1949

The Valley Mortuary v. Lionel Fairbanks : Brief of Appellant on Appeal

Utah Supreme Court

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In the Supreme Court of the State of Utah

THE VALLEY MORTUARY, a Corporation,
Plaintiff and Respondent,

vs.

LIONEL FAIRBANKS,
Defendant and Appellant.

CASE NO. 7350

APPELLANT'S BRIEF ON APPEAL

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This is an appeal by the defendant from the judgment of the DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT after refusal to grant a jury upon due demand, holding that a contract between the parties precluded the defendant from performing funeral services in a specified territory, awarding damages for past alleged breaches and enjoining the defendant from performing services in said territory in the future.

STATEMENT OF FACTS

Under date of August 6, 1945, Lionel Fairbanks, defendant and appellant, doing business as Lionel Fairbanks Mortuary, entered into an agreement with Aura C. Hatch, acting for and on behalf of the Valley Mortuary, plaintiff and respondent herein. This agreement was subsequently modified as to paragraph five (5) thereof so that the agreement after its modification reads as follows (plaintiff's Exhibit "A"):

"AGREEMENT

This agreement made this 6th day of August, 1945, by and between Lionel Fairbanks Mortuary of Eureka, Utah, and the Valley Mortuary a Corpn. of Utah County with main office at Provo, Utah.

Now, Therefore, the seller Lionel Fairbanks agrees to furnish the Valley Mortuary buyer, with a Warranty deed for the Mortuary property in Eureka, with abstract brought up to date to the satisfaction of the Commercial Bank of Spanish Fork.

2. To furnish the buyer with a certificate of title, free and clear, to the Buick Hearse mentioner in the inventory.

3. To furnish the buyer with a BILL OF SALE to the mortuary equipement, caskets, supplies, and personal property set forth in the attached inventory.

4. To deliver to the buyer possession of the premises herein referred to, together with all the equipment, fixtures, etc. as set out immediately on the signing of this agreement.

5. That the said sellor will not for a period of (25) twenty five years, from the date of this contract, operate a mortuary or funeral business in Utah Co. Pro-

vo & South of Provo or Juab Counties, in his own name or through a subsidiary or third party.

6. The sellor agrees that all bills, accounts, and obligations and taxes incurred prior to August 6, 1945, shall be paid by him.

/s/ Lionel Fairbanks
LIONEL FAIRBANKS MORTUARY

/s/ Aura C. Hatch
PRES. VALLEY MORTUARY"

Exhibit "A" also includes the inventory attached to the contract, which itemized the following property, which was to be conveyed under the agreement:

"INVENTORY AT THE FAIRBANKS MORTUARY, EUREKA, UTAH

As of August 6th, 1945

CASKETS

1	State (Pink)	$95.00
1	" Chocklet	77.00
1	" oct.	95.00
1	" Red	95.00
1	" Sil Rivera	95.00
1	" Orc.	87.50
1	" Mohogney Pol	187.50
1	" Corduary Rose	54.00
1	" " Blue	54.00
1	Oct.	65.00
1	Tan	37.00
1	Lamb	35.00
3	2/0 White Lamb.	23.25
5	Rough Boxes	40.00

FURNITURE & FIXTURES

Drapes and Curtains
Underwood Typewritter
1 Electric Heater
1 Lawn Mower
2 Ash Trays on Stands
1 Monkey Stove
1 Heater
19 Plain Chairs
1 Mohar Divan
1 Lether Divan
8 Other chairs
1 Roletop Desk & Chair
1 Library Table
3 9-12 rugs
2 Coffee Tables
1 Center table
3 Floor Lamps
1 Table Lamp
1 Hall Tree

SUPPLIES

184 Bottles Embalming Fluid.
2 Mens Suits
2 Womens Dresses
1 Womens Slippers
1 L D S Garment

1 Buick Hearse 1935

1 Casket vail
1 Frigid Lowering Device
1 Set Green grave drapes
1 Metal Emb. Table
1 Metal Stretcher
1 XXXXX "
1 Vigial Lamp
3 Crucifix

1 Set Embalming Inst.
1 Make up Kit.
2 Church Trucks
2 Display "
28 Sheets
2 Pillow slips"

On or about the month of September, 1945, Lionel Fairbanks approached Aura C. Hatch, president and manager of the Valley Mortuary, and told Mr. Hatch that Fairbanks wanted to build a mortuary or funeral home in Orem or American Fork, and Hatch, in his own handwriting, added by interlineation in paragraph five (5) of such agreement, after the words "mortuary or funeral business in Provo, Utah" the words "co. and south of Provo" so that paragraph five (5) of the agreement, after the interlineation, is as shown above.

