

1954

Kimball Elevator Company, Inc. v. Elevator Supplies Company, Inc. : Petition for Rehearing

Utah Supreme Court

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Andrew John Brennan; Attorney for Respondent and Petitioner;

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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

PETITION FOR REHEARING

ANDREW JOHN BRENNAN,
Attorney for Respondent and Petitioner

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a corporation,

Plaintiff and Respondent,

vs.

ELEVATOR SUPPLIES COMPANY, INC.,
a corporation,

Defendant and Appellant.

Case No. 8066

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Comes now the respondent, Kimball Elevator Company, Inc., a corporation, and petitions the Court for a rehearing and reargument of the above-entitled cause upon the following grounds:

POINT I

THAT THE COURT IN ITS DECISION ON FILE HEREIN HAS NOT CONSIDERED THE FINDINGS OF FACT ARRIVED UPON BY THE JURY.

POINT II

THAT THE COURT IN ITS DECISION HAS MADE IRRECONCILABLE STATEMENTS RELATIVE TO THE ISSUES.

POINT III

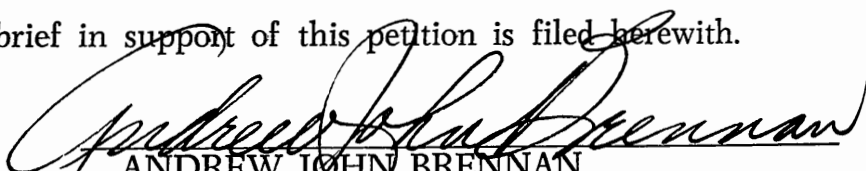
THAT THE COURT HAS MISCONSTRUED THE FACTS IN ITS APPLICATION OF THE LAW AND HAS COMMITTED ERROR THEREBY.

POINT IV

THAT THROUGH ITS DECISION THE COURT WOULD COMMIT AN INJUSTICE.

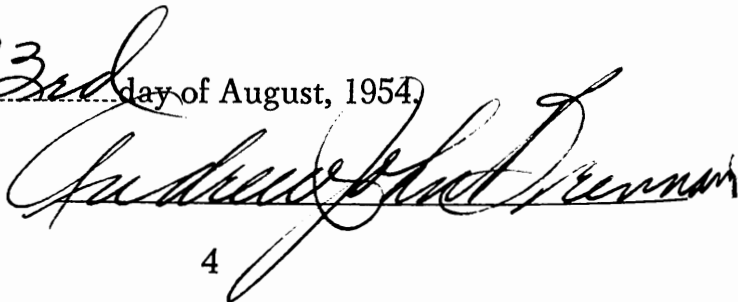
WHEREFORE, petitioner prays that the judgment and opinion of the Court be recalled and a reargument be permitted of the entire case,

A brief in support of this petition is filed herewith.


ANDREW JOHN BRENNAN
Attorney for Respondent and Petitioner

ANDREW JOHN BRENNAN hereby certifies that he is attorney of record for the respondent and petitioner herein, and that in his opinion there is good cause to believe that the decision of the Court is erroneous, that the verdict and judgment of the trial court should be sustained and the appeal reargued and reconsidered.

Dated this 23rd day of August, 1954.



BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THAT THE COURT IN ITS DECISION ON FILE HEREIN HAS NOT CONSIDERED THE FINDINGS OF FACT ARRIVED UPON BY THE JURY.

It is the position of your petitioner that this Court, in its decision, has not accorded the respondent the right of having its theory of the case completely examined, nor has the Court, in the opinion of your petitioner, taken all of the evidence and given such every reasonable inference in the line most favorable to the plaintiff.

It must be remembered that this case was tried to a jury of eight persons and that a unanimous verdict was rendered in favor of the plaintiff and respondent, your petitioner herein.

In order that this petition may be fairly and openly considered and reviewed by the Court, it is respectfully suggested that the following instructions, as submitted by the trial court to the jury, should be studied.

In the action the jury was instructed in part as follows:

“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 defendant says that there was no such understanding. Defendant also says that the defendant was free to bid for an original contract.

This is the first dispute for you to decide.”
(Instr. No. 5, page 120)

Since a verdict was accorded the plaintiff, such findings as here required by the trial judge in his instruction No. 5, may not be set aside by this honorable Court in any ruling or decision unless it is apparent to the Court that an error at law was committed.

