engineers' estimate was prepared by the three companies in order that the bank could call for bids (Exh. "YY", R. 343). The original of this estimate was

given to the board of directors. The Kimball Company had not and did not contact any other company for proposals on similar equipment (R. 345).

Together with Pacific Elevator and Equipment Company, the Kimball Elevator Company working with the defendant attempted to secure a job at the Zion's Benefit Building Society, Salt Lake City. The Pacific Elevator and Equipment Company (assuming the part theretofore occupied by Murphy) indicated what it would furnish Kimball on the job exclusive of the Elevator Supplies Company.

On the Congress Hotel at Salt Lake City, Mr. Connole, manager of the plaintiff, requested Henker of the Pacific Company to get together with the Elevator Supplies Company and make a quotation on the job and on September 6, 1950, Elevator Supplies Company submitted its quotation to Kimball (Exh. "BBB", R. 347-348).

On the University Heights Apartments at Salt Lake City on November 1, 1950, the Elevator Supplies Company and the Pacific Elevator Company submitted their proposal in conformity with the defendant (Exh. "CCC", R. 349). The W. S. Tyler Company placed its quotation to Kimball on the cabs.

The Charleston Apartments at Salt Lake City were also acted upon by the parties. On April 3, 1950 Kimball sent the specifications to Elevator Supplies Company and also to the Pacific Elevator Company (R. 350) and on April 10, 1950 Elevator Supplies replied to Kimball stating: "We have talked this job over with Pacific and

the equipment we have quoted on will tie in with their equipment." The defendant also advised the plaintiff that they had been in touch with the Tyler and Dahlstrom people and that Kimball would receive a quotation on the cabs (Exh. "DDD", R. 351).

There was also an elevator project at the Deseret News Building, Salt Lake City, in the spring of 1950. At that time the Kimball Company requested Elevator Supplies refer the "elevator parts" to Mr. Henker of the Pacific Elevator and Equipment Company at San Francisco, California. Mr. Smith of the Elevator Supplies Company talked the job over with Henker (R. 338) and the W. S. Tyler Company, and Dahlstrom Cab Companies, at the request of Roy Smith, also made quotations to Kimball. As shown by exhibit "UU", the job was bid by Kimball with Pacific Elevator furnishing the hoisting equipment and controls and Elevator Supplies the door operators, the controller, the safety edge, car door contacts and the closers and interlocks.

Charles Maynard Henker testified that he has been in the elevator business since 1924 and is a registered electrical engineer of the State of California. He told the court and jury that his company engaged in a complete line of elevator work (R. 660) and that in October, 1949, he was engaged by plaintiff company in an engineering capacity on the Medical Arts job and that on the occasion he discussed with Connole and Roy C. Smith jobs coming up in the area including the Hotel Utah (R. 662). Henker described the functions and type of equipment to be furnished by Elevator Supplies and that by Pacific Elevator and Equipment Company (R. 670).

Henker further testified that he conferred with Mr. Roy C. Smith on several jobs to be performed at Salt Lake City, such as the Charleston Apartment (R. 680), and the Desert News Building (R. 681, Exh. "B"). He stated: "it is another typical job of the type wherein all three collaborated" (R. 783). He described the Congress Hotel as being "the usual deal between Pacific Elevator, Elevator Supplies and Kimball" (R. 683). The University Heights apartments (R. 686, Exh. "D") were quoted upon by Pacific to Kimball. Henker further stated that his company manufactures relay and control equipment comparable to that of Elevator Supplies (R. 688) but that they had never been asked to bid on such equipment in this area by Kimball. Henker further confirmed the fact that Dan Connole introduced him to representatives of the Continental Bank Building in the company of Roy C. Smith of Elevator Supplies and that on the occasion of that visit the three companies came up with a round figure estimate which was given to the Continental management (R. 690). He said it was the type of job Elevator Supplies would do under an elevator contractor (R. 692). As shown by his testimony and letters to Kimball, Henker of the Pacific Elevator would confer with Smith of Elevator Supplies on equipment Elevator Supplies would furnish before quoting to Kimball (R. 701, 703).

Concerning the Hotel Utah — in November of 1947, the plaintiff wrote to both defendant and to the Murphy Company telling them that the management of the hotel had requested prices and estimates on the modernization of the three passenger elevators (Exh. "GGG", R. 3570).

The Elevator Supplies Company on November 18, 1947, made a quotation to Kimball and Murphy for synchron control, car relay panels, selectors, car push panel buttons and annunciator push button boxes and indicators with all necessary pipe, wire fittings and cable — on an installed basis. The plaintiff never asked for and did not receive quotations from any other company. The hotel did not proceed on this project but put in two new service elevators at the rear of the building.

Since 1947, Roy C. Smith, district manager of the defendant company, in the company of Mr. Connole of plaintiff, conferred at the Hotel Utah with the then manager, the late Guy Toombs, and also the building engineer, Jerry Smith. They discussed the type of equipment which would be installed (R. 364). Mr. Connole of plaintiff and Smith of the defendant company, in 1949 and 1950 took the Hotel Utah building engineer to the Medical Arts Building to see the equipment running and how it operated (R. 365).

The parties continued to discuss the Hotel Utah job and on May 11, 1950 the plaintiff wrote to Roy C. Smith of the Elevator Supplies requesting that he figure the job on an installed basis and also asking Smith to confer with Charles M. Henker of the Pacific Company for a price on three G. E. Controllers and plyathon levers in order “that the Medical Arts job could be duplicated.”

On May 16, 1950, by letter (Exh. “III”), the defendant company wrote Kimball re Hotel Utah and requested information relative to the drive motors and generators. Defendant said:

“We have your old elevator layout but outside of the capacity and speed there does not appear to be any data which would indicate the size of either the drive motor or the generator” (R. 361).

Plaintiff secured the generator readings and sent them on to the defendant company.

On July 13, 1950, the Pacific Elevator and Equipment Co. proposed to furnish relay panels, selectors, cabling, and “general overhaul of the equipment with the exception of what the Elevator Supplies people were to do”, with an estimate of the labor time involved (Exh. “JJJ”, R. 362). Pacific stated:

“This job should be the first of a lot of big modernizations we can do in your area. You will have our close cooperation all the way through, *both in selling and installation.*”

On July 14, 1950, the Elevator Supplies Company also made its quotation on the synchron control system to plaintiff company for the Hotel Utah. On August 16, 1950, the plaintiff submitted its bid to the Hotel Utah. According to the manager of the plaintiff the bid was accompanied by cuts to show the Elevator Supplies lines (Exh. “KKK”, R. 363).