Lionel Fairbanks built a mortuary or funeral home in Orem about seven (7) miles north of the north city limits of Provo, Utah, (Tr. 16) and began operation thereof on December 22, 1946 (Tr. 16). Thereafter Fairbanks picked up bodies in Provo and in Utah County south of Provo and in Juab County and conducted funerals in these localities, particularly in the city of Eureka in Juab County (Tr. 18, 19, 33). Fairbanks operated only one establishment where some funerals were held, and all of the bodies were embalmed, and that establishment was in Orem, seven (7) miles North of Provo (Tr. 63).

Almost two (2) years after Fairbanks began the operation of his funeral business in Orem, Valley Mortuary in August of 1948 instituted an action in the Fourth Judicial District Court against appellant Lionel Fairbanks, claiming violation of the contract, plaintiff's Exhibit "A." The words

of the complaint, eliminating the formal parts, are as follows:

"Comes now the plaintiff and for cause of action against defendant alleges:

1. That the plaintiff now is and at all of the times hereinafter mentioned has been a corporation duly organized under and by virtue of the laws of the State of Utah, with its principal place of business at Provo, Utah.

2. That the defendant Lionel Fairbanks now is and at all of the times herein mentioned has been a resident of Utah County, State of Utah, and now is doing business in Utah County as the Lionel Fairbanks Mortuary.

3. That prior to the 6th day of August, 1945, defendant was operating and conducting a mortuary and funeral business in Juab and Utah Counties, with his principal place of business at Eureka, Utah. That on or about the said 6th day of August, 1945, plaintiff and defendant entered into an oral agreement whereby the plaintiff promised and agreed to pay defendant the sum of Five Thousand and Five Hundred Dollars ($5,500), for and in consideration of the defendant agreeing to perform certain conditions on his part, the terms of which were to be incorporated into a written agreement, which written agreement was made and entered into on the said 6th day of August, 1945, a copy of which agreement follows:"

(Thereafter there is set out the contract (plaintiff's Exhibit "A"), except paragraph 5 of the contract as shown in the complaint was quoted somewhat incorrectly as follows:)

'5. That the said sellor will not for a period of (25)) twenty five years, from the date of this contract, operate a mortuary or funeral business in Provo, Utah

and in Utah County south of Provo, or Juab County, in his own name or through a subsidiary or third party.'

4. That in consideration of the foregoing written promises made by defendant and in reliance thereon, plaintiff paid the defendant the sum of Five Thousand and Five Hundred Dollars ($5,500).

5. That the defendant performed the conditions of the agreement as above set forth except that defendant, shortly after the signing of said agreement and the payment to him by plaintiff of the sum of Five Thousand and Five Hundred Dollars ($5,500), began operating a mortuary and funeral business in Provo and in the area south of Provo in Utah County and in Juab County in his own name, in that he solicits and procures customers in those places and holds funerals there.

6. That by reason of the breach of said contract by defendant and the operatian of a mortuary and funeral business in Provo and in Utah County south of Provo and in Juab County, plaintiff's business has been thereby lessened and damaged to plaintiff's injury in the sum of Twenty Thousand ($20,000) Dollars.

WHEREFORE, plaintiff prays judgment:

1. That the Court issue a permanent injunction and restraining order enjoining the defendant and his agents and assigns from operating or conducting a mortuary or funeral business in Juab County and in Provo City and in that of Utah County south of Provo City until August 6th, 1970.

