

1954

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

Utah Supreme Court

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Paul E. Reimann; Howard J. Cantus; Attorneys for Defendant and Appellant;

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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

FILED
JAN - 9 1954

Clerk, Supreme Court, Utah

Brief of Appellant

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Defendant and Appellant.

Case
No. 8066

Brief of Appellant

STATEMENT OF THE FACTS

(a) *Preliminary Statement*

Defendant and appellant, Elevator Supplies Company, Inc., has appealed from the judgment on a verdict of \$17,085 entered March 17, 1953, in favor of plaintiff and respondent, Kimball Elevator Company, in the District Court of Salt Lake County, State of Utah. (R. 194, 212).

Plaintiff, the *unsuccessful* bidder on the Hotel Utah passenger elevator modernization project, sued defend-

ant, the *successful* bidder. Plaintiff alleged an express oral agreement whereby defendant was to submit to Utah Hotel Company a "supporting bid" in an amount of \$18,000 or \$19,000 in excess of plaintiff's bid, and that in "violation" of the "agreement" defendant made a *firm bid* and accepted an award of the contract in its own name. (R. 34-41). The "theory" was changed at the trial to "an implied agreement not to compete" with plaintiff, although the subject of competition was never specifically discussed. (R. 632, 651). The trial court rejected the contentions of defendant that there was no consideration for any such purported "agreement", and also held that federal and state statutes interdicting agreements in restraint of trade and competition, are "inapplicable."

Utah Hotel Company on September 27, 1950, awarded to defendant two contracts. One was for modernization of the passenger elevators, in the sum of \$78,774, Exhibit "J"; and the other was for installation of two electric dumb-waiter elevators, Exhibit 4. (R. 243-244, 770-771, 779-782). When plaintiff learned that defendant had been awarded the contracts, plaintiff (whose bids on both projects had been rejected by Utah Hotel Company), demanded that defendant (the successful bidder) pay plaintiff a "commission". (R. 590-591). At the trial, plaintiff's manager admitted that defendant never told plaintiff at any time that defendant would give plaintiff a "cut out of the job" if Utah Hotel Company awarded the contracts to defendant; that defendant's manager did not promise anything; and that there were no

promises. (R. 589-590). Defendant flatly refused to pay anything to plaintiff. (R. 893-895).

Plaintiff then asked Utah Hotel Company, owner of the building, for a "commission", which was refused. (R. 238, 240, 250-251). Plaintiff finally attempted to induce the hotel company to cancel its contract with defendant on the passenger elevators and to issue a contract in the name of plaintiff, which the hotel management refused to do. (R. 239-240).

Of the total verdict, \$8,555 was awarded by the jury for "*Plaintiff's loss of profit in not getting contract with Hotel Utah,*" (R. 194). Plaintiff's only bid on the modernization of the passenger elevators, dated August 16, 1950, Exhibit "I", was incomplete, vague, and said bid was unsatisfactory to Utah Hotel Company. (R. 246-247, 263-264, 787-788, 813-817, 822, 831-832). Plaintiff's bid on two electric dumb-waiters, was also unsatisfactory to the hotel management, Exhibit 20. (R. 792-793). Utah Hotel Company did not see fit to ask plaintiff if it cared to submit another bid. (R. 264). Nor was the hotel company anxious to do business with plaintiff nor to invite plaintiff to submit another bid, as plaintiff had not submitted a satisfactory bid to begin with. (R. 263-264).

Defendant did not solicit this particular business from the hotel company. (R. 242). Plaintiff's bid was never discussed with defendant by the hotel company. (R. 237). Defendant did not do nor say anything to discourage the hotel management from dealing with plain-

tiff. (R. 248). Utah Hotel Company had been a customer of defendant since 1948, Exhibit 3. (R. 243-244, 770-771, 779-782). On August 17, 1950, the management of the hotel expressly requested defendant to submit a *firm bid* on the over-all modernization project; and such request was repeated on August 30, 1950. Such a bid was submitted about September 11, 1950, Exhibit "J". (R. 241-242, 788-792). Said bid was the only one the hotel management ever obtained for doing the job as the hotel wanted it done. (R. 264). The hotel management also requested defendant to submit a firm bid on the dumb-waiter elevators. Exhibit 4 is defendant's bid with the acceptance by Utah Hotel Company. (R. 244).

The balance of the verdict, \$8,530, was awarded for "*Plaintiff's loss of advertisement value*", because plaintiff's name-plates were not installed in the thresholds of the new passenger elevator cabs. (R. 194). There was no evidence that plaintiff could possibly have been awarded a contract, as its bid was unsatisfactory to the offeree; the hotel management refused to entertain it, and did not see fit to invite plaintiff to submit any further bid. (R. 264). Plaintiff was not the manufacturer of any of the equipment involved in the modernization. The subject of name-plates had never been discussed by plaintiff with the hotel management. (R. 586-587, 650), nor was anything mentioned about it in the only bid plaintiff ever submitted on the elevator modernization (Exhibit "I"). Utah Hotel Company as owner of the building refused to allow any name-plates in the elevator cabs, except the name of the cab manufacturer, "Tyler",

in small letters on the capacity plate in each elevator cab. (R. 249, 259-260, 834-835).

(b) *Pleadings, motions and orders.*

Kimball Elevator Company filed suit against defendant October 22, 1951 (R. 1-7). By its amended complaint, plaintiff demanded 10% of the contract price of the passenger elevator modernization contract awarded to defendant by Utah Hotel Company (10% of \$78,774), plus \$50,000 "damages" for "breach" of an alleged express oral agreement. Plaintiff alleged that it procured from defendant a written proposal on a portion of the elevator modernization project in June 1950; that plaintiff then submitted a firm bid to Utah Hotel Company in the sum of \$59,600 on the entire project on August 16, 1950; that plaintiff then obtained a quotation on two electric dumb-waiters, and plaintiff in turn quoted Utah Hotel Company; that defendant then "agreed" with plaintiff to submit to Utah Hotel Company a "supporting bid" on the elevator modernization project in the amount of \$78,000 or \$79,000 (which would be \$18,400 or \$19,400 in excess of the bid presented by the plaintiff); that "in violation of the trust and confidence between the parties and the agreement with plaintiff", instead of a "supporting bid" the defendant made a *firm bid* to Utah Hotel Company and accepted an award of the contract in its own name. (R. 34-41).

Defendant challenged the validity of the complaint and the amended complaint, by motion to dismiss. (R. 42-43). The district court denied defendant's motion to

dismiss, also its alternative motion for a more definite statement, and motions to strike. (R. 44).

By answer defendant expressly denied there was any such agreement or any other agreement between the parties. Defendant alleged there was no consideration for any such agreement, and also that if such an agreement had been made the same would have been illegal and void; that such an agreement would have been designed to stifle competition and to aid plaintiff to monopolize the bidding to the injury and detriment of Utah Hotel Company as owner of the property, and any such agreement would have been against public policy and void. Defendant further alleged that plaintiff knew that Utah Hotel Company desired a bid from defendant; that said hotel company expressly requested defendant to submit a bid on the over-all project; that defendant thereupon submitted to Utah Hotel Company a bona fide bid and defendant was awarded the contract. (R. 45-53).

On motions to strike, the district court struck out the affirmative defense of illegality of the alleged agreement, lack of authority of any agents of defendant to make any such agreement, and also the allegation that Utah Hotel Company as owner of the building did not allow name-plates in the elevator cabs. (R. 54-59).

At pre-trial conferences November 21 and December 2, 1952, there was advanced on behalf of plaintiff the novel "theory" that an *unaccepted offer* may give rise to an "implied agreement not to compete" with the

offeree; and that the claimed "issue" was "that when the plaintiff requested a bid from the defendant, that the defendant agreed to refrain from competitive competition with the plaintiff for the work on which the bid was made, and for the work of the customer for whom the work was to be done." (R. 62). Defendant thereupon again moved to dismiss the amended complaint on the ground that the pre-trial hearing disclosed that plaintiff has no cause of action, and that plaintiff cannot show any legal consideration. (R. 62-63).

The defendant contended that if there had been such an agreement as alleged in the amended complaint, the same would have been illegal and void, as an unlawful agreement in restraint of competition in violation of federal and state criminal statutes. The trial judge ruled that defendant's claim that the alleged agreement would be illegal and void, does not constitute a defense, to which defendant excepted. (R. 62-63).

The various defenses allowed by the pre-trial order as amended, included: (a) Denial that any contract was ever made, inasmuch as the unaccepted offer had expired; (b) that such an agreement would have been collusive and void; (c) that the bid on a portion of the proposed job was obtained by plaintiff from defendant on the false representation that plaintiff would be awarded the contract by Utah Hotel Company; (d) that plaintiff never entered into any agreement with Utah Hotel Company, and that the only bid submitted was incomplete, indefinite and unsatisfactory; (e) that there

was no consideration for any agreement not to compete; and (f) that if the plaintiff's name-plates had been placed in the elevator cabs, the same would have constituted a mislabeling and an unfair trade-practice, since plaintiff was not the manufacturer of any of the equipment. (R. 62-67).

The trial court on January 19, 1953, denied defendant's motion for a summary judgment. (R. 71-79).

On March 2, 1953, following plaintiff's opening statement, the defendant moved to dismiss the case with prejudice. (R. 96). At the conclusion of plaintiff's case in chief, defendant orally moved for a verdict in favor of defendant. (R. 756-757). The trial judge deferred ruling on such motion. (R. 764). At the close of all of the evidence, defendant presented and filed its written motion for a directed verdict against plaintiff, no cause of action. (R. 106-109). Ruling on said motion was deferred until after the verdict. (R. 963).

The court submitted the case to the jury on the theory that there were "exclusive dealings" between the plaintiff and defendant, which the jury might consider in determining whether there was an "implied agreement . . . that the defendant would not compete against the plaintiff." (R. 121). During the trial, however, the court sustained an objection to questions designed to draw admissions from plaintiff that plaintiff did not purchase exclusively from the defendant. The court ruled that whether or not the dealings were exclu-

sive, was wholly immaterial. (R. 501). It was expressly stipulated that defendant did not quote exclusively to plaintiff, and that defendant uniformly allowed a discount of 10% from list price to all elevator companies which purchased from defendant. (R. 858-859). Plaintiff admitted that it purchased from other elevator companies, the same type of materials which defendant manufactures and sells. (R. 505). Plaintiff also admitted that notwithstanding numerous requests from plaintiff for bids on dumb-waiters, plaintiff never at any time purchased any dumb-waiter from defendant, but plaintiff always purchased such equipment from other companies. (R. 503, 874, 948-949, Exhibit 14). Plaintiff's manager also admitted that Kimball Elevator Company at no time issued any purchase order to defendant for synchron control, signal control, nor any other modern elevator controls manufactured by defendant, on which plaintiff had requested bids. (R. 480-482).

Mr. Connole, plaintiff's manager, admitted that defendant never at any time told plaintiff in writing that defendant would give plaintiff an exclusive bid; and when asked whether defendant ever told him orally that defendant would give an exclusive bid, Mr. Connole answered, "Not specifically." (R. 651). He also admitted that defendant did not at any time promise that it would refrain from submitting a bid to any competitor, and that such matter was *never discussed*. (R. 632).

When the court asked counsel for plaintiff if "part of your implied agreement is based on any theory that

the defendant had an agreement that they would deal exclusively with you”, counsel said: “*We do not claim that, your Honor.* We do make the claim they never informed the Kimball Elevator Company they were ever bidding or making quotations to competitors of Kimball Elevator Company.” (R. 846). Mr. Connole, however, admitted that it is not the practice in the elevator field for one elevator company to disclose to another company, to whom it is bidding. (R. 520-521).

The court refused defendant’s requests for instructions whereby the court would construe the written instruments, and the court declined to instruct the jury that there can be no finding of an “implied agreement not to compete with plaintiff” from unaccepted offers and from other past negotiations.

Numerous exceptions to the charge to the jury were taken, and exceptions were also taken to the refusal of the court to instruct as requested. (R. 963-971).

Following entry of verdict and judgment on the verdict (R. 193-194), defendant served and filed its motion to set aside the verdict and to vacate the judgment, and to enter judgment in favor of defendant in accordance with the motion of defendant for a directed verdict of no cause of action, and also a motion for new trial in the alternative, March 24, 1953. (R. 195-200). On June 4, 1953, both motions were denied (R. 202). Notice of appeal was filed on July 2, 1953. (R. 212).

(c) *The evidence.*

Plaintiff, Kimball Elevator Company, is an elevator contractor. It does not manufacture the type of elevator equipment involved in the modernization of the passenger elevators at Hotel Utah. Daniel W. Connole is the manager of plaintiff corporation. Plaintiff has been agent for Kimball Brothers Company, of Council Bluffs, Iowa. (R. 460). About 1945, plaintiff became agent for Murphy Elevator Company, of Louisville, Ky. (R. 301-302, 460). In 1949 plaintiff also became territorial representative of Pacific Elevator and Equipment Company, of San Francisco. (R. 328-329, 460, 688, 701).

Defendant, Elevator Supplies Company, Inc., is an elevator equipment manufacturer. It manufactures elevator controls, signal systems, electric door operators, relay panels, hangers, various elevator accessories, and electric dumb-waiters. Defendant's manufacturing plant is in New Jersey. Roy C. Smith, with office in San Francisco, has been district manager since 1924. (R. 842-843).

Defendant has issued catalogs, from which its materials can be ordered by catalog number. Plaintiff has ordered some repair parts from defendant by catalog number. (R. 415, 461). On jobs of any size, plaintiff has asked for bids. (R. 461). Defendant not only sells elevator equipment on an F.O.B. basis, but throughout the years it has sold materials on contracts to install the equipment. It has been the practice of defendant, which has always been engaged in interstate commerce, to submit bids to everyone who has asked for quotations. (R. 849-

850). As illustrated by Exhibits 34, 36, 39 and 42, when two or more elevator companies requested defendant to give quotations on identical equipment and installation, the bids have been identical. It was admitted by plaintiff that defendant did not quote and sell exclusively to plaintiff. (R. 846, 856-858).

A trade discount of 10% from list price, has always been allowed by defendant on all purchases by elevator companies, whether the sale has been on an F.O.B. basis or on an installed basis. (R. 459, 849-850). The only way such discount can be obtained is to make the purchase. (R. 519). Defendant has sold not only to plaintiff on that basis (R. 438, 459, 519, 743, 850), but defendant has sold on the same discount basis to Murphy Elevator Company, Otis Elevator Company, Montgomery Elevator Company, Pacific Elevator and Equipment Company, Elevator Maintenance Co., Ltd., Elevator Service and Supply Company, and others, as illustrated by Exhibits 5, 6, 8, 31, 32, 33, 39, 40, 43. *Although the plaintiff has made numerous requests for bids, in more than 20 years, the plaintiff has actually awarded to defendant only 7 contracts, and one of them was canceled.* Most of defendant's business has come from other corporations. See Exhibit 46. As to the numerous exhibits offered in evidence over objections of defendant, referred to by Mr. Connole as "business deals" and "contracts," he admitted that the bids were never accepted, no purchase orders ever issued and no contracts materialized. (R. 500).

Prior to February 1948, Hotel Utah had purchased various elevator repair parts from Kimball Elevator Company, but the management became dissatisfied with the service. Commencing February 1948, Utah Hotel Company (owner of Hotel Utah) began to purchase replacement parts and equipment from defendant for rebuilding the existing equipment. Exhibit 3 consists of a number of invoices from defendant to Hotel Utah, with attached letter. The hotel company went directly to defendant to expedite the repair of the equipment. (R. 770-771). Most of the elevator parts deal with door operating equipment. The hotel rebuilt the door closing mechanisms, prior to the time when the Utah Hotel Company decided to undertake the modernization program. The repair of the passenger elevators was carried on in 1948 and 1949. Some of the repair parts were ordered by the hotel by catalog number. (R. 779-782). At the request of Utah Hotel Company, Mr. Roy C. Smith made an investigation of the passenger elevators and reported to Mr. Charles W. Lerch and Associates, elevator consultants employed by the hotel, under date of December 28, 1948, Exhibit 26. (R. 770-777). Roy C. Smith assisted the hotel in the repair program. (R. 877-787).

After Utah Hotel Company began to order equipment from defendant for the repair of the elevators, Mr. Connoles of plaintiff corporation, asked Mr. Roy C. Smith for a "commission". Payment was refused. Mr. Connoles was told that defendant did not pay commissions; that it sold at a discount, and that if plaintiff had

ordered such materials it would have purchased at a discount. (R. 878). Defendant has never paid any commissions.

Otis Elevator Company wrote a letter to Utah Hotel Company on December 1, 1947, Exhibit 25, stating that the existing equipment could not successfully be adapted to modernization. (R. 772). Some months later, in 1948, Mr. Jerry Smith, building superintendent at Hotel Utah, began a series of conferences with Roy C. Smith of defendant corporation, with respect to the kind of modernization program which would be most economical to the hotel. Jerry Smith had been instructed by management to investigate the possibility of bringing up to date all of the passenger elevator equipment. He had been dealing with Roy C. Smith on the repair program and he had confidence in the ability of Roy C. Smith. The hotel had used Elevator Supplies Company equipment satisfactorily for some years. Roy C. Smith pointed out how Elevator Supplies equipment could be used in connection with some existing elevator equipment. Jerry Smith ultimately made recommendations to the hotel management for use of Elevator Supplies equipment in modernization. (R. 782-784).

Jerry Smith discussed modernization of existing equipment with Otis Elevator Company, Elevator Service and Supply Company, Westinghouse, and Kimball Elevator Company. He also asked for recommendations and bids. (R. 784). On May 11, 1950, after Kimball Elevator Company was advised by Jerry Smith that the hotel was

interested in recommendations and bids with respect to modernization, plaintiff sent a letter to defendant, Exhibit HHH: "Please figure out the necessary Elevator Supplies equipment to revamp the three passenger elevators in the Hotel Utah. We would like these figures on an installed basis."

Before submitting any quotation to plaintiff, Roy C. Smith asked Mr. Connole of plaintiff corporation what the bidding procedure would be on the project. Mr. Connole admitted that he told Roy C. Smith that Kimball Elevator Company was going to do the job at Hotel Utah; that he understood that there would be *no other bidder on this job*, and that he told Roy C. Smith that Jerry Smith stated he would not let Otis Elevator Company bid. (R. 523-524; 883). Defendant, through Roy C. Smith, then submitted to plaintiff a bid on a portion of the modernization of the passenger elevators, on an installed basis, Exhibit KKK, dated June 14, 1950, delivered June 30, 1950. (R. 524, 883).

Jerry Smith never told Mr. Connole that Kimball would be awarded the job, nor did he say that Otis would not be allowed to bid. (R. 785). Mr. Max C. Carpenter, manager of Hotel Utah, called to testify by plaintiff, also said that he did not tell Mr. Connole that the Kimball bid would be accepted. (R. 242). Nor did Mr. Carpenter authorize anybody to make such a statement. (R. 242).

Plaintiff obtained a quotation dated July 13, 1950, from Pacific Elevator and Equipment Company, Exhibit

JJJ, covering a portion of the items not included in the bid of defendant to plaintiff. Under date of August 16, 1950, the plaintiff submitted the only bid it ever presented to Utah Hotel Company on the passenger elevator modernization, Exhibit "I". Said bid was made up by copying the proposal obtained from defendant, except for the price; and by including the following items without any specifications whatsoever: "Main generator and drive control panels. Leveling units, vanes and brackets. Three new cabs at a value of \$1800 each." (R. 524-526). The 15 repair items mentioned in the bid from Pacific were entirely omitted.

Mr. Connole had a conversation with Jerry Smith at the time the bid was presented to Utah Hotel Company, Exhibit "I". (R. 533). Over the objections of defendant that such was hearsay, and not the best evidence, the court permitted Mr. Connole to testify as to what Jerry Smith allegedly said. (R. 369-370). Mr. Connole said that conversation was following August 16, 1950; that Jerry Smith said he did not know whether the hotel would change the outside lanterns, push buttons and things of that type for the present; and that he wanted to know what reduction could be obtained if the old ones were used; and that Mr. Connole said that as soon as they made up their minds "we could give him a firm proposal." (R. 371-372). Mr. Connole also said that Jerry Smith wanted to know "if I had any suggestions as to who they could get another bid from. I suggested the Westinghouse Elevator Co." Mr. Connole further testified that Jerry Smith asked him "*if Elevator Supplies*

would give a bid on the total job, and I told him that I did not know; that I would telephone San Francisco and ask them if they would bid on the total job, as an estimate." (R. 371-373). He further testified: "I told him that the bid would be by 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).

Jerry Smith denied that there was any discussion about re-using the lanterns, push buttons or other equipment, after the Kimball bid was presented. (R. 788). He testified that in the conversation with Mr. Connole about getting other bids, "*I told him it was necessary to get additional bids, and that I was going to ask Elevator Supplies for a bid. . . . He told me that he did not feel it would be of any value, because it would be the same bid that he had received from them or would get from them; it would be identical.*" (R. 786-787).

Jerry Smith further testified that when plaintiff's bid dated August 16, 1950, Exhibit "I", was presented, Mr. Connole told him that the bid covered a *portion* of the necessary work; and that there was some additional work not included in the bid which would be discussed later; and that Mr. Connole said "we could come to some kind of an understanding as to how it was to be executed, whether we would do it at the hotel, which was his recommendation, or just how the balance of the work would be done." (R. 787, 815). Upon examination of said bid, Jerry Smith determined that it was not a satis-

factory bid; that the bid was not complete; that it did not cover the entire scope of the work that was necessary to have the job done as the hotel wanted it; and that he recommended to the management of the hotel that said bid be rejected. (R. 787-788).

When Max C. Carpenter, manager of Hotel Utah, examined the bid, Exhibit "I", he did not regard the bid as satisfactory. (R. 246). He testified that he could not tell from reading it, just what work would actually be done. It was too vague. (R. 247). As to certain items there were no specifications nor detail. (R. 235-236). Mr. Carpenter did not discuss the matter with Mr. Connole. (R. 236). There was a small service elevator installed by Kimball Elevator Company which did not work satisfactorily, and the job of repairs by Kimball had also been unsatisfactory, and the elevator had to be replaced. (R. 258). Mr. Carpenter did not even submit the Kimball bid to the executive committee. (R. 264). The hotel management was not very anxious to do business, or invite Kimball to come back and submit another bid, as Kimball had not submitted a satisfactory bid to begin with. (R. 263). Mr. Connole was never asked if Kimball cared to submit a new bid, after the hotel was informed by him that there was going to be a price increase. (R. 264).

After examining the Kimball bid, Mr. Carpenter instructed Jerry Smith, building superintendent, to call Elevator Supplies Company, Inc., at San Francisco, California, and ask defendant to submit a bid on the over-

all job. (R. 241). There were Elevator Supplies equipment in the passenger elevators, and parts had been replaced by defendant from time to time. The hotel had been dealing directly with defendant, and had a course of business dealings with defendant for a period of time. (R. 243-244). Exhibit 3 consists of a number of invoices representing purchases by the hotel from defendant after February 1948. (R. 242-243). When Roy C. Smith of defendant company came to the hotel, Mr. Carpenter told him he wanted him to present a straight-forward bid to the hotel, which could be accepted by the hotel. (R. 248). Defendant did not solicit this business. (R. 242).

On August 17, 1950, Jerry Smith of Hotel Utah called Roy C. Smith of defendant corporation, at San Francisco. Exhibit 28 is the record of the telephone call to defendant's telephone number on that date. (R. 788-790). Jerry Smith asked Roy C. Smith if Elevator Supplies Company would be interested in submitting a quotation with recommendations to the Hotel Utah covering the modernization and general rebuilding of the elevators. He did not ask for anything other than a *firm bid*. (R. 788-790). Roy C. Smith said it would be necessary for him to give it some consideration, and to contact his home office. (R. 789-790). About three days later, when Roy C. Smith was in Seattle, he called and said he felt his company would be interested, and that he would be in Salt Lake City about the latter part of the month and would go into detail. (R. 790-791).

On August 18, 1950, Mr. Daniel W. Connole of plaintiff corporation called Roy C. Smith, by telephone. There is a conflict in the evidence as to what was said in such conversation. Roy C. Smith testified that Mr. Connole called for a quotation on two dumb-waiters, which defendant furnished by telegram dated August 22, 1950, Exhibit 19, both on an F.O.B. basis and on an installed basis. (R. 885). Plaintiff offered no evidence that the request for bids on the dumb-waiters was made in writing.

Mr. Connole testified: "I told him that the Hotel Utah would like to have a proposal on the over-all job to verify our bid and justification of the amount quoted in our proposal and asked him if he could prepare the same and he said he would . . . he said he would have to get in touch with the Pacific people." (R. 374). On cross-examination, when asked to state what was said by Roy C. Smith, he testified: "I don't remember just what he said." (R. 578).

Mrs. Alice Connole, mother of Daniel W. Connole, and secretary of Kimball Elevator Company, testified that she listened in on the conversation her son had with Roy C. Smith over the telephone on August 18, 1950: "That was when he asked for a bid, another estimate . . . He called them and told them that the hotel company wanted a supporting bid; that Otis was not going to bid, and that Westinghouse had too much on the coast, they would not come into the Salt Lake territory with the elevator business. . . . He said he would look it up and let us know." She could not remember if there was

anything else discussed. (R. 940). On cross-examination she admitted that her son had called up Roy C. Smith for a quotation on dumb-waiters, and it may have been in the telephone conversation of August 18, 1950. (R. 942).

Both Roy C. Smith and Jerry Smith denied that Mr. Connole ever said anything about a “supporting bid”, and denied that such a term was ever used. (R. 786, 885). Roy C. Smith never heard of that term prior to this lawsuit, and he would not know what was meant. (R. 884-885).

By letter dated August 28, 1950, Exhibit 20, plaintiff submitted a proposal on two electric dumb-waiters to Utah Hotel Company, on a non-installed basis. Such bid was unsatisfactory to Utah Hotel Company as it was only interested in bids on an installed basis. (R. 249). Furthermore, the bid was incomplete, and it contained no specifications whatsoever. (R. 793).

Mr. Roy C. Smith and Mr. Charles Maynard Henker came to Salt Lake City on August 29, 1950. Mr. Henker was one of the partners in Pacific Elevator and Equipment Company. (R. 695-696). Prior to coming, Roy C. Smith asked Mr. Henker if Pacific would submit a bid to defendant on a portion of the project on an installed basis (R. 673). At that time defendant was not manufacturing the power controls. Mr. Henker said it would be all right if “it is all right with Kimball Elevator Company”, as Pacific had already submitted a bid to Kim-

ball. (R. 673-674). Kimball was then representative of Pacific Elevator and Equipment Company in Utah. (R. 688). Mr. Henker said he would not make a bid to defendant without clearance from Kimball. (R. 674). He also told Mr. Roy C. Smith that he thought it would be absolutely necessary to make a complete survey of the job at the job site. (R. 716). There had been business dealings for many years between defendant and Pacific, always on the basis of a request for bid, submission of a quotation or bid, and a purchase order. That had been true both ways. (R. 725). Contracts have always been in writing. (R. 727).