Certainly the Court agrees, and in its decision on file herein has ruled that a contract may be made and found legally binding between the parties even though such a contract and agreement was not reduced to writing. The jury under the instruction given so held.

The court further instructed:

“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.

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

(Instr. No. 6, page 124.)

The Court went on to instruct:

“The defendant says that plaintiff was informed that the defendant was making a competitive bid, and that the plaintiff said it was all right.

If the contention of the defendant in this respect is true, then plaintiff has waived the implied agreement that the defendant would not compete, if such an agreement existed, and in that event, plaintiff cannot recover.

In determining whether the plaintiff acquiesced in an

original, competitive bid by the defendant, you will have to determine the intentions of the parties as they would have clearly appeared to ordinary prudent men in the positions of the parties at the time the defendant says that the plaintiff acquiesced."

(Instr. No. 6-a, page 125)

"The plaintiff has the burden to prove the implied agreement hereinbefore discussed, either generally or for the Hotel Utah job.

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.

The plaintiff has the burden of proving damages.

(Instr. No. 7, page 127.)

It is respectfully submitted that although the decision of this honorable Court filed July 21, 1954, recognizes "that a contract may be made out even though there may be no express words formally stating it"; and although the Court further recognizes in its decision that Kimball had a right to exact a covenant from Elevator Supplies that it would not compete, in consideration of an understanding that Kimball would sub-let part of the work to Elevator Supplies; and further that it is not only permissible but common practice for a wholesaler to contract not to sell to retail customers.....The Court rules against the plaintiff.

Again it is apparent that the jury found not only the existence of such a covenant, but also the violation thereof by the appellant, Elevator Supplies. The Court does not clarify or point out in its decision where the jury erred in this regard.

It was the position of the plaintiff throughout the trial the

Hotel Utah knew the Kimball Elevator Company and the defendant company worked together on the modernization jobs to be installed in Salt Lake City and also that they had together estimated and planned the Hotel Utah. Not only did the written bid submitted by plaintiff August 16, 1950, absolutely confirm this but also (as mentioned in the decision on file) Mr. Connole told Jerry Smith of the Hotel that if the Elevator Supplies made a bid on the total job such a bid would be on identical equipment *and that the Hotel Utah could use it as an estimate to see if the Kimball bid was in line.* The jury obviously believed this to be a fact. This Court has adopted such facts.

As shown by Instruction No. 7 the jury was admonished that defendant had the burden to prove that plaintiff acquiesced in the defendant's giving a competitive bid to the Hotel Utah.

There is not one iota of proof of such acquiescence on part of plaintiff.

Rather - Mr. Connole testified that he called Roy C. Smith of Elevator Supplies. TR. 374, Line 6:

"I told him that the Hotel Utah would like to have a proposal on the overall 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."

Later, as brought out on his cross examination, Mr. Connole further stated:

"Q. And Mr. Smith told you that he was making a bid on the overall job did he not?

A I believe I stated -- I asked Mr. Smith to make a supporting bid or estimate.

Q You did not use the word "supporting".

A I certainly did. It had to be a supporting bid.

Q You did not use the word "supporting bid" to Mr. Smith, did you?

A I certainly did. * * * *

A I spent several evenings with Mr. Henker.

Q You spent several evenings with Mr. Henker and you knew Mr. Henker was submitting a firm bid to the Elevator Supplies Company on the overall job, did you not?

A I did not. Mr. Henker was never to give them a firm bid.

Q I am asking you whether you knew. I am not asking you to state your conclusion.

THE COURT: He said he did not.

Q (Mr. Reimann) Now didn't you testify that you told Mr. Henker it was all right to give the Elevator Supplies Company a bid on this job?

A Yes I told him they were making up an engineer's estimate, a supporting bid and for them to give and for Mr. Henker who asked me -- I think in my deposition of Mr. Henker's he asked me if he should give my figures to Elevator Supplies Company and I told him yes, that I had asked for a supporting bid to verify my contract.

Q You told Mr. Henker did you not, that it was perfectly all right with you to give a bid to the Elevator Supplies Company, didn't you?

A Not a firm bid, an estimate bid or supporting bid."