2. For the sum of Twenty Thousand Dollars ($20,000) damages.

3. For the costs of this suit and such other and further relief as to the Court may seem equitable and just."

Defendant demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action against the deffendant. The Demurrer was overruled. Thereupon the defendant filed his Answer which, eliminating the formal parts, is as follows:

"Comes now the defendant in the above entitled action, and without waiving the Demurrer heretofore filed herein, by way of Answer, to the complaint of the plaintiff, admits, denies,, and alleges as follows:

1. Replying to Paragraph 1 of plaintiff's Complaint, defendant admits the same.

2. Replying to paragraph 2 of plaintiff's Complaint, defendant admits the same.

3. Replying to paragraph 3 of plaintiff's Complaint, defendant admits the same, excepting that defendant alleges that paragraph No. 5 of said alleged written agreement read and reads as follows:

'That the said seller will not for a period of (25) twenty five years, from the date of this contract, operate a mortuary or funeral business in Utah County, Provo and South or in Juab Counties, in his own name or through a subsidiary or third party.'

In addition thereto, the said agreement had attached, and has attached, an inventory of the property sold, other than the mortuary building and lot itself.

4. Answering paragraph 4, defendant admits that the plaintiff corporation paid $5,500.00, pursuant to the terms of the agreement; but not having information with which to form a belief as to the truth or falsity of the allegation contained in the balance of said paragraph, the defendant denies the same.

5. Answering paragraph 5, the defendant admits that he performed on his part the conditions of the agreement, set forth therein; but denies the allegation in said paragraph to the effect that defendant, after the signing of the agreement and the payment of the $5,500.00, began operating a mortuary or funeral business in Provo, Utah and in Utah County, South of Provo and in Juab County; but alleges as an affirmative matter that he began operating a mortuary and funeral business in Orem, Utah, located approximately five (5) miles north of Provo, and that he has an investment of approximately $75,000.00 in such business. Defendant admits that he has served patrons who have resided in Provo and in parts of Utah County, south of Provo and in parts of Juab County, and has performed isolated services in connection with funerals held therein; but denies the balance of said paragraph, and denies specifically that he has at any time since said agreement was entered into operated a mortuary and/or funeral business in Provo or in the area south of Provo or in Juab County.

6. Answering paragraph 6, the defendant denies the same and the whole thereof.

7. Defendant denies each and every other material allegation contained in plaintiff's complaint, not heretofore admitted, modified or denied.

By way of further defense and as an affirmative matter, defendant alleges as follows:

(a) That Aura C. Hatch, president of the plaintiff corporation, at about the time referred to in plaintiff's complaint, prepared the alleged agreement and signed the same on behalf of said corporation, and at the time of its preparation and execution it was the understanding and intent of the defendant and plaintiff and its officers and agents and president that the

said agreement should and did provide that the defendant should not maintain a building or other physical establishment for a mortuary business in Provo, Utah in Utah County South of Provo, or in Juab County; but defendant alleges that it was not at that time or at any time, the intent of the parties or their understanding, and that the agreement does not provide that the defendant could not conduct funerals within said territory or serve patrons therein residing, or accept, solicit, or perform services therein.

(b) Defendant further alleges that the tangible property conveyed pursuant to the terms of the agreement, consisting of the mortuary building and lot and the funeral equipment, including the hearse, was, at the time it was conveyed, of a reasonable and fair value of at least $5,500.00; and that to require the defendant not to accept business in Provo, and in Utah County, South of Provo or in Juab County, would not be fair and would be arbitrary and unconscionable and not within the terms of the alleged agreement.

(c) Defendant further alleges that to require the defendant to refuse business in or from Provo, and in Utah County South of Provo and in Juab County, would be arbitrary and unfair and in unreasonable restraint of trade and injurious to the public welfare.

WHEREFORE defendant prays that the Complaint of the plaintiff be dismissed."

The plaintiff demurred to the defendant's Answer and subsequently waived his Demurrer. The plaintiff also filed a Motion to Strike and a Motion for Judgment on the pleadings. The Motion for Judgment on the pleadings was denied, and the plaintiff subsequently waived his Motion to Strike.