There was a conference on August 30, 1950, between Max C. Carpenter, manager of Hotel Utah, Jerry Smith, building superintendent, and Roy C. Smith of defendant corporation. Mr. Carpenter testified that he had asked Jerry Smith to call Roy C. Smith for a bid from defendant on the over-all elevator modernization. On this occasion Mr. Carpenter asked Roy C. Smith to submit a bid to the hotel on modernization of the three passenger elevators. Defendant did not solicit the business. (R. 242). Mr. Carpenter told Roy C. Smith that he expected Roy C. Smith to present a straight-forward bid to the hotel—one that could be accepted by the hotel. (R. 248). There was no discussion about the Kimball bid. Roy C. Smith did not say or do anything to discourage Mr. Carpenter from dealing with Kimball. (R. 248). Mr. Carpenter at that time also asked Roy C. Smith to submit a bid on two electric dumb-waiters. (R. 244). They went over the elevator openings and made a

thorough inspection and examination, and Mr. Carpenter told Roy C. Smith the things he wanted done. (R. 250).

Mr. Henker testified that after he and Roy C. Smith arrived in Salt Lake City, they talked to some of the hotel people, "Then we made a very thorough survey of the equipment down to the last detail, preparatory to making up a *firm bid* to Elevator Supplies Company." (R. 676). Mr. Jerry Smith told Mr. Henker that the management had invited Elevator Supplies Company to submit a bid on the over-all job, and that the hotel wanted Elevator Supplies equipment used as far as possible. (R. 716-717). Mr. Henker spent whatever time he thought was necessary to determine just how much this job should cost for Pacific equipment and supplies, plus installation charges, before submitting a bid to defendant. The purpose of his visit to Salt Lake City was to determine what to bid to defendant. (R. 717-718).

There was a conversation that day between Roy C. Smith, Daniel W. Connole and Charles Maynard Henker, on the way to the Park Building at the University. Roy C. Smith testified that he told Mr. Connole that he wanted him to know that Hotel Utah had asked defendant for a bid on the entire job, and that defendant was going to submit a bid; and that Mr. Henker came here to make a survey of the job to quote on an installed basis. Mr. Henker asked Mr. Connole if it was all right to give defendant a bid, and Mr. Connole told Mr. Henker, yes, as long as they were bidding list price. (R. 886-887).

Mr. Henker testified that he told Mr. Connole that he had been requested by defendant to bid on the Hotel Utah job on an installed basis, and he wanted to be sure that Mr. Connole had no objections to submitting a bid to Elevator Supplies Company. Mr. Connole made some statement to the effect that he knew that the hotel management had requested additional bids on the over-all job. (R. 718). Mr. Henker said that he had already bid to Kimball so he asked Mr. Smith and Mr. Connole whether they were in agreement, as he wanted to clear himself of any wrongdoing as far as Kimball Elevator Company was concerned. (R. 676-677). He said they indicated they were in agreement, but that was all that was said. (R. 677).

On direct examination Mr. Connole testified that Mr. Henker said: "While I have the two of you together, you understand Mr. Smith is going to place a proposal to the Utah Hotel. Am I to give him your figures?" Mr. Connole told him "Yes." He did not recall whether anything else was said. (R. 374-375). On cross-examination Mr. Connole admitted that he told Mr. Henker it was all right to submit a bid to Roy C. Smith, but he did not know if that was the exact language. (R. 572). He admitted that on deposition he testified: "The Elevator Supplies Company requested the information from Mr. Henker, and Mr. Henker refused to give it to them, until he had my permission and that it was finally understood that I knew they were bidding it." (R. 572). "He told me that he could not give them a quotation, because we were figuring the job and representing them—unless it

was with our permission. . . . I told him it was all right.” (R. 573).

Eight days later, Pacific presented a firm bid to defendant dated September 7, 1950, Exhibit 18. (R. 717). The bid was on an installed basis. By letter dated September 15, 1950, addressed to plaintiff, Exhibit “F”, Pacific increased its original bid of July 13, 1950, from \$3050 per car to \$3715 per car (R. 714), or nearly 22%. There was a 30% increase in price of electrical equipment alone that year. (R. 734-735). In the letter of Pacific to plaintiff, Pacific advised of the price increase and stated: “Mr. Henker made an extensive survey of the present installation and we wish to add the following items of repair work which you would have to figure locally:” (8 items including new hoist cables, governor cables, etc.). Mr. Henker said that Pacific called attention to those additional items so that if Kimball had an opportunity to revise its bid, it could take those items into consideration. (R. 714-715). Pacific intended that Kimball should rely on its new quotation. (R. 736). A quotation from Pacific is only good for 30 days. (R. 734-735).

As of September 11, 1950, defendant submitted two bids to Utah Hotel Company, Exhibit “J” on the overall passenger elevator modernization, and Exhibit 4 on two electric dumb-waiter elevators on an installed basis. On the same day, defendant also submitted to plaintiff two new bids, both dated September 11, 1950, Exhibit LLL. One was a new proposal on the passenger elevators

with the elimination of the provision for night attendant in one elevator, and a price increase from \$30,126 quoted as of June 14, 1950, Exhibit KKK, to \$32,020. A new proposal was also made on the dumb-waiters. Defendant quoted plaintiff, list price less 10%, but quoted Utah Hotel Company list price.

Plaintiff admitted that after receiving new quotations from both defendant and Pacific, plaintiff did not present any new bid to the Utah Hotel Company. (R. 542). There was a discussion between plaintiff and Utah Hotel Company about price increase, but there is a dispute as to what was said. (R. 534-535, 794-796, 816-817).

On September 27, 1950, Utah Hotel Company accepted both proposals of defendant, and signed the contracts, Exhibit "J" and Exhibit 4.

Mr. Connole was asked if he was trying to keep Hotel Utah from getting a bid on the over-all job from Elevator Supplies Company. He testified: "I wasn't trying to keep them from it." (R. 579). He further testified that prior to the award of the contract he did not tell anyone at the hotel not to award the contract to defendant. Then he added, "I never knew they would consider it." (R. 596). Mr. Connole also testified that Roy C. Smith did not say that he would not submit a firm bid to Utah Hotel Company. (R. 589). Also, Roy C. Smith did not at any time tell Mr. Connole that if the Hotel Utah awarded the contract to defendant, defendant would give plaintiff

any cut out of the job. Mr. Connole admitted *there was no cut*, and *there were no promises*. (R. 589-590).

When Mr. Connole learned that the contract had been awarded to defendant, he said he told Roy C. Smith, "I expected my regular commission on this job, as I had estimated in my figure." (R. 590). Defendant never at any time paid any commissions. It merely sold to elevator companies at a discount of 10% from list price. (R. 895). When Mr. Connole demanded a "commission", Roy C. Smith told him defendant absolutely would not pay any commission; and that defendant merely allowed a discount to elevator companies on the materials which they purchased from defendant. (R. 893-895).

Mr. Connole then went to Hotel Utah and asked Mr. Carpenter for a "commission" on the job awarded to defendant. (R. 238, 240). Mr. Carpenter said he would not pay any commission because there was no commission to pay; that Hotel Utah was dealing with Elevator Supplies Company; that Hotel Utah had put the job out on bid, and Kimball had not been the successful bidder. (R. 250). Mr. Connole then attempted to induce Utah Hotel Company to change the contract from defendant to Kimball, on the assurance that it would not cost any more. Mr. Carpenter refused to do anything to change the contract in any way, shape or form. (R. 239-240).

Pacific Elevator and Equipment Company received a purchase order from defendant, October 4, 1950, Exhibit 2. After the job got under way, Pacific employed

defendant's men to do its part of the work. (R. 722-723). The two jobs, on elevator modernization, and on the dumb-waiter elevators, were successfully and satisfactorily performed.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES FOR REVERSAL OF THE JUDGMENT

1. The motions to dismiss should have been granted for the reason plaintiff's pleadings show that plaintiff was not entitled to any judicial relief.

2. The pre-trial order recites as the "issue" a purported "agreement not to compete" which would be utterly void if proved: (a) For want of consideration, (b) as a restraint of trade illegal at common law, and (c) as a violation of federal and state criminal statutes.

3. No agreement to refrain from competing with plaintiff could be implied from numerous unaccepted written offers nor from other negotiations which had terminated.

4. Defendant was entitled to a directed verdict, for the evidence not only fails to show any agreement to refrain from competition, but the evidence requires a finding that plaintiff recognized the right of defendant to submit bona fide bids to Utah Hotel Company as well as the right of the hotel company to obtain firm bids from defendant.

5. Plaintiff was the only wrongdoer, (a) by practice of deceit in an effort to prevent competition, and

(b) by attempting to exact a spurious “commission” from defendant as successful bidder, and by wrongfully attempting to deprive defendant of its contract.

6. There was no competent evidence that plaintiff would have obtained the modernization contract, and no competent proof of any damages.

7. There was no proof of legal consideration.

8. The trial court deprived defendant of basic rights, by injecting fictitious issues into the case, by prejudicial comments on evidence, by receiving inadmissible evidence of plaintiff, by excluding competent evidence of defendant, and by rejecting a number of defenses.

9. The court misdirected the jury prejudicially both as to the law and as to the evidence, and the court also withheld from the jury various theories of defense by refusing to give appropriate instructions.

ARGUMENT

POINT 1.

THE MOTIONS TO DISMISS SHOULD HAVE BEEN GRANTED FOR THE REASON PLAINTIFF'S PLEADINGS SHOW THAT PLAINTIFF WAS NOT ENTITLED TO ANY JUDICIAL RELIEF.

The complaint and the amended complaint both show on their face that plaintiff as unsuccessful bidder on the Hotel Utah elevator modernization projects, sought to exact "damages" from defendant, the successful bidder. Claim was not made that defendant unlawfully interfered with presentation of a proper bid by plaintiff. Plaintiff sued because of frustration of its scheme to deprive Utah Hotel Company of its right to obtain a firm bid from defendant. Plaintiff alleged an express collusive agreement.

Stripped of its verbiage and diversionary allegations, the amended complaint, like the original complaint in substance states: That plaintiff is a Utah corporation engaged in general elevator construction, repair and supply business; that defendant is a New Jersey corporation; that under date of June 14, 1950, plaintiff procured from defendant a written proposal to furnish the plaintiff on an installed basis in connection with modernization of the passenger elevators at Hotel Utah, the signal control system, and other equipment at a price of \$30,126; that prices were list and subject to discount of 10%; that on August 16, 1950, plaintiff made

a written offer to Utah Hotel Company to perform the passenger elevator modernization at a firm price of \$59,600; that on August 22, 1950, plaintiff obtained from defendant a proposal to furnish and install two dumb waiters at Hotel Utah, and on August 28, 1950, plaintiff made a written offer to furnish such dumb waiters to the hotel; that it was "then agreed between the plaintiff and the defendant companies that a supporting bid would be made by the defendant company to the Hotel Utah Company on the over-all job", and after a conference between officers of the two companies, "it was thereafter agreed that a bid would be made by the defendant company to the Hotel Utah Company on the same modernization job in the amount of \$78,000.00 or \$79,000.00"; that thereafter a representative of defendant conferred with a representative of Utah Hotel Company and agreed upon new and additional specifications; that "in violation of the trust and confidence between the parties and the agreement with the plaintiff company to merely submit a supporting bid, the defendant company . . . made a new, separate and *firm bid* upon the changed and altered project"; and that defendant "made its independent bid and accepted a contract to perform and complete the entire and altered project in its own name and right." The plaintiff demanded 10% of the contract price and \$50,000 "damages". (R. 34-41).

By answer to interrogatory No. 8 plaintiff stated under oath: "It is a fact that the Utah Hotel Company stated it wanted more than one firm to bid on the job." (R. 23). Any bid which the defendant submitted to Utah

Hotel Company was expected by the hotel company to be a genuine bid, or in other words, a bona fide offer to perform. The dictionary definition of "bid" is "an act of one who bids something; an offer, as of a price at an auction; a statement of what one will give or do for something to be received, or will take for something to be done, or furnished; also that which is offered."

The pleadings of plaintiff state a collusive agreement, but fail to state any consideration whatsoever. There is no allegation that plaintiff agreed to give defendant anything. No valid agreement is alleged. Any agreement of such a character would have been void, with or without consideration. If there had been consideration, it would have been clearly a conspiracy to commit a fraud on Utah Hotel Company. Plaintiff could not possibly be entitled to any judicial relief, for plaintiff shows that it was frustrated from doing that which it never had a legal right to do, either at common law or under statute.

In *Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co.*, 139 F. 780, both plaintiff and defendant were bidders for removal of slag from the bed of a stream, for a private steel company. Defendant in that case agreed to bid \$1.60 per yard and plaintiff agreed to bid \$1.70 per yard, with the understanding that whichever party was awarded the contract, the other was to be given half the work. After a change in requirements, both bids were rejected; and defendant put in a bid for \$1.25. Plaintiff tendered half

of the work of performance, which defendant refused. Plaintiff sued for breach of the agreement. It was held that such an agreement constituted a conspiracy to defraud the owner awarding the contract, and that such agreement was void as against public policy, so that recovery was precluded. The court further held that the rule which is applicable to bids on public works is also applicable to private contracts. The court said that a party calling for bids is entitled to have bona fide bids based upon actual competitive bidding, not collusive bids designed to make it appear that one party has submitted a good faith bid when in fact he has not.

The court said: "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate." *Richardson v. Crandall*, 48 N. Y. 348, cited with approval in *McMullen v. Hoffman*, 174 U. S. 654, 19 S. Ct. 845, 43 L. Ed. 1117. Finally, the court stated:

"... Viewed from the standpoint of morals, square dealing, and commercial integrity, combinations for collusive, misleading biddings, wherever made, cannot be approved; yet to enforce rights based on an agreement to make such bids is to make the law an active agent to accomplish such deceptive purposes. In view of this result, we think the law should adjudge such agreements void on the broad ground of public policy . . ."

In *Daily v. Hollis*, 27 Tex. Civ. App. 570, 66 S. W. 586, a private corporation called for bids for the erection of a gas plant. One of the bidders agreed with the other that one of them should make a higher bid, and upon the award of the contract, there should be a sharing of profits. The court held that such an agreement was void as against public policy, and denied recovery. To the same effect is *Ray v. Mackin*, 100 Ill. 246.

The allegations of plaintiff's pleadings show an intent on the part of plaintiff to prevent Utah Hotel Company from obtaining from defendant a bona fide firm bid, and that the design of plaintiff was to prevent competition. The owner of real estate who calls for bids is entitled to obtain bona fide bids. Any scheme to circumvent the efforts of Utah Hotel Company to obtain firm bids, by having defendant submit a bid which would not be intended as a firm bid, would have been fraudulent, not merely on the part of defendant, but on the part of plaintiff. The rule is well-stated in *Corbin on Contracts*, (1951), Sec. 1468:

“An agreement for the suppression of competition is a matter of restraint of trade and commerce, and if the bidding relates to the making of a contract with a private individual it is a fraud upon such person and is unenforceable, for it is in the public interest to prevent a fraud upon such person.”

It is true that the plaintiff did not allege any consideration for such an agreement; but that merely shows that the agreement, if made, would be unenforceable for

want of consideration if it had been legal; but the lack of consideration could not make it any less fraudulent as to Utah Hotel Company, as the intended victim of such collusive agreement. Not having a right to make such an agreement, the plaintiff could not have been damaged by the breach of it; and it could not be damaged when it gave no legal consideration anyway.

POINT 2.

THE PRE-TRIAL ORDER RECITES AS THE “ISSUE” A PURPORTED “AGREEMENT NOT TO COMPETE” WHICH WOULD BE UTTERLY VOID IF PROVED: (A) FOR WANT OF CONSIDERATION, (B) AS A RESTRAINT OF TRADE ILLEGAL AT COMMON LAW, AND (C) AS A VIOLATION OF FEDERAL AND STATE CRIMINAL STATUTES.

The defendant renewed its motion to dismiss at the pre-trial conference. It was improper for the court to allow plaintiff to go to trial on some nebulous claim of an “implied agreement not to compete with plaintiff” when such claim is in defiance of law just as much as an express agreement to that effect. The law cannot be circumvented by doing indirectly, that which a person cannot do directly.

The following statement was made as the “issue” at the pre-trial conference, whereupon the defendant again moved to dismiss the case:

“The court finds that plaintiff’s cause of action is based on an alleged contract between the

plaintiff and the defendant, that when the plaintiff requested a bid from the defendant, that the defendant agreed to refrain from competitive competition with the plaintiff for the work on which the bid was made, and for the work of the customer for whom the work was to be done.” (R. 62).

(A) *Any “agreement” of such a character would have been void for want of consideration.*

Both the plaintiff and the trial judge refused to make any statement as to what consideration there would be for such purported “agreement”. The recital of an agreement not to compete, does not show any consideration, legal or illegal. The statement of the “issue” suggests that a separate agreement arose each time the plaintiff procured a bid from defendant. A request for a bid does not constitute consideration, and it is not even an offer.

An analysis of the “issue” shows that there is no consideration. An offeree is under no duty to accept a bid, even if the offeree solicits the bid. By failure of plaintiff as offeree to accept any bid of defendant, under such a theory as stated in the pre-trial order, defendant could be prevented from getting any business, whether plaintiff’s failure to accept were due to acceptance of the bid of defendant’s competitor or due to plaintiff’s inability to obtain the award of a contract.

In 1 *Williston on Contracts*, Sec. 31, page 74, it is pointed out that a request for bids is not an offer: “That

is, an ordinary advertisement for bids or tenders is not itself an offer, but the bid or tender is an offer which creates no right until accepted.”

Inasmuch as an offer creates no right until accepted, it is palpably absurd to say that while failure to accept an offer cannot give rise to an express contract, it will nevertheless give rise to an implied contract to refrain from competing with the offeree. Until there is acceptance of an offer, there is no contract, and that means there is no consideration.

Consideration has been defined as a benefit to the promisor or a loss or detriment to the promisee. 17 C. J. S., sec. 70, page 420. The statement of “issue” does not suggest that plaintiff promised to accept the offer of defendant which plaintiff procured, so there could be no consideration and no contract, express or implied. A contract must be supported by consideration to be valid and legally enforceable. 17 C. J. S., sec. 71, page 421. Plaintiff did not claim at the pre-trial conference that it suffered any detriment or gave any promise in return for the pretended implied promise of defendant to refrain from competing. The pre-trial order shows a scheme to get something for nothing, since plaintiff promised nothing nor suffered any detriment for the “implied promise” not to compete.

The so-called “agreement” is fictitious on its face, involving a naked promise on the part of defendant to refrain from doing that which defendant had a right

to do, without any obligation on the part of plaintiff to do anything or to give anything.

As will be illustrated later, the rule is that agreements in restraint of trade are illegal and void. Among the few exceptions to the rule are agreements involving the sale of an established business with the good will of the business, by the terms of which sale the seller may agree to refrain from competing with the buyer within a limited area or territory for a specified period of time. Such agreements are permitted as exceptions to the general rule on the theory that refraining from competition with the vendee is incident to sale of the business. Failure to enforce the express agreement to refrain from competing with the vendee might operate to deprive the purchaser of his newly acquired business.

Inasmuch as the law discourages restraints of trade, even agreements for the sale of a business with a covenant to refrain from competition, will be strictly construed, and will not be extended beyond the express terms by implication. *Rapalee v. John Malmquist & Son*, 165 Iowa 249, 145 N. W. 279.

Such a restrictive covenant must be ancillary to a lawful agreement, and such restrictive covenant must be supported by a valuable consideration. As pointed out in 5 *Williston on Contracts*, Sec. 1636, page 4580:

“... A rule of the early decisions, still operative, that consideration must be given for a restrictive promise, even though it is under seal, accords with the broader principle that the re-

strictive promise must be ancillary to some permissible transaction.”

Inasmuch as the purported “agreement not to compete” could not be ancillary to a valid contract, inasmuch as the procurement of an unaccepted bid does not constitute a contract, there could be no valid basis for an agreement not to compete. Furthermore, there is nothing which even resembles consideration.

The pre-trial order stated no cause of action, but a scheme to get something without consideration, which the law cannot condone.

(B) *Such a purported “agreement not to compete” would have been illegal and void at common law.*

The pre-trial order clearly shows that the purpose of the plaintiff was to prevent a prospective customer or owner of property from obtaining a competitive bid from defendant. Such purpose would have been illegal because it would operate to deprive the prospective customer or the owner of property of his legal right to obtain competitive bids. Such agreements have never been countenanced in America. As codified in *The Restatement of the Law, Contracts*, Sections 513, 516, 517, 577, *inter alia*, specify:

“Sec. 513: A bargain is in restraint of trade when its performance would limit competition in any business or restrict a promisor in the exercise of a gainful occupation.”

“Sec. 516: Comment on Clause (e).

“g. An agreement providing for exclusive dealing between the parties, while not in itself necessarily illegal is not unlikely to involve an attempt to obtain a monopoly. In such a case the agreement is illegal . . .”

“Sec. 517: A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal.

“Comment:

“a. The common case of the application of the rule stated in the Section is in bargains not to bid at auction sales or at other competitive sales. Competition may also be stifled, however, by an agreement so to bid as to affect injuriously the final result of the competition even though the number of bidders is not diminished. (See illustration 6).

* * * *

“4. A, advertises for bids for the construction of a building. B, a contractor, promises \$1,000 each to C and D if they will refrain from bidding. They do so. The bargains are illegal.

* * * *

“6. A, B, C and D, building contractors agree with one another to form the X association and that in future bids for the award of building contracts the successful bidder shall pay the X association 2 percent of the gross amount of the price fixed in the contract awarded. The agreement between A, B, C and D is illegal.”

“Sec. 577. A bargain, performance of which would tend to harm third parties by deceiving them as to material facts, or by defrauding them, or without justification by other means, is illegal.”

As previously pointed out, an agreement for the suppression of competition whereby a person agrees to refrain from bidding to a private person, it is a fraud upon such person and such agreement is unenforceable. In each of the situations where the plaintiff would have had defendant refrain from submitting a bid to the prospective customer or owner of property, the prospective customer or owner would have been the victim. The plaintiff had no right to make any agreement to defraud Hotel Utah or anyone else. Yet, such was the purpose of the purported agreement not to compete. Such a scheme was especially reprehensible in this type of case where Hotel Utah had been a customer of defendant for over two years.

In 5 *Williston on Contracts*, Sec. 1663, page 4691, under “*Bargains to stifle competitive bidding*”, the rule is stated:

“A bargain not to bid at an auction or other competitive sale, or on the competitive award of a contract, is illegal and unenforceable by either party if the primary purpose was to stifle competition and secure an unfair advantage over the vendor or the person awarding the contract. Bargains directly tending to chill competition, such as one that the successful bidder shall pay a percentage to his competitors, or employ a possible competitor to perform the contract at a pre-agreed price, constitute illegal stifling of competition. Competition may also be stifled by a bargain so to bid as to affect injuriously the final result of the competition though the number of bidders is not lessened. . . . It may probably be assumed that if the contract is against public policy, so

far as the parties to it are concerned, it is also fraudulent as regards the seller or one awarding the contract, and the converse of this proposition is undoubtedly true.”

Obviously, under the amended complaint the theory of plaintiff was that defendant agreed to submit a “supporting bid” to Utah Hotel Company in an amount of \$18,000 or \$19,000 in excess of the bid presented by plaintiff. In view of the written answer to interrogatory that Utah Hotel Company “stated that it wanted more than one firm to bid on the job”, (R. 23), the plaintiff alleged an illegal agreement, one which would have been a palpable fraud on Hotel Utah. The pre-trial order changed the theory to allege an agreement not to compete with plaintiff, equally reprehensible and fraudulent, whether the design was to prevent defendant from submitting a firm bid to Utah Hotel Company or any other person desiring to obtain from defendant a bona fide bid.

In the cases above cited, where a party to an illegal agreement promised to pay the other party a sum of money or give part of the profit for not submitting a bid or for making a higher bid, the agreement was pronounced illegal and void. Even if no promise had been made to give consideration for such an illegal agreement, the agreement of such character would not be valid or enforceable, for either illegal consideration or lack of any consideration would render the agreement void. Furthermore, it is the nature of the agreement, the purpose of which is to deprive an owner of property of his right to obtain fair and honest bids and thereby

circumvent his freedom of contract, which makes the agreement fraudulent and void.

The purported “implied agreement not to compete with plaintiff”, could not possibly come within the exception to the rule prohibiting agreements in restraint of competition, since the so-called “agreement” could not be *ancillary to some lawful agreement*. An unaccepted offer is not a contract, so it would be utterly impossible for such pretended agreement to be ancillary to a lawful agreement. The pre-trial order utterly fails to state a valid contract to which an agreement not to compete with plaintiff, could possibly be ancillary, for the order fails to show anything other than an unaccepted bid, which cannot be a contract. There is nothing to exempt the “agreement” from obvious illegality.

(C) *Any such “agreement” would have violated federal and state criminal statutes, and would have been void.*

The trial court entertained the idea that the plaintiff could avoid the inexorable prohibitions of the federal and state statutes, by abandoning the idea of an express agreement such as alleged in the amended complaint, and by adopting a theory of an “implied agreement not to compete”. Neither the federal nor state statutes exempt “implied agreements in restraint of competition.”

Even if such an agreement to refrain from bidding did not affect the movement of goods in interstate com-

merce, the “agreement” recited in the pre-trial order, even if it were not void for want of consideration, would be void as a violation of the statutes of this state. Section 50-1-3, U. C. A. 1953, declares:

“It shall not be lawful for any corporation . . . , or an agent, officer, employee, director or stockholder of any corporation, to enter into any combination, contract or agreement with any person or persons, the purpose or effect of which shall be . . . to monopolize any part of the trade or commerce within this state.”

Section 50-1-6, U. C. A. 1953, declares that “Any contract or agreement in violation of any provision of this chapter shall be absolutely void.” In *Endicott v. Rosenthal*, 216 Cal. 721, 16 P. 2d 673, under similar California statutes, it was held that contracts entered into for the purpose of preventing competition are void as in restraint of trade and as tending toward monopoly. Such contracts need not actually result in monopoly to be void. The criminal penalties provided by our statutes are severe, to say the least.

Inasmuch as plaintiff pleaded by amended complaint that defendant expressly agreed to submit a bid to Utah Hotel Company in an amount \$18,000 or \$19,000 in excess of the bid submitted by plaintiff, it is well to point out that the Legislature in enacting the Unfair Practices Act, Sec. 13-5-3, U. C. A. 1953, did not distinguish between activities done either directly or indirectly:

“That it shall be unlawful for any person engaged in commerce, in the course of such com-

merce, either directly or indirectly, to discriminate in price between purchasers of commodities of like grade and quality, . . . or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; . . .”