TR. Pages 545-546

There is no proof of acquiescence on the part of the plaintiff for the defendant to make a firm bid.

Such was the theory of the plaintiff and also the fundamental element of the case as submitted to the jury by the trial court. If there was a contract, express or implied, existing between the

parties, the defendant was not released therefrom by Kimball.

Yet this Court in its decision on file herein, seems to take and adopt the view that the Hotel Utah could revoke and release Elevator Supplies through a direct request to Elevator Supplies.

The Court states in its decision of July 21, 1954:

“However, on the next day Hotel Utah called Elevator Supplies and asked for a bid on the entire job, in response to which defendant submitted a firm bid which was accepted.

These facts do not indicate any acquiescence by plaintiff but rather a deliberate breach of contract by the defendant company.

The fact that Hotel Utah may have requested a firm bid from the defendant is no proof plaintiff released defendant from its agreement not to bid.

POINT II

THAT THE COURT IN ITS DECISION HAS MADE IRRECONCILABLE STATEMENTS RELATIVE TO THE ISSUES.

In the closing remarks of this decision the Court reports:

“The Hotel Utah indicated that it wanted another bid and there is no showing that it is expected or desired anything other than a bona fide one. ***”

The Respondent must again point out that it makes no claim against the Hotel Utah, its officers or employees, and that the “desires” of the Hotel Utah were not at issue before the trial court or the jury. The Hotel Utah is not a party to this proceedings.

It has constantly been, and it will forever be, the position of the Kimball Elevator Company that the Hotel Utah would have received identical equipment and a complete renovation of its machines - all at a lower cost - if the defendant had remained

true to its contract and submitted an estimate to the Hotel rather than its firm quotation.

We respectfully urge and plead for a reargument of this case.

Consider the decision of this Court filed July 21, 1954, reporting in its conclusion:

“Kimball itself requested Elevator Supplies to bid and thus of course knew that it was being made, but neither exacted a promise from defendant that the bid would be excessive, nor advised the Hotel Utah that the bid would be anything other than an honest bid on the job. If such promise had been made, so that the Elevator Supplies was not free to make a truly competitive bid, it would have been highly improper for plaintiff to refer the Hotel Utah to Elevator Supplies for a bid without disclosing such fact to the Hotel Utah. Since no such disclosure was made, it must follow that even if plaintiff had established such a contract it would have been a fraud against the Hotel Utah and consequently unenforceable.”

A grave statement for a published record - wherein does the Court in justice make such a ruling when in the same decision it may report the following:

“The Hotel Engineer, Mr. Jerry Smith, asked plaintiff’s Mr. Connole if he had any suggestions as to other companies which might desire to bid and particularly inquired if Elevator Supplies would make a bid on the total job. *Mr. Connole stated that such a bid would be on identical equipment and that the Hotel Utah could use it as an estimate to see if the Kimball bid was in line.* He then called Roy Smith, manager of Elevator Supplies in San Francisco, and advised him that the Hotel Utah would like a bid on the over-all job to verify the plaintiff’s price. It is plaintiff’s position that these circumstances show that the bid was to be simply what it calls a ‘check bid’ for the purpose of getting a comparison on the general range of Kimball’s price, but that it was not

to be competitive to plaintiff's quotation. However, the next day the Hotel Utah called Elevator Supplies and asked for a bid on the entire job, in response to which the defendant submitted a firm bid, which was accepted."

Is it not obvious that the plaintiff put the Hotel on notice that such a bid from the defendant could be used only as an estimate?

And again we repeat that the Hotel Utah was fully aware plaintiff was in fact bidding on the defendant's control system.

Also, if the defendant was not aware of its responsibility to the plaintiff company why was it necessary for Roy C. Smith to tell Jerry Smith that before he could fulfill the direct request from the Hotel he would have to check with his home office in New Jersey? Certainly Roy C. Smith made no statement of the necessity of such clearance to Mr. Connoles when Mr. Connoles asked *for an estimate on the entire job*.

Elevator Supplies Company has never been an independent contractor in this area. It has never been considered a competitor by the plaintiff and certainly was not held in the position of competition. The record substantiates the fact that these two companies closely associated their efforts in the securing of a job. That is the reason Roy C. Smith did not have any idea of making a competitive bid until he was directly contacted and requested so to do by the Hotel. He had to clear with the home office. Roy C. Smith did not advise Mr. Connoles or any representative of Kimball that he intended to make a firm and competitive bid.