Defendant duly and timely demanded that the matter be tried by a jury (Tr. 3-7). The right to jury trial was by the court denied and the matter was heard before the court over the objection of the defendant (Tr. 3-7). The court, in making this ruling, stated as follows:

> THE COURT: "The Court, of course, indicated its conception of the law respecting the significance of the prayer of the complaint to be as supported by the authority that Judge Young cited, that it isn't part of the allegation, but it may be looked to to determine the nature of the relief sought. There is an allegation of acts which the plaintiff contends are being carried on at the present time, which the plaintiff contends are in violation of the contract, and there is an implication of it being on occasions of more than one, at any rate: Solicits, and procures, customers in those places and holds funerals therein. The reasonable interpretation being that there be numerous, at least exceeding one such act.
>
> The Court conceives in light of the prayer for the relief the paramount object of the proceeding is injunctive, that there is an allegation of violation which presently continues, and where that's supported by the reference to the answer of the defendant, claiming a right to that, because to enforce the plaintiff's interpretation of the contract would result in unlawful restraint of trade; that in view of such matter, the question is primarily equitable, that the damage action or the damage claimed in this respect, to the matter, is incidental to the primary relief; it being primarily equitable in the Court's mind, the parties are not entitled as a right to a jury to try the cause. And in as much as no jury is presently in attendance and this is the day set and is appearing, at any rate, that very likely if the question had been raised prior to this date, the Court may have refused the application for a jury, it is now ordered

that the application be rejected and that the clerk return to the defendant the fee heretofore paid for the jury.

You will want to make your exception to that?

MR. SHERMAN CHRISTENSON: "Yes. If the Court please, the ruling is not based upon the fact that a jury was not timely demanded, as I understand? The record shows that?"

THE COURT: "No, I make no point of that. Mrs. Carter was checking that and I understood that the fee was paid. I think the record may show that the fee was paid in advance of the setting date and in conformance with the rule of the court, which places the question entirely upon the discretion of the Court and its interpretation of the cause as an equitable action primarily, so that the record is clear."

MR. SHERMAN CHRISTENSON: "Then the defendant excepts to the ruling of the Court denying the defendant's right to a trial by jury pursuant to his demand, and also excepts to the holding that this is primarily an equitable action and not primarily a law action; and that no jury is obtainable as a matter of right. And further excepts to the ruling of the Court denying the request for a jury setting." (Tr. 6, 7, 8).

The matter was thereafter heard before the Court which in its Findings of Fact assumed to determine that plaintiff had been damaged in the amount of Seven Hundred Fifty and NO/100 ($750.00) Dollars by defendant for breach of the contract, and found with respect to certain funerals held by the defendant in Provo, and in Utah County south of Provo and in Juab County, that there had been a violation. The Court, of course, found that the contract had been executed between the parties.

The Conclusions of Law herein are very interesting, and, eliminating the formal parts, are as follows:

"1. That on the 6th day of August, 1945, plaintiff and defendant entered into a contract whereby the defendant agreed, for a valuable consideration paid to him by plaintiff, that he would not, for a period of twenty-five years from that date, operate a mortuary or funeral business in Utah County or Juab County; that said contract was not and is not in restraint of trade and its terms are definite and certain.

2. That the contract dated August 6, 1945, was later modified so as to exclude the area north of Provo in Utah County from its terms.

3. That the defendant, in going to Provo and there obtaining and accepting the dead bodies of those who at the time of their deaths were residents of the area north of Provo in Utah County and thereafter transporting said bodies into Provo and into Utah County south of Provo and into Juab County for funeral services and burial did not violate the terms of the contract mentioned in paragraph "1" hereof.

4. That defendant, in going to Provo and into the area south of Provo in Utah County and into Juab County and there receiving and accepting the bodies of deceased who at the time of their death were either residents of Provo or of the area south of Provo in Utah County or of Juab County, violated the terms of the contract in that in so doing he engaged in the funeral business in said area.

5. That defendant, in conducting funeral services and burials in Provo and in Utah County south of Provo and in Juab County, when he had not prepared those

bodies for burial violated the terms of the contract in that in so doing he engaged in the funeral business in said area.