Mr. Connole, manager of plaintiff, stated that following the submission of the Kimball bid he had a conversation with Jerry Smith, the engineer of the Hotel Utah (R. 371). There was some question as to whether or not the hotel would desire to change its hall lanterns and push buttons. This equipment is to be furnished by Elevator Supplies Company (R. 372). Jerry Smith told Connole that Otis Elevator Company was not to be invited to bid

on the job. He asked Connole if he had any suggestions as to other companies which might desire to bid. Connole suggested Westinghouse Electric Co. Later Jerry Smith of the Hotel Utah asked if Elevator Supplies would give a bid on the total job. Connole stated he did not know. That it would be identical equipment and if Smith wanted to use it as an estimate he could do so to find if the Kimball bid was in line. Smith said he wanted it for the Board. Mr. Connole stated at that time:

“I explained to Mr. Jerry Smith it would have to be a supporting bid because it was identically the same manufacturer and people doing the work. *He knew that.* I told him the bid would be identically the same people; and I could not see what justification there would be for having two people bid on identically the same equipment (R. 575-576).

(R. 373). Connole telephoned Elevator Supplies at San Francisco and talked with Roy C. Smith. Connole told R. C. Smith the Hotel Utah would like to have a proposal on the overall job to verify the Kimball bid and justification of the price quoted.

Thereafter, Smith and Henker conferred in San Francisco. Henker said:

“Q. We want you to tell us, Mr. Henker, just as well as you can remember, what was said between you.

“A. Well, I was probably asked by Roy Smith if I would consider presenting a bid from Pacific Elevator and Equipment Company for this part of the work. which would include, well, all the work previously tendered to Kimball Elevator Company, and our own, and on an installed basis,

which was quite a great deal more to Pacific Elevator and Equipment Company than had previously been in the Kimball bid.

“Q. What was said between you when this took place?

“A. When that took place I said, ‘well, it will be perfectly all right with Pacific Elevator and Equipment Company, if it is all right with Kimball Elevator Company, to go ahead on that basis.’ After all, we had a bid already in to Kimball and it was the most natural thing for us to say, ‘if it is okay with Kimball Elevator Company, it will be all right’. *I think we talked about it with the idea that they wanted two bids. In other words, they only had one bid and they wanted two bids, which would let them know about where they stood, I imagine, with their first bid.*

“Q. Did they let the Hotel Utah know where they stood?

“A. Yes. That is a normal procedure of buyers of that type. Of course, that is what necessitated the trip for Roy and I, going up there and making the survey that we did.”

* * * * *

“Q. Now, if we understand you correctly, you told Mr. Smith, of Elevator Supplies Company, that you would not make a quotation to Elevator Supplies without a clearance from Kimball?

“A. That is correct.

“Q. What did Mr. Smith say to you when you told him that?

“A. The best I can recall, *Roy had the same impression that that was a bid, a check bid, and naturally it was going to be higher, being done out of San Francisco both by ourselves and them-*

selves. I think the feeling was mutual between us, at least it was my impression that the bid would be so much higher that there would be nothing to it; that the contract would automatically go to Kimball Elevator Company.”

Gerald Smith also testified that on August 17 he requested Roy C. Smith to make a bid and that Roy Smith then stated he would have to take the matter under consideration and contact his home office for an opinion from them before he could give a definite answer (R. 789). Approximately three days later Roy C. Smith conferred by telephone from Seattle and told Gerald Smith he thought they would be interested.

Jerry Smith stated he knew that the Elevator Supplies had already quoted on the job to the Kimball Elevator Company.

Roy C. Smith further testified that following his company's bid to the Kimball Elevator Company, he received a call on August 17, 1950, from Mr. Jerry Smith of the Hotel Utah asking for a bid on the entire job (R. 883); that he told Jerry Smith he would have to think it over; and that conversation was on Thursday. On the following Tuesday he talked from Seattle to Jerry Smith and told him he (R. C. Smith) would have to get in touch with Mr. Fanning (home office) and would let him know as soon as possible (R. 884).

Henker further stated that when they arrived at Salt Lake City he discussed the matter with Connole and Smith and that they indicated they were in agreement (R. 677).

Connole positively states that he requested Roy C.

Smith to make a supporting bid (R. 546); that he spent several evenings with Mr. Henker while he was in Salt Lake City to estimate the job and that Mr Henker never expected to make a firm bid.

When Smith of defendant Company had his proposal ready to turn in to the hotel he came to the office of the plaintiff at Salt Lake City, on the Dinwoody Furniture job or the Utah Agricultural job, and stated the Elevator Supplies proposal would be \$18,000.00 higher (R. 376). Thereafter Smith came to the Kimball office and informed them he had been awarded the Hotel Utah contract.

On September 11, 1950, the same day that the defendant company submitted its quotation to the Hotel Utah, it submitted a revised quotation on the same job to plaintiff. Although the quotation eliminated the night attendant feature the price was raised \$2,000.00 to the sum of \$34,637 (Exh. "LLL", R. 378).

When the revised quotation was made to Kimball, the same letter stated that defendant was making a direct quotation to the hotel on "D. W." (dumb waiter) equipment. No reference was made to a direct quotation on the synchron control equipment (R. 379).

Smith also admitted he knew no other elevator or supply company was making proposals to Kimball beyond his own company and the Pacific Elevator because the two systems would have to synchronize (R. 926). And that he did not receive any request for an estimate from Connole but his quotation was upon the request of the Hotel (R. 927). Smith also denied any conversation con-

cerning a supporting bid with Henker but said he was going to tell Kimball what it was all about when he got to Salt Lake (R. 930).

Connole considered the items of repair suggested by the Pacific Elevator Company in its proposal and indicated the cost of following through would be slight (R. 384, 385, 386).