Not only did the defendant mislead plaintiff in this regard, but on the same day it made its bid to the Hotel, it submitted its proposal on the same job to the plaintiff corporation.

This Court adopts as the basis of its decision the failure of the Elevator Supplies to directly and expressly promise plaintiff

it would not bid competitively. We respectfully challenge such a finding in opposition to the conclusion of the jury who had opportunity to peruse the documentary evidence and to observe the demeanor and credibility of the witnesses.

The jury found such a covenant to be implied in fact and also that defendant was not released from this covenant.

POINT III

THE COURT HAS MISCONSTRUED THE FACTS IN ITS APPLICATION OF THE LAW AND HAS COMMITTED ERROR THEREBY.

The Court in its decision has adopted the theory that in the instance of the Hotel Utah it became incumbent upon the plaintiff to prove by *express oral or written* agreement that Elevator Supplies made a direct promise not to submit a competitive bid.

(We have heretofore shown that such theory is contra to the outline of the issues as submitted to the jury.)

However, if this Honorable Court is to hold to this position we respectfully urge a reconsideration of the facts concerning the statements of Charles M. Henker.

The testimony, by stipulation was taken through deposition. It was clearly understood that such testimony was not taken for purposes of discovery but rather for presentation to the trial court and jury.

The portion of the record of such, as presented, which this Court in its decision of July 21, 1954, has held to be error (on the authority of a case not in point) reads as follows:

“Q Prior to your visit to Salt Lake, which you have just mentioned, Mr. Henker, did you have any conversation

with Mr. Roy Smith, of the Elevator Supplies Company, as to the Hotel Utah job?

A Yes.

MR. REIMANN: Just a moment, where you skip you had better have it noted. If this will go to the Supreme Court, you read the whole works.

THE COURT: You had better dictate to the reporter where you skipped question.

MR. REIMANN: He skipped from lines 14 to 21, on page 17.

MR. BRENNAN: Q Where did those conversations take place?

A In San Francisco, and probably over the phone. I don't recall that we went to each other's office particularly.

Q Could you tell us the date of such conversation?

A I am only basing the date on our first bid that we tendered to Elevator Supplies Company, which was September 7th, and the whole thing took place, I would say, within thirty days prior to that date.

Q Thirty days prior to September 7?

A Right.

Q *And could you tell the court and counsel, and the jury, as well as you can remember, the conversation, just exactly what was said between you and Mr. Smith?*

A *Well, at this time, of course, it is pretty hard to tell that far back any exact wording of conversations. All you know is your impression and the things that you must have said in order to put up such a bid.*

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

A Well, I was probably asked by Roy Smith if I would consider presenting a bid from Pacific Elevator and Equipment Company for this part of the work, which would include,

well, all the work previously tendered to Kimball Elevator Company, and our own, and on an installed basis, which was quite a great deal more to Pacific Elevator and Equipment Company than had previously been in the Kimball bid.

Q What was said between you when this took place?

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

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

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

MR. REIMANN: You can eliminate the objection to the next question.

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

A That is correct.

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

A The best I can recall, Roy had the same impression that that was a bid, a check bid, and naturally it was going to be higher, being done out of San Francisco both by ourselves and themselves. I think the feeling was mutual between us, at least it was my impression that the bid would be so much higher that there would be nothing to it; that

the contract would automatically go to Kimball Elevator Company.

MR. REIMANN: I moved to strike the answer on the ground it was not responsive. I would like the Court to examine that.

MR. BRENNAN: He hasn't answered yet. How could you move to strike? I asked him what Mr. Smith said when he told him he would not bid, -- he would not make a quotation to Elevator Supplies without a clearing from Kimball and this is the same conversation.

MR. REIMANN: He did not answer the question, and gave his impression and interpretation rather than what was said. He said in the beginning, You Honor ---

THE COURT: Let me read it. I cannot look at you and read it too.

The objection is overruled.

MR. BRENNAN: Q What did Mr. Smith say to you when you told him that?