6. That plaintiff is entitled to a judgment of this Court in the sum of $750.00 damages and for its costs herein expended."

After making and entering his Findings of Fact and Conclusions of Law, the Court, eliminating the formal parts, decreed as follows:

"It is hereby ordered, adjudged and decreed that the defendant, Lionel Fairbanks, his attorneys, agents, servants and employees, is and are hereby restrained and enjoined until August 6, 1970, from engaging in or performing any of the following business or functions within the area of Provo City and in Utah County south of Provo City and in Juab County, to-wit:

1. From operating a mortuary therein.

2. From accepting or receiving any body for preparation and burial in cases where, at the time of death, the deceased was a resident of such area.

3. From conducting funerals and burials where the body has been prepared for burial at a mortuary not owned and operated by the defendant.

4. From advertising that he is conducting a mortuary establishment or doing a funeral business.

5. It is further ordered, adjudged, and decreed that plaintiff have and recover from said defendant, Lionel Fairbanks, the sum of $750.00 as damages together with its costs herein expended."

It is from this decree that the plaintiff appeals.

STATEMENT OF ERRORS UPON WHICH DEFENDANT AND APPELLANT RELIES FOR A REVERSAL OF THE JUDGMENT AND DECREE OF THE COURT BELOW.

1. The Court erred in holding that the complaint stated facts sufficient to give the Court jurisdiction to grant equitable relief.

2. The Court erred in refusing the defendant the right to have the case tried by a jury.

3. The Court erred in interpreting the contract to mean that the appellant should be prohibited from conducting funeral services and performing other isolated services in Provo and in Utah County south of Provo, and in Juab County.

4. The Court erred in refusing to receive testimony of the value of the mortuary or funeral home operated by appellant, Lionel Fairbanks, in Orem, Utah County, Utah.

5. The Court erred in striking the testimony of the appellant, Fairbanks, to the effect that Mr. Jex, Treasurer of the Valley Mortuary, after the agreement was entered into between the plaintiff corporation and defendant, Fairbanks, came to Orem to approve the loan on behalf of the Commercial Bank of Spanish Fork, in which bank he was an officer, and in refusing the proferred testimony with respect to Mr. Fairbanks' conversation with Mr. Jex.

6. The Court erred in rejecting the proferred testimony that the value of the tangible property sold under the agreement herein by appellant to respondent was at least Fifty Five Hundred and NO/100 ($5,500) Dollars, the contract price.

7. The Court erred in making and entering its Finding of Fact No. 3.

8. The Court erred in making and entering its Conclusion of Law No. 1.

9. The Court erred in making and entering its Conclusion of Law No. 3.

10. The Court erred in making and entering its Conclusion of Law No. 4.

11. The Court erred in making and entering its Conclusion of Law No. 5.

12. The Court erred in making and entering its Conclusion of Law No. 6.

13. The Court erred in decreeing that the defendant should be enjoined from accepting or receiving any body for preparation or burial in cases where at the time of death, the deceased was a resident of Provo City or of Utah County south of Provo, or in Juab County.

14. The Court erred in decreeing that the defendant should be enjoined and restrained from conducting burials in Provo City or Utah County south of Provo, or in Juab County, where the body was prepared for burial at a mortuary not owned and operated by the defendant.

15. The Court erred in decreeing that the defendant should be enjoined from advertising in Provo, or in Utah County south of Provo or in Juab County, that he is conducting a mortuary establishment or doing a funeral business.

16. The Court erred in ordering, adjudging and decreeing that the plaintiff recover judgment against the defendant in the sum of $750.00, together with his costs expended.

17. The Court erred in disregarding the testimony of witnesses of the defendant that they would not have given

their funeral work to the Valley Mortuary even though the services of the appellant Fairbanks were not available.

18. The Court erred in interpreting the contract to mean that the defendant had sold to the plaintiff corporation under the agreeement, his good will in addition to the other property sold under the terms thereof.

STATEMENT AND ARGUMENT UPON PARTICULAR QUESTIONS INVOLVED FOR DETERMINATION.