Mr. Connole compared Exhibit "I", the Kimball bid of \$59,600.00 and Exhibit "J", the Elevator Supplies contract and stated that his quotation included all of the work except the replacement of the sheaves. That Elevator Supplies had made an allowance of \$3,500 per cab and that the Kimball allowance was \$1,800.00, but as there was no specification on the cabs the exact price could not be determined until the hotel made a selection (R. 389).

After Roy C. Smith advised Kimball that the contract had been taken, Connole went to see Max Carpenter, Hotel Utah manager, and asked him if it would be possible the contract issue to Kimball. Carpenter said he had nothing against Kimball Elevator Company and he would check on it. The next day Carpenter told Connole the hotel could not do so because Elevator Supplies reported if this were done the price would have to be increased (R. 392).

It was shown that cordial relations at all times existed between these two companies and at no time prior to September 27, 1950 did Kimball consider Elevator Supplies as a competitor (R. 412). *At no time prior to September 27, 1950 in operations in Utah, Nevada, Wyoming,*

Montana, Washington and Idaho, had the Elevator Supplies Company acted as an original contractor.

As shown by the record (Exh. "QQQ", R. 413), on January 13, 1950, in a letter concerning the Veterans Hospital at Salt Lake City, Roy Smith advised that Elevator Supplies were not able to secure plans and specifications because they were not a *prime* bidder (R. 414).

The record further discloses that elevator parts purchased from the defendant by catalogue number (Exh. "L", R. 416) were not purchased or quoted upon in the same manner as a modernization system (R. 416).

The Kimball Elevator Company acts as an original contractor (R. 420).

Mrs. Rod Conole, secretary Kimball Elevator Company, verified that Daniel W. Connole made a call to Roy Smith at San Francisco on August 18, 1950; that Connole then told Smith of the desire for a bid to verify Kimball's quoted price; and also made request for Elevator Supplies to submit a supporting bid. Mrs. Connole further stated that at the time of Smith's visit to Salt Lake he stated he would make his quotation about \$18,000 to \$19,000 higher than the Kimball Elevator bid. Also at no time was Roy Smith or Elevator Supplies considered a competitor of the plaintiff.

At no time was plaintiff's bid increased 26% (R. 421). Connole told Jerry Smith, Engineer of the Hotel Utah there would possibly be a slight increase in electrical equipment and at that time Smith said he was not sure they would re-use the outside lanterns.

The average life of an elevator is twenty to twenty-five years, and the elevators at the Hotel Utah would not require another complete renovation for at least that time (R. 424).

The president and manager of the plaintiff company testified that in his opinion the advertising value to plaintiff company of the nameplates at the thresholds of the cabs in the passenger elevators at the Hotel Utah would be \$30,000 over a period of 20 years (R. 443).

Emerson S. Smith, a witness for the plaintiff, testified that for the past 26 years he has engaged in the advertising and public relations field and for 13 years past at Salt Lake City; that he is familiar with the number of rooms in the Hotel Utah, the number of service clubs and the type of patrons and invitees using the hotel (R. 555). He stated—a company's name on the threshold of the three passenger elevators at the Hotel Utah would have a value of \$1,000 per year (R. 556).

He also stated that the prestige of having the equipment in the Hotel Utah would be of tremendous value for future sales.

Smith pointed up something which has always been true, and especially true of the elevator industry: “* * * it has been accepted practice that the manufacturer of a product, shall be entitled to identify it, as a protective measure not only for the public but also for himself (R. 563, 564, 565).

The annuity schedule presented to the jury (Exh. “UUU”, R. 625), gave a guide to show the present in hand value of money which would be received at \$1,000 per

year over a ten, fifteen, twenty and twenty-five year basis (R. 626).

The preponderance of the evidence in every respect justifies the conclusion reached by the jury and its verdict. The manager and engineer at the Hotel Utah Company found themselves in the position of anxiously supporting the contract signed on the hotel's behalf with the defendant company, in view of the statements of the witnesses for the plaintiff that the contract as signed was intended as only a supporting bid. The jury had the right to disregard their testimony in its entirety or to believe or discredit such testimony in each of the jurors own judgment. The circumstances surrounding statements made by both of these witnesses made the reliability of such statements so doubtful and incomparable that the jury could put little weight on such testimony. Both witnesses were openly anagonistic to the plaintiff's cause and yet the record shows that prior to the filing of the lawsuit, the plaintiff company enjoyed a very good busines relationship with the Hotel Utah and with its personnel.

Positive Number One:

THERE WAS AN AGREEMENT NOT TO COMPETE.

The overwhelming weight of the evidence supports the verdict of the jury and the position of the plaintiff that through a long course of business dealings the defendant established itself as a supplier and the plaintiff as an original contractor. It was uniform practice for

the plaintiff to submit specifications on a job to the defendant and request quotations on elevator materials f.o.b., or on control systems installed at the job site. Frequently representatives of the parties would consult and collaborate on specifications and designs most suitable for the customer. On many occasions representatives of both parties would jointly confer with a customer or building owners and thereafter — based upon quotations made by the defendant to the plaintiff — plaintiff would bid the overall and complete job. If the job were secured the plaintiff, Kimball Elevator Company of Utah, would act as the original contractor and the defendant, Elevator Supplies Company, would act as supplier or sub-contractor under the plaintiff.

It was conclusively established that elevator modernizations projects involved considerable expense to building management and that such projects entailed long term planning of importance to the owner, the elevator companies and to the elevator supplier.

In 12 Am. Jur. 498, the law is simply and clearly stated:

“Contracts are express or implied. Implied contracts are implied in fact or in law. Contracts are express when their terms are not so stated. Contracts implied in fact are inferred from the facts and circumstances of the case and are not formally or explicitly stated in words, etc. It is often stated that the only difference between an express contract and a contract implied in fact is that in former the parties arrive at their agreement by word, whether oral or written, sealed or unsealed while in the latter, their agreement is arrived at by a consideration of their acts and

conduct, and that in both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it. (See numerous citations).”

Considering the great abundance of proof, both oral and documentary, offered by the plaintiff in proof of and showing the existence of such an agreement the honorable court properly instructed the jury and presented for its determination the issue as to the existence of an agreement. The jury found in favor of the plaintiff. Plaintiff submits that reasonable minds could not differ as to its existence.

Defendant seeks to attack the legality of this agreement through arguments which are based on the assumption that the defendant, Elevator Supplies Company, was a competitor of plaintiff and that the agreement would be in restraint of trade and its effect would be to stifle competition.