A The best I can recall, Roy had the same impression that that was a bid, a check bid, and naturally it was going to be higher, being done out of San Francisco both by ourselves and themselves. I think the feeling was mutual between us, at least it was my impression that the bid would be so much higher that there would be nothing to it; that the contract would automatically go to Kimball Elevator Company.

MR. REIMANN: I move to strike the answer on the grounds the witness gives his impressions rather than what is a fact.

THE COURT: The motion is denied.

MR. REIMANN: Now I want to make a separate motion to strike "Roy had the same impression that that was a bid, a check bid, and naturally it was going to be higher, being done out of San Francisco both by ourselves and themselves".

THE COURT: Without subsequent material, I think your objection would be well taken. In view of what I read in the next question, the motion is denied.

MR. BRENNAN: Now may I ---

MR. REIMANN: I want to make a separate objection, and move to strike the statement, "I think the feeling was mutual between us" in other words, the balance of the sentence, on the ground it is a conclusion of the witness and is not a statement of fact at all, lines 3 and 4.

THE COURT: The motion is denied.

MR. BRENNAN: May the record show we are proceeding, at line 8, page 20 with this question, Q You are referring, Mr. Henker, to what was said between you and Mr. Smith?

A That is correct. *After all this time all you can give is impressions.* No man remembers what was said at this time. I may put it this way: It was definitely discussed on those terms. That is beyond the point of impression. I am trying to point out to you that I am not going to be able to tell you word for word what was said. That is out of the question.

The foregoing testimony, based upon *Reese vs. Morgan Silver Mining Company*, 17 Utah 489, 54P. 759 was ruled upon as being in error. In the Reese Case one of the questions for the jury was whether or not deceased had been guilty of contributory negligences after having used a defective and rotten ladder in a mine shaft, the Utah Court noted:

"It was agreed that F. S. Snyder, a witness for the defendant, if present, would testify subject to all legal objections, as follows: Deceased understood perfectly the ground we were working, the nature of the incline and the character of the ladder. The court on motion struck out this testimony as being a conclusion of the witness and not a statement of fact within his knowledge."

Let it be noted Henker stated positively and unequivocally:

"It was definitely discussed on those terms. That is beyond the point of impression. I am trying to point out to you that I am not going to be able to tell you word for word what was said. That is out of the question."

Since Mr. Henker could not remember word for word what was said, his recount of the discussion was not the most accurate method of translating the incidents to the court and jury. This method is sound, common sense practice and good law.

See Wigmore on Evidence Third Ed. Vol. VII, Page 466, Par. 2049. This learned author at Par. 2049, Sub par. II (4), page 473 sums up his treatise as follows:

"(4) Finally, the rules must often, by practical necessity, be different for oral and for written utterances. The former lie in memory only, and overmuch cannot be demanded in the reproduction of words by mere memory. The latter may be copied literally and entirely, or may be produced in specie. Hence, less strictness may be shown in applying the principle to the former class of utterances."
Observe Wigmore Third Ed. Vol. VII, par. 2097.

"Complete certainly as to an utterance's true meaning can be ascertained only by considering every word in it. The change, omission, or addition of even a single word may radically alter the meaning. But for oral utterances such verbal precision need not and cannot be required. It need not be, for the importance of single words in oral discourse is comparatively much less than in writings; and it cannot be, since memory does not retain precise words, except of simple utterances and for a short time.

Hence, verbal precision is in general *not required* in proving *oral utterances*; the *substance* or effect is sufficient:

1836, RICHARDSON, C. J., in *Eaton v. Rice*, 8 N. H. 380:

‘It can rarely happen that a witness who was present when a conversation was had between two individuals can at any time afterwards, and particularly at any distant time, state precisely what was said by them, although he may recollect distinctly an agreement made between them at the time. If then, in all cases the witness is required to state what was said so accurately that the jury may be enabled to judge by the terms used what a contract was, it must frequently happen that a contract not in writing cannot be proved at all. . . . The recollection of a witness as to what an agreement between parties was, according to his understanding of what was said by them at the time, may be very satisfactory evidence, although he may not be able to recollect distinctly one word that was said. . . . The credit that may be due to a witness in these cases may depend much on his being able to detail enough of the conversation to show that his understanding of the matter was probably right. But what he understood is in all cases evidence to be weighed by the jury.’