1. The Court erred in holding that the Complaint stated facts sufficient to give the Court jurisdiction to grant equitable relief.

The only allegation in the Complaint which plaintiff claims might be a basis for equitable relief is quoted from paragraph 5 as follows:

> "That the defendant performed the conditions of the agreement as above set forth except that defendant, shortly after the signing of said agreement and the payment to him by plaintiff of the sum of Five Thousand and Five Hundred Dollars ($5,500), began operating a mortuary and funeral business in Provo and in the area south of Provo in Utah County and in Juab County in his own name, in that he solicits and procures customers in those places and holds funerals there."

Paragraph 6 of the Complaint is quoted as follows:

> "That by reason of the breach of said contract by defendant and the operation of a mortuary and funeral business in Provo and in Utah County south of Provo and in Juab County, plaintiff's business has been thereby lessened and damaged to plaintiff's injury in the sum of Twenty Thousand Dollars." (J. R. 3).

Then follows the prayer for an injunction and damages.

The Court held, over the objection of the defendant, that the question was primarily equitable and that he should hear the matter without a jury and determine the whole cause, including the matter of an injunction and the question of damages. (Tr. pp. 6, 7, 8).

Justice Folland of the Supreme Court of the State of Utah, in the case of Wasatch Oil Refining Company vs. Wade, 92 Utah 50, 63 Pac. 2d 1070, on page 1078, quoted from 10 R. C. L. 372, what he stated was the rule, as follows:

> "While it is true that a court of equity, having once obtained jurisdiction of a cause, will retain it for all purposes and administer complete relief, it is generally conceded, despite the existence of a few opposing decisions, which may be characterized merely as variants from the general rule, that in order to authorize relief which can be obtained in a suit at law there must be some substantial ground of equitable jurisdiction, and if there is no equitable ground of jurisdiction and the remedy sought can be as well obtained in an action at law, a court of equity cannot retain jurisdiction and grant a purely legal remedy. Mere statements in a bill on which the chancery jurisdiction might be maintained, but which are not proved, will not suffice to authorize a decree on such parts of the bill as, if standing alone ,would not give the court jurisdiction, but to justify the retention of a cause not only must some special and substantial ground of equitable jurisdiction be **alleged,** but it must also be proved on the hearing." (Boldface type ours).

See also: Wyoming Coal Sales Co. v. Smith-Pocahontas Coal Co., 105 W. Va. 610; 144 S. E. 410; 62 A. L. R 740;

Norback vs. Board of Directors, etc., 84 Utah 514, 37 Pac. 2d 339; Goldthait vs. Lynch, et al, 9 Utah 186, 33 Pac. 699; State ex rel, Hansen, et al vs. Hart, 26 U. 186, 72 Pac. 938; Estay vs. Holdren, District Judge (Kans.), 267 Pac. 1098.

In a full examination of the complaint and all of the pleadings, it is respectfully submitted that there is no basis for equitable cognizance. The plain statement in the present tense by plaintiff that shortly after the signing of the agreement the defendant began operating a mortuary and funeral business in Provo and in Utah County south of Provo and in Juab County in his own name, in that he solicits and procures customers in those places and holds funerals, certainly is a statement of no fact showing a basis for equitable relief. From the whole complaint it would appear that the action was primarily legal for damages. There is no allegation to invoke equitable jurisdiction. There is no statement of facts showing that the remedy at law was inedequate, nor was there any other statement of any other fact to show that the action was primarily equitable. Such facts should be stated. There is no showing in the complaint that the building and equipment in Eureka was ever even retained by the plaintiff and that there was ever any necessity for an injunction—nothing to show that the legal remedy of damages was not adequate. For the court to take equitable jurisdiction and decide the case without a jury, sufficient facts must be stated in the complaint to justify the same. In fact, the plaintiff alleged specific damages covering all the claimed wrongful acts of the defendant, and there can be no other conclusion from the body of the complaint but that those damages would furnish it full relief.