Section 13-5-13, U. C. A. 1953, makes “Any contract express or implied . . . in violation of any of the provisions of this act . . . an illegal contract and no recovery thereon shall be had.”

Our state statutes are patterned after the federal statutes, and the federal courts have left no room for doubt that contracts of the character stated in the pre-trial order would be criminal and void.

The pleadings show that defendant is engaged in interstate commerce. As indicated by 15 U. S. C. A., sec. 1:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal. . . .”

Inasmuch as the defendant was and is engaged in interstate commerce, defendant could not have done any differently than it did throughout the years, which was to quote and offer to sell to all persons who sought to purchase, without discriminating against any person. As stated in 15 U. S. C. A., sec. 13:

“It shall be unlawful for any person engaged in commerce, in the course of such commerce,

either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; . . . ”

The federal statutes interdict monopolies and restraints of trade. Criminal penalties are imposed, but in addition to criminal penalties for entering into agreements in restraint of trade or to create a monopoly in interstate commerce, Congress provided that the injured party may recover treble damages, 15 U. S. C. A., sec. 15. Thus, Utah Hotel Company would have had a cause of action for treble damages against plaintiff and defendant if any such agreement had been entered into as contended by plaintiff. The United States Supreme Court in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 500, 60 S. Ct. 982, 996, 84 L. Ed. 1311, 128 A. L. R. 1044, said that “this court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition.”

In *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291, 311, 312, 44 S. Ct. 96, 100, 68 L. Ed. 308, the Supreme

Court declared illegal under the Sherman Act *any agreement to refrain from selling to a particular person or class of persons*:

“The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and ‘restricts, in that regard, the liberty of a trader to engage in business’ (Loewe v. Lawlor, 208 U. S. 274, 293, 28 S. Ct. 301, 303, 52 L. Ed. 488, 13 Ann. Cas. 815) and, as a necessary corollary, to restrain interstate trade and commerce in violation of the Anti-Trust Act.”

As stated in *United States v. Southern Wholesale Grocers’ Ass’n.*, 207 Fed. 434, at 439, on the subject of monopolies interdicted by the Sherman Act:

“It may be conceded, as contended by the plaintiff, that a contract between many engaged in the same business to refrain from selling to an individual, or a class would be an illegal restraint of trade under the Sherman Act, unenforceable at law and subjecting the participants to a criminal prosecution thereunder. Such a *contract might be express or implied*, or consist of a mere combination or conspiracy to accomplish that end. No definite form of agreement is required. . . .” (Italics added.)

The foregoing case disposes of the contention that the plaintiff could get around the statute by an *implied* agreement instead of an *express* agreement. In *United States v. American Tobacco Co.*, 221 U. S. 106, 174, 31 S. Ct. 632, 55 L. Ed. 663, the court pointed out that the term “restraint of trade” used in the statute is the common law definition; that the statute was designed to

protect the individual right to contract, and to preserve the fundamental right of freedom of trade. It is obvious that the “agreement not to compete with plaintiff” was designed to circumvent the fundamental right of Utah Hotel Company to make a contract with defendant, and to interfere with the individual right to contract.

In *United States v. Griffith*, 334 U. S. 100, 68 S. Ct. 941, it was held that it is not always necessary to find a specific intent to restrain trade or to create a monopoly. Furthermore, that

“It is indeed ‘unreasonable, per se, to foreclose competitors from any substantial market.’ *International Salt Co. v. United States*, 332 U. S. 392, 396, 68 S. Ct. 12. The anti-trust laws are as much violated by the prevention of competition as by its destruction. * * *”

In a footnote to *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, it is stated that “the amount of interstate or foreign trade involved is not material (*Montague & Co. v. Lowry*, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608), since §1 of the Act brands as illegal the character of the restraint, not the amount of commerce affected. *Steers v. United States*, 6 Cir., 192 F. 1, 5; *Patterson v. United States*, 6 Cir., 222 F. 599, 618, 619.” Furthermore in the main opinion in *United States v. Socony-Vacuum Oil Co.*, supra, the court held that pretended good intentions on the part of the person who seeks to prevent competition on the ground that “competition is ruinous to the industry”, cannot be used as a defense to either criminal prosecution or injunction proceedings:

“* * * Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing agreements. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice.”

It was not within the discretion of the trial court to say that the purported “agreement not to compete with plaintiff”, whereby defendant would be required to abstain from bidding, should be sanctioned when the law prohibits the purpose and the effect of such an agreement as well as the agreement itself, whether with or without consideration.

Even agreements to divide territory, whereby one party promises not to compete within the area, are also void. *Pennsylvania W. & P. Co. v. Consolidated G., E. L. & P. Co.*, 184 F. 2d 552. (Certiorari denied).

In 5 *Williston on Contracts*, Sec. 1658, page 4664, in referring to the Sherman Act, it is stated that “Agreements to fix prices, . . . to refrain from selling to an individual or a class, are all within the statute.”

If the plaintiff could have proved the agreement stated in the pre-trial order, (assuming that consideration could have been established), plaintiff would have

proved only a criminal offense, and a fraud on Utah Hotel Company with a right of the hotel to recover treble damages.

The court erred in denying each of the motions to dismiss the action.

POINT 3.

NO AGREEMENT TO REFRAIN FROM COMPETING WITH PLAINTIFF COULD BE IMPLIED FROM NUMEROUS UNACCEPTED WRITTEN OFFERS NOR FROM OTHER NEGOTIATIONS WHICH HAD TERMINATED.

Plaintiff was only an occasional purchaser of some of defendant's equipment. Notwithstanding numerous requests for bids, and the submission of numerous written bids to plaintiff, in more than 20 years the plaintiff awarded defendant only 6 contracts (except for one other which was later cancelled). On some types of equipment, such as dumb-waiters, plaintiff requested bids from defendant on numerous occasions, but invariably purchased from competitors of defendant. Plaintiff ordered some replacement parts from defendant by catalog number, on occasions. It is undisputed that defendant did not sell nor offer to sell to plaintiff on terms more favorable than terms granted by defendant to other elevator companies. Defendant sold its equipment to all elevator companies at a discount of 10% from list price, whether F. O. B. or on an installed basis. Most

of defendant's business in Utah came from elevator companies other than plaintiff.

By Instruction No. 6 in the charge to the jury, the court authorized the jury to find in favor of plaintiff either on the basis of "an implied agreement not to compete" generally, or "an implied agreement not to compete for the Hotel Utah job." (R. 124). There was no competent evidence of any "implied agreement" in either category, and the admissions of the plaintiff negated the possibility of any agreement. No express agreement was claimed, and no written agreement was claimed. There was no competent evidence offered from which reasonable minds could find any "implied agreement." The court should have granted the motion for directed verdict in favor of defendant (R. 106-109), for the evidence manifested a wrongful attempt of plaintiff as the unsuccessful bidder to get something for nothing by a resort to fictitious claims.

Over the objections of defendant (R. 268, 276), the trial court permitted plaintiff to introduce "as evidence of the past dealings which show the close relationship of the parties", *negotiations* relating to numerous proposed elevator projects during a period of more than 20 years. (R. 229-231, 267-357). Those negotiations involved: (a) Requests for defendant to submit bids, either to plaintiff or to Murphy Elevator Company (of which plaintiff became territorial representative in 1945), such requests being in writing with few exceptions. (b) Submission of bids by defendant in specific detail, either

to plaintiff, or to Murphy Elevator Company, the bids invariably being in writing. (c) Written notice of acceptance and issuance of purchase order, in the few cases where the bids were accepted. (d) Oral discussions and written communications with respect to how defendant's equipment would be co-ordinated with other materials and equipment.

During a period of 5 years, of the various bids submitted by defendant to Murphy Elevator Company, only one contract was awarded, which was for installation of synchron control and electric door operators by contract dated November 20, 1947, in the Medical Arts Building, Exhibits "T", 8, 46. During a period of more than 20 years in which plaintiff made numerous requests for bids, plaintiff awarded the defendant only 7 contracts, and the one on the Walker Bank Building in 1948 was subsequently canceled. See Exhibit 46. The 6 instances where plaintiff accepted bids procured from defendant, and the contracts were performed, with the date of the contract and the equipment involved, are as follows:

February 1, 1930, Hotel Utah, flashlight annunciator, waiting passenger lanterns, electric door operators, ground floor position indicators.

September 22, 1931, Kiesel Building, Ogden, door closers, interlocks, and hangers.

December 5, 1945, Hotel Utah, electric door operator and hangers.

January 26, 1950, Logan Temple, door operator and hangers.

June 3, 1950, John R. Park Building, electric door operator, hangers, position indicators.

August 8, 1950, Z. C. M. I., electric door operator and hangers.

Each of the six contracts was fully performed. *Each of them will be searched in vain for any suggestion that defendant will refrain from competing with plaintiff.* Plaintiff had every opportunity in its requests for bids to make any statement it saw fit to make, but it did not ask nor even hint that defendant should refrain from competing with plaintiff. It is true that in addition to the 6 contracts in 20 years, plaintiff ordered repair parts from defendant by catalog number, as indicated by a group of invoices, Exhibit "L". However, neither plaintiff nor defendant could have stayed in business on the amount of business which they transacted between them in 20 years.

Plaintiff exhausted the alphabet nearly 3½ times with exhibits which were supposed to show a course of "past dealings" from which an "implied agreement not to compete" allegedly arose. With the few exceptions noted, *those exhibits consisted only of negotiations which had terminated* long prior to the Hotel Utah modernization project. The evidence pertaining thereto was incompetent, irrelevant and immaterial, unless to demonstrate that the claims of plaintiff were outrageous. Mr. Connole, manager for plaintiff, repeatedly referred to such exhibits as "business deals" and as "contracts", notwithstanding they were unaccepted proposals which

had expired. The court finally directed him to use the word “proposal” instead of “contract”. (R. 370-371). In each instance, if the bid procured from defendant had been accepted, a separate and distinct contract would have come into being, unrelated to any other bid on some other project. Mr. Connole admitted that the prospective jobs did not materialize. (R. 500). When defendant sought to bring out admissions from Mr. Connole that those negotiations did not result in any contract, and that the instruments were requests for bids and *unaccepted offers* which had expired, the trial judge interjected (R. 503):

“THE COURT: It doesn’t make any difference. The complaint is, the contract breached was not a contract to install, but a *preliminary contract of negotiations*.” (Italics added.)

The “preliminary contract of negotiations” concept, is alien to American jurisprudence. Negotiations do not constitute a contract. Liability cannot be fastened upon a person by mere negotiations, where the essential elements of a valid contract are lacking, such as a meeting of the minds, a good and valuable consideration, and agreed terms. With respect to the numerous exhibits involving negotiations short of acceptance of bid, no contract came into being. Nevertheless, the trial court permitted evidence of negotiations which came to naught, as *proof* of an “implied contract not to compete with plaintiff.”

In each instance, the written proposal submitted by defendant, whether to plaintiff Kimball Elevator Com-

pany or to Murphy Elevator Company, contemplated a written contract, which could come into being only by acceptance of the proposal. Failure to accept such offer precluded the creation of the particular contract proposed; but the effect of the court's ruling amounts to saying that although plaintiff's failure to accept such proposal prevented the creation of an express written contract, such failure on the part of plaintiff (or Murphy) to do the very thing essential to bring into existence a valid written contract could give rise to an implied-in-fact contract not to compete with the offeree. The idea that failure of the offeree to accept, would merely defeat the creation of an express written contract, but might bring about an "implied contract of negotiations" on matters not even discussed, is patently absurd. The attempt to read into those simple requests for bids and into the detailed and explicit proposals in response thereto, some undiscussed and unmentioned "promise not to compete", amounts to an effort to force down the throat of defendant a fictitious contract to which defendant never assented, in derogation of fundamental constitutional rights.

There can never be an implied agreement arising out of an unaccepted offer or a group of unaccepted offers, for there is no contract without acceptance. Nor could there be any consideration for "an implied agreement" when there is no acceptance to create a contract.

The court not only overruled objections of defendant to such incompetent evidence of negotiations which had

faded into oblivion, but the trial judge refused to construe those written instruments in accordance with their tenor as negotiations involving requests for bids and unaccepted offers. The court delegated to the jury the judicial function of interpreting written instruments, and *allowed the jurors to find from negotiations which had terminated and from expired unaccepted written offers, an implied agreement not to compete with plaintiff*. (R. 120-122, 124, 157, 159-160).

The trial court had the duty to construe the written instruments; but in construing written instruments the court is limited by principles which govern construction of written instruments. Courts cannot manufacture contracts out of unaccepted offers, nor can courts read implied terms into written instruments which are not reasonably required by the provisions of such instruments. As to the vast majority of the exhibits which involved unaccepted offers, there was no contract and hence no contractual terms either express or implied. The written instruments in each exhibit are clear and explicit, and there is no room for implication. There is no hint of refraining from competition. This is true both as to proposals which were never accepted and also to the few which resulted in written contracts. As to the few instruments which did result in contracts, the rule is well-stated in 17 C. J. S., Contracts, Implied Terms, pages 779-780, which rule is approved by this Court in *Donovan v. McGurrin*, 69 Utah 1, 251 P. 1067:

“However, in order that an unexpressed term may be implied, the implication must arise from

the language employed in the instrument or be indispensable to effectuate the intention of the parties. So there can be no implication as against the express terms of the contract, and the courts will be careful not to imply a term, where the subject thereof is completely covered by the contract, or as to which the contract is intentionally silent, or which is against the intention of the parties as gathered from the whole of the instrument. *Also, a term which the parties have not expressed is not to be implied merely because the court thinks it is a reasonable term, or because the contract is advantageous to one party, and a person may not be required to do what he did not promise merely because what he did promise was not sufficient to meet the requirements of some real or supposed public policy. Terms of another agreement cannot become a part of the contract except by express stipulation or necessary implication that the parties contract with reference to it.*' (Italics added.)

As to the numerous instances where there was no acceptance of offer, there could have been no contract, and hence no room for any implication of some undisclosed promise. To read into any of the written instruments an implied promise not to compete with plaintiff on some other project would do violence to the instruments. As to the six isolated cases where plaintiff awarded contracts, four of them had been fully performed before the Utah Hotel Company announced any intention to proceed with a modernization program. The consideration in each of the six contracts is limited to the particular job expressly mentioned. There is no reference to any other project. There is nothing in any

of the instruments which could possibly be construed to restrict or limit the conduct of defendant in the future, nor with respect to some other job. There is a total absence of language from which the court could imply any agreement to refrain from competing with plaintiff. There is no promise, express or implied, that either party would do business with the other in the future. Inasmuch as the court could not imply a promise from any one of them, it could not imply a promise from the whole group of them collectively. The "issue" of an "implied contract not to compete with plaintiff" was utterly fictitious.

Inasmuch as the court cannot make a new agreement for the parties, the court cannot imply some promise which would give the other party something more than he bargained for, nor read into the instrument some implied covenant not essential to make the agreement effective. As illustrated in *Johnson v. Iglehart Bros.*, 95 F. 2d 4, where it was contended that an agreement to refund the processing tax should be implied, although the written agreement was silent as to refund:

"It is urged upon us, however, that notwithstanding the want of express language to cover the situation presented, the court should construe the contracts as containing an implied promise to refund to the plaintiff that part of the purchase price which went to make up the processing tax. In other words, we are asked, by construction, to afford the plaintiff protection against a contingency other than that which the parties themselves provided."

After citing a number of cases, the court said:

“... It seems clear to us that the law is well settled that where parties expressly contract, under what circumstances an obligation may arise with reference to a certain subject-matter, where the same is entered into without fraud or mutual mistake, it excludes the possibility of an implied covenant of a contradictory or different nature. In the instant case, the alleged implied covenant, of course, is not contradictory to those expressly made, but it certainly is different and in addition thereto . . .”

The law will never permit an implied contract where from the nature of the case the parties could not legally make an express contract. Simpson v. Bowden, 33 Maine 549. “An implied contract is one which the law infers from the facts and circumstances of a case, but it will not be inferred in any case where an express contract would for any reason be invalid.” *Case v. Second Ave. R. Co.*, 97 N. Y. 384, 388, 49 Am. Rep. 531. Inasmuch as an express agreement not to compete would have been illegal, it would have been impossible to have implied an agreement not to compete which could have been lawful.

The subject of competition was never discussed. Apart from the fact that the comments and conclusions of Mr. Connole concerning the written instruments were contradictions of their express contents, any oral testimony at variance with those instruments was incompetent under the parol evidence rule anyway, and the objections to such conversations should have been sus-

tained. On cross-examination, Mr. Connole admitted that defendant never at any time told plaintiff in writing that defendant would give plaintiff an exclusive bid. (R. 651). Nor did he even testify as to any conversation in which defendant promised to give an exclusive bid or to refrain from competition. Mr. Connole was evasive, to say the least. When forced to answer the question "whether the defendant ever told Kimball Elevator Company the defendant was giving Kimball Elevator Co. an exclusive bid", he said, "Not specifically." (R. 651). *There was no competent evidence that anything was ever said from which a reasonable mind could arrive at the conclusion that defendant impliedly promised to refrain from competition.* The subject was *never discussed*. Although Mr. Connole made a number of gratuitous remarks to the effect that he *never knew* that defendant was dealing with any competitors of plaintiff, he admitted that he testified on deposition (R. 631-632):

"Q. But there was no agreement entered into between your company and the Elevator Supplies Company whereby the Elevator Supplies Company stated that it would not submit a bid to any competitor?

"A. No."

"Q. But you have admitted, have you not, that at no time did the defendant corporation ever promise that it would refrain from submitting a bid to any competitor?

"A. That was never discussed.

"Q. Never discussed?

"A. No."

There was no evidence whatsoever, that defendant ever dealt with plaintiff on any basis different from any other elevator company. By Request for Admission No. 5 the plaintiff was asked to admit (R. 10) :

“5. All negotiations between plaintiff and defendant have been on the basis of requesting defendant to submit bids, and defendant has submitted quotations and proposals to sell or contract on the basis of list price less a discount, said discount being made available to plaintiff if plaintiff would accept such proposal and pay the quoted price.”

By answer, plaintiff stated under oath (R. 18) :

“Plaintiff admits No. 5, except that from time to time plaintiff has purchased materials from defendant at a certain price less plaintiff’s discount.”

Plaintiff has always been allowed a discount of 10% from list price on its *purchases* from defendant. (R. 438, 459, 519, 743, 850). Such trade discount has been *allowed to all elevator companies* making purchases from the defendant either on an F. O. B. basis or on an installed basis. (R. 459, 849-850). As shown by Exhibits 34, 36, 39 and 42, when two or more elevator companies requested defendant to give quotations on identical equipment and installation, the bids were identical. Defendant has always been in interstate commerce, and its practice has always been to submit bids to everyone who has asked for quotations. (R. 849-850). However, as shown by stipulation, when quotations were requested by own-

ers, defendant did not quote subject to the 10% trade discount allowed to elevator companies. (R. 858).

As indicated by Exhibits 5, 6, 8, 31, 32, 33, 39, 40 and 43, the defendant has contracted to sell at list price less the trade discount of 10%, to Otis Elevator Company, Murphy Elevator Company, Montgomery Elevator Company, Pacific Elevator and Equipment Company, Elevator Maintenance Co., Ltd., Elevator Service and Supply Company, and others. The only way the trade discount of 10% can be obtained is by making the purchase. (R. 519).

It costs money for defendant to prepare a proposal on any project. (R. 462). If any job did not materialize on which plaintiff asked defendant for a bid, plaintiff did not reimburse defendant for making such quotation. (R. 519). Pacific Elevator and Equipment Company, of which plaintiff became territorial agent in 1949, has had business dealings with defendant over the years, on the basis of a request for bid, submission of a firm bid, and issuance of purchase order if the bid was accepted. Such practice has been true both ways. (R. 725).

Defendant's equipment has been quoted on various jobs by Murphy Elevator Company. (R. 464). Whenever Murphy bid on defendant's equipment in connection with its bids on elevator modernization, it obtained bids from defendant with respect to equipment manufactured by defendant. (R. 280, 310, 316-317). Exhibit "GG" contains illustrative material issued by Murphy which

features certain equipment manufactured by defendant corporation. (R. 312).

Defendant has issued catalogs, from which its materials can be ordered by number. Plaintiff has ordered repair parts from defendant by catalog number (R. 415, 461), although on jobs of any size, plaintiff has asked for bids. (R. 461). Hotel Utah in 1948 and 1949 also ordered repair parts from defendant by catalog. (R. 779-782).

Mr. Connole admitted that Montgomery Elevator Company is an elevator manufacturer, and that on the original bidding on the Park Building job, Montgomery bid on defendant's controls. (R. 520). Such admission further proved that defendant did not deal exclusively with plaintiff. Finally, counsel for plaintiff admitted, "We do not claim we had exclusive dealings." (R. 847).

In disregard of the stipulation of counsel showing that defendant dealt with other elevator companies on the same basis as plaintiff (R. 858-859), and the admissions of plaintiff that there were no exclusive dealings, the trial judge submitted the case to the jury on the false theory that there was evidence of a course of exclusive dealings between plaintiff and defendant which the jury might "consider" "in determining whether or not there was an implied agreement to the effect that the defendant would not compete against the plaintiff." Instruction No. 5-a. (R. 121).

First of all, *there was no competent evidence that defendant either sold exclusively to plaintiff nor contracted exclusively with plaintiff*. The evidence required a finding that defendant dealt with other elevator companies on the same basis as defendant dealt with plaintiff. When the court finally asked counsel for plaintiff if “part of your implied agreement is based on any theory that the defendant had an agreement that they would deal exclusively with you”, counsel answered: “*We do not claim that, your Honor. We do make the claim they never informed the Kimball Elevator Company they were ever bidding or making quotations to competitors of the Kimball Elevator Company.*” (R. 846). Obviously, defendant had no duty whatsoever to disclose to plaintiff that defendant had negotiations with or submitted bids to other persons. That was none of plaintiff’s business anyway. However, Mr. Connole expressly admitted that it is *not the practice* in the elevator field for one elevator company to *disclose to another company*, to whom it is bidding. (R. 520-521).

“Q. As a matter of fact, it is not the practice in the elevator field for one elevator company to disclose to another company, to whom it is bidding, is it?

“A. Why no.

It is significant that most of defendant’s business in the State of Utah was awarded by corporations other than plaintiff. Of the six contracts awarded to defendant by plaintiff in 20 years, (exclusive of the one on the Walker Bank Building which was canceled in 1948), the

largest of all was on the Hotel Utah job in 1930. Three of the contracts were awarded in 1950, all of which were very small jobs as far as the purchase orders to defendant were concerned. The largest was the one on the Park Building job, awarded June 3, 1950, in the amount of only \$1,502.10. See Exhibit 17. The other two were even smaller. Three jobs of comparable size were awarded to defendant in 1950 by Elevator Service and Supply Company of Salt Lake City, as shown by Exhibit 46. The one large contract, in the sum of \$36,000, was on the new Veterans Administration Hospital, Exhibit 39, June 9, 1950, awarded by Elevator Maintenance Co., Ltd.

*Nor was there any competent evidence that plaintiff purchased exclusively from defendant, the type of equipment defendant was manufacturing. If defendant had been compelled to rely on the business it was awarded by the plaintiff, it would have gone bankrupt. Notwithstanding the trial court's charge to the jury that there was evidence of exclusive dealings, such instruction was contrary to the written evidence and the admissions of plaintiff. There were statements in the testimony of Mr. Connole to the effect that plaintiff had *always* bid on defendant's equipment, the evidence requires a finding that such testimony is utterly false, for it contradicts the written exhibits introduced by plaintiff and such pretenses were destroyed by admissions made on cross-examination. Although Mr. Connole testified several times that plaintiff had "exclusive dealings" with defendant, the court sustained an objection to questions*

designed to draw admissions from him that plaintiff did not purchase exclusively from defendant (R. 501):

“THE COURT: The objection is sustained. Members of the jury, in this case the plaintiff through Mr. Connole has made two or three statements that they purchased exclusively from the defendant, and because that statement has been made the defense is trying to rebut it, and that was not a proper statement in the first place. They had a right to deal with them exclusively or the right to deal with a number of people. It does not make any difference. The court admonishes the jury not to give weight to that statement because it is immaterial and with that admonition the court restrains cross-examination on that subject. . . .”

Defendant agrees with the statement that plaintiff had a right to deal with any number of people; but so did the defendant have such right too. And the evidence conclusively shows that plaintiff did deal with others, for plaintiff expressly admitted at the trial that it purchased from others, the type of materials which defendant manufactures and sells. (R. 505). It was admitted by Mr. Connole that on numerous occasions plaintiff requested defendant to furnish quotations on dumb-waiters, but that at no time did plaintiff ever purchase a dumb-waiter from defendant. Such equipment was invariably purchased from other companies. (R. 503, 874, 948-949). Other elevator companies, however, awarded contracts to defendant on dumb-waiters, as evidenced by Exhibits 32, 39, 41 and 46. Exhibit 14, a letter from plaintiff to defendant dated June 14, 1950,

states that plaintiff awarded the contract to another company:

“We wish to inform you that you were high on the above job, hence we have awarded this to another company. . . .”

Contrary to the testimony of Mr. Connole that Kimball “bid on” and “purchased their controls” (referring to controls manufactured by defendant), the fact is that plaintiff did not at any time ever award to defendant a contract nor issue a purchase order for synchron control, signal control, directional collective control, or any other modern controls of defendant’s. Mr. Connole so admitted on cross-examination. (R. 480-482). He tried to claim credit on behalf of Kimball for the purchase of synchron control in connection with the Medical Arts Building job in 1947, because Kimball was the agent of Murphy. Plaintiff would put in reverse the elementary rule that the act of the agent is the act of the principal, by contending that the act of Murphy, the principal, was the act of Kimball, the agent.

The fact is that plaintiff did not even ask defendant to bid on a number of jobs in 1950 which would involve controls of the type manufactured by defendant. In 1949 plaintiff became the territorial representative of Pacific Elevator and Equipment Company. It was admitted that Pacific has manufactured control equipment which performs the same functions as equipment manufactured by defendant. (R. 486).

On the Park Building job, defendant originally bid to Murphy Elevator Company and Montgomery Elevator Company. Montgomery was the low bidder, but the job was refigured. On March 21, 1950, Kimball obtained from defendant a quotation on *directional collective control*, and on various other items, Exhibit 16. Kimball then obtained a quotation on the controls from Pacific Elevator and Equipment Company, and asked defendant to furnish a new quotation which would exclude the controls. Such new proposal was presented by defendant May 25, 1950. The purchase order of June 3, 1950, from plaintiff to defendant (which was the sixth one in 20 years), did not cover any of the control equipment for the job, but covered only signals, door hangers, electric door operators, as shown in Exhibits 16 and 17. The gross amount was only \$1,502.10, subject to the trade discount of 10% allowed to elevator companies. Mr. Connole, plaintiff's manager, *admitted that plaintiff purchased the controls from Pacific.* (R. 510-518).