The parties to this action were never competitors nor did they ever deal at arms length. The plaintiff was selling the defendant's supplies and control systems and it was incumbent upon plaintiff to deal with the defendant after the plaintiff had urged the customer to use defendant's system and after plaintiff made its bid based upon quotations received from the defendant.

It is neither the intent nor purpose of the Sherman Act or the Clayton Act to nullify or abolish agreements necessarily made in the ordinary and regular channels of trade. The plaintiff, without such an understanding, would find itself in the anomalous and always risky posi-

tion of seeking quotations from the defendant, then attempting to compete on a price to the customer. American free enterprise would suffer, if such were the law.

Positive Number Two:

THE AGREEMENT WAS NOT IN RESTRAINT OF TRADE.

There is not one item of evidence in the entire record which would indicate that the agreement was in restraint of trade or would have the effect of stifling competition or creating a monopoly. The defendant through its long course of dealings merely promised it would not quote direct to the building management where plaintiff had requested a quotation from the defendant and plaintiff had thereafter submitted a bid to the building management. In not one instance is there shown any combination or agreement of competitors but rather a mere assurance on the part of a manufacturer or wholesaler that it would not sell directly to the consumer.

The following appears in 58 C.J.S. 1023:

“In the absence of any intent or purpose to create or maintain a monopoly, a trader or manufacturer engaged in an entirely private business has a right to exercise his own independent discretion as to persons with whom he may deal, unless a refusal to deal with a person is part of an illegal conspiracy or combination. He may sell or refuse to sell to whom he pleases, and may buy or refuse to buy from whom he pleases. This rule is not affected by state *anti trust statutes* or by the federal anti trust acts unless the actual effect of such conduct is substantially to lessen competition or to restrain trade.”

Citing:

“The anti trust laws do not restrict the right of a manufacturer freely to exercise his own independent discretion as to the parties with whom he will deal. *U. S. v. Parker Rust Proof Co.*, 61 Fed. Supp. 805.”

U. S. v. Aluminum Company of America, 447 Supp. 97, cause certified and transferred 64 S. Ct. 1281, 322 U.S. 716, 88 L. Ed. 1557, reversed on other grounds. C.C.A. 1487 2d 416.

The agreement here, in fact, supports rather than restrains competition. Such an agreement could not possibly establish a monopoly in derogation of the public interest since the parties were subject to competition from other elevator companies. Even the defendant argued in court that it had on occasion submitted quotations to elevator companies other than plaintiff.

The following note appears in Title 15 of U.S.C.A.:

“The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called ‘competition’ — the play of the contending forces ordinarily engendered by an honest desire for gain. ‘The statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. The words “restraint of trade” should be given a meaning which would not destroy the individual right to contract, and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the

purpose of the statute to protect.' United States v. American Tobacco Co., N.Y. 1911, 31 S. Ct. 632, 221 U.S. 106, 179, 180, 55 L. Ed. 663, 693, 694. See also, Federal Trade Commission v. Sinclair Ref. Co., 1923, 43 S. Ct. 450, 261 U.S. 463, 67 L. Ed. 746; Charles A. Ramsay Co. v. Associated Bill Posters, N.Y. 1923, 43 S. Ct. 167, 260 U.S. 501, 67 L. Ed. 368."

It was apparent that the relay control systems as developed by the Elevator Supplies Company were to be sold in a competitive field and that no monopoly or detriment to the public interest could possibly result through the business practice followed by the parties to this cause.

It is further set forth in the Code:

"It has now become a settled rule that only unreasonable restraint of trade or commerce are within the prohibition of this section. Standard Oil Co. v. U.S., No. 1911, 31 S. Ct. 502, 221 U.S. 1, 55 L. Ed. 619, Ann. Cas. 1912D, 734, 34 L.R.A. N.S., 834. See also, U.S. v. American Tobacco Co., N.Y. 1911, 31 S. Ct. 632, 650, 221 U.S. 106, 55 L. Ed. 633; U. S. v. Trans-Missouri Freight Ass'n., Kan. 1897, 17 S. Ct. 540, 166 U.S. 290, 41 L. Ed. 1007; U.S. v. Fur Dressers' & Fur Dyers' Ass'n., D.C.N.Y. 1925, 5 F. 2d 869; Fosburgh v. California, etc., Sugar Refining Co., C.C.A. Cal. 1923, 291 F. 29; Lee Line Steamers v. Memphis Helena & Rosedale Packet Co., C.C.A. Tenn. 1922, 277 F. 5; McLatchy v. King, C.C. Mass. 1917, 250 F. 920; American Press Ass'n. v. U.S., Ill. 1917, 245 F. 91, 157 C.C.A. 387, L.R.A. 1918A, 1039; Paterson v. U.S., Ohio 1915, 222 F. 599, 138 C.C.A. 123, certiorari denied 35 S. Ct. 939, 238 U.S. 635, 59 L. Ed. 1499;" (The note continues with numerous federal and state citations.)

"Restrictions imposed by sections 1-7 of this

title are not mechanical or artificial but set up essential standard of reasonableness and called for vigilance in detection and frustration of all efforts unduly to restrain free course of interstate commerce and do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measure to protect it from injurious and destructive practices and to promote competition on a sound basis. *U. S. v. Inter-Island Steam Nav. Co.*, D.C. Hawaii 1950, 87 F. Supp. 1010."

There is no reason at law or equity, nor no rule in legislation or custom against selection of customers. The agreement to refrain from a direct quotation is not interdicted by congressional act or state law.

In *Federal Trade Commission v. Raymond Bros. Clark Co.*, 263 U.S. 564, 44 S. Ct. 162, 68 L. Ed. 448, 30 A.L.R. 1114, Mr. Justice Sanford, speaking for the Court stated:

"It is the right, 'long recognized' of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to the parties with whom he will deal.' (citations) Thus, a retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons satisfactory to himself. (Citations.) He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. (Citations.) Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. (Citations.) Likewise, a wholesale dealer has the right to stop dealing with a manufacturer for reasons sufficient to himself. And he may do so because he thinks such manufacturer is undermining his

trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. * * *

“A different case would of course be presented if the Raymond Company had combined and agreed with other wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers. An act when lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or the individual against whom the concerted action is directed.”