We submit that the issues based upon the complaint

are primarily, and, indeed, solely legal. Vol. 3 of Bancroft on Code Pleadings, page 2551, paragraph 1545, states:

> "The Complaint must state all the facts essential to a cause of action for equitable relief and more particularly the facts justifying an injunction. What must be alleged in a particular case, of course, depends largely upon what is essential in a right of action in that sort of case."

From an examination of the complaint, we certainly cannot see how the Court could determine that the action was primarily equitable and that there were sufficient facts alleged upon which to base an injunction.

2. The Court erred in refusing the defendant the right to have a trial by jury.

If the District Court were correct in holding that the issues raised by the complaint and answer established primarily an equitable action, then and only then under the law had he the right to deny the defendant a jury trial. The Court did deny such right to the defendant and based its denial upon his holding that the action, based on plaintiff's complaint, was primarily equitable (Tr. 6, 7 & 8).

Justice Moffitt, speaking for the Utah Supreme Court in the case of Norback vs. Board of Directors of Church Extension Society, 84 Utah 514, 37 Pac. 2d 339, at page 343, said:

> "Where the issues are legal issues, the fact that equitable relief may be prayed for, to carry into effect the judgments based upon the legal issues, is not sufficient to deprive either party of his right to have the legal issues submitted to a jury."

The same view is held in the case of Mortimer vs. Laynes, (Calif.) 168 Pac. 2d 481; Petty vs. Clark, 102 Utah 186, 129 Pac. 2d 568. See also: State ex rel Hansen vs. Hart, 26 Utah 229, 72 Pac. 938. In this case the only basis for equitable relief is the prayer, and the prayer is not part of the complaint. The whole basis for the relief in the complaint is legal. It follows that the Court herein wrongfully denied the defendant the right to a trial by jury, and the case should be remanded.

3. The Court erred in the interpretation of the contract.

The Court held that the contract (plaintiff's Exhibit "A") was definite and certain, and that it meant that the defendant had agreed not to conduct funerals and engage in other miscellaneous activities in Provo, Utah, and in Utah County south of Provo and in Juab County. As may be seen by the Conclusions of Law quoted above, and in Judgment Roll, page 43, the Court concluded that the residence of a decedent governed as to whether or not the defendant could perform funerals in Provo and in the other parts of the territory in question. The decree supported the conclusions in this particular respect. (J. R. 44-45).

It is interesting to note in examining the transcript of record with respect to the occasion when counsel for plaintiff was examining the defendant with respect to funerals that had been held by defendant, as to the questions that were asked. In the case of the death of Lawrence Russell Gren, a resident of Orem, who died in Utah Valley Hospital in Provo, with funeral in Orem and burial in Provo, counsel apparently claimed a violation (Tr 27-28). The same was the case of Susan Virginia Stokes, resident of Orem,

who died in the Utah Vally Hospital with funeral in Provo (Tr. 28). The same was the case in connection with the death of Lewis Wahlquist, a resident of Orem, who died in Utah Valley Hospital in Provo, and who was buried in Eureka (Tr. 28-29).

Counsel apparently claimed no violation with respect to the death of Arthur Lynn Boswell, a resident of Vineyard (near Provo) who died in Utah Valley Hospital, with funeral held in Provo (Tr. 29-30).

Counsel for plaintiff apparently claimed a violation with respect to Anna W. Maag, a resident of Orem who died in Payson Hospital, with funeral in Orem and Burial in Provo (Tr. 40).

Counsel also apparently claimed violation with respect to Thomas Fielding, a resident of Orem, who died in Utah County Infirmary with burial in Orem and funeral in Orem (Tr. 40).

The same was apparently the case with respect to the death of Alice Diane Carter, a resident of Orem, who died in Utah Valley Hospital at Provo, with funeral in Orem and burial in Heber, Utah (Tr. 41, 42).

As an anomaly herein, counsel apparently felt there was no violation in the case of Arthur Gilbert, Jr., a resident of Provo, who died in Salt Lake City, the funeral services conducted in Provo and burial in Murray, Salt Lake County, Utah (Tr. 42).

Counsel apparently claimed a violation with respect to the death of Charles Terry, a resident of Orem, who died in the Utah Valley Hospital in Provo, the funeral services in Orem and burial in Provo (Tr. 42-43).