When it came to bidding on the Charleston Apartments, by letter dated April 3, 1950, from plaintiff to defendant, Exhibit 12, plaintiff restricted its request for a bid to one only on signals, hangers, and door operators. In that letter plaintiff said to defendant: "We believe it would be well to get in touch with the Pacific Elevator Company to find out if they want to use *your directional collective or their own type control.*" (Italics added). Plaintiff obtained a quotation from its principal, Pacific Elevator and Equipment Company on the *entire control system*, and in submission of bid to general contractors,

the plaintiff based its bid on the quotation from Pacific for controls manufactured by Pacific, Exhibit 11, dated May 1, 1950. (R. 486). It would have been strange indeed, when plaintiff gave Pacific the option of quoting on its own controls or on defendant's controls, if Pacific had not quoted on controls manufactured by Pacific.

It was finally stipulated that prior to September 11, 1950, "With regard to quotations on signal control, collective and duplex collective control, it is further stipulated that the defendant Elevator Supplies Corporation (Company) did not quote exclusively to the plaintiff, Kimball Elevator Company, but that all quotations on such equipment by defendant Elevator Supplies Company, were made exclusively to original elevator contractors." (R. 858-859). It was finally admitted that neither party dealt exclusively with the other. In fact, the evidence demonstrated that the dealings were few indeed, and that the only relationship consisted of vendor and purchaser with respect to items purchased by catalog number, and as subcontractor under an express written contract where defendant was awarded contracts by acceptance of specific proposals, which happened in only 7 instances in 20 years.

In the few instances where plaintiff did accept defendant's proposals, and defendant became a subcontractor on those specific projects, that relationship ended upon completion of defendant's contract. None of those written contracts related to any other project. Owing to the fact that the plaintiff awarded defendant a con-

tract on a small portion of the Park Building elevator job on June 3, 1950, which was prior to the time when defendant submitted a bid on the Hotel Utah elevator modernization, an attempt was made at the trial to infer that some agreement not to compete on the Hotel Utah projects arose by virtue of the contract on the Park Building job, although there was no connection whatsoever between the two projects. The trial judge attempted to generalize on the subcontractor relationship, and injected a false issue into the case during the cross-examination of plaintiff's manager (R. 506):

“THE COURT: I am going to limit you, the same as I said at noon, to the issue of whether the defendant was a subcontractor for the plaintiff.”

The defendant could not possibly have been a subcontractor for plaintiff on the Hotel Utah projects in 1950, for plaintiff had no contract whatsoever. The subcontract on the Park Building job had nothing to do with Hotel Utah. The court nevertheless made a further prejudicial comment on the evidence by saying, “Most of the evidence was, they were the original contractor and subcontractor.” (R. 506). The comment was contrary to the undisputed evidence, for there had been no acceptance of the bids to which reference was made. The jury was told that a contractual relationship existed when none had come into being because the offeree had failed to accept the offers. Inasmuch as plaintiff did not submit bids to the owner in most instances, the plaintiff could not have been an original contractor even if there

had been a contract awarded to plaintiff by a general contractor.

There was absolutely no competent evidence of any “prior dealings” from which there could have been any “implied agreement not to compete.” The contract awarded to defendant June 3, 1950, on the Park Building job, could not possibly be construed to imply any promise that either of the parties would contract with the other in the future. As far as the “course of business dealings” were concerned, an examination of the negotiations on the Park Building job negative any idea that one party intended to deal exclusively with the other in any category. Plaintiff admitted knowing that on the original bidding on the job back in 1949, Montgomery Elevator Company had quoted on defendant’s control equipment, and Montgomery was the low bidder, Exhibit 15. (R. 520). Defendant originally had bid to Murphy on the control equipment, then on rebidding in 1950, plaintiff obtained a bid from defendant on the controls as well as other items, but purchased the major items including the controls, from Pacific, and awarded a contract to defendant on only a relatively small portion of the work on which defendant originally had been requested to bid. Obviously, in May and June 1950, it would have been impossible to have had any “implied agreement not to compete with plaintiff” even if there had been no question of illegality.

Plaintiff’s own witness, Allen E. Mecham, general counsel for the Associated General Contractors, testified

on written stipulation that in “the construction industry there is free competitive bidding.” (R. 667). Free competitive bidding precludes any “implied agreement to refrain from competing with the offeree.” Charles Maynard Henker, of Pacific Elevator and Equipment Company, when asked by counsel for plaintiff whether in the elevator industry there is a trade practice not to bid directly to a customer, testified that he had “seen it both ways, three ways against the middle. . . . Well, in some of these places they will bid to suppliers, and bid to the customer, and with different figures, and everything else.” (R. 774-745).

POINT 4.

DEFENDANT WAS ENTITLED TO A DIRECTED VERDICT, FOR THE EVIDENCE NOT ONLY FAILS TO SHOW ANY AGREEMENT TO REFRAIN FROM COMPETITION, BUT THE EVIDENCE REQUIRES A FINDING THAT PLAINTIFF RECOGNIZED THE RIGHT OF DEFENDANT TO SUBMIT BONA FIDE BIDS TO UTAH HOTEL COMPANY AS WELL AS THE RIGHT OF THE HOTEL COMPANY TO OBTAIN FIRM BIDS FROM DEFENDANT.

The trial court erred prejudicially in failing to grant the motion of defendant for a directed verdict, and by submitting the case to the jury with a charge that the jury might “find” either “an implied agreement not to compete with plaintiff” generally, or “an implied agree-

ment not to compete with plaintiff for the Hotel Utah'' jobs. (R. 124). Plaintiff proved no agreement whatsoever with defendant concerning Hotel Utah elevator modernization. All that plaintiff could show, was an unaccepted offer which plaintiff had obtained by deceit. The trial court disregarded the elementary rule of law that an *unaccepted* written offer creates no rights in the offeree, and that an unaccepted offer could not give birth to either an express or an implied contract of any kind. The court was also inexorably wrong in charging the jury that an implied agreement not to compete with plaintiff would be legal and valid, in view of both federal and state statutes to the contrary.

The federal courts have declared criminal and void under the Sherman Act, every contract or agreement, *express or implied*, to refrain from selling to a person or to a class of persons. *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291, 311, 312, 44 S. Ct. 96, 100, 68 L. Ed. 308, and *United States v. Southern Wholesale Grocers' Ass'n.*, 207 Fed. 434, 439 (certiorari denied). In *United States v. Griffith*, 334 U. S. 100, 68 S. Ct. 941, it was declared that "It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' . . . The anti-trust laws are as much violated by the prevention of competition as by its destruction."

It is true that the federal cases do not say that a person who is in a position to compete, must give a competitive bid, but the cases hold that *if a person agrees with someone that he will not give a competitive bid or*

not sell to a particular person or to a class of persons, such agreement is a criminal offense and renders all parties liable to the victim for treble damages. The court should have dismissed the action with prejudice, for each of the alternates of "implied agreement", general or specific, submitted to the jury would constitute a criminal offense. The plaintiff was not entitled to have the case submitted to the jury anyway, since it had not proved any kind of an agreement, for an implied agreement cannot be created from an unaccepted offer. There was a failure to prove any of the essential elements of a valid contract.

Plaintiff's own witnesses produced evidence which required findings against the plaintiff, including the following facts heretofore or hereinafter detailed, which precluded any recovery by plaintiff: (1) Defendant did not transact business with plaintiff on any basis more favorable than defendant transacted business with other elevator companies, which was on the basis of *selling* at list price less a discount of 10%. (2) In more than 20 years, of the vast number of bids obtained by plaintiff from defendant, only 7 were accepted and resulted in contracts, and offers and acceptances in each instance were in writing, and there was not the slightest intimation that defendant would surrender its right to compete with plaintiff. (3) The subject of competition was never discussed, and defendant never gave plaintiff any promise either orally or in writing. (4) Since February 1948, Utah Hotel Company had been *the customer of defendant*, and the hotel company was well-satisfied with

its business dealings with defendant. (5) Plaintiff procured a bid from defendant dated June 14, 1950, on a portion of the proposed elevator modernization at Hotel Utah. Said bid was obtained by deceit, for plaintiff falsely represented to defendant that plaintiff was going to be awarded the contract. (6) Plaintiff obtained a quotation from Pacific Elevator and Equipment Company on some equipment, dated July 13, 1950. (7) On August 16, 1950, plaintiff submitted to Utah Hotel Company an incomplete bid, which was unsatisfactory and unacceptable to the hotel company. (8) Plaintiff knew that Utah Hotel Company not only wanted more than one firm bid on the over-all project, but plaintiff knew that the hotel wanted a firm bid from defendant. (9) On August 17 and 30, 1950, the Utah Hotel Company requested defendant to submit a firm bid on the elevator modernization. (10) Defendant requested Pacific to give a bid on a portion of the job on an installed basis, but Pacific refused to give defendant any bid without clearance from plaintiff, inasmuch as plaintiff then was territorial representative of Pacific. (11) On August 30, 1950, Mr. Connole, manager of plaintiff corporation, told Mr. Henker of Pacific, that *it was all right for Pacific to submit a bid to defendant*. (12) Pacific submitted a *firm bid* to defendant on September 7, 1950. (13) On September 15, 1950, Pacific submitted to plaintiff a new bid, raising the price quoted in its letter of July 13, 1950, and also calling attention of plaintiff to 8 items of necessary repair, in addition to 15 items mentioned in the letter of July 13, 1950. *All of said items had been omitted from*

plaintiff's bid to Utah Hotel Company dated August 16, 1950. (14) On September 11, 1950, defendant submitted two firm bids to Utah Hotel Company in accordance with the request of the hotel company, one on the passenger elevator modernization, and one on the two electric dumb-waiter elevators. (15) On the same day, defendant withdrew its original bid to plaintiff, and submitted two new bids in the light of information defendant had acquired from Utah Hotel Company, defendant quoting to plaintiff list price less a discount of 10%. (16) Although plaintiff had definite information from both defendant and Pacific as to what Utah Hotel Company wanted and what it did not want, which would disclose to plaintiff that plaintiff's original bid was abortive, plaintiff neither attempted to revise its bid nor to submit a new bid. (17) Utah Hotel Company awarded the two contracts to defendant on September 27, 1950, the defendant having submitted the only bids for doing the work as the hotel wanted it done. (18) Defendant never paid a commission to plaintiff nor to anyone else, and defendant did not at any time promise plaintiff a commission nor any other kind of a "cut out of the job." (19) When plaintiff learned that defendant had been awarded the contracts, plaintiff demanded a "commission" which defendant refused to pay, and plaintiff then asked Utah Hotel Company for a "commission" which was likewise refused. (20) Plaintiff then unsuccessfully attempted to induce Utah Hotel Company to cancel its contract with defendant on elevator modernization, and issue a new contract to plaintiff.

The first three factual propositions have already been discussed. The others likewise demonstrate that plaintiff's claims are spurious. Although plaintiff made numerous insinuations to the effect that defendant "tried to steal plaintiff's prospect", the undisputed fact is that plaintiff knew that Utah Hotel Company had been a satisfied customer of defendant for over two years, and that plaintiff sought to monopolize the bidding on the modernization job by the practice of deceit.

Max C. Carpenter, manager of Hotel Utah, testified that there had been satisfactory business relations between the hotel and defendant since February 1948. Mr. Carpenter testified that there were Elevator Supplies Company equipment in the passenger elevators prior to the time he became manager. Such equipment had operated satisfactorily. Utah Hotel Company became a customer of defendant in February 1948, and began to make purchases of repair parts and replacement parts, as indicated by Exhibit 3, invoices from 1948 to 1950. (R. 243-244).

Jerry Smith, building superintendent of Hotel Utah, testified that prior to 1948, various elevator replacement parts had been purchased from plaintiff, but the service had not always been satisfactory. Consequently, the hotel began to purchase elevator parts directly from defendant in order to expedite the repair of the equipment. (R. 770-771). Mr. Roy C. Smith testified without contradiction that after defendant sold materials directly to Utah Hotel Company in 1948, Mr. Connole asked for

a "commission", which was refused. He was told by defendant that defendant did not pay any commissions, but sold to elevator companies at a discount, and if plaintiff had obtained the order for the materials it could have purchased them at a discount. (R. 878). Mr. Conole merely said he could not remember the conversation. (R. 638). Mr. Roy C. Smith assisted the hotel in the repair program. (R. 877-878). Some of the repair parts were ordered by the hotel by catalog number. (R. 779-782). Defendant issued catalogs, and made the same available to all who were interested in them. One of such catalogs was given to Utah Hotel Company. (R. 908-909). The repair program at the hotel was carried on principally in 1948 and 1949. The hotel rebuilt the door closing mechanisms. (R. 779-782).

In 1947 the hotel asked Otis Elevator Company to make recommendations with respect to modernization. By letter dated December 1, 1947, Exhibit 25, Otis represented to the hotel that "The present equipment does not lend itself to conversion to automatic control of any kind," and Otis recommended that the hotel discard the existing equipment and start all over with "new Otis signal control equipment." Inasmuch as defendant's equipment had operated satisfactorily in the elevators for years, Mr. Jerry Smith started to consult with Mr. Roy Smith of defendant corporation, not only with respect to necessary repairs, but also in regard to how modernization could be accomplished most economically. At the request of the Hotel Utah, Roy C. Smith made an investigation of the condition of the passenger eleva-

tors and reported to Mr. Charles W. Lerch and Associates, elevator consultants, under date of December 28, 1948, Exhibit 26. (R. 770-777).

Jerry Smith had been dealing with Roy C. Smith in the repair of the elevators, and he had confidence in the ability of Roy C. Smith, who pointed out how Elevator Supplies Company equipment could be used in connection with some existing equipment in the modernization program. Jerry Smith ultimately made recommendations for use of Elevator Supplies equipment in the modernization. (R. 782-784).

In 1950, Jerry Smith had discussions as to modernization, not only with defendant, but also with Otis Elevator Company, Elevator Service and Supply Company of Salt Lake City, Kimball Elevator Company, and Westinghouse. Jerry Smith asked for recommendations and also for bids. (R. 784). After Kimball was advised that the hotel was interested in recommendations and bids, plaintiff addressed to defendant a letter dated May 11, 1950, Exhibit HHH: "Please figure out the necessary Elevator Supplies equipment to revamp the three passenger elevators in the Hotel Utah. We would like these figures on an installed basis." Plaintiff furnished no specifications whatsoever.

Before submitting any bid to plaintiff, Roy C. Smith asked Mr. Connole, plaintiff's manager, what the bidding procedure would be on the project. Mr. Connole said that he (Mr. Connole) would be the *only bidder*. (R.

883). Mr. Connole admitted that he told Roy C. Smith that Kimball Elevator Company was going to do the job at Hotel Utah; that he understood there would be no other bidder on this job, and that Jerry Smith had told him Otis Elevator Company would not be permitted to bid. (R. 523-524). The representation was false, and without excuse. Hotel Utah had never even intimated that Kimball would be awarded the contract. Mr. Connole did not offer any testimony that anyone at the hotel told him that Kimball would get the job. On the contrary, Mr. Carpenter testified that he did not tell Mr. Connole nor anyone else that Kimball's bid would be accepted, nor was anyone authorized to make such a statement. (R. 242). Jerry Smith testified that he did not tell Mr. Connole that Kimball would be awarded the job, nor that Otis would not be allowed to bid. (R. 785).

The only purpose of the false pretense that Kimball was going to be awarded the job, was to discourage competition, by making it appear useless for defendant to present a bid either to the hotel (defendant's customer) or to anyone else. The claim that by submitting a bid to plaintiff (which was never accepted and which could not possibly result in any contract), defendant impliedly "agreed" to refrain from submitting a bid to Utah Hotel Company, the customer of defendant, is patently absurd and fictitious on its face. The claim of "implied agreement not to compete", wears the badge of fraud—fraud on the defendant and fraud on Utah Hotel Company, for plaintiff knew that the hotel company wanted more than one firm bid on the over-all

job, and the hotel had not promised Kimball anything. Furthermore, Mr. Connole knew that there had been strained relations between Kimball and Hotel Utah for several years over the small service elevator which Kimball had installed, which never operated satisfactorily, and ultimately had to be removed. (R. 258). In the light of the hotel's unsatisfactory experiences with Kimball, the hotel would scrutinize any proposal from Kimball.

The claim of "an implied agreement not to compete with plaintiff for the Hotel Utah" jobs, amounts to saying that when plaintiff procured a written offer from defendant by false representations, defendant thereby impliedly agreed with plaintiff that it would not submit a bona fide bid directly to defendant's own customer, although Utah Hotel Company requested defendant to do so. The claim of plaintiff is utter sham, for there could not be any agreement when there was only an unaccepted offer—an offer procured by deceit. No rights could arise from an unaccepted offer. There was no consideration, no meeting of the minds, nor any other essentials of a contract. There was not even a discussion suggesting that defendant refrain from dealing with its own customer.

After plaintiff obtained the written bid on a portion of the passenger elevator modernization, dated June 14, 1950, Exhibit III (R. 524, 883), plaintiff obtained from Pacific Elevator and Equipment Company a quotation dated July 13, 1950, Exhibit JJJ, covering the power

controls and some other equipment. Plaintiff waited over a month longer before getting around to submitting a bid to Utah Hotel Company. The only bid plaintiff ever submitted to the hotel was dated August 16, 1950, Exhibit "I". That bid was made up by copying the proposal obtained by plaintiff from defendant, except for the price; and by listing the following, without any specifications whatsoever: "Main generator and drive control panels. Leveling units, vanes and brackets. Three new cabs at a value of \$1800 each." (R. 524-526). The 15 items of necessary repair, mentioned in the letter of July 13, 1950, from Pacific to plaintiff (which had to be done in connection with the job), were entirely omitted from plaintiff's bid. One glance at the bid ought to be enough to understand why Mr. Carpenter, manager of Hotel Utah, would not even present it to the executive committee of Hotel Utah, and why he would not consider it any further, but rejected it. (R. 235-236, 246-247, 258, 263-264).

Mr. Connole testified, over the objections of defendant that it was hearsay and not the best evidence, that at or about the time he presented Exhibit "I" to Utah Hotel Company, "Mr. Jerry Smith told me that Otis Elevator Company was not going to be invited to bid on the job, and wanted to know if I had any suggestions as to who they could get another bid from. I suggested the Westinghouse Elevator Company . . . At the hotel he asked me . . . *if Elevator Supplies would give a bid on the total job*, and I told him that I did not know, that I would telephone San Francisco and ask

them if they would bid on the total job, as an estimate.” (R. 369-370, 372-373, 533). Plaintiff showed that Utah Hotel Company not only wanted another bid on the total job, but it wanted a “bid on the total job” *from defendant*. By answer to interrogatory No. 8, plaintiff stated under oath: “It is a fact that the Utah Hotel Company stated that it wanted more than one firm to bid on the job.” (R. 23).

The term “bid” means a proposal or offer to perform. There can be no dispute about the fact that Utah Hotel Company wanted defendant to submit a bona fide offer to perform, which, if accepted, would become a contract. The remark of Mr. Connole that he would ask defendant to “bid on the total job, as an estimate,” is presumptuous, to say the least. It suggests an attitude of dictating to defendant and to Utah Hotel Company. No sane person could expect defendant to go to the expense of figuring out how the job should be bid, and then turn the figure in to the hotel as an “estimate.” Plaintiff could not foreclose the hotel of its right to have a bona fide bid, nor could plaintiff dictate to defendant that defendant restrict its figure to a mere “estimate”. At that time, Mr. Connole made no pretense that there was any agreement, express or implied, to prevent defendant from giving the hotel company as its customer, a firm bid.

Mr. Jerry Smith testified concerning the conversation with Mr. Connole: “I told him it was necessary to get additional bids, and that *I was going to ask Elevator*

Supplies for a bid . . . He told me that he did not feel it would be of any value, because it would be the same bid that he had received from them or would get from them; it would be identical.” Jerry Smith categorically denied that the term “estimate” was mentioned, or that Mr. Connole was to contact the defendant. (R. 786-787). On cross-examination, Jerry Smith testified that he told Mr. Connole that he (Jerry Smith) was going to get a bid from Elevator Supplies Company. “I insisted on a bid on Elevator Supplies equipment. That was our decision. We wanted to go along with the same equipment we had been, in using Elevator Supplies equipment.” He said that Mr. Connole told him it would do no good to get such a bid; that the “bid would be identical.” (R. 818). Thus, Hotel Utah had specified defendant’s equipment. The hotel had been a customer since 1948, and the hotel was satisfied with defendant’s equipment. The hotel had a right to obtain a firm bid, not a fictitious bid from defendant. Inasmuch as defendant was engaged in interstate commerce, it would have been a criminal offense for defendant to have *agreed* with plaintiff or any one else, either expressly or impliedly, that it would refrain from selling to Utah Hotel Company or to any group of persons.

On cross-examination, Mr. Connole admitted that “I told him that the bid would be by 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). Plaintiff made no claim to Utah Hotel Company that defendant was precluded from

giving the hotel a bona fide bid, although plaintiff had every opportunity to do so, and it had a duty to say so if it so claimed. Plaintiff merely used the selfish argument that it could not see the "justification" for "having two people bid on identically the same equipment." In the field of trade and commerce, that is the very purpose of getting bids, to get the best price on the same kind of equipment and materials.

That was the second occasion when Mr. Connole made false representations. He knew that Elevator Supplies Company at that time was not manufacturing power control equipment (R. 576), so he knew that the bid from defendant on the over-all job would not be an identical bid. He also knew that a bid from Kimball and another bid from defendant would not be bids from the same people. There was no other purpose for his misrepresentations than to discourage the hotel company from getting a bid from defendant. The very argument used to attempt to talk Jerry Smith out of getting a bid from defendant, constituted a recognition of the right of the defendant to submit a bid to the hotel company, and it amounted to an acknowledgment of the right of the hotel to receive a firm bid. No one had any right to interfere with the attempts of the hotel company as owner, to obtain firm bids from defendant.

An examination of Exhibit "I", dated August 16, 1950, exclusive of the notations placed thereon by Jerry Smith, discloses that said bid was an incomplete and abortive bid. Utah Hotel Company did not have to have

any reason for rejecting it, and it had no duty to explain why it did not accept it. There were substantial reasons for rejecting it. The bid states:

“We propose to modernize the three passenger elevators from the present car-switch control to push button signal control with automatic leveling.

“The new equipment would consist of the following:

Relay panel.

Selectors.

Door operators, interlocks and hangers.

Car operators fixture including annunciator.

Position indicator and hall lanterns.

Hall buttons.

Main generator and drive control panels.

Leveling units, vanes and brackets.

Three new cabs at a value of \$1800 each.

“In accordance with the following specifications”.

The only specifications which follow the quoted words, are the specifications contained in the proposal from dependant to plaintiff. Utah Hotel Company had a very definite reason for pronouncing the bid unsatisfactory, since the plaintiff only actually offered to do the work contained in defendant's proposal, inasmuch as there were no other specifications. The italicized items are those which were not embodied in the proposal from defendant dated June 14, 1950, Exhibit KKK. As to the items emphasized with italics, there were no specifications whatsoever to suggest type of manufacture or method of installation. The bid of plaintiff omitted all

of the 15 items mentioned in the letter from Pacific dated July 13, 1950, as “items you will have to estimate locally”, which were necessary repair items. Plaintiff *did not offer* to furnish that equipment nor to do the necessary work. The proposal of plaintiff was therefore incomplete and unsatisfactory on its face, and Utah Hotel Company had every reason to reject it, as such bid did not show where plaintiff’s work would end and the hotel’s would begin or vice versa.

At the time the bid was presented by plaintiff, according to the uncontroverted testimony of Mr. Jerry Smith: “Mr. Connole told me that *this was a bid on a portion of the work* that would be involved, and that the work that was not included in this bid would be discussed between us at a later date, and that we could come to some kind of an understanding as to how it was to be executed, whether we would do it at the hotel, which was his recommendation, or just how the balance of the work would be done. . . . I did not have to ask him in that conversation what work was omitted, because we had discussed this job previously, and I was as well aware of it as he was.” (R. 815). As to omitted items, there was electrical work, new feeders, new end feeders to the penthouse, new hoisting hinges on the hoisting sheaves; cable rings on the hoisting sheaves, and a number of other items. Furthermore, “There is no mention here of who is to do the actual installation of a great portion of the work necessary, that had been discussed between Mr. Connole and myself.” (R. 815). Other than by omission of a number of items from the bid, there was

nothing in the bid from plaintiff to indicate what work was to be done by the hotel.

When he examined the bid, Exhibit "I", dated August 16, 1950, Mr. Jerry Smith testified that he did not regard it as a satisfactory bid: "It was not a satisfactory bid because it was not complete. It had not covered the entire scope of the work that was necessary, and the work that had been discussed previously. Therefore, I could not term it a 'satisfactory bid'." (R. 787-788). After he examined the bid he took it up with management: "I told them it was not complete, and that . . . my recommendation would be that it be rejected on that basis." (R. 788).

Plaintiff's own witness, Mr. Max C. Carpenter, manager of Hotel Utah, testified that when he examined the bid, Exhibit "I", he did not regard it as a satisfactory bid. (R. 246). He was not able to tell from reading the bid, what work would actually be done; that the bid "was too vague." (R. 247). At that time, the relationship of Utah Hotel Company with Kimball Elevator Company was unsatisfactory to some degree, because Kimball had installed a small service elevator which did not operate satisfactorily, and it had to be removed. (R. 246-247). Mr. Carpenter said he never submitted the Kimball bid to the executive committee, and he never asked Kimball if it cared to make another bid. He said the only bid which Utah Hotel Company ever obtained as it wanted the job done was the bid later submitted by defendant Elevator Supplies Co. (R. 264).

Mr. Carpenter testified that any contract of any size had to be approved by him. He instructed Jerry Smith to call Mr. Roy C. Smith and ask Elevator Supplies Company to submit a bid to the hotel on the modernization of the three passenger elevators. (R. 242). The hotel had a course of business dealings with defendant since February 1948. (R. 243-244).