See also :

Mennin Company v. Federal Trade Commission,
288 Fed. 744, 30 A.L.R. 1127, Cert. denied, 67
L. Ed. 1219.

The same rule is set forth in 36 *Am. Jur.*, at
page 504:

“One who is not bound by contract or public duty has the right under ordinary conditions to refuse to sell his property to, or to have other dealings with, any other person, absolutely or conditionally, regardless of reason or motive; and any loss or injury thereby inflicted upon the other person is *damnum absque injuria*, and gives rise to no legal liability.”

Citing:

Moore v. New York Cotton Exchange, 270 U.S.
593, 70 L. Ed. 750, 46 S. Ct. 367, 45 A.L.R. 1370;
Federal Trade Commission v. Raymond Bros.
Clark Co., 263 U.S. 565, 68 L. Ed. 448, 44 S. Ct.

162, 30 A.L.R. 1114; (and many other decisions).

The defendant by stipulation in open court, admitted that in Utah, Idaho and Montana, prior to September 11, 1950 all quotations on synchron control, collective and duplex collective control were made exclusively to original elevator contractors (R. 858-859). There was absolutely no evidence which could possibly lead to the conclusion that it would have been illegal for the defendant to continue its long, customary and well established method of doing business.

In *Associated Perfumers v. Andelman, et al.*, 316 Mass. 176, 55 N.E. 2d 209, it is stated:

“Where considering a contract in the light of business and situation of parties and circumstances with reference to which it was made, it appears that restraint contracted for is an honest purpose, is only such as affords a fair protection to the legitimate interests of party in whose favor it is imposed, and not so large as to interfere with interests of the public, the restraint is reasonable and the contract valid.”

The rule is outlined in 17 C.J.S. at page 639:

“Subject to the rules of public policy against contracts detrimental to the public interest and lessening competition, and certain inhibitions against combinations in restraint of trade, agreements generally providing that one person will trade or do business only with another person or in a certain way for a definite or an indefinite period are ordinarily valid if reasonable and necessary to the protection of the interests of the covenantee. The same is true of agreements restraining a person from carrying on business in

certain premises, or agreements reasonably restricting the use to be made of premises. Many other agreements of similar character have been sustained by the courts as legal and binding obligations, where not unreasonably in restraint of trade. *Seymour Mfg. Co. v. Derby Mfg. Co.*, 109A 395, 94 Conn. 311.”

In the *Derby Mfg. Co.* case the Court stated:

“Of course the defendant cannot bid against the plaintiff for any contract and at the same time agree to act as plaintiff’s bailee for hire in assisting to fill it. But this does not make the bailment or the agreement as to terms on which such bailment will thereafter be undertaken, illegal at common law or under the Sherman Act.

“It is also claimed that the contract is illegal because the defendant agrees not to make any bid or take any order for bands. We find no prohibition in the contract against the defendant accepting business on its own account. (It is only where the agreement is concerned between them as to price and this has nothing to do with restraining business between the parties.)”

United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, holds:

“In the absence of any purpose to create or maintain a monopoly the Sherman Anti Trust Act of July 2, 1890 does not restrict the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal and to announce in advance the circumstances under which he refuses to sell.”

Positive Number Three:

THE AGREEMENT IS SUPPORTED BY LEGAL CONSIDERATION.

Defendant argues that positively nothing passed from the plaintiff to the defendant in support of the agreement which could possibly constitute a legal consideration.

Defendant does not recognize the time, effort and expense occasioned on plaintiff's part in securing good will, local contacts, copies of specifications, and estimations including the defendant's materials and relay systems on a job. It was shown by a positive preponderance of the evidence that the plaintiff constantly and without exception attempted to convince its prospects of the superior quality of the defendant's signal and relay control system; that plaintiff did not seek quotations on such systems from the defendant's competitors; that the defendant knew plaintiff was dealing exclusively with the defendant in this regard; and that defendant knew plaintiff was estimating and including defendant's equipment specifically in its quotations to the customer or building owners. Also there was certainly a promise from the defendant to the plaintiff that when plaintiff requested and secured a quotation on Elevator Supplies material and thereafter based thereon made plaintiff's bid to the customer including defendant's material, that defendant would not bid directly to that customer. There was also a promise running from the plaintiff to use defendant's material since it was unequivocally established such was all plaintiff ever specified and estimated.

All of the parts of a transaction will be considered to ascertain whether a consideration sustains a contract. *Bennett v. Baum*, 133 N.W. 439, 90 Neb. 320.

Mutual promises express or implied furnish consideration for an executory contract. *McDonald v. McDonald*, Tex. Civ. App. 143 S.W. 2d 142.

A consideration for a promise is an act other than a promise, a forbearance, the creation, modification or destruction of a legal relation, or a return promise. *Latimer v. Holladay*, 134 P. 2d 183, 103 Utah 152.

A promise for a promise is good consideration and will always support a contract. *Chicago Title and Trust Co. v. Two-O-One Building Corporation*, 32 N.E. 2d 352, 308 Ill. App. 673.

Where contract by which defendant company was made an exclusive distributor of defendants radios, refrigerators, and washing machines within a certain territory lacked mutuality at its inception, evidence of performance by defendant established that a "consideration" arose which related back to unilateral promise and caused contract to become obligatory. *Hedeman v. Fairbanks Morse & Co.*, 36 N.E. 2d 129, 286 N.Y. 240.

Although the manager of the Pacific Elevator and Equipment Company of San Francisco, had been associated with the plaintiff company for a period of approximately two years only, he testified that it was valuable for his company to have a representative in the intermountain area. The defendant company, after having associated with the plaintiff for more than twenty-five years, would now assert that the representation of the plaintiff and the close business association of the parties

was absolutely of no value. The comparison of comments made by companies in somewhat the same field accentuate the attitude of the defendant. It is obvious:

Firstly, the defendant company knew that plaintiff was quoting the customers on equipment which it had manufactured, trade-named and offered to plaintiff under written specifications on particular jobs.

Secondly, the defendant knew that the plaintiff was bidding this material in the overall job to the plaintiff's customers.

Thirdly, the Elevator Supplies Company knew that the plaintiff was not securing quotations on similar equipment from competitors of Elevator Supplies (R. 296).