**** The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. *He may give his ‘understanding, or ‘impression’ as to the net meaning of the words heard.”*

We respectfully submit that the trial court did not err and the jury was entitled to consider the testimony of Charles Henker concerning the type of bid Elevator Supplies was to make to the Hotel Utah.

POINT IV

THAT THROUGH ITS DECISION THE COURT WOULD COMMIT AN INJUSTICE.

The undisputed facts are contrary to the decision of July 21, of this Court and through the reversal of the judgment and the

verdict of the jury, this court would commit a dire injustice, in that the plaintiff would not only lose a contractual right, but also be held as a party to a colusive agreement.

The plaintiff, contrary to the decision of the Court on file July 21, 1954, did not recommend or propose that a bid be made by its supplier, Elevator Supplies.

Again the undisputed facts are that Mr. Jerry Smith, of the Hotel Utah, inquired of this, and was told by Mr. Connole that Elevator Supplies would have to quote upon the same equipment and that any bid from them could be considered only as an estimate.

The law is clearly settled that unless it clearly appear a contract conflicts with public policy, the court is not justified in making such a conclusion. See *Palmer vs. Chamberlain* 191 F 2d 532, 27 A.L.R. 2d 416, wherein the court ruled:

“When the court is asked to declare a contract void on the ground that it conflicts with policy, to justify sustaining the defense, the line of policy must be clear and distinct. *Bank of Augusta vs. Earle*, 13 Pet. 519, 597, 10 L.Ed. 274. This is upon the reasoning that men shall have the utmost liberty of contracting and that their agreements, when entered into fairly and voluntarily shall be held sacred and enforced by the courts. This freedom of contract is not to be lightly interfered with. The burden of showing illegality is upon the party asserting it and it is not sufficient to create confusion and suggest doubts as to its legality. *Illinois Surety Co. vs. O'Brien* 6 Cir. 2237 F. 933.”

See also 12 Am. Jur. 744, holding that there is a presumption of the legality of contracts and that were the terms of an agreement are disputed, the Court may not find facts making the contract contrary to public policy, but must follow the findings of the jury or of the trial court, in order to conclude or make a presumption on such disputed facts.

It has constantly been the position of the plaintiff that if the defendant corporation had lived up to the covenants existing between them, the Hotel Utah would have profited by such an agreement. In other words, the Hotel Utah, through a word from representatives of the defendant corporation could have been assured that the bid of the plaintiff at less than \$60,000.00 was fair and reasonable. The plaintiff adequately showed in the trial of the cause, that this contract price of less than \$60,000.00 would not only cover the job, but also afford the plaintiff a modest profit.

Considering the plaintiff's theory of this case, which the jury unanimously held to be the truth, justice and fair dealing are sponsored, but if the decision of July 21, is not reconsidered, it is the considered and honest belief of counsel for your petitioner that this court sanctions breach of contract, unfair dealing and dishonesty.

It has been held quite unanimously by the authorities, were a contract is capable of construction in accordance with justice and fair dealing, the court will adopt such construction instead of a construction which shall entail loss to a party on the contract.

See 17 C.J.S. Contracts 319 pages 739-740, also *U.S. vs. Southern Gulf Lumber Company* 106 Fed Sup. 815.

The Kimball Elevator Company was certainly justified in protecting its own business interest so long as the rights of the Hotel Utah were not thereby jeopardized and so long as the Hotel was not either preyed upon or misled.

See 17 C.J.S. 549, Contracts 197, wherein it is stated:

“**** An agreement having the effect of restricting bidding may be legal where it is made to protect the rights of the parties and to advance their interests and there is no purpose to injure or defraud others interested in the result

of the sale or contract award.” Note 31, citing: *Wilder vs. Noble et ux*, 79 P.2d 682, 195 Wash. 1.

CONCLUSION

Since the facts of this case and the law uphold the verdict of the jury and the judgment of the trial court, it is respectfully and earnestly petitioned that this Honorable Court reconsider its decision of July 21, 1954 and grant a rehearing and reargument of the case, and that upon such review it uphold the position of the plaintiff, which is the position of right and justice.

Respectfully submitted.

ANDREW JOHN BRENNAN

Attorney for Respondent and Petitioner