On August 17, 1950, Mr. Jerry Smith called defendant Elevator Supplies Company, Inc., San Francisco, and talked to Roy C. Smith: "I asked him if Elevator Supplies Company would be interested in submitting a quotation, with recommendations, to the Hotel Utah, covering the modernization, and the general rebuilding of our equipment, and assuming the full responsibility for that work." (R. 788-789). Mr. Jerry Smith said he did not ask for anything other than a firm bid. (R. 789). Mr. Roy C. Smith said it would be necessary for him to contact his home office before giving a definite answer. Exhibit 28, is the telephone company memorandum showing Jerry Smith called defendant's telephone number, Garfield 17799, San Francisco, on August 17, 1950. (R. 788-789). Roy C. Smith subsequently told Jerry Smith he would meet with him in Salt Lake City, the latter part of the month. (R. 791).

The next day, D. W. Connole called Roy C. Smith, August 18, 1950. Roy C. Smith testified that Mr. Connole asked for a quotation on two dumb-waiters, which quotation defendant furnished by telegram dated August 22, 1950, Exhibit 19, on an installed basis and also on

an F. O. B. basis. (R. 885). Roy C. Smith denied that there was any other discussion. The plaintiff offered no evidence of any written request for dumb-waiter quotations. Mrs. Alice Connole, mother of Mr. Connole, and secretary of Kimball Elevator Company, testified that she listened in on the telephone conversation. On cross-examination Mrs. Connole *admitted that her son had called Roy C. Smith for a quotation on dumb-waiters*, and it may have been in the telephone conversation of August 18, 1950. (R. 942).

Mr. Connole testified as to the conversation with Roy C. Smith: "I told him that the Hotel Utah would like to have a proposal on the over-all job to verify our bid and justification of the amount quoted in our proposal and asked him if he could prepare the same and he said he would . . . he said he would have to get in touch with the Pacific people." (R. 374). On cross-examination, when pressed for an answer as to what was said by Roy C. Smith, he admitted that he testified on deposition: "I don't remember just what he said." (R. 578). He again admitted that he did not remember what Roy C. Smith said. (R. 579). No one could imply a promise from Roy C. Smith, when Mr. Connole did not remember what he said. Roy C. Smith promised nothing.

Mrs. Connole testified that she listened in on the conversation which her son had with Roy C. Smith over the telephone on August 18, 1950: "That was when he asked for a *bid, another estimate*. . . . He called them and told them that the hotel company wanted a support-

ing bid; that Otis was not going to bid, and the Westinghouse had too much on the coast, they would not come into the Salt Lake territory with the elevator business. . . . *He said he would look it up and let us know.*” She could not remember if there was anything else discussed. (R. 940). The last remark quoted apparently had reference to dumb-waiter prices. Inasmuch as Jerry Smith had asked for a *bid*, and did not use the term *supporting bid*, if Mr. Connole intended to convey some idea that the hotel wanted something other than a *firm bid* or a *bona fide proposal* which the hotel could act on, then Mr. Connole was practicing deceit for the third time.

Mr. Connole admitted that Jerry Smith did not ask for a *supporting bid*, but stated that he wanted a bid from defendant. (R. 577). Mr. Connole admitted that on deposition he testified: “He asked me if they would give him a bid. I told him I would call Elevator Supplies and ask them to give a supporting bid.” (R. 577). On deposition when asked whether Jerry Smith used the words “supporting bid”, Mr. Connole said: “*I explained to Mr. Jerry Smith that it would have to be a supporting bid, because it was identically the same manufacturers and the same people doing the work. . . . I told him that the bid would be by 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). The falsity of the representations of Mr. Connole is demonstrated by comparing Exhibits “I” and “J”, which proves they are not identical.

The version of the conversation, stripped of conclusions, presented by the plaintiff, fails to show that Utah Hotel Company wanted any kind of a figure from defendant except a *firm bid*. By resort to misrepresentations plaintiff tried to talk Utah Hotel Company out of getting a bid from defendant.

Mr. Allen E. Mecham, general counsel for Associated General Contractors, a witness for plaintiff whose testimony was stipulated to, stated: "As far as I have any knowledge, the term 'supporting bid' is not used in the construction industry." On cross-examination he said the term might be used as a "collusive bid" or *it might be used to mean a bona fide bid*. He further stated that in "the construction industry there is free competitive bidding." (R. 657). Both Jerry Smith and Roy C. Smith denied that such a term or expression was used in any conversation, and Roy C. Smith said he never heard of such expression prior to this lawsuit. (R. 786, 884-885).

The testimony of the plaintiff fails to show in any particular that Roy C. Smith promised that defendant would not give Utah Hotel Company a bona fide firm bid. When Mr. Connole was asked whether R. C. Smith ever told him (Mr. Connole) that defendant "would not present a firm bid to the Hotel Utah" on the over-all job, Mr. Connole answered, "No." (R. 589). Nor was there any testimony that there could have been any possible consideration, even if Roy C. Smith had promised not to submit a firm bid to Utah Hotel Company. The fact is, that there was no such promise. Both plaintiff

and defendant knew Utah Hotel Company wanted a firm bid from defendant, and if there had been any agreement to refrain from submitting a firm bid such an agreement (even if there had been consideration) would have been collusive and fraudulent as against the Utah Hotel Company. Inasmuch as a bid is an offer, any bid submitted by the defendant to the hotel company of necessity would have had to be one which could be accepted or it would not be a bid. Mr. Connole denied that he was trying to keep Utah Hotel Company from getting a bid from defendant (R. 579):

“Q. Were you trying to keep the Hotel Utah from getting a bid on the over-all job from the Elevator Supplies Company?

“A. I was never aware that Elevator Supplies would bid the job. I wasn't trying to keep them from it.”

By letter dated August 28, 1950, Exhibit 20, plaintiff submitted a proposal to Utah Hotel Company for the sale of two electric dumb-waiters on a non-installed basis. (R. 249). Such bid was unsatisfactory to the management of Hotel Utah as the hotel was only interested in bids on an installed basis. (R. 249). Furthermore, the bid was incomplete, and it contained no specifications whatsoever. (R. 793).

Mr. Roy C. Smith of defendant corporation came to Salt Lake City with Mr. Charles Maynard Henker of Pacific Elevator and Equipment Company, August 29, 1950. (R. 695-696). Prior to coming, Roy C. Smith had asked Mr. Henker if Pacific would submit a bid to de-

fendant on a portion of the Hotel Utah elevator modernization on an installed basis. That would amount to a great deal more than Pacific had previously bid to Kimball. (R. 673). Mr. Henker said that it would be all right "if it is all right with Kimball Elevator Company", as Pacific had submitted a bid previously to Kimball. (R. 673-674). Kimball was then the representative of Pacific Elevator and Equipment Company in Utah. (R. 688). Mr. Henker said he would not make a bid to defendant without clearance from Kimball. (R. 674). He also told Mr. Roy C. Smith that he thought it would be absolutely necessary to make a complete survey of the job at the job site. (R. 716). There had been business dealings between defendant and Pacific for many years, always on a basis of a request for a bid, submission of a quotation or firm bid, and a purchase order. That had been true both ways. (R. 725). Contracts between them had always been in writing. (R. 727).

There was a conference on August 30, 1950, between Max C. Carpenter, manager of Hotel Utah, Jerry Smith, building superintendent, and Roy C. Smith of defendant corporation. Mr. Carpenter testified that he had asked Jerry Smith to call Roy C. Smith for a bid from defendant on the over-all job. On this occasion Mr. Carpenter asked Roy C. Smith to submit a bid to the Hotel Utah on the modernization of the three passenger elevators. Defendant did not solicit the business. (R. 242). Mr. Carpenter at that time also asked Roy C. Smith to submit a bid on two electric dumb waiter elevators. (R. 244). Mr. Carpenter also said he told Roy C. Smith that

he wanted a bid on the over-all job on the passenger elevator modernization, and that he expected Roy C. Smith to present a straight-forward bid to the hotel—one that could be accepted by the hotel. (R. 248). There was no discussion of the Kimball bid. Roy C. Smith did not say or do anything to discourage Mr. Carpenter from dealing with Kimball. (R. 248). Mr. Carpenter had Roy C. Smith go over the elevator openings and make a thorough inspection and examination, and Mr. Carpenter told him the things he wanted done. (R. 250).

Mr. Henker testified that after he and Roy C. Smith arrived in Salt Lake City, they talked to some of the hotel people, “Then we made a very thorough survey of the equipment down to the last detail, preparatory to making up a *firm bid* to Elevator Supplies Company.” (R. 676). Mr. Jerry Smith told Mr. Henker that the management had invited Elevator Supplies Company to submit a bid on the over-all job; and Mr. Smith also stated that the hotel wanted Elevator Supplies equipment used as far as possible. (R. 716-717). Before submitting any bid to defendant, Mr. Henker spent whatever time he thought was necessary to determine just how much this job should cost for Pacific supplies and equipment, plus installation charges. (R. 717). The purpose of his visit to Salt Lake City was to determine what to bid to defendant. (R. 718).

On August 30, 1950, there was a conversation between Roy C. Smith, Daniel W. Connole and Charles Maynard Henker on the way to the Park Building at the

University of Utah. Roy C. Smith testified that he told Mr. Connole that he wanted him to know that Hotel Utah had asked defendant for a bid on the entire job and that defendant was going to submit a bid; and that Mr. Henker came here to make a survey of the job to quote on an installed basis. While he could not hear the entire conversation between Mr. Henker and Mr. Connole, both of whom were in the front seat of Mr. Connole's car, Mr. Henker asked Mr. Connole if it was all right to bid to defendant, and Mr. Connole told Mr. Henker, yes, as long as they were bidding list price. (R. 886-887). Mr. Connole said it was all right for Pacific to give defendant a quotation. (R. 936-937).

Mr. Henker testified that he told Mr. Connole that he had been requested by Elevator Supplies Company to give a bid on the Hotel Utah job on an installed basis, and he wanted to be sure that Mr. Connole had no objections to submitting a bid to Elevator Supplies Company. Mr. Connole made some statement to the effect that he knew that the hotel management had requested additional bids on the over-all job. (R. 718). Mr. Henker also testified that the purpose of his visit to Salt Lake City was to go over the job with the idea of bidding directly to defendant; and that required a survey of the job to get down to facts and figures which they had to have in order to bid the job on that basis. (R. 671-672). He further testified that he had already bid to Kimball and he asked Mr. Smith and Mr. Connole whether they were in agreement, as he wanted to confirm his company's position in tendering this bid to defendant, and he wanted

to clear himself of any wrongdoing as far as Kimball Elevator Company was concerned. (R. 676-677). He said they indicated they were in agreement, but that was all that was said. (R. 677). In consequence of that discussion, under date of September 7, 1950, Pacific Elevator and Equipment Company "submitted a quotation or a firm bid to the Elevator Supplies Company, Inc." (R. 717).

On direct examination Mr. Connole testified that Mr. Henker said: "While I have the two of you together, you understand Mr. Smith is going to place a proposal to the Utah Hotel. Am I to give him your figures?" Mr. Connole told him "Yes." He did not recall whether anything else was said. (R. 374-375). On cross-examination Mr. Connole admitted that he told Mr. Henker it was all right to submit a bid to Roy C. Smith, but he did not know if that was the exact language. (R. 572). He admitted that on deposition he testified: "*The Elevator Supplies Company requested the information from Mr. Henker, and Mr. Henker refused to give it to them, until he had my permission and that it was finally understood that I knew they were bidding it.*" (R. 572).

"Q. At the time that Mr. Henker spoke to you he asked you whether it was agreeable for him to furnish a quotation to the Elevator Supplies Company on the Hotel Utah job.

"A. The Elevator Supplies Company requested the information from Mr. Henker, and Mr. Henker refused to give it to them, until he had my permission and that it was finally understood that I knew they were bidding it.

“Q. That is right, and he told you that Elevator Supplies Company was bidding on this job and had asked Pacific Elevator and Equipment Company to furnish them a quotation.

“A. That is correct.”

The testimony of Mr. Connole shows clearly that Pacific Elevator and Equipment Company had express permission from Kimball to submit a bid to defendant, and that it was *understood* that *defendant was bidding on the job*. Quoting further from the admissions of Mr. Connole (R. 573):

“Q. All he said to you was that the Elevator Supplies Company ‘requested us’ to give them a quotation on a certain part of this work?

“A. He told me that he could not give them a quotation, because we were figuring the job and representing them—unless it was with our permission.

“Q. And you told him it was all right?

“A. *I told him it was all right.*”

The word “quotation” was used as a synonym for “bid”, as illustrated by the testimony of Mr. Henker. (R. 717). There would not have been any occasion for Pacific to get clearance from Kimball to merely submit an “estimate of cost”. Kimball was the territorial agent of Pacific, and Pacific was unwilling to give defendant a firm bid or quotation until Mr. Connole consented. Mr. Connole expressly told Mr. Henker “it was all right” to give defendant a quotation. The admissions of Mr. Connole, as plaintiff’s manager, show that he consented

unequivocally to presentation of a firm bid by Pacific to defendant. The only possible purpose of the detailed work done by Mr. Henker in his survey, was “preparatory to making up a firm bid to Elevator Supplies Company.” (R. 676). The testimony of Mr. Henker clearly shows too, that he relied on the consent of plaintiff to present a bona fide bid to defendant, for Pacific gave a bid to defendant about one week later, on September 7, 1950, Exhibit 18, and on October 4, 1950, Pacific accepted a purchase order from defendant, Exhibit 2. (R. 717, 719-721).

In the conversation between Mr. Connole, Mr. Henker and Mr. Smith, on August 30, 1950, there was a definite express discussion of the fact that Utah Hotel Company had asked defendant to submit a bid, and that defendant had requested a bid from Pacific on a portion of the over-all job. Plaintiff did not make any pretense in that discussion that there was any “agreement” whereby defendant would refrain from submitting a firm bid to Utah Hotel Company. When the subject of submission of a bid by defendant to its customer, Utah Hotel Company, was expressly discussed, plaintiff could have declined to give Pacific permission and defendant would have been compelled to get a quotation from some other elevator company. Plaintiff did not merely passively acquiesce in submission of a bid by Pacific to defendant, but plaintiff expressly told Mr. Henker “it was all right.” Plaintiff thereby recognized the right of defendant to present a firm bid to Utah Hotel Company, and plaintiff also recognized the right of the hotel

company to obtain a firm bid from defendant. The admissions of plaintiff completely shattered plaintiff's claim of an "implied agreement not to compete with plaintiff". It was improper to submit the case to the jury when plaintiff's own evidence proved there was no such "agreement". The trial court had no authority to permit the jury to speculate that Mr. Connole did not mean what he said when he told Mr. Henker it was all right to submit a bid to the defendant, when the sole purpose of such a bid was to enable defendant to submit a bona fide bid to Utah Hotel Company.

Mr. Connole, as manager of Kimball Elevator Company, was confronted with a specific inquiry by Mr. Henker. In response, Mr. Connole used unequivocal words of consent which induced Pacific to submit a firm bid to defendant. After Pacific submitted such bid, plaintiff could not be heard to say that Mr. Connole did not mean what he said. Even if Mr. Connole had not expressly consented but plaintiff had merely passively acquiesced in the submission of a firm bid by Pacific to defendant, plaintiff could not be permitted to complain either to Pacific or to defendant after both Pacific and defendant had acted thereon. As stated in *McSweeney v. Equitable Trust Co.*, 127 N. J. L. 299, 22 A. 2d 282, 285, 139 A. L. R. 653:

"The rule is well recognized that where a party, with full knowledge or with sufficient notice or means of knowledge of his rights and of all the material facts, remains inactive for a considerable time or abstains from impeaching a contract or transaction, or freely does what

amounts to a recognition thereof as existing, or acts in a manner inconsistent with its repudiation and so as to effect or interfere with the relation and situation of the parties, so that the other party is induced to suppose that it is recognized, this amounts to acquiescence and the transaction, although originally impeachable becomes unimpeachable.”

Plaintiff has never tried to impeach the conduct of Pacific in giving defendant a firm bid. The significant fact is, that plaintiff did not remain inactive when defendant disclosed that it had asked Pacific for a bid; but plaintiff expressly told Pacific that it was all right to give defendant a bid. Obviously, if plaintiff had merely registered disapproval, Pacific would have refrained from giving defendant a bid, as Pacific did not want to offend its agent, Kimball Elevator Company. Plaintiff did not just refrain from making an objection. Plaintiff gave Pacific the “green light”, by expressly consenting to submission of a bid by Pacific to defendant.

In *Stewart v. Finkelstone*, 208 Mass. 28, 36, 92 N. E. 37, 39, 28 L. R. A. (n.s.) 634, 18 Am. St. Rep. 370, it was said that “if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right. * * * It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose there was no objection to his operations.” Obviously, plaintiff, as territorial representative of Pacific, could not have maintained an action against Pacific for submitting a

firm bid to defendant, since plaintiff expressly consented thereto. The action against defendant is not in good faith. Plaintiff has not tried to impeach the conduct of Pacific, but complains against defendant on a fictitious claim after expressly telling Pacific it was all right to submit a bid to defendant, knowing that such bid would assist defendant in preparation and submission of a firm bid to the hotel company on the over-all job.

In *Uccello v. Gold'N Foods*, 325 Mass. 319, 90 N. E. 2d 530, 535, 16 A. L. R. 2d 458, it is said: "Acquiescence is conduct from which may be inferred assent with a consequent estoppel or quasi-estoppel." Numerous cases are cited. However, in the instant case, there was no need to infer assent of plaintiff, for plaintiff expressly consented. Mr. Connole said that Mr. Henker *refused* to give defendant a bid "until he had my permission and that it was finally understood that I knew they were bidding it." Mr. Connole told Mr. Henker it was *all right* for Pacific to give defendant a quotation. There is no room for explanation or interpretation. Plaintiff, by express language, unequivocally consented to submission of a bid by Pacific to defendant, on which consent Pacific relied in presenting a firm bid to defendant. Without qualification, plaintiff recognized the right and propriety of defendant in submitting a firm bid to Utah Hotel Company, which had been a customer of defendant for over two years.

Under date of September 7, 1950, Pacific Elevator and Equipment Company submitted a *firm bid* to de-

fendant, Exhibit 18. (R. 717). Said bid covered the power control and certain other equipment not then being manufactured by defendant. The bid was on an installed basis. (R. 717).

Eight days later, by letter from Pacific to plaintiff dated September 15, 1950, Exhibit "F", Pacific increased its original bid of July 13, 1950, from \$3050 per car to \$3715 per car (R. 714), an increase of nearly 22%. The revised quotation was due to a rising market. In that letter increasing the price of the quoted equipment, Pacific stated: "Mr. Henker made an extensive survey of the present installation and we wish to add the following items of repair work which you would have to figure locally:" (8 items specified, including new hoist cables, governor cables, etc.) "Our revised labor estimate including all of these items would be 139 crew days for the entire job, exclusive of Elevator Supplies." Pacific called attention to those additional items so that if Kimball had an opportunity to revise its bid, it could take those items into consideration. (R. 714-715). A quotation from Pacific is good for only 30 days. There was a price increase of 30% in electrical equipment in 1950. (R. 734-735). When counsel for plaintiff asked whether Pacific intended that Kimball should be able to rely on the new quotation, Mr. Henker answered, "Of course. Why not?" (R. 735). It was not improper for Pacific to submit a bid to defendant and also submit a bid to plaintiff, or to anyone else, when acceptance could come from only one of them.

On September 11, 1950, defendant submitted two bids to Utah Hotel Company. Exhibit "J" was on the over-all passenger elevator modernization project, and Exhibit 4 was on the two electric dumb-waiter elevators, on an installed basis. Mr. Carpenter, manager of Utah Hotel, testified that Exhibit "J" was the only bid which the hotel ever received for doing the modernization the way the hotel wanted it done. (R. 264).

On September 11, 1950, defendant withdrew the original quotations to plaintiff, and in the light of information obtained from the hotel, defendant submitted two new bids to plaintiff, Exhibit LLL. One was a new proposal on the passenger elevators, increasing the price from \$30,126 quoted as of June 14, 1950, (Exhibit KKK), to \$32,020. A new proposal was made on the dumb-waiters to meet new specifications of Hotel Utah. In the covering letter dated September 8, 1950, defendant stated that it thereby withdrew its original proposal on the passenger elevators, and it was thereby submitting a new proposal with price increase, stating "we have also omitted the provision in one car for operation without an attendant, as we have been definitely informed by the building that this feature is not desired." Defendant also advised plaintiff that an identical quotation on the dumb-waiters had been made to Hotel Utah "as per their request." Of course, the bid to Utah Hotel Company on the passenger elevator modernization was not an identical quotation to the one given to plaintiff, for the one given to plaintiff covered only a portion of the proposed job while the one given to the hotel covered

the entire modernization project. In that letter, defendant advised plaintiff that the prices quoted were list, subject to a discount of 10%. Suggestion was also made that Mr. Connole call Mr. Smith to “discuss any other questions which may be pertinent to this *negotiation*.”

Defendant and Pacific each made it possible for plaintiff to make a new bid to Utah Hotel Company which would remedy the omissions and uncertainties which made the bid dated August 16, 1950, an abortive and unsatisfactory bid. Plaintiff was not foreclosed of opportunity to present a proper bid as far as the actions of defendant and Pacific were concerned. In fact, both defendant and Pacific called plaintiff's attention to information obtained from Hotel Utah, to which plaintiff would have to give heed in order to submit a bid satisfactory in form. The failure of plaintiff to present a complete and definite proposal on August 16, 1950, was entirely the fault of plaintiff. Defendant did not prevent plaintiff from making a satisfactory proposal to the hotel company, either on August 16, 1950, or at any time. Plaintiff disregarded both the new proposal from defendant dated September 11, 1950, and the new proposal from Pacific dated September 15, 1950, and never attempted to present a new bid to Utah Hotel Company. (R. 542).

The pretended excuse for failure of plaintiff to submit a new or revised bid was the hearsay testimony of Mr. Connole (permitted over objections), that he told

Jerry Smith that Kimball was anticipating a "slight increase in cost of electrical parts"; that Jerry Smith said that the hotel had not decided definitely whether it would re-use the lanterns and push-buttons; that there was some discussion about price increase, but that he never told Jerry Smith he was raising the bid 26%; and that he told Jerry Smith if he would let plaintiff know what the hotel wanted deleted, "I would give him a new bid, and he never let me know." (R. 534, 542). Mr. Connole admitted that although plaintiff received new quotations from both defendant and Pacific, plaintiff did nothing to present a new bid to Utah Hotel Company. (R. 542).

Jerry Smith denied that anything was said about re-use of lanterns and push buttons after plaintiff submitted its bid. He testified that sometime following submission of the Kimball bid, Mr. Connole told him the bid was no longer in effect due to price increase, and that he wrote 26% on the face of the bid as the figure by which Mr. Connole had said the bid would be increased. (R. 794-796, 816-817). *When Jerry Smith made such notation on the Kimball bid, the hotel management instructed him to disregard that bid and that company, and not communicate further with it.* (R. 822).

Although there is no competent proof that plaintiff was misled by anything Jerry Smith supposedly said to Mr. Connole, Mr. Connole admitted that Jerry Smith never told plaintiff not to revise its bid. Plaintiff could not have proffered any excuse of that character anyway,

after September 11, 1950, when defendant presented its new proposal to plaintiff covering what the hotel wanted.

Plaintiff not only ignored the information it obtained from defendant, but also the information it had received from Pacific which clearly showed that plaintiff had omitted 23 essential items from its bid of August 16, 1950. By letter dated July 13, 1950, Pacific advised plaintiff that there were 15 repair items which plaintiff would have to figure. Plaintiff omitted all 15 from its bid. On September 15, 1950, Pacific notified plaintiff that Pacific had found 8 additional items to be included. Plaintiff continued to do nothing to remedy the fatal omissions and uncertainties of its bid of August 16, 1950. Plaintiff simply would not include all of the items the hotel rightfully insisted on having in the modernization. Plaintiff foreclosed itself of opportunity to have Hotel Utah consider it as a prospective contractor, by its own mismanagement and indisposition to offer Hotel Utah what it wanted, as well as by plaintiff's previous dealings.

The Utah Hotel Company did not make an award of the two contracts to defendant until 16 days after defendant presented the two new bids to the plaintiff. The contracts were awarded September 27, 1950.

The plaintiff did not at any time say to anyone at Hotel Utah that defendant had no right to present a firm bid. Nor did plaintiff make any such representation to defendant. The plaintiff recognized the right of de-

fendant to deal with Utah Hotel Company which had been a satisfied customer of defendant for over two years. In fact, when Mr. Connole was asked if he tried to keep Hotel Utah from getting a bid from Elevator Supplies Company on the over-all job, he said, "I wasn't trying to keep them from it." (R. 579). He further testified that he did not tell anyone at the hotel prior to the award of the contracts, not to award a contract to defendant. He added gratuitously, "I never knew they would consider it." (R. 596). Mr. Connole also admitted that Roy C. Smith never said at any time that he would not submit a firm bid to Utah Hotel Company. (R. 589). Nor did Mr. Connole know of any bid which defendant ever submitted to anyone which was not a firm bid. It was further admitted by Mr. Connole that Roy C. Smith never told Mr. Connole that defendant would give plaintiff a "cut out of the job" if the hotel company awarded the contract to defendant. Mr. Connole stated that *there was no promise of a cut, and there were no promises.* (R. 589-590).

Appellant will point out later, that the attempt of plaintiff to exact a "commission" from defendant as the successful bidder, was wrongful, for plaintiff knew that defendant did not pay any commissions, and plaintiff also knew that plaintiff was not instrumental in having Utah Hotel Company award the contracts to defendant. Furthermore, the attempt of plaintiff to induce Hotel Utah to cancel the elevator modernization contract with defendant, and to issue a new contract to plaintiff, was a wrongful act designed to deprive defendant of its

contract rights in the effort of plaintiff to get something for nothing.

The trial court should have granted the motion for directed verdict, of no cause of action, for plaintiff demonstrated that it had no right of action.

POINT 5.

PLAINTIFF WAS THE ONLY WRONGDOER, (A) BY PRACTICE OF DECEIT IN AN EFFORT TO PREVENT COMPETITION, AND (B) BY ATTEMPTING TO EXACT A SPURIOUS "COMMISSION" FROM DEFENDANT AS SUCCESSFUL BIDDER, AND BY WRONGFULLY ATTEMPTING TO DEPRIVE DEFENDANT OF ITS CONTRACT.

The claim of plaintiff that it had "excellent business relations" with Utah Hotel Company back-fired. Its own witness, Max C. Carpenter, manager of Hotel Utah, testified that at the time in question the relations between the hotel and plaintiff were unsatisfactory to some degree because Kimball had installed a small service elevator which did not operate satisfactorily, and it ultimately had to be removed. (R. 246-247). Instead of making corrections, plaintiff furnished excuses and arguments. Jerry Smith, building superintendent of Hotel Utah, testified that prior to 1948, the hotel had purchased various repair parts from Kimball Elevator Company, but the service was not always satisfactory, so that in 1948 the hotel began to purchase directly from defendant

to expedite a repair program. (R. 770-771). Mr Carpenter also testified that the hotel had business dealings with defendant since 1948. (R. 243-244). Utah Hotel Company in 1950 was a customer of defendant.