Fourthly, it was of direct value to the defendant to have its equipment quoted for sale.

Fifthly, there was an irrevocable commitment made by the Kimball Elevator Company to the Elevator Supplies Company to purchase the material, if the plaintiff were awarded a job. The plaintiff could not but install the defendant's system, since the system had been discussed and featured in direct talks and dealings with the customer.

Disregarding the acts of the plaintiff in supporting defendant's products, even slight consideration is sufficient to sustain a contract and courts will not look closely into the adequacy of consideration. *Brawley v. Research Foundation*, 166 P. 2d 392, 73 Cal. App. 2d 103.

Defendant knew and understood it would benefit through the plaintiff and in this regard there was a mutuality of contract existing between them. *Young v. Mason Walsh Co.*, 33 F. Supp. 358; *City of Atlanta v.*

DeKalb, 26 S.E. 2d 334, 196 Ga. 252; *Western Beauty Supply Co. v. Duart Sales Co.*, 133 P. 2d 202, 192 Okl. 6. In this situation giving rise to this case plaintiff had fulfilled its part by making a bid to the hotel undeniably including defendant's relay control system.

The agreement was not waived by the plaintiff and the evidence by a great preponderance supports the finding of the jury and its verdict.

Positive Number Four:

THE AGREEMENT WAS NOT WAIVED.

The representative of the defendant company, both in his deposition and on the witness stand before the jury, denied that he had received a call from the plaintiff company requesting a supporting bid or estimate for the hotel on the overall job and that he had ever discussed this with Mr. Henker of the Pacific Company before coming with him to Salt Lake City.

Henker states positively that the representative of the defendant company talked with him about the situation sometime prior to the trip of August 29th to Salt Lake City. He stated the conversation was between himself and Roy Smith by telephone, in person, or by both methods. Although Henker could not remember the exact words of the conversation, he definitely was of the same impression as Roy Smith that there were no other bidders than Kimball on the job, that the hotel wanted a check bid or an estimate and that due to the situation of Elevator Supplies and Pacific, any estimate given by them to the hotel would be so much higher that necessarily the job would automatically go to Kimball. He further

pointed out that he had refused to give any figures to the defendant company until he had definitely determined that Dan Connole and Roy Smith were in agreement.

After working to secure a job since prior to 1946 it is not reasonable to assume that Kimball could have been in agreement for Elevator Supplies to make a firm bid and take the contract. Neither could the defendant so conclude or reasonably ask the jury to so conclude. Mrs. Rod Connole, Mr. Henker and Dan Connole testified to the contrary and Roy Smith's statements in the Kimball office shows that he was definitely in agreement with them.

Counsel for appellant argues that this would be contrary to public policy and void and cites *McMullin v. Hoffman*, 174 U.S. 1117, 43 Lawyers Ed. 683, and cases of similar import, as authority for this position. The *McMullin* case concerned a secret agreement between bidders on a public contract for the improvement of the water supply of the city of Portland. It was a collusive agreement. The Supreme Court concludes its statement of the facts with this statement. "This community of interest was to be kept secret and concealed from all persons including the water committee." The case is not in point at all since Mr. Connole not only introduced the manager of Hotel Utah to defendant's representative, and took representatives of Hotel Utah to the Medical Arts Building pent house to see the defendant's relay control system in operation and also on one occasion this was done in Roy Smith's company. There is no question but what the Hotel Utah people knew the plaintiff was using Elevator Supplies' system and certainly Connole

told the representatives of the hotel that any quotation by Elevator Supplies could be only an estimate. The facts were on the table as far as plaintiff and the hotel were concerned and the *McMullin v. Hoffman* case or any other case based upon collusion, is not good authority here.

In addition to the close association of the parties, their frequent visits together to the Hotel Utah and the conferences concerning the equipment sold by the defendants, the building engineer Jerry Smith was directly informed by Connole of the plaintiff company that any bid made by the defendant could only be an estimate as it was the same equipment set forth in the Kimball bid.

One definition of collusion set forth by *Black's Law Dictionary*, page 352, reads :

“A secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them, by deceiving a court or its officers. *Baldwin v. New York*, 45 Barb. (N.Y.) 359; *Belt v. Blackburn*, 28 Md. 235; *Railroad Co. v. Gay*, 86 Tex. 571, 26 S.W. 599, 25 L.R.A. 52; *Balch v. Beach*, 119 Wis. 77, 95 N.W. 132.

“In divorce proceedings, collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce. Civil Code Cal. 114. But also means connivance or conspiracy in initiating or prospecting the suit, as where there is a compact for mutual aid in carrying it

through to a decree. *Beard v. Beard*, 65 Cal. 354, 4 P. 229; *Pohlman v. Pohlman*, 60 N.J. Eq. 28, 46 Atl. 658; *Drayton v. Drayton*, 54 N.J. Eq. 298, 38 A. 25; *Harne v. Harne*, 141 Md. 123, 118 A. 122, 123; *Stewart v. Stewart*, 93 N.J. Eq. 1, 114 A. 851, 852; *McCauley v. McCauley*, 88 N.J. Eq. 392, 103 A. 20, 23; *Underwood v. Underwood*, 50 App. D.C. 323, 271 F. 553, 555.”

The forthright statements to the Hotel Utah by Conole of the plaintiff corporation do wholly away with contentions by defendant that the plaintiff attempted to collude against the hotel. Consider the conversation between Jerry Smith of the hotel and the representative of the plaintiff. Also examine the fringe of the testimony given by the witnesses Smith, Jerry and Roy, regarding the request of the hotel for a direct quotation. The jury considered the entire circumstances and found for the plaintiff.

Jerry Smith produced a telephone check to prove he had called San Francisco on this subject. Roy Smith stated he had been called but that he did not make a decision because he had to contact the home office. He gave the same statement from Seattle sometime later. Not only did Smith of the Hotel Utah know it was an extraordinary request and understand the reason the defendant hesitated to bid but he must have also realized the situation in which Elevator Supplies found itself. No fraud or collusion was attempted by the plaintiff. No over-estimated contract was submitted to the Hotel by the plaintiff.