In 1950 no contract whatsoever existed between plaintiff and Utah Hotel Company. Plaintiff did nothing to regain the hotel's confidence. The only proposal submitted by plaintiff to the hotel was dated August 16, 1950, and it was unsatisfactory and unacceptable to the hotel management. (R. 246). Mr. Carpenter could not tell from reading the bid, what work would actually be done. The bid was incomplete and "too vague." (R. 246-247). Mr. Carpenter never submitted the Kimball bid to the executive committee, and he never asked Kimball if it cared to make another bid. (R. 264). Defendant did not say or do anything to discourage the hotel company from dealing with plaintiff, and the Kimball bid was never discussed with defendant. (R. 237).

Defendant did not even solicit the business from the hotel, but Utah Hotel Company requested a bid on the over-all job from defendant. (R. 241-242). Defendant presented the only bid which was acceptable to the hotel company. (R. 264). When the hotel management was informed that plaintiff was going to increase the price of its bid, Jerry Smith, building superintendent, was instructed to disregard the Kimball bid and not to communicate further with Kimball Elevator Company. (R. 822).

Plaintiff did not sue in tort on some theory that it was maliciously prevented from entering into contract with Utah Hotel Company, for there could have been no possible factual basis of recovery on any such theory, or any other legal theory. The tort rule is stated in *Walker v. Cronin*, 107 Mass. 555:

“Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. *He has no right to be protected against competition*, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss comes as a result of competition or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract, or otherwise, is interfered with. But if it comes from the merely wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands upon a different footing.” (Emphasis added.)

The statement in *Skene v. Carayanis*, 103 Conn. 708, 131 A. 497, 498, illustrates the law:

“The instant case does not fall fully within the principle which holds liable him who, knowingly and without adequate justification, causes another to breach his contract. *R and W Hat Shop, Inc., v. Sculley*, 98 Conn. 1, 119 A. 55, 29 A. L. R. 551. The law does not, however, restrict its protection to rights resting upon completed contracts, but it also forbids unjustifiable interference with any man’s right to pursue his lawful business or occupation, and to secure to himself the earnings of his industry. *Full, fair, and free competition is necessary to the economic life of a community*, but under its guise, no man can, by

unlawful means, prevent another from obtaining the fruits of his labor. 'The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or, at least, must not be inconsistent with their free operation. No man can justify interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation.' Martell v. White, 185 Mass. 255, 261, 69 N. E. 1085, 1088, 64 L. R. A. 260, 102 Am. St. Rep. 341; Auburn Draying Co. v. Wardell, 227 N. Y. 1, 11, 124 N. E. 97, 6 A. L. R. 901; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 31, 142 N. W. 930, 1136, L. R. A. 1915 B, 1179, 1195."

Plaintiff proved no misrepresentations by defendant, nor any fraud, molestation or interference. *The only party guilty of any such conduct was the plaintiff.*

(A) *Plaintiff practiced deceit in the effort to prevent competition.*

At the time plaintiff requested defendant to "figure out" the necessary elevator supplies for modernization of the passenger elevators, in May 1950, plaintiff knew that Utah Hotel Company had been a customer of defendant for over two years. Before submitting any bid, defendant asked Mr. Connole what the bidding procedure would be. (R. 883). Mr. Connole admitted that he told Roy C. Smith that Kimball Elevator Company was going to do the job at Hotel Utah, and that he understood that there would be no other bidder on this job. (R. 523-524). The representations were false, and uttered without excuse, in an effort to prevent competition with plaintiff.

It is undisputed that Utah Hotel Company informed plaintiff that it wanted a bid from defendant on the total job. Mr. Connole falsely represented to Utah Hotel Company that it would do no good; that such bid from defendant would be identical with plaintiff's bid. (R. 786-787, 818). Mr. Connole admitted saying, "I told him that the bid would be by 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). The representation that the bid from defendant would be identical was false, as demonstrated by Exhibits "I" and "J". The plaintiff sought to discourage the hotel from procuring a bid from defendant.

Although neither defendant nor Utah Hotel Company entered into agreement with plaintiff by virtue of such false representations, had either one done so, the agreement would have been subject to rescission. As pointed out by this Honorable Court in *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 P. 687, it is not necessary in an action for rescission to prove that the party who made the false representations knew them to be false; but merely that they were false and induced the making of the contract. "Why should he who makes false representations be permitted to profit by them, whether he knew they were false or not? Upon the other hand, why should the party who is deceived be bound by a contract based upon false representations, simply because he cannot prove that the other party to the contract knew the statements when made were false?" Plaintiff

sued because it was frustrated in its unlawful scheme to perpetrate a fraud by the practice of deceit both on defendant and on Hotel Utah, and plaintiff seeks to be put in a more advantageous position than if it had been successful in its wrongful designs in the first instance.

The claim of "implied agreement" is fictitious on its face in the light of the deception practiced by plaintiff, and the deception was of such a material nature that if an agreement could have been induced successfully by plaintiff, either with defendant or with Utah Hotel Company, there would have been a complete bar by virtue of the right to rescind.

(B) Plaintiff was a wrongdoer by attempting to exact a spurious "commission" and by attempting to interfere with the contract awarded to defendant.

Mr. Connole expressly admitted that defendant did *not* promise the plaintiff a "cut out of the job." (R. 589-590). He also admitted that there were no promises. (R. 590). Mr. Connole also knew very well that defendant had never paid commissions. Defendant sold to elevator companies at a discount of 10% from list price. That did not constitute a commission, as an offeree could not realize such discount or any other benefit if it failed to make the purchase. Mr. Connole knew that Utah Hotel Company had awarded the contracts to defendant on the basis of acceptable bids. Neither he nor his company induced Utah Hotel Company to award the contracts to defendant. When he

said, "I expected my regular commission on the job" (R. 590), he knew there was no commission due or owing, and that he had never been paid a commission, nor had Kimball Elevator Company. It was a plain attempt of an unsuccessful bidder (if Kimball could be considered a bidder when it declined to submit a new bid), to exact a fee from the successful bidder without consideration. It was an unconscionable effort to get something for nothing, commonly called a "shake-down".

When defendant flatly refused to submit to such exaction, plaintiff asked Utah Hotel Company for a "commission" which was likewise refused. Plaintiff was told that Hotel Utah had put the job out on bids, and that Kimball had not been the successful bidder. (R. 238, 240, 250). Plaintiff then wrongfully attempted to induce Utah Hotel Company to change the contract from defendant to Kimball, on the assurance that it would not cost any more. Mr. Carpenter refused to do anything to change the contract with defendant in any way, shape or form. (R. 239-240). The entire conduct of plaintiff was reprehensible, in defiance of the rights of defendant.

In answer to defendant's motion for summary judgment, plaintiff made the unwarranted contention that acceptance of a contract by defendant from Utah Hotel Company on the passenger modernization project, constituted a "piratical taking of the Hotel Utah contract". (R. 82). Such false contention was echoed throughout the proceedings. Defendant did nothing to prevent plain-

tiff from submitting a satisfactory bid to Utah Hotel Company. Plaintiff presented an abortive bid, and when plaintiff was furnished the necessary information by defendant and by Pacific from which plaintiff could have remedied the fatal omissions and uncertainties of its unsatisfactory bid, plaintiff neglected to do anything about it. When the contracts were awarded to defendant because the defendant was the only bidder which offered to do the jobs as the hotel wanted them done, the plaintiff first wrongfully tried to exact a spurious "commission". When that contemptible scheme failed, plaintiff tried to work on Hotel Utah.

The testimony of Mr. Connole as to what he said to Max C. Carpenter demonstrates that he again resorted to deceit in an effort to deprive defendant of its contract: "I asked him if it would be possible to transfer the contract that was issued to Elevator Supplies Company over into the name of Kimball Elevator Company, that it was one and the same people doing the work, that it was identical quotations, and it would make no difference in price on the job." (R. 391). The testimony was incompetent as part of an attempt of plaintiff to impeach its own witness, Mr. Carpenter, but Mr. Connole's own version shows deceit: (1) The statement that "it was one and the same people doing the work", was false, as the bid submitted by the defendant contemplated performance by defendant and by Pacific, and Kimball had no part in performance. (2) The assertion that "it was identical quotations", was false, for the Kimball bid omitted 23 essential items which were all included in

the defendant's bid. Had plaintiff been successful in its wrongful attempts to deprive the defendant of the contract, it would have been a case of "piracy of contract", and actionable as a tort.

The only wrongdoer was the plaintiff, first by the practice of deceit upon defendant and upon Utah Hotel Company, then as unsuccessful bidder by the unconscionable attempt to exact a spurious "commission", and finally by the attempt to deprive defendant of the contract awarded by Utah Hotel Company. It was apparent at every step of the proceedings that plaintiff was attempting to use the judicial machinery to accomplish its unlawful scheme to get something for nothing. The lower court should have dismissed the action with prejudice, since it was obvious that the action was in bad faith in an effort to perpetrate a fraud.

POINT 6.

THERE WAS NO COMPETENT EVIDENCE THAT PLAINTIFF WOULD HAVE OBTAINED THE MODERNIZATION CONTRACT, AND NO COMPETENT PROOF OF ANY DAMAGES.

Obviously, plaintiff could not claim damages for not being awarded the Hotel Utah elevator modernization contract, when plaintiff failed to prove that it would actually have been awarded the contract, except for some wrongful act of defendant. There was no claim made by plaintiff that defendant committed any tort. De-

fendant did not mislead the plaintiff, nor in any way induce the plaintiff to submit an improper bid to Utah Hotel Company. Nor was the defendant in any way responsible for the unsuccessful past business dealings between plaintiff and Utah Hotel Company which reduced the confidence of the hotel company in plaintiff to practically zero. There was no competent evidence that the hotel company would have awarded the contract to plaintiff even if defendant had refused to give the hotel a bid.

Plaintiff was an unacceptable bidder as far as Utah Hotel Company was concerned, not only by reason of the indisposition of plaintiff to submit a bid proposing the type of performance which the hotel wanted, but also because plaintiff had not given the hotel satisfactory performance in the past. Plaintiff had "two strikes against it" before it submitted its incomplete bid on August 16, 1950, Exhibit "I". Mr. Carpenter, manager of the hotel, testified that at that time, the relationship of Utah Hotel Company with Kimball Elevator Company was unsatisfactory to some degree, because Kimball had installed a small service elevator which did not operate satisfactorily. (R. 246-247). Said elevator did not work efficiently, and it had to be removed in 1949. (R. 258). Its speed was too slow, the cab was too heavy, and it operated unsatisfactorily even after Kimball changed the gear ratio. (R. 799, 805). Furthermore, Kimball had given unsatisfactory service to the hotel on repair parts, so that beginning with 1948 the hotel com-

pany began to purchase the repair parts from defendant.

When plaintiff submitted its bid on August 16, 1950, which omitted 23 essential items, and which was indefinite and otherwise incomplete, if that was not "strike three against the plaintiff" it was at least "foul ball." Plaintiff acknowledged to the hotel that the bid covered only a portion of the project. Plaintiff manifested no disposition to present a bid which would be acceptable to the hotel management. When plaintiff notified the hotel of price increase, there can be no question about the fact that the hotel called "strike three". *At that time the management instructed Jerry Smith to disregard the Kimball bid and the Kimball Elevator Company, and not communicate further with it.* (R. 822). The hotel did not have to offer any reason for its decision not to do business with plaintiff; but plaintiff had given unsatisfactory performance in the past, and instead of doing something to restore confidence, plaintiff made such an objectionable proposal that the hotel company was unwilling to risk doing business with it. Mr. Carpenter even declined to submit the Kimball bid to the executive committee. (R. 264). He did not see fit to ask the Kimball Elevator Company if it cared to make another bid. The hotel was not very anxious to do business, or even to invite Kimball to come back and submit another bid, since Kimball had not submitted a satisfactory bid in the first instance. (R. 263-264).

It would be utterly impossible for reasonable minds to reach the conclusion from the evidence, that Hotel

Utah would have awarded any contract to any firm which took the attitude that Kimball manifested. There was no basis for submitting the case to the jury, and submission was a mere invitation to engage in speculation in violation of the rights of defendant.

Nor did plaintiff show that it could have made any profit, if it were assumed for purposes of argument that such a contract had been awarded to plaintiff. There was no competent evidence whatsoever, that plaintiff could have made either \$8,555 awarded by the jury or any other amount in excess of costs of performance. Mr. Connole originally testified that the job was bid low (R. 416):

“We took the price of the Elevator Supplies equipment, the portion of the work they were to do on an installed basis and took the price of the Pacific Elevator & Equipment Company—we took their estimates of their time or labor, our overhead and arrived at the price of \$59,600.

“Q. (By Mr. Brennan) Did you consider any other element than *cost* in making this price?

“A. Yes we bid the job lower than normal because we wanted it as an advertising feature.”

Such testimony indicates that plaintiff did not figure on any profit. Later, in an attempt to build up a claim of “damages”, plaintiff offered in evidence Exhibit SSS, which was an “estimate sheet” prepared by plaintiff *after* the suit was started, to show a “profit” of \$12,899.08. Said incompetent instrument was received in evidence over objections of defendant, notwithstanding

said paper shows on its face that at the time it was prepared, plaintiff omitted a number of known items of cost. (R. 607-612).

Plaintiff omitted the net increases which plaintiff would have had to pay defendant under the new bid of September 11, 1950, in the amount of \$1,884.60 and the net increase in the new bid of Pacific dated September 15, 1950, amounting to \$1,995.00. The 34 additional crew days mentioned by Pacific for installation of its equipment and other items, were also omitted from the labor computations. Plaintiff used "labor figures" of August 1950, notwithstanding the costs in 1951 had increased when the job would have been performed. Even at plaintiff's low labor estimate of \$3.98 per crew hour (times 8 for 34 days), would amount to an additional \$1,082.56 alone, plus 10% for insurance would add \$108.26. The total of these specific items alone which plaintiff conveniently excluded from the "estimate sheet" specially prepared for trial, aggregate \$5,070.42. Those items alone reduce plaintiff's "estimated profit" down to \$7,828.66 or a figure *below* the \$8,555 awarded by the jury, before various other omitted items are taken into consideration.

Mr. Connole admitted that there were additional items mentioned in the letter from Pacific to plaintiff dated September 15, 1950. He said the new drive sheaves would cost about \$425 each. Two of them would cost \$850. He said two new hoist cables would each cost from \$150 to \$175, and he was not trying to overstate those

costs. Three of them at \$175 would add another \$525. The governor cables would cost \$150 each or \$450. (R. 386-388). These few additional items would amount to \$1,825 to reduce the "estimated profit" down to \$6,003.66. There were numerous other items of expense, some of which he did not attempt to price, but merely stated they were "included" in the original figure. If all of the omitted items had been candidly disclosed, they would not only have completely wiped out the balance of the "estimated profit", but show a loss of thousands of dollars.

Mr. Connoles originally testified that he figured overhead in computing the figure of \$59,600; but all overhead costs except 10% for payroll insurance, are omitted from the "estimate". Later, he testified, "You can't operate on 10% in any business." (R. 530). There can be no doubt that such an admission was not an overstatement. He further testified that the 10% discount allowed to elevator companies on purchases made by them, only "covers part of the cost of operation." He admitted that he figured *nothing for overhead* in his computation; that he "never" figures it in the job. "You will find it under the *profit column*." (R. 530). Thus, a new technique has been devised for showing a "profit", by including overhead items in the "profit column." Even if only 10% were used as the basic figure for overhead costs, and the 10% were not figured on the sum which plaintiff would have had to pay defendant if plaintiff had been awarded the contract, (\$28,818 after deducting the 10% discount from list price), there would have been

at least \$30,782 of plaintiff's bid to which overhead would apply, or \$3,078.20 to reduce the "estimated profit" to \$2,925.46.

There was no figure set up for *contingencies*. It was undisputed, as testified by Mr. Roy C. Smith, that in the light of actual experience of doing the job, there should have been from 8% to 10% allowed for contingencies. (R. 914). If only 8% of \$30,782 were figured, there would be an additional cost of \$2,462.56 to reduce the "estimated profit" to \$462.90, and the \$462.90 would not begin to cover the other undisclosed costs, which were conveniently omitted from the specially prepared "estimate sheet" written up sometime after this suit was initiated.

Plaintiff omitted the cost of a *supervisor*. Mr. Conole testified that Pacific was to send a man for supervision, and that the figure from Pacific did not include the cost of supervision. (R. 549). Mr. Henker testified that if Kimball had been awarded the job, Kimball had arranged to hire a supervisor from the coast. (R. 741-743). Plaintiff did not see fit to disclose how many thousand dollars such supervision with board allowance would have cost. The trial court sustained objections to questions designed to show what the costs actually were on the job. Plaintiff did not show what they were, so the jury could not make a finding from a lack of proof. As stated by counsel for plaintiff: "He knows Mr. Henker refused to show the cost sheets. Mr. Reimann asked him." (R. 898). The best evidence of whether a

profit could be made on a job is what the job actually cost, when done efficiently. Plaintiff also omitted the cost of screening between the elevators, which would have resulted in substantial expense in view of the height of the building. Plaintiff failed to account for the increased labor costs in the year 1951 over the year 1950, which would have added considerable expense. Instead of even a "profit" of \$462.90, there would have been a *loss* of thousands of dollars.

There was no competent evidence of any possible "profit", either in the amount of \$8,555 or any other sum. The court invited the jury to speculate. An examination of the verdict, which shows that some figures were written and then crossed out, demonstrates how utterly confused the jury had become. (R. 193-194). Reasonable minds could not have concluded that plaintiff could have made any profit whatsoever. Proof of profit cannot be made by willfully omitting costs or by failing to disclose the full amount of the costs.

As stated in *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 80 N. E. 2d 522, 532: "To recover, the profits in question must be capable of determination as a practical matter upon evidence that proves them by a fair degree of certainty and accuracy; they cannot be recovered when remote, speculative, hypothetical and not within the realm of reasonable certainty." Exhibit SSS was an incompetent misleading statement devised by plaintiff after the suit was started. Damage cannot be established for loss of profits, by the art of showing

a fictitious profit through a deliberate omission of essential items of cost or by failure to disclose the actual amount of the costs.

The trial court also erroneously allowed the jury to award “damages” for loss of advertising value. The purported “loss” was allegedly occasioned by being “deprived” of having its nameplates, “Kimball Elevator Co.” in the thresholds of the three elevator cabs. The \$8,530 awarded by the jury was without warrant under the facts or under the law. Defendant did not prevent plaintiff from making a deal with Utah Hotel Company to get plaintiff’s nameplates in the cabs. The Utah Hotel Company did not allow defendant nor anyone else to have any nameplates in the cabs. Kimball was not the manufacturer of any of the equipment, but defendant was the manufacturer of some of the important parts of the equipment in the modernization, and there would have been some reason for defendant to have its own nameplates there if the hotel had permitted nameplates. The old thresholds with the nameplates had to be removed along with the old cabs. The hotel management selected thresholds for the new cabs, which were blank. The hotel refused to allow any name in the cab except the name of the cab manufacturer, “Tyler”, in small letters on the capacity plates in the cabs. (R. 249, 259-260, 834-835).

There is not the slightest competent evidence that Utah Hotel Company would have allowed Kimball, which manufactured none of the major equipment, to have put

its nameplates in the elevator cabs, even if by some miracle Kimball could have regained the confidence of the hotel management and submitted an acceptable proposal, and have been awarded the contract. The bid which plaintiff submitted, Exhibit "I", does not mention the subject. Mr. Connole admitted that the subject of nameplates had never been discussed by plaintiff with the hotel management. (R. 586-587, 650). There was no competent evidence from which the jury could "find" that the hotel would have tolerated plaintiff's nameplates.

In submitting the case to the jury, the court utterly disregarded the absolute right of Utah Hotel Company as owner of the property to refuse anyone permission to advertise. Defendant did not make that decision, and defendant did not prevent plaintiff from making some kind of a deal with the hotel company to have plaintiff's nameplates in the cabs. It was a violation of a fundamental rule of liability to invite the jury to recover damages against the defendant for the decision of Utah Hotel Company, when defendant was not responsible for that decision. Inasmuch as defendant, as manufacturer of some of the important equipment which went into the modernization, could not get permission from the hotel to install its nameplates, no person of ordinary intelligence could arrive at any conclusion rationally that plaintiff could have obtained permission when plaintiff was not a manufacturer of any of the equipment.

The Utah Hotel Company, notwithstanding the refusal of the trial court to so instruct, had the absolute

right as the owner of the property, to refuse to permit installation of nameplates. There is no evidence that plaintiff would have been accorded some special privilege. There is a definite reason why the hotel would not have allowed Kimball to install its nameplates. The nameplate is supposed to be the *manufacturer's* nameplate, and Kimball could not possibly qualify. Emerson S. Smith, called by plaintiff as an "advertising expert" who admitted that he was not qualified in the elevator field (R. 566), admitted that the purpose of the nameplate is to *identify the manufacturer*. (R. 557). Mr. Connole testified that it is a practice of the manufacturer to install its nameplate on the machine or on the cabs of the elevator. (R. 649). He admitted that Kimball had to obtain *permission* in the cases where it did install its nameplates.

The award of damages was predicated on the loss of advertising value of having a *manufacturer's nameplate* in the elevator cabs. (R. 560-561, 563). The testimony as to "damages" for not having Kimball's nameplates in the cabs was incompetent, for Kimball's nameplates could not possibly be manufacturer's nameplates. One who has a contract to install manufactured equipment, is not the manufacturer. Mr. Emerson S. Smith was not qualified to give an opinion. He gave an opinion as to *manufacturer's nameplates*, which was irrelevant. He had been in the elevator cabs on many occasions, but he never paid any attention to whether there were any nameplates in the thresholds of the cabs. (R. 558). Until he made the inspection for the purpose of testifying, he

was not aware of the absence of nameplates. Although he saw a name on the capacity-plate, he had no recollection as to the particular name. (R. 560). Yet, he tried to say that the general public who are not advertising conscious and not "experts", would observe what he failed to observe. The court erred in refusing to strike such ridiculous testimony of a man who admitted he was not qualified in the elevator field.

Kimball Elevator Company was not the manufacturer of any of the equipment constituting the elevators. The hoisting machines were manufactured by Ideal Electric Company. The power control relays are General Electric, assembled by Pacific Elevator and Equipment Company. The oil buffers were made by Pacific. The signal controls and door operators and accessories, were manufactured by Elevator Supplies Company, Inc., the defendant. The cabs were manufactured by Tyler Cab Company. The car safeties were manufactured by Kimball Brothers, of Council Bluffs, Iowa. Utah Hotel Company would not allow any nameplates of defendant or of anyone else in the thresholds of the elevator cabs, because five manufacturers were involved. (R. 833-834).

To have placed "Kimball Elevator Co." nameplates in the cabs, would have falsely advertised plaintiff as the manufacturer of that which it did not and does not manufacture. Such nameplates would constitute an unlawful mislabeling. Plaintiff could not lawfully advertise in any manner without permission of the owner; and Utah Hotel Company refused consent to those who asked,

and plaintiff did not even presume to ask for a permission which would be refused. A person who is not the manufacturer, cannot rightfully claim to be damaged by not having a manufacturer's nameplate on something which he has never manufactured. *It would have been unlawful, as an unfair trade practice, for Kimball to have placed its nameplates in the elevator cabs.* It was prejudicial error for the court to advise the jury that damages could be recovered against defendant, when the *owner* did not permit such advertising, and when plaintiff would have been guilty of false advertising by using such false labels.

Section 13-2-11, U. C. A. 1953, declares that "Unfair methods of competition or trade are declared unlawful." The state statute is substantially the same as the federal statute. This case involves equipment sold and shipped in interstate commerce, so that the federal statute would be applicable, 15 U. S. C. A. Secs. 41-45. False and misleading labels constitute unfair methods of competition which are declared unlawful. In *Federal Trade Commission v. Army & Navy Trading Co.*, 88 F. 2d 776, it was held that false and misleading representations as to the origin of a commodity or as to its nature or quality constitute an unfair method of competition. In *Ditz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, the court declared that the mere fact that an expert would not be deceived is immaterial, and that the important criterion in determining whether a product is falsely mislabeled or advertised is the net impression

which the advertisement is likely to make upon the general public.

If Kimball could have had its nameplates in the elevators, it would have falsely advertised that it was the manufacturer of the equipment which it does not manufacture. Inasmuch as such conduct would be *unlawful*, plaintiff cannot claim to be damaged by being “prevented” from doing that which it had no legal right to do. Obviously, no claim could be asserted against defendant in any event, for the hotel company as owner did not allow any nameplates in the cabs.

The plaintiff could not have obtained an award of the contract. It could not have made a profit, and it could not have had any right to put its nameplates in the elevator cabs. There could be no basis for any “damages”. The claims of plaintiff were unfounded. Plaintiff was not entitled to recover any sum or amount. The court erred in refusing to enter judgment in accordance with the motion of defendant for a directed verdict of “no cause of action.”

POINT 7.

THERE WAS NO PROOF OF LEGAL CONSIDERATION.

Plaintiff proved that it devised a scheme to get something for nothing. Plaintiff did not merely fail to prove legal consideration, but actually produced evidence that there was no consideration. When plaintiff learned

that defendant was awarded the contracts, plaintiff tried to get a "cut out of the job", by demanding a "commission". Plaintiff admitted that defendant had not promised plaintiff a "cut out of the job", nor made any other promises in the event defendant was awarded the contracts. There can be no question about the fact that plaintiff tried to *shake down* the successful bidder. Plaintiff admittedly did not stop there, but tried to induce Utah Hotel Company to cancel its contract with defendant on the elevator modernization and to award the contract to plaintiff. In such attempt, the plaintiff again resorted to false representations.

The law has never countenanced schemes to get something for nothing, either by outright false representations, or by agreements induced without consideration. It is elementary that an agreement is invalid if not supported by a legal and valuable consideration.

The trial judge did not require the plaintiff to specify what consideration, if any, plaintiff claimed for the purported "agreement not to compete with plaintiff." The so-called "issue" recited in the pre-trial order, failed to state a cause of action, for want of consideration, as discussed under Point 2 (A), as well as for the reason that such an "agreement" would have been illegal and void under the Sherman Act, whether express or implied.

No evidence was produced by plaintiff which even slightly resembles consideration as that term has been defined in the cases and in text-books. The numerous

requests for bids could not constitute either offers or consideration. As pointed out in 1 *Williston on Contracts*, Sec. 31, page 74, an advertisement for bids "is not itself an offer, but the bid or tender is an offer which creates no rights until accepted." Nor could the unaccepted offers from defendant in response to requests for bids, imply a promise not to compete, for without acceptance there could be no contract.

Neither a promise to refrain from competition, nor consideration, could be implied from a group of unaccepted offers and other negotiations which terminated prior to May 11, 1950. Disregarding (for purposes of illustration) the fact that plaintiff obtained the bid dated June 14, 1950, from defendant by falsely representing to defendant that Hotel Utah was going to award the job to plaintiff, that bid was merely an offer which never resulted in any contract because it was never accepted. Furthermore, defendant withdrew said offer by letter dated September 8, 1950. No contract, express or implied, could possibly have resulted from such unaccepted withdrawn offer.

In the light of specifications required by Utah Hotel Company, defendant submitted two new bids to plaintiff dated September 11, 1950. One was on the elevator modernization, and one was on the dumb-waiters. Plaintiff did not give any consideration for those two new offers. In fact, plaintiff did not even request defendant to submit either of those two bids. Those new bids were not presented to plaintiff until *after* defendant had

already submitted its two bids to Utah Hotel Company. It would have been impossible for defendant in presenting the new bids to plaintiff, to have "impliedly promised" plaintiff that it would not give any good faith bids to Utah Hotel Company when defendant had already given such bids to the hotel company. Plaintiff did not and could not show any possible consideration for its claim of an "implied agreement" for defendant to refrain from doing business with its own customer, Utah Hotel Company. The authorities cited under Point 2 (A) are applicable here.

The court could not make a contract for the parties. Neither could the court lawfully dispense with proof of a legal consideration. There was not only a want of proof of any consideration, but affirmative evidence that there was no consideration. Consequently there was no proof of a contract. The court erred prejudicially in failing to grant the motion of defendant for a directed verdict of no cause of action. Due process of law prohibits entering a judgment on a purported contract when there is no evidence that the alleged contract ever existed. The law in America requires consideration for agreements. The attempt to recover on a pretended "implied agreement" for which there could be no conceivable consideration, is a scheme to get something for nothing which is not countenanced under the law. The courts cannot be permitted to be used as instruments to foster schemes to get something for nothing.

POINT 8.

THE TRIAL COURT DEPRIVED DEFENDANT OF BASIC RIGHTS, BY INJECTING FICTITIOUS ISSUES INTO THE CASE; BY PREJUDICIAL COMMENTS ON EVIDENCE; BY RECEIVING INADMISSIBLE EVIDENCE; BY EXCLUDING COMPETENT EVIDENCE OF DEFENDANT; AND BY REJECTING A NUMBER OF DEFENSES.

From the inception of the trial, the court permitted plaintiff to present incompetent, irrelevant and immaterial evidence over repeated objections of defendant. Some of the objectionable evidence consisted of testimony of purported negotiations on other projects which had terminated, transactions not even involving defendant, and requests for bids on other projects and numerous unaccepted offers. Mr. Connole was allowed to comment on such unsuccessful negotiations which had faded into oblivion, as "contracts" and as "business association". Objections of defendant were overruled persistently. (R. 268, 269, 271, 276, 279, 283). Finally, the court allowed defendant a continuing objection to all evidence not relating to the Hotel Utah modernization projects. (R. 283).

Defendant objected to most of the exhibits offered by plaintiff, inasmuch as they had nothing whatsoever to do with the Hotel Utah projects. Most of them consisted of negotiations on other projects which had terminated, written offers which had expired, and corres-

pondence having no bearing on plaintiff's claims. Defendant did not object to Exhibits A, F, I, J, L, 2-G, 2-P, 2-S, 3-D, 3-F to 3-L, 3-N, 3-O, 3-Q, 3-X, 3-Z, 4-A, 4-C to 4-I. The remainder of the exhibits offered by plaintiff were challenged as incompetent, irrelevant and immaterial, and they could not serve any purpose other than to mislead and confuse the jury. The court even allowed Mr. Connole to comment on the instruments. (R. 295-296). Defendant objected in vain to testimony as to negotiations. (R. 297). Defendant also objected to evidence of transactions to which defendant was not a party. (R. 299). The court opened the gates to a flood of hearsay.

The court repeatedly injected into the case fictitious issues. Mr. Connole admitted that the jobs on which plaintiff and Murphy Elevator Company had obtained bids from defendant, never materialized. (R. 500). When defendant sought to bring out admissions that those negotiations did not result in any purchase order nor any other contract with defendant, and that the exhibits which defendant had objected to were *unaccepted offers* which never became contracts, the trial judge cut off cross-examination with the declaration:

“It doesn't make any difference. The complaint is, the contract breached was not a contract to install, but a *preliminary contract of the negotiations*.” (R. 503).

The court opened the door to the wildest speculation that defendant could be liable on some theory of “breach of preliminary contract of negotiations.”

Negotiations for a contract never executed are not competent evidence. Negotiations do not constitute a contract at all. The assertion of the court was utterly contrary to the law, and falsely inferred that defendant was liable without a valid contract involving the essentials of mutual assent, consideration, and legal subject-matter. The statement of the court was a prejudicial comment on the incompetent evidence, which amounted to saying that negotiations which had terminated and unaccepted written offers which had expired, might constitute a "preliminary contract of negotiations."

The trial court also permitted plaintiff to introduce evidence that defendant was a subcontractor for plaintiff on a limited portion of the Park Building job in 1950, then repeatedly made unwarranted comments about the "relationship of contractor and subcontractor", which were highly prejudicial. *There was no connection whatsoever between the Park Building job and the Hotel Utah projects.* The relationship of contractor and subcontractor did not extend beyond the Park Building job. No such relationship came into existence with respect to Hotel Utah projects, for the simple reason that there was no acceptance of any proposal made by defendant and hence no contract. The court injected another false issue into the case in limiting cross-examination by counsel for defendant (R. 506):

"I am going to limit you, the same as I said at noon, to the issue of whether the defendant was a subcontractor for the plaintiff."

The so-called "issue" was patently false, for with respect to the Hotel Utah projects, it was impossible for defendant to be a subcontractor for plaintiff when defendant's proposals to plaintiff were never accepted, and there was no contract between the plaintiff and defendant. The court also made a highly prejudicial misstatement concerning the incompetent evidence which plaintiff had introduced, by saying that "Most of the evidence was, they were the original contractor and subcontractor." (R. 506). Inasmuch as the bids had not been accepted, and had expired, no such purported contractual relationship ever came into existence. The jury was advised by the court, that there was a contractual relationship when none in fact had come into being.

Section 38-1-2, U. C. A. 1953, defines "Contractors and Subcontractors":

"Whoever shall do work or furnish materials by *contract*, express or implied, with the owner, as in this chapter provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors." (Italics added.)

The defendant certainly had a right to show that the bids were not accepted, that no contract came into existence, and that defendant had not become a subcontractor in the numerous cases referred to by plaintiff as "contracts". The evidence did not even show that the plaintiff had always bid as a proposed original contractor; and inasmuch as some of the bids were to general contractors, plaintiff would have been a subcontractor in

those cases if its bids had been accepted. In a number of the cases, plaintiff acted as agent for Murphy Elevator Company, and plaintiff was not even the bidder.

The court also erroneously sustained objections to questions designed to show that defendant never refused to submit bona fide bids to any persons requesting bids. The purported ground for such adverse ruling was another invalid "issue" that it was *plaintiff's theory* that defendant had never made any contract as an *original contractor* in Utah prior to submission of two bids by defendant to Utah Hotel Company in 1950. (R. 844-845). Such "issue" echoed the spirit of regimentation which characterized the feudalistic age. Such claim was not even embodied in the pre-trial order. (R. 62-63). It was asserted by plaintiff as a smoke-screen to obscure the fact that there was no contract of any kind between plaintiff and defendant with respect to Hotel Utah. The claim would have been immaterial if it had been true, but *plaintiff's own evidence proved that such contention was false*. In 1948, 1949 and the early part of 1950 the defendant was an *original contractor* with Utah Hotel Company, the owner of Hotel Utah, for defendant sold materials to the hotel company for the repair of the passenger elevators, Exhibit 3. (R. 243-244, 770-771).

It was stipulated at the trial, "that prior to September 11, 1950, the defendant corporation, Elevator Supplies Company, had not in Utah, Idaho or Montana, ever bid as a prospective original contractor, as to any elevator supplies or equipment, except on . . . the sale

of elevator parts and equipment, as manufactured by the said Elevator Supplies Company, in case of sale of parts a uniform discount of 10% off list or quotations, was always allowed to all elevator contractors, but no discount was allowed to other purchasers. With regard to quotations on signal control, synchron control, collective and duplex collective control, it is further stipulated that the defendant, Elevator Supplies Company did not quote exclusively to the plaintiff, Kimball Elevator Company, but that all quotations on such equipment by the defendant, Elevator Supplies Company, were made exclusively to original elevator contractors.” (R. 858).

The fact that prior to September 11, 1950, defendant had not bid as a prospective original contractor *except on materials which it manufactured*, did not imply a promise to plaintiff nor to any other elevator company nor to anyone else that defendant would not in the future include in its bids any materials manufactured by others. Likewise, the fact that prior to September 11, 1950, defendant had given bids on signal control, synchron control, and other types of controls only to elevator contractors, did not and could not imply a promise to anyone that in the future defendant would refrain from quoting to owners of buildings or persons other than elevator contractors.

Plaintiff’s evidence shows that defendant was an original contractor with Utah Hotel Company in 1948,

1949 and the early part of 1950; but even if that had not been the case, and even if in 1949 and in the early part of 1950 the defendant had restricted its operations to that of a subcontractor in Utah, such a policy would not have prevented defendant from altering that policy later on in 1950 if it saw fit to bid as a proposed original contractor. Defendant certainly did not have to get permission from plaintiff nor any other corporation.

The right to contract is guaranteed by the Constitution of Utah, Article I, Section 1: "All men have the inherent and inalienable right . . . to acquire, possess and protect property." Such constitutional right cannot be whittled down by implication, or otherwise. Not even the Legislature can impose restrictions upon such right, except to specify the form in which contracts shall be executed in order to be valid. In the case of *Golding v. Schubach Optical Co.*, 93 Utah 32, 70 P. 2d 871, this Honorable Court held that Article I, Section 1, Constitution of Utah, is infringed when one is deprived of his liberty to contract with others respecting the use to which he may subject his property or employ his talents. If the Legislature cannot deprive an individual of such right, neither can plaintiff nor any other corporation arrogate to itself the power to dictate to defendant how defendant shall contract or with whom it shall contract, or how defendant shall otherwise run its business. The idea that an "implied contract" can be forced onto a person without his consent is contrary to the Bill of Rights.

The court allowed Mr. Connole to assume the attitude of a dictator, by permitting him to make a prejudicial impudent remark by way of conclusion (R. 949):

“Q. Did you at any time, *authorize* Roy Smith to make a *firm bid* to the Hotel Utah?

“MR. REIMANN: Just a moment. I object to that, as calling for a conclusion, which is incompetent, immaterial and irrelevant. He has no authority to speak for defendant.

“MR. BRENNAN: I said, did he authorize?

“THE COURT: The objection is overruled.

“A. I did not.”

In the first place, the plaintiff had no legal right to dictate to defendant. Plaintiff had no legal authority to license defendant to bid as a prospective original contractor nor to prevent defendant from exercising the rights guaranteed by the Constitution. The power to license resides in the State, not in some corporation, nor in Daniel W. Connole. Section 58-6-3, U. C. A. 1953, states that “the term contractor, . . . shall include subcontractor.” Section 58-6-4 provides for issuance of “a license authorizing the applicant to engage in the practice and business of contracting.” Application is made to the State, not to an individual or a corporation. The statute does not regiment a qualified person to the role of subcontractor, even if he never previously operated as an original contractor. A licensee may start the year as a subcontractor and change his methods of business anytime during the year to operate as a general contractor. It is strictly his own business. Many contrac-

tors, by reason of lack of sufficient capital are financially unable to operate as original or "prime" contractors.

In the second place, it was prejudicial error for the trial court to permit Mr. Connole by way of an incompetent impudent conclusion, to interpret his express words of consent to Pacific Elevator and Equipment Company to mean that there was not to be a "firm bid." If the bid were not a firm bid it would necessarily be a collusive or "phoney bid." Mr. Connole admitted that he told Mr. Henker that it was all right for Pacific to submit a bid to defendant. Having used unequivocal language of consent in response to an inquiry of Mr. Henker, Mr. Connole could not later be allowed to interpret his remarks to state that he did not mean what he said. Even if Mr. Connole had not expressly consented, but had merely passively acquiesced in the conduct of Pacific in submission of a firm bid to defendant, plaintiff could not later complain either to Pacific or to defendant. However, the evidence required a finding that plaintiff expressly consented to a bid by Pacific to defendant.

Plaintiff's own witness, Allen E. Mecham, general counsel for the Associated General Contractors, said that "in the construction industry there is free competitive bidding", and he was not aware of any collusive bidding. (R. 667). When Mr. Henker of Pacific Elevator and Equipment Company, was asked by counsel for plaintiff if there is a trade practice in the elevator industry not to bid directly to a customer, he testified that he had "seen it both ways, three ways against the middle . . .

Well, in some of these places they will bid to suppliers, and bid to a customer, and with different figures, and everything else.” (R. 774-775). How they bid is a matter of company policy. Mr. Henker was careful to make it clear that Pacific did *not agree* to refrain from selling to any person.

The trial judge made a prejudicial comment by misstating the evidence in sustaining objections of plaintiff to interrogation of a defense witness (R. 844):

“THE COURT: . . . He admits you had a right to make proposals to other original bidders, and that is embraced in your question, *that is the question at issue*. He does not claim that. The objection that it is immaterial is sustained. In explanation of the court’s ruling on this point, the jury may see it this way: The Pacific Elevator Company might be invited to bid on two original proposals. One might be by the plaintiff and one might be by the defendant, which they were in this case. Now whether they can ethically bid to both is not a problem in this lawsuit, because *the only question here raised is whether the defendant could make an original bid to the hotel Utah after having made a sub-bid—a bid for a sub-contract with the plaintiff*. There could be a question, but it is not in this case because the defendant did not get involved in any offer with any other proposed original contractor.” (Italics added).

In substance the court said that there was an *issue* as to whether the defendant had a right to exercise the privileges guaranteed by the Constitution. The comment “whether they can ethically bid to both”, inferred that

there might be something unethical about the conduct of defendant. The answer to such comment is, that it is always ethical to have free competitive bidding, and not only unethical but criminal to violate the federal and state statutes which prohibit agreements in restraint of competition.

Even if plaintiff did repeatedly assert at the trial that defendant could not become an original contractor (R. 654), there was no occasion for the court to keep repeating such false contention. Defendant had a constitutional right to contract directly with Utah Hotel Company in 1950. Defendant had done so in 1948 and 1949. The hotel company not only had a right to purchase directly from defendant on catalog, but the hotel had a right to request defendant to submit a bid on an installed basis. Defendant did not have to obtain the consent of plaintiff or of any other corporation in order to include in the bid of defendant, materials manufactured by others who were willing to sell to defendant. It was a terrific shock to hear the trial judge infer that defendant could not exercise its constitutional right to contract, unless defendant obtained permission of plaintiff.

Inasmuch as it was conceded that defendant had a right to present a bid to some proposed original contractor other than plaintiff, the claims of plaintiff were obviously fictitious. How could there be an implied agreement to refrain from competing directly with plaintiff, when it is admitted that there was no implied agreement

or any other agreement to refrain from competing with plaintiff by submission of a bid to a competitor of plaintiff who would then bid to the owner?

The repeated statement that there was an "issue" as to whether defendant could bid to Hotel Utah after having submitted a bid on a portion of the work to plaintiff, was also prejudicial and unwarranted in the light of the facts. The original bid obtained by plaintiff from defendant through misrepresentation, was *withdrawn* by defendant by letter dated September 8, 1950. No one can intelligently challenge the right of defendant to withdraw that bid, inasmuch as it had never been accepted. The situation then was as if no bid had been presented to plaintiff, so that even the assertion that defendant presented a bid to Utah Hotel Company after submitting a bid to plaintiff is misleading as well as irrelevant. On September 11, 1950, defendant first presented bids to Utah Hotel Company, then submitted two new bids to plaintiff. The situation at that time was if defendant had *first* submitted bids to Utah Hotel Company. The argument of "implied agreement not to compete with plaintiff", becomes even more ridiculous; for at that time there were already two bids submitted to Utah Hotel Company, defendant's customer, and no rational person could say that defendant "impliedly promised" to refrain from doing the very thing which plaintiff knew defendant had already done.

The court persistently ignored the fundamental reason, independent of the constitutional right to con-

tract, why there can be no legal objection to giving a bid to several different persons. A bid is merely an offer. A request for a bid is not an offer. Until the offer is accepted, there is no contract. In 1 *Williston on Contracts*, Sec. 31, page 74, it is stated:

“Often tenders or bids are advertised for . . . by private corporations. The rules governing such bidding are analogous to the rules governing auction sales. That is, an ordinary advertisement for bids or tenders is not itself an offer, but the bid or tender is an offer which creates no rights until accepted.”

In Section 32, at page 77, the rule is stated that it is possible to make offers to any one “or to every one.” If an offer can be made to an unlimited number of people, it can also be made to specified individuals, and different proposals can be made. Neither cases nor texts can be found which even hint that it is actionable to submit offers to a proposed general contractor and also to the owner. On the other hand, an attempt to prevent the owner from obtaining competitive bids is a fraud on the owner, and a violation of law.

If plaintiff on September 16, 1950, had submitted a new bid to Utah Hotel Company in the light of information received from Pacific and from defendant, and *if* such bid had been in acceptable form and content to satisfy Utah Hotel Company, and *if* plaintiff had been able to regain the confidence of the hotel company which plaintiff had lost, and *if* Utah Hotel Company had accepted plaintiff's bids instead of the bids of defendant,

Utah Hotel Company would not have accepted the bids of defendant. In that situation, defendant would not have accepted the bid from Pacific. Plaintiff might have accepted the bids from both Pacific and from defendant. It was no more possible for both plaintiff and defendant to accept the bids from Pacific, than it was for Utah Hotel Company to accept the over-all bids from both defendant and plaintiff (assuming that plaintiff had submitted a new bid which was free from the objections which caused rejection of the original bid of August 16, 1950). The hotel company having accepted the bids of defendant, defendant accepted the bid from Pacific (which was a vastly different bid from the one presented by Pacific to plaintiff). The plaintiff not being awarded the contract would not in any event accept the bid submitted by defendant. There could be no possibility of breach of contract by submission of bids to both a proposed original contractor and to the owner, for there can be no contract until or unless there is acceptance of an offer. Only one of the offers submitted by defendant could possibly be accepted on one project.

The trial court erred in restricting cross-examination. Such cross-examination was obviously designed to demonstrate the falsity of the claims and conclusions asserted by plaintiff over objections of defendant.

The court erroneously refused to allow defendant to show actual costs of the job, even after the court had permitted Mr. Connoles to give estimates of what he

thought the cost should have been. (R. 897-899). The court then made the unwarranted comment (R. 899):

“The only question there is what bid could have been obtained to determine whether the plaintiff had a loss as a result of not getting a contract.”

The statement of the court inferred that plaintiff was entitled to recover because plaintiff did not obtain a contract. By such prejudicial comment, the court erroneously denied defendant the right to show actual costs of doing the job. Actual costs would be competent in any event, as an appropriate criterion for determining whether plaintiff could possibly have made any profit if it had been awarded the job. The idea that plaintiff could rely on “estimates” of costs which excluded many of the items of expense, is patently absurd. Also, the assertion of the court that it would be necessary to show bids from someone other than defendant, (which would be utterly impossible), ignores the basic rule that profit is the margin of return over and above costs.

The court erred in allowing Mr. Connole to comment on, interpret, and contradict the written instruments. He was even permitted to call the bid dated August 16, 1950, Exhibit “I”, a “contract” although the instrument was entirely unsatisfactory to Utah Hotel Company and was rejected. (R. 385-388). His testimony was also objectionable because he tried to vary the instrument by parole, by saying that various items not mentioned in the proposal “were figured in our original contract.” (R. 385-386).

Mr. Connole was allowed to contradict some of the testimony of Mr. Carpenter, who had been called to testify by plaintiff. (R. 390-393). Such testimony of Mr. Connole was clearly hearsay. He was permitted by the court to make prejudicial hearsay remarks as to what he allegedly said to Mr. Carpenter, such as “my commission for handling was all in the original contract”, knowing very well there was no contract. (R. 392). The court also erred prejudicially in allowing Mr. Connole to testify as to purported conversations with Mr. Carpenter and with Mr. Jerry Smith, of Hotel Utah. (R. 369-373).

The court arbitrarily ruled out a number of defenses. One was the defense of illegality of the purported contract alleged in the amended complaint, and the defense of illegality to the pretended “agreement not to compete” recited in the pre-trial order. (R. 63).

The court ruled out the defense of lack of authority of any officer or agent of defendant to enter into any agreement to refrain from competition. (R. 25, 58-59).

The trial judge sustained an objection to questions on cross-examination which would demonstrate that Mr. Connole acted in bad faith in demanding a “commission” on September 27, 1950. Defendant asked whether plaintiff had received any money, check or bank draft. (R. 605). Plaintiff well-knew that the only basis of dealing had been purchasing from defendant at a discount, on the same basis as other elevator companies.

By repeatedly restraining cross-examination which demonstrated that the claims of plaintiff constituted subterfuge, the defendant was deprived of further admissions from plaintiff.

If the trial court had ruled correctly, instead of the way it did rule on objections of defendant, the case would have been dismissed with prejudice.

POINT 9.

THE COURT MISDIRECTED THE JURY PREJUDICIALLY BOTH AS TO THE LAW AND AS TO THE EVIDENCE, AND THE COURT ALSO WITHHELD FROM THE JURY VARIOUS THEORIES OF DEFENSE BY REFUSING TO GIVE APPROPRIATE INSTRUCTIONS.

The trial court should have directed a verdict against the plaintiff. The claims of plaintiff are contrary to law. Plaintiff failed to prove any agreement or any breach of contract.

In submitting the case to the jury, the court substantially deprived defendant of its defenses, by contradicting the evidence, by disregarding the express stipulations of the parties, and by ignoring the admissions of plaintiff. The court also refused to present to the jury by appropriate instruction, the defenses established by the evidence. Defendant duly excepted to the erroneous instructions given, and also excepted to the refusal of the trial judge to give 28 separate instructions which

had been timely requested by defendant. (R. 111-131, 157-189, 966-971).

Defendant excepted to the last four lines of Instruction No. 1 inasmuch as there was no evidence of any implied contract, nor any circumstantial evidence that the parties intended to make a contract such as claimed by plaintiff. Defendant excepted to Instruction No. 2 for the same reason. (R. 112-113). Instruction No. 2-a, was vicious, for there was not only a lack of competent evidence of any agreement between the parties to prevent defendant from submitting a bid to Utah Hotel Company, but the instruction was in defiance of the federal and state statutes which make any such purported agreements illegal (R. 114):

“... If you shall believe from all the evidence in this cause as to the actions, conduct and manner of doing business between the parties that both the plaintiff and defendant understood and agreed that the defendant company could not contract directly with a customer to whom plaintiff had already submitted a bid for sale or use of defendant's equipment, such agreement, if any, although not in writing would be binding between the parties.”

The instruction disregards the admissions and stipulations which show that defendant quoted plaintiff on the same basis as other elevator companies. The instruction is contrary to law for the reason previously indicated, that unaccepted offers cannot impliedly create a contract; and even in the few instances where contracts were actually made, they were specific, express and in

writing, and left no room for any implications. Also, the execution and performance of a specific contract in the past, does not constitute any implied agreement to enter into a similar contract in the future, nor to limit activities in the future. The instruction also permitted the jury to construe written instruments, which is not a function of the jury. The trial court had no authority to delegate such function to the jury. The trial judge could not have lawfully construed a group of expired unaccepted offers and negotiations which had terminated, as an implied contract not to compete. The instruction was in defiance of the Bill of Rights.

Instruction No. 5 contains the same vices as No. 2 a, and more. (R. 120). Among the objectional features of said instruction were the following:

“The plaintiff says that an understanding had developed from the nature of their business, their locations, their past dealings with each other, and all of the facts up to the submission of the defendant’s bid to the plaintiff.

“The plaintiff says that the implied understanding was that they were acting as follows: When the plaintiff had asked the defendant for a bid, and after the defendant had responded with a bid, that the defendant would not compete with the plaintiff in any way for the original contract.”

The instruction fails to show a valid agreement for want of consideration, and the statement of the claim is void on its face. Furthermore, the court ignored the fact that the original bid of June 14, 1950, obtained by false representations by plaintiff, was *withdrawn* Sep-

tember 8, 1950. The court failed and refused to state the defenses of defendant, but merely stated, "The defendant says there was no such understanding." The statement is false, for defendant denied that there was any agreement whatsoever, and the court inferred that there was some other kind of "understanding". The mere assertion that "Defendant also says that the defendant was free to bid for an original contract", was not a fair nor an adequate statement of the defendant's position, for defendant claimed that plaintiff's conduct was not in good faith in that the plaintiff was guilty of misrepresentation.

Instruction No. 5-a disregarded the admissions of plaintiff, the undisputed evidence and the stipulations of counsel, and authorized the jury to disregard those matters (R. 121):

"Plaintiff has introduced evidence to show that the plaintiff did not invite other companies to compete with the defendant on certain products, and that the plaintiff used said certain products of the defendant exclusively."

Such statement was utterly contrary to plaintiff's own evidence, which showed that plaintiff never did use defendant's products exclusively, and particularly never at any time purchased any dumb-waiters, relay controls of any of the modern types, and that plaintiff took orders on such items from companies other than defendant, as previously pointed out in argument of Point 3. Counsel for plaintiff stipulated that defendant did not deal exclusively with plaintiff, and also that plaintiff

purchased from others the type of equipment which defendant manufactures, which completely precluded any such instruction. The plaintiff's evidence did not at any time show that the dealings were exclusive, and the charge to the jury of exclusive dealings was absolutely contrary to the evidence. The court had no right to contradict the admissions of plaintiff and the stipulations of counsel which clearly showed that there were no exclusive dealings.

The court further attempted to delegate to the jury the privilege of construing the written negotiations as amounting to an implied contract, when the court would have been compelled by the fundamental rules of law to charge that those instruments did not imply any such agreement as contended by plaintiff. The instruction stated, "You may consider the conduct of the parties whatever you find it to have been, in determining whether or not there was an implied agreement to the effect that the defendant would not compete against the plaintiff." (R. 121). The court told the jury it could find anything, as it refused to give the jury instructions in accordance with the stipulation of the parties or the admissions of plaintiff. The court attempted to license the jury to construe written negotiations and unaccepted offers which had expired as an implied agreement not to compete. Neither the court nor the jury had any such right.