Positive Number Five:

THE AWARD OF DAMAGES WAS JUST

The appellant assigns a substantial portion of the argument in its brief to a claim that the award by the jury is excessive. Counsel attempted before the jury to compare the experience of the defendant on the job and the figures used by the plaintiff in its quotation to the hotel. The defendant asserted—we did not make a profit so you must not give the plaintiff a verdict, the plaintiff would have lost on this job. We in fact rescued them from their own folly.

The plaintiff invited the court and jury to scrutinize its books and records. The summarization of its calculations on the hotel job was introduced as exhibit “SSS”. That exhibit actually shows a margin of \$12,899.08. The jury cut this item of damage to \$8,555.00.

This Court has repeatedly held that a verdict must be plainly wrong and manifestly against the weight of the evidence in order for it to be set aside. *People v. Swasey*, 6 U. 93, 21 P. 400; *United States v. Brown*, 6 Wn. 115, 21 P. 461.

The plaintiff submitted only one proposal to the Hotel Utah before the job was taken by the defendant in its own name. Yet the brief of counsel for appellant goes on and on claiming the award of damages is excessive since there were items in its \$79,500 contract which the plaintiff had not figured. Mr. Connole explained the significance of the items of repair recommended by Henker of the Pacific Company both from the functional standpoint and monetary cost. Most of the items, with the exception of the drive sheaves and hoisting cables

had been originally included. Surprisingly, even if counsel's arguments were competent, the award would still hold as being fair, just, and reasonable. Counsel would attack the business acumen of the Kimball people; however, Roy C. Smith repeatedly indicated that the Kimball people knew their business.

Counsel for appellant stay on the old rule of law that profits which are purely imaginary and speculative may not be assigned as an item of damage or recovered because they are not provable.

Plaintiff brought before the jury its business experience on the Medical Arts job and also showed the court and jury its books and records. Exhibit "SSS" was a complete summarization and certainly justified and supports the finding of a loss of profits, which could well exceed the figure awarded by the jury.

This honorable court will remember that the defendant had quoted to the plaintiff upon a substantial portion of the job on an installed basis and that its price to the plaintiff company included a discount of 10%. The plaintiff had a margin of 10% in the quotation made by the defendant. The Pacific Elevator and Equipment Co. had quoted equipment at a certain price and had also given an estimate of the "crew days" required to complete the job. The Dahlstrom Cab Co. also offered plaintiff a discount of 10% and the allowance of \$1800.00 for cabs would bring the plaintiff at a price of \$180 on each cab; however, as indicated by the manager of the plaintiff company the cost of cabs would undoubtedly go well over \$3,000 and would therefore return a profit to the plaintiff in excess of the \$180 per cab shown on

exhibit "SSS". Since the plaintiff figured his cost on the installed and complete job it was proper for the court to receive and for the jury to consider a difference between the quoted price to the customer and the cost of materials, labor and taxes as being the margin of the profit.

Consider the following:

Profits has been defined to be the arithmetical excess of the price received over the total of all cost to the seller, and accordingly profits cannot be computed until the total cost is determined. *Hanley Co. v. Bradley*, 259 N.Y.S. 279, 145 Misc. 285.

Profit is the acquisition beyond expenditure excess of value received for producing, keeping or selling over cost; hence pecuniary gain in any transaction or occupation; emolument. *Mundy v. Van Hoose*, 30 S.E. 783, 104 Ga. 292.

Profits as contained in an action for breach of contract stating measure of damages to be the loss of 'profits' occasioned by such breach; means the gain which would have been made if the contract would have been complete. *Hincley v. Pittsburgh Bessemer Steel Co.*, 7 S. Ct. 875, 121 U.S. 264, 30 L. Ed. 967.

The conclusion is warranted by the facts found.

The accuracy of the plaintiff's figures were attacked by counsel before the jury and also in their brief on appeal; however, the record discloses the honorable court made certain that the figures set forth in exhibit "SSS" were accurate, not only were the items substantiated through the quotations received from subcontractors, but also the cost of the "crew day" and materials required for the job were explained by the plain-

tiff's manager through his personal experience on other elevator projects and his knowledge of the labor market. Mr. Connole very adequately showed that though the job was figured at a low marginal profit this was done to insure the prestige and advertisement the company would realize through the installation of its elevators at the Hotel Utah.

It is to be recognized that if the plaintiff had gone ahead at the hotel in its own name and right that the item of profits could be more accurately set forth as a fact; however, since it was wrongful conduct and breach of contract on the part of the defendant that took the job away from the plaintiff, the defendant is not in position to complain about the accuracy of proof of profit. See *Elsbach v. Mulligan*, 58 Cal. App. 2d 354, 136 P. 2d 651; *Natural Soda Products v. City of Los Angeles*, 143 P. 2d 12, 23 Cal. 2d 193; *Zinn v. Ex-Cell-O Corporation*, 149 P. 2d 177, 24 Cal. 2d 290; *Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal. 2d 634, 160 P. 2d 812.

See also *Hacker Pipe & Supply Co. v. Chapman Valve Manufacturing Co.*, 62 P. 2d 944, 17 Cal. App. 2d 265, wherein the court stated:

“It is well established that damages consisting of the loss of anticipated profits need not be established with certainty. It is sufficient that it be shown as a reasonable probability that the profits would have been earned except for the breach of the contract. As stated in *Pye v. Eagle Lake Lumber Co.*, 66 Cal. App. 584, 277 P. 193, 195, quoting from *Kennett v. Katz Const. Co.*, 273 Mo. 279, 202 S. W. 558, ‘“While the actual amount of damages from the breach of a contract may not

be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account." * * * The law requires "only that the best evidence be adduced of which the nature of the case is capable." It is held generally that the breach of an exclusive sales agency contract through the invasion of the territory of the agent (which is substantially the case in hand) will entitle the latter to the profits he would have made upon sales in the amount of those made by his principal in the invaded territory. *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 P. 460, 462; *Bredemeier v. Pacific Supply Co.*, 64 Or. 576, 131 P. 312, 313. In ascertaining the amount of damage it is proper to assume that one who has an established sales agency would have been able to conduct his business in the usual manner, except for the interference, and it is therefore proper to take into consideration, in estimating profits alleged to have been lost, the volume of business done in the past and the percentage of profit made thereon. *Schumann v. Karrer*, 184 Cal. 50, 192 P. 849; *Yaguda v. Motion Picture Publications, Inc.*, 140 Cal. App. 195, 35 P. 2d 162; *Erskine v. Marchant*, 37 Cal. App. 590, 174 P. 74; *Sanford v. East Riverside Irrigation District*, 101 Cal. 275, 35 P. 865; *National Oil Refining & Mfg. Co. v. Producers' Ref. Co.*, 169 Cal. 740, 147 P. 963."