The court's instruction No. 5-b that such an agreement would have been legal and valid and not against public policy, was contrary to the express provisions of the Sherman Act, and also other federal and state legis-

lation discussed under Points 1 and 2. The first line of No. 5-c was objectionable for the same reason.

Instruction No. 6 was wholly unwarranted, and prejudicial for the reason that there was neither evidence of a “general implied agreement not to compete with plaintiff”, nor “an implied agreement not to compete for the Hotel Utah job”. That instruction was particularly vicious in opening two avenues of conjecture, without competent evidence (R. 124):

“If you find from the dealings of the parties generally, and independent of the negotiations for the Hotel Utah job, that an implied agreement not to compete existed between the plaintiff and the defendant, then you should find in favor of the plaintiff unless plaintiff waived that agreement.”

It would be impossible to make out an implied agreement generally when the matter was never discussed, and in 20 years defendant had been awarded only seven contracts, each by way of written acceptance of written bid; and the evidence showed that defendant did not deal with plaintiff on any different basis than any other elevator company. There was no proof of any consideration, nor any other essential elements of a contract. The court also opened an alternate avenue for the wildest sort of conjecture (R. 124):

“If you find that there was no implied general agreement, but that there was an implied agreement not to compete for the Hotel Utah job, then you should find for the plaintiff unless it was waived by the plaintiff or unless the plaintiff in-

duced the implied agreement by a misrepresentation as explained hereafter.”

The evidence required a finding that plaintiff recognized the right of defendant to make a bid to Utah Hotel Company and the right of Utah Hotel Company to obtain a firm bid from defendant, for the plaintiff tried to talk Utah Hotel Company out of getting a bid from defendant and plaintiff made no claim that defendant was precluded from giving a bid, and plaintiff expressly told Mr. Henker that it was all right for Pacific Elevator and Equipment Company to submit a bid to defendant, which would destroy the claim that there was in existence at that time any “implied agreement not to compete.” Furthermore, the original bid of defendant to plaintiff, which was obtained by false representations was withdrawn on September 8, 1950, there having been no acceptance. The bid submitted thereafter was junior to the bid submitted by defendant to Hotel Utah. The jury was told that it could find from the evidence an agreement which never existed, and that if it “found” such an “agreement” the plaintiff was entitled to recover, falsely inferring that defendant violated some contractual right of plaintiff when no such contractual right had ever existed or could have existed under the law.

By the second paragraph of Instruction No. 7 the court charged (R. 127):

“The defendant has the burden to prove that the plaintiff acquiesced in the defendant’s giving a competitive bid to the Hotel Utah, and that the plaintiff induced the defendant to agree not to

compete by a misrepresentation, if such an agreement existed.”

A party never has a burden to prove anything which his adversary has already proved beyond a reasonable doubt. In this case the plaintiff admitted making the false representations. The plaintiff also admitted telling Mr. Henker that it was all right for Pacific to give defendant a bid; so that defendant had no burden whatsoever to prove the very things which the plaintiff confessed. The court had no right to invite the jury to speculate as to whether Mr. Connole meant what he said when he told Pacific that it was all right to submit a bid to defendant, knowing that defendant was going to use the bid from Pacific to arrive at a proper bid to submit to Utah Hotel Company. The court might just as well have told the jury that plaintiff admitted those things, but the jury could disregard the admissions of the plaintiff on the theory that defendant had the burden of proving them, and what the plaintiff unequivocally admitted or stipulated to be the facts would not count.

Instruction No. 11 related to the award of damages. There was no evidence that plaintiff could have obtained an award of the contract. The court charged *inter alia* (R. 128):

“If you find for the plaintiff then you are to award plaintiff the damages that resulted from the defendant’s breach of contract. In such an event the plaintiff would be entitled to the profit that plaintiff would have made on the contract with the Hotel Utah, and that amount cannot exceed \$12,899.08.”

There was no contract and no possible “breach of contract.” There was no proof of any damages. As pointed out under Point 6, there was no competent evidence that plaintiff could have made a cent of profit. Mr. Connole first testified that he figured the job “low” by computing only the items which would be the actual costs. When he sprang Exhibit SSS which had been concocted after this suit started, it was apparent that to arrive at the figure of \$12,899.08 he had willfully omitted at least \$15,000 of actual costs.

The court further instructed (R. 128):

“The verdict may also include the loss of advertising that would have gone to the plaintiff, if any, had the plaintiff had the original contract. Such loss would include the observations that passengers might be able to make of the sign that plaintiff could have and would have lawfully maintained on the elevator cabs.

“The amount that plaintiff would be entitled to for the use of signs in the elevator cabs, and for not being able to point out the Hotel Utah as one of its installations, cannot exceed the amount of \$1,000 per year, discounted for payment in advance . . .”

The last quoted portions of Instruction No. 11 are objectionable by inferring, contrary to the evidence, that plaintiff would have been able to put its signs in the elevator cabs lawfully. The evidence is undisputed that Utah Hotel Company as owner of the property did not and would not consent to any nameplates in the thresholds of the cabs. If plaintiff, by some miracle, had

been able to obtain an award of the contract, and had put its nameplates in the cabs to falsely advertise itself as the manufacturer, Utah Hotel Company could and would have ripped them out of the cabs. There is no evidence that the nameplates would have remained in the cabs for even 24 hours, even if the plaintiff could have installed them without Utah Hotel Company knowing about it.

There never was any permission to advertise, and plaintiff could not have been damaged. It would have been unlawful as an unfair trade practice for plaintiff to have advertised itself as the manufacturer of that which it did not and does not manufacture. A person cannot be heard to say he was damaged by being prevented from doing an unlawful act, or even prevented from doing that which he had not obtained the right to do. The evidence of damage related to loss of privilege of placing the manufacturer's nameplates in the cabs. The plaintiff could not possibly qualify as a manufacturer. The instruction further *assumes* that defendant would be *liable for the decision made by Hotel Utah*.

The court violated fundamental rules by refusing to give instructions on the theories of defendant as to the defenses asserted. Out of requests for instructions numbered 1 to 37 inclusive, the court refused to give any of that list except 1, 6, 15, 16, 20, 21, 35, 36 and 37 in whole or in part. This Honorable Court held in *Webb v. Snow*, 102 Utah 435, 132 P. 2d 114, that a party is entitled to have his theory submitted to the jury by appropriate

instructions, when there is evidence to sustain it. The trial court erred in its refusal to give each of the requested instructions, inasmuch as correct statements of law are embodied in such requested instructions, and there was more than ample evidence to warrant such instructions.

By request No. 2, the court was requested to charge that in order to have a contract implied by conduct, all of the elements of a valid contract must exist, including a meeting of the minds to do that which is lawful, and also consideration. (R. 157). The defendant was inexorably right in request No. 4 (R. 159):

“The fact that the parties have entered into a particular contract or agreement in the past, by express written terms, does not imply that the parties will continue to make contracts of such character in the future. In other words, where there is a written agreement between the parties on a particular date whereby one party contracts to do a particular job for the other party, that fact does not imply that a similar transaction will be entered into thereafter. Such written contract and the performance under it is not to be construed as conduct which implies some other agreement, in the absence of language in such instrument which indicates that the parties contemplate performance in addition to that which is expressly stated in the written agreement.”

See *Donovan v. McGurrin*, 69 Utah 1, 251 P. 1067, 17 C. J. S., Contracts, Implied Terms, pages 779-780, and *Johnson v. Iglehart Bros.*, 95 F. 2d 4. Likewise, it was prejudicial error to fail to give request No. 5:

“You are instructed that it is the duty of the court to construe the written instruments. In this case, none of the written instruments nor the performance required under any of said written instruments, show any intention on the part of the defendant to agree to refrain from submitting a bid to any other person. Furthermore, you are instructed that in a number of instances, the defendant submitted written bids on the same job or project to plaintiff and to one or more other companies.

“Neither the request of plaintiff to defendant, dated May 11, 1950, to submit a bid on a portion of the modernization of the passenger elevators at Hotel Utah, nor the proposal by defendant dated June 14, 1950, to the plaintiff, nor the written proposal made to plaintiff by defendant dated September 11, 1950, can be construed in any manner as an agreement on the part of defendant to refrain from submitting to management of Utah Hotel Company a bid on the entire modernization project.”

The court had a duty to construe the written instruments, and it had no authority to delegate that function to the jury. The request of defendant was proper, for there could be no other construction of the written instruments.

Defendant was entitled to have submitted request No. 7: “The fact that defendant had submitted to plaintiff a proposal covering a portion of the modernization project, did not make it wrongful for defendant to submit to Utah Hotel Company upon invitation of Utah Hotel Company a proposal covering the entire modernization

project.” The hotel had been a customer for over two years, and the hotel had a right to receive a firm bid from defendant, and a right not to receive a misleading or collusive bid. Likewise, defendant was entitled to have request No. 8 granted (R. 163), particularly in view of the prejudicial comments of the court on the evidence:

“You are instructed that the mere fact that defendant had not previously bid as a prime contractor in the State of Utah, did not require defendant to obtain the consent of the plaintiff or any other elevator company, in order to submit a bid to Utah Hotel Company as a proposed prime contractor. The term “prime contractor” means one who undertakes to perform the entire construction project, as distinguished from a “subcontractor” who merely performs a portion of such project.”

By the court’s refusal to give such instruction, the court inferred again that defendant had no right to exercise its constitutional right to enter into contract.

By request No. 9 the defendant asked the court to charge the jury that every contract in restraint of trade or commerce is illegal if such contract prevents competition and tends toward monopoly. The court gave an instruction directly contrary to law. The substance of defendant’s request was included in the motion for a directed verdict. Request No. 10 was, “An agreement or promise not to bid for the award of a contract, having as its primary object the stifling of competition, is illegal.” That request was taken from the Restatement of Law, Contracts, Sec. 517. There could be no dispute

about the fact that plaintiff sought to prevent competition. Defendant was entitled to directed verdict, and it was error for the court to refuse to follow the law.

By request No. 11 the court was asked to charge that if the plaintiff procured a quotation from defendant on the false representation that plaintiff would be the only bidder on the job, the jury should find against the plaintiff. A person cannot enforce a fraudulent claim.

By request No. 12, defendant appropriately asked that the jury be instructed that if plaintiff failed to submit any further bid within a reasonable time, plaintiff was not acting in good faith with the Utah Hotel Company, and plaintiff cannot complain about acceptance of the request of Utah Hotel Company to defendant to submit a bid on the over-all modernization project. (R. 167). There can be no dispute about the insufficiency and unsatisfactory nature of plaintiff's bid to Utah Hotel Company. By request No. 13, defendant asked that the jury be instructed that defendant is not responsible for the failure of plaintiff to submit a bid to Utah Hotel Company which would be satisfactory to the hotel company. (R. 168). There was no reason for refusing such request.

By request No. 14: "You are instructed that it was the right of the Utah Hotel Company to ask the defendant or any other person to submit bids on the over-all construction project." Such request was proper in law

and in fact. The court ignored the Bill of Rights both from the standpoint of defendant as well as Utah Hotel Company's position. By request No. 17: "The owner of a building is entitled to require the things done it desires done in the remodeling or construction conducted on the owner's premises, and the owner has a right to specify what is to be done and to reject any proposal which does not meet the owner's wishes." Said instruction was properly proposed in view of the contention of defendant that plaintiff failed to obtain the award of the contract because it would not do the things that the hotel wanted, in the past or at that time. The court was arbitrary in refusing each of the requests. The court ignored the defenses which plaintiff had proved.

By request No. 18, the defendant asked the court to instruct the jury as follows (R. 173):

"In this case the plaintiff claims it was damaged by the removal of name-plates from the elevator thresholds. You are instructed that the purpose of such name-plates is to advertise. The owner of a building has the absolute right to determine whether or not any name-plates or any other device shall be made a part of the equipment installed, and the owner has the right to either prohibit the placing of any advertising device on his premises or to remove the same at any time.

"The plaintiff cannot recover damages for the loss of advertising through removal of the name-plates if such name-plates were removed by reason of the fact that the Utah Hotel Company did not want any such name-plates."

The instruction was correct, and it reflects the theory of defendant that Utah Hotel Company had the old name-plates removed, and it did not allow any name-plates in the new cabs. Defendant could not possibly be liable in damages for the acts of the Utah Hotel Company or its decisions not to have name-plates.

The defendant was entitled to have the court give its request No. 19 inasmuch as plaintiff was not a manufacturer, and the placing of name-plates denoting a manufacturer, when Kimball Elevator Company did not manufacture such equipment, would be an unfair trade-practice by false advertising:

“You are instructed that it is an unfair trade practice to place a false or misleading label on any manufactured article or equipment. In this connection you are charged that where a person merely installs equipment manufactured by some other person, the placing of a name-plate or other device upon such equipment in such a manner that it denotes the name of the manufacturer, and not the installer of such equipment, such labeling which falsely denotes the name of a manufacturer is an unfair trade practice.

“You are further instructed that a person who is guilty of an unfair trade practice has no cause of action for the removal of any such device nor for preventing him from continuing such false or misleading labeling.”

The court in denying such request, deprived defendant of a substantial defense. The denial amounted to saying that one who is prevented from falsely advertising, has a cause of action against the person who had

no part in preventing it; for in this case the decision to have blank thresholds was made solely by Utah Hotel Company, as the owner. The court disregarded the rights of the owner, and inferred that Kimball Elevator Company had some special property rights on the premises of Hotel Utah. The refusal of the court to give request No. 22, was also prejudicial (R. 177):

“The Utah Hotel Company is not a party to this action. There is evidence in this case that the old elevator cabs were removed, and new elevator cabs were installed as a part of the modernization project. There is no evidence that the name-plates of the plaintiff which were in the old elevator cabs were installed as safety devices, and the evidence is that they were advertising devices. There is evidence that the old name-plates could not have been used in the new elevator cabs in any event, and that the management of Utah Hotel Company refused to allow any name-plates on the thresholds of the new cabs.

“You are instructed that the Utah Hotel Company was under no legal duty to allow any name-plate or any other advertising device on the threshold of any elevator. You are further instructed that the defendant had no legal right to put a name-plate in such elevator cabs without the consent of the Utah Hotel Company. You are therefore instructed that the defendant is not in any manner liable for the alleged loss of advertising to the plaintiff by reason of the decisions of the Utah Hotel Company.”

Obviously, an owner of property has a right to decide whether a person who wants to advertise shall have his advertising on the premises. The idea that

plaintiff could put its advertising on Hotel Utah premises whether the hotel liked it or not, is un-American. Plaintiff's own witness, Max C. Carpenter stated that the hotel would not allow any such name-plates, and there is no evidence that the hotel was willing to allow any of plaintiff's name-plates to be installed, particularly in view of the fact that plaintiff was not a manufacturer of any of the essential equipment. By request No. 23, which the defendant was entitled to have the court give to the jury, it is stated that plaintiff is not entitled to recover for either the removal of the old name-plates nor for not putting new plates in the new cabs, for the reason that there is no evidence that there was any agreement between the hotel and plaintiff for plaintiff to have such name-plates in the new cabs, nor any evidence that plaintiff paid the hotel money or any other thing of value for name-plates in the new cabs. The instruction requested is strictly in accordance with the record. Plaintiff did not acquire any right to have name-plates in the new cabs, and the claim of loss, was utterly fictitious.

By request No. 24, the defendant asked the jury to be instructed (R. 179) :

“An agreement between parties whereby one party is to submit an additional bid to the owner with the purpose of inducing the owner to believe that there is competitive bidding and that the bid already submitted is a reasonable price for the proposed job, is a collusive agreement and there can be no recovery for any alleged breach of such an agreement.”

Such an instruction was warranted by the statements of Mr. Connole that he wanted defendant to give the hotel a bid which would "justify our price". He knew that the hotel wanted an honest firm bid. While defendant denied that there was such a conversation as claimed by plaintiff, the fact is that the testimony of plaintiff would show that plaintiff sought the presentation of a collusive bid, and no recovery could be had on an agreement of such a character, even if there had been any consideration. There was no consideration and the pretended "agreement" would have been void anyway.

Request No. 25 should have been given because it is quoted from Corbin on Contracts, Sec. 1468, which states that an agreement designed for the suppression of competition is a matter of restraint of trade, and if the bidding relates to a proposed contract with a private individual it is a fraud upon such person and such agreement is unenforceable for it is against public policy to permit a fraud upon an individual or a corporation which seeks competitive bids. The evidence clearly shows that plaintiff was seeking to suppress competition, by deceit and by trying to discourage the hotel from getting a bid from defendant.

Request No. 26 should have been given and it was prejudicial error to refuse it, for the hotel company had a constitutional right to get a bid from defendant, and plaintiff had no right to impede or restrict the bid in any manner (R. 181):

“You are instructed that the Utah Hotel Company as the owner of the property where the modernization of the elevators was contemplated, had the absolute right to request the defendant to submit a firm bid to the Utah Hotel Company and that the plaintiff company had no right to restrict or to place any limitation on the bid to be submitted by the defendant corporation to the Utah Hotel Company.”

The foregoing proposed instruction is so fundamental that a denial of it amounts to a refusal to recognize the Bill of Rights. Likewise, request No. 27 is inexorably right as a statement of law (R. 182):

“An implied contract is one which the law infers from the facts and circumstances of a case, but it will not be inferred in any case where an express contract would for any reason be invalid.”

The “implied contract” theory was designed to circumvent the federal and state statutes which interdict agreements to refrain from selling to a person or class of persons. Request No. 29 is also a correct statement of the law, which defendant was entitled to have the court give to the jury (R. 184):

“You are instructed that if you find from the evidence that Utah Hotel Company requested the defendant corporation to submit a bid in writing on the over-all job, and not a mere estimate, that there could not be any lawfully implied agreement between the plaintiff and defendant for the defendant to refrain from submitting a firm bid to Utah Hotel Company; and that any attempt on the part of the plaintiff to prevent the Utah Hotel Company from getting a good faith bid would

have been fraudulent and in derogation of the rights of Utah Hotel Company, and your verdict must be against the plaintiff and in favor of the defendant, no cause of action.”

Such an instruction would have been generous to plaintiff, since the court erred in not directing a verdict in favor of defendant. Plaintiff did not have any right to interfere with the property rights of Utah Hotel Company, by having any agreement with defendant to refrain from submitting a firm bid to the hotel. No such agreement was ever thought of until the pre-trial conference, and there was no proof of it at the trial.

Request No. 28 was inexorably right, for the court had no authority to turn over a group of miscellaneous irrelevant instruments to the jury to construe. It is the duty of the judge to construe written instruments, and that function cannot be delegated to the jury. (R. 183).

“You are instructed that the preliminary negotiations which lead up to the submission of a bid, do not constitute either an express or implied contract. Where the terms of a request for bid are clear and the terms of a bid submitted in response to such request are likewise clear, there is not to be read into either the request or into the bid something which is contrary to or at variance with what is expressly stated. You are further instructed that parties are presumed to say what they intend to say when they make an express written statement which is clear and definite.”

This request was warranted in view of the court's statement that the complaint was that there was a breach

of a "preliminary contract of negotiations." Furthermore, since the instruments were clear and definite, there was no occasion to imply some agreement whereby defendant would be subservient to plaintiff.

By request No. 32, defendant asked that the jury be instructed to disregard all comments of any witness referring to plaintiff as agent of defendant for the reason there was no evidence of such a relationship. By request No. 33, the defendant rightfully asked the court to instruct the jury sufficiently on consideration as a necessary element of a valid contract, and to caution the jury that the various instruments introduced in evidence could not constitute consideration for an "implied agreement" (R. 188):

"You are instructed that there must be consideration for a contract. That is, a person who claims a contract must show that there is legal consideration to support the promise or the agreement. You are instructed that the fact that the parties may have had prior dealings does not constitute consideration. In this case there were prior bids made by defendant to plaintiff, some of which were accepted and some of which were never accepted. In this connection, where the bid is to sell specified property for a definite price and that price is paid, that transaction is completed, and the fact that a definite contract so resulted is not consideration for some future transaction.

"You are therefore instructed that mere negotiations in the past in which plaintiff sought to obtain a bargain from defendant, or negotiations

which resulted in actual sales, do not constitute consideration for any future agreement.”

The court allowed plaintiff to confuse the jury with a mass of incompetent, irrelevant and immaterial evidence. To make matters worse, the court delegated to the jury the function of construing written instruments, to permit the jury to find an “implied agreement not to compete with plaintiff” from negotiations which had terminated and from numerous unaccepted offers which had expired. The court licensed the jury to “find” consideration when none could possibly exist.

The court also erred in failing to give request No. 34, for if plaintiff actually used some term which has no common meaning, plaintiff had the duty to make itself understood. The court was wrong in ruling that defendant had the burden of finding out what plaintiff meant. In any event no meeting of the minds could be presumed.

Having committed prejudicial error by submitting the case to the jury when there was no evidence of any agreement, the court committed further error by prejudicial instructions which invited the jury to fasten liability on defendant when none existed. The court also ignored the stipulations of the parties and the admissions of plaintiff. Not only did the court fail to give fair instructions, but the court practically blotted out most of the defenses, although plaintiff itself proved most of them. The court refused to present the defendant’s theories of defense.

There were adequate reasons for motion for a new trial. The court made rulings contrary to law, admitted incompetent evidence and excluded proper evidence, and then misdirected the jury and failed to give adequate or proper instructions. The affidavit of counsel for defendant (R. 197-200), shows not only misconduct of Mr. Connole during the trial, but that Exhibits 22, 23, 24, 26, 27 and 28 were missing when the case was submitted to the jury. Inability of counsel to find those exhibits was called to the attention of the clerk. Exhibits 26, 27 and 28 were found after the jury returned its verdict, March 19, 1953. Exhibits 22, 23 and 24 are still missing. Those particular exhibits were produced at the trial by plaintiff upon demand of defendant. They were copies of letters from plaintiff to Murphy Elevator Company dated January 31, February 23, and April 22, 1948. Those letters refute statements of Mr. Connole that Kimball did not charge Murphy Elevator Company a commission. Exhibit 23 shows that plaintiff did not know how to figure the freight elevator modernization jobs at Hotel Utah in 1948.

The defendant was and is entitled to have granted its motion for judgment in accordance with the motion for directed verdict. The court did not even grant the motion for new trial, although the case shrieks with prejudicial error.

CONCLUSION

Plaintiff pleaded a collusive illegal agreement. Plaintiff neither pleaded nor proved any consideration. None of the written instruments even suggest any idea that defendant as seller or prospective seller, should refrain from selling to anyone or refrain from entering into contract with anyone. The court refused to give heed to the federal and state statutes which declare illegal and criminal, the very type of agreement asserted in this case. The court had no authority to grant plaintiff immunity from the law, nor did the court have any right to make a contract, nor to deny defendant the defenses it asserted, including the defense of illegality.

The evidence demonstrated that plaintiff devised a scheme to get something for nothing, first by making a fictitious demand for a "commission" from defendant as successful bidder. For all practical purposes, plaintiff had ceased to be a bidder or a candidate for the award of the modernization contract, by submission of an unsatisfactory bid and then by failing and neglecting to submit a new bid which would conform to specifications required by Utah Hotel Company. The original quotation dated June 14, 1950, obtained by plaintiff from defendant by false representations, was never accepted, and it was withdrawn by letter dated September 8, 1950, delivered September 11 or 12, 1950. A new bid from defendant to plaintiff dated September 11, 1950, was submitted by defendant to plaintiff *after* the defendant had submitted bids to Utah Hotel Company in response to requests of

Utah Hotel Company. The bid of defendant to Utah Hotel Company on the modernization of the passenger elevators was based in part on a bid given to defendant by Pacific Elevator and Equipment Company. Pacific, (plaintiff's principal), did not submit such bid to defendant until plaintiff was fully informed nor until plaintiff told Pacific it was all right to give defendant a quotation. The claim that there was an "implied agreement not to compete with plaintiff" by the submission of an offer to plaintiff by defendant, is fictitious and sham; for there was no discussion about refraining from competition, and plaintiff was informed not only by Utah Hotel Company, but by the defendant and by Pacific, that the hotel company asked defendant to submit a bid on the over-all job. There was no legal nor factual basis for any pretended "implication". The claim that by submitting a bid to plaintiff on September 12, 1950, defendant "impliedly promised" not to submit a good faith bid to the hotel company, when plaintiff knew defendant had already submitted a bid to Utah Hotel Company, is utterly devoid of candor. Utah Hotel Company had been the customer of defendant at that time for about 30 months.

The plaintiff proved neither meeting of minds, consideration, nor legal subject-matter for an agreement. Defendant was entitled to a directed verdict of no cause of action. Instead of throwing the plaintiff out of court for trying to perpetrate an unconscionable scheme to get something for nothing, the trial judge threw the law of contracts out of court. It became obvious that plaintiff

could not show any contract, but only unaccepted offers and negotiations which had terminated, which could not possibly give birth to a contract. The court then announced that "the contract breached was not a contract to install, but a preliminary contract of negotiations." Such a "theory" is utterly in defiance of all rules of contract, for negotiations do not constitute a contract.

The court disregarded the constitutional rights of both defendant and Utah Hotel Company. The trial judge ignored the evidence which shows that plaintiff was not prevented from doing business with Utah Hotel Company by a wrongful act of defendant, for defendant was not guilty of any wrongful act. Only the plaintiff was guilty of wrongdoing. Utah Hotel Company had a legal right to refuse to do business with plaintiff, without reason at all, but it established two good reasons why it could not risk doing business with plaintiff: (1) Plaintiff had given unsatisfactory performance in the past without making corrections; and (2) plaintiff utterly failed to offer to do the job the way the hotel wanted it done or to include all of the items which had to be included. There was no evidence that plaintiff could possibly have been awarded either of the two contracts. Plaintiff did not even prove that it could have made any profit, even if by some miracle it could have been awarded the contract, for plaintiff resorted to incompetent evidence of an estimate which omitted a number of essential items of cost which would have shown that the cost exceeded the contract price. Plaintiff was allowed recovery for the failure to have its name-plates on the

thresholds of the elevator cabs, when such name-plates would have been illegal and would have constituted an unfair trade practice since plaintiff would not have been the manufacturer. Furthermore, plaintiff could not show that it could have even obtained permission of Utah Hotel Company, and the evidence is that the hotel would not allow such name-plates. Plaintiff "struck out" on every claim it presented. It proved that it resorted to the judicial machinery in an effort to turn its "own delicts into a triumph" in a scheme to get something for nothing.

Defendant and appellant respectfully submits that the judgment should be reversed and the cause should be remanded to the district court, with directions to enter a judgment against the plaintiff of no cause of action, for the reason that the evidence shows that plaintiff has no valid claim and no right of recovery against defendant. Appellant prays for any and all other appropriate relief, including new trial if for any reason this Honorable Court should deny appellant judgment against respondent of no cause of action.

Respectfully submitted,

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