The same result is reached by the court in *Grupe v. Click*, 26 Cal. 2d 680, 160 P. 2d 840:

"Upon this question, it is held that where the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and

extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. (Overstreet v. Merritt, 186 Cal. 494, 200 P. 11 (breach of contract) and numerous other cases.)”

It has been said that “if a man make a better mousetrap than his neighbor — the world will make a beaten track to his door,” — but he must first tell the world that he has the mousetrap. This is the medium of advertising.

The plaintiff for more than twenty years had its nameplates on the thresholds of the cabs of the three passenger elevators at the Hotel Utah. This hotel is one of the very finest in the country. The plaintiff enjoyed this prestige, used a picture of the hotel on the cover of an advertising pamphlet or company brochure, and the manager of the plaintiff stated that this had an advertising value of at least \$30,000.00. An advertising expert testified that in his opinion the names of any company on the threshold of the three elevators would have a value of at least one thousand dollars per year.

Counsel for appellant argue that the plaintiff could not sustain a loss in this respect since the hotel did not permit a name on the threshold of the new cabs and, that even though Kimball had done the job and completed the modernization it would be a misnomer for plaintiff's name to be there; and that such, if there, would amount to false advertising.

This argument runs squarely in the face of the established and standard custom in the elevator industry.

Name plates are used not only in the state of Utah but throughout the United States. Peculiarly nothing was said to Connole concerning either the use of name plates or the removal of threshold nameplates. This was discussed between Jerry and Roy Smith of the defendant company; however, the discussion took place long after September 27, 1950, when defendant breached its contract with plaintiff and several months after the dispute arose between the parties and the plaintiff had made its demands upon the defendant company. If plaintiff had been awarded the contract and proceeded in continued good will its name would have been in the lobby and at the entrance of each floor of the hotel — for at least a minimum of ten years and perhaps for twenty-five years. Its loss in this regard was obvious to the jury and the subject of its unanimous verdict for the minimum ten years under the interest amortization schedule. The jury was certainly temperate in its decision. Counsel for appellant cannot reasonably show the verdict excessive. This element of damage could have been doubled.

There is some confusion in the arguments raised by appellant concerning the legal right of the plaintiff to use its name where it has not actually produced *all* of the equipment making up the complete elevator. There does not seem to be any direct, in-point authority on this subject. Perhaps the situation of the elevator “manufacturer” or contractor is similar to the question of the right to use a “trade-name” as distinguished from a “trade mark”. As explained by one of the witnesses, various trade marked articles may go into a complete machine which will end up with a trade-name.

The following is set forth in 52 Am. Jur. 509:

“The term ‘trade name’ is used in various senses. Thus, it has sometimes been used to indicate a mark affixed to goods where such mark is not originally susceptible of exclusive appropriation but has acquired a secondary meaning. It has also been used to indicate a part or all of a firm name or a partnership name. In its most common usage, it means a name, word, or phrase employed by one engaged in business, as a means of identifying his products, business or services, and of establishing good will. * * * A trade name also involves the individuality of the maker, for protection in trade, to avoid confusion in business, and to secure the advantages of a good reputation, and therefore it is said to have a broader scope than a trademark. It has also been declared that it is more properly applied to the good will of the business. Therefore, while a trademark may consist of a name, a tradename as herein defined is not regarded as a trademark in the strict technical sense.”

and continuing the text 52 *Am. Jur.* 513:

“* * * A tradename is also said to be a species of property, and, while not strictly a trademark will as a general rule be protected in like manner. The theory of this is that a man may have acquired a reputation for excellence in the manufacture or preparation of a certain article for sale, which reputation may be a source of profit to him in the enjoyment of which he ought to be protected.”

There can be no question concerning the value of advertising. American business and industry spends more for advertising media than any other country in the world. The plaintiff enjoyed the finest medium avail-

able in its operating area and the jury was one hundred per cent correct in awarding plaintiff damages for loss of advertising and prestige. The verdict is legal and proper.

Positive Number Six:

THE TRIAL WAS FAIR

The actual trial of this case ran for a number of days, interspersed with continuations required by the regular district assignments of the trial judge. Consequently the Court attempted to restrict evidence to the issues set by the pre-trial order and by stipulations of counsel in meetings in chambers.

Counsel for appellant wanted to establish certain notariety among the elevator trade for defendant's reputation as an independent or prime contractor by showing direct bidding; however, after the consummation of several hours of trial time it was stipulated the Elevator Supplies Company had quoted to elevator companies other than plaintiff but that it had never been a prime contractor, not even for the installation of dumb waiters. The explanation of these issues by the trial judge, of which the defendant now so strongly complains, could not have been prejudicial.

From the very beginning of this lawsuit, plaintiff based its case on an implied agreement. Defendant denied it had any agreement with the plaintiff, argued the reason for its denial and the non existence of such an implied agreement before the jury. *The issue was one of fact.* The jury found in favor of plaintiff. The facts are supported by the great preponderance of the evidence.

CONCLUSION

The verdict of the jury is well founded by the record, and the evidence—both oral and documentary as set forth therein. The issues were outlined originally in plaintiff's complaint and its amended complaint, and through written interrogatories and depositions prior to the trial of the cause. Plaintiff positively maintains that through a long course of business dealings with the defendant an implied agreement existed. The defendant had fair and unlimited opportunity to set forth its denial and proof of the nonexistence of such an agreement.

After both sides had offered its proof, issues were fully and finally presented through the instructions of the court. The findings and verdict were in favor of the plaintiff. Considering its loss of profit, and prestige over the years, the amount of the verdict awarded to the plaintiff is little compensation for its actual damages.

Plaintiff requests that this Honorable Court uphold the action of the lower court and jury; and that plaintiff be awarded the judgment as entered and its costs as respondent on this appeal.

Respectfully submitted,

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*Attorney for Plaintiff and
Respondent.*