Counsel also apparently claimed a violation with respect to Lena Smith, a resident of Los Angeles, California,

who died at Los Angeles, with funeral in Eureka and burial in Springville, Utah (Tr. 43).

Counsel also apparently claimed a violation with respect to Lawrence Russell Rand, a resident of Orem, who died in Provo and was buried in Orem (Tr. 46).

Counsel for plaintiff apparently claimed violation with respect to Janice Sanstrom, a resident of Provo, who died in Orem and was buried in Provo (Tr. 50).

Counsel for plaintiff apparently claimed violation with respect to Tim Allred, a resident of Orem, who died in Provo with burial in Orem.

Counsel apparently claimed no violation as to a person who died in France and was buried in Santaquin (Tr. 54), and others where the body was not prepared for burial by the defendant (Tr. 54-55).

Of course, in a statement to the Court, counsel admitted that he may have been somewhat inconsistent in his questions in this respect, but stated that was because of his desire not to be unfair to the defendant (Tr. 206).

The above is shown in detail to exemplify the rather strained and far-fetched interpretation the Court gave the contract in question. He apparently interpreted it that the defendant should not conduct funerals in Provo and in Utah County south of Provo and in Juab County; but then holds that the contract meant that if people were residents of places north of Provo, it was all right to conduct funerals therein; to pick up bodies therein, and to supervise the burial therein. If the Court is right that the contract did not mean that the defendant should only not operate a physical establishment at Provo or in Utah County south of Provo and in Juab County, then we submit he would be wrong in saying that defendant was not in violation when

he conducted funerals in Provo and Utah County south of Provo or in Juab County, even though the decedents were, at the time of their deaths, residents of places north of Provo. The distinction is artificially drawn. Of course, the Court attempts to avoid this rather anomalous situation by saying in his memorandum decision that it would be unthinkable to hold that the defendant could not conduct these funerals in the disputed area. It is unthinkable, in our opinion, for the Court to interpret the contract artificially and in such a strained way as he has, when the contract, interpreted in the way we maintain is correct, would be clear and unequivocal. The Court held the contract to be clear and unequivocal; the only way it could be unequivocal would be to hold that it meant that the defendant would not operate a physical establishment in Provo or in Utah County south of Provo or in Juab County. Indeed, it would appear to be all the protection the plaintiff would need to protect its business building in Eureka.

Let us consider the words about which the controversy mainly has arisen. We quote again from paragraph 5 of the contract (plaintiff' Exhibit "A") as follows:

> "That the seller will not for a period of twenty five 25 years from the date of this contract, operate a mortuary or funeral business in Utah County, Provo and South of Provo or in Juab Counties in his own name or through a subsidiary or third party."

The New Century Dictionary, Volume 2, published by Collier, gives the two main definitions of **operate** other than the manual act upon the body of a patient, they define it as follows:

"to be working, act effectively, or exert force or influence (as, the same causes are operating today; a new spirit was operating among them; etc)."

It also gives the definition:

" to bring about, effect, or produce, and by action or the exertion of force or influence; also, to keep (a machine, apparatus, factory, industrial system, etc.) working or in operation; manage or use (a machine, etc.) at work."

In discussing the definition of the word **operate** there are several interesting cases in the publication **Words and Phrases,** among which is the case of State vs. Mahforez, 181 Louisiana 183, 158 Southern 609. In that case it was held that the word **operate** means

"to bring about; to put into or continue an operation or activity; to manage, to conduct; to carry out or through; to work, as to operate a machine."

In the case Kornhouser vs. National Surety Co., 114 Ohio St. 24, 150 N. E. 921-923, it was stated that in relation to the operation of a coal bed, the word **operate** is synonymous with occupy or work. In discussing the case the judgment says:

"occupy is also held to be synonymous with work or operate, in the primary and most familiar sense of the word, occupy is the equivalent of the word possess. It implies the conception of permanent tenure for a period of greater or less duration as used in a deed. In relation to the operation of a coal bed, the word **occupy** is synonymous with the word **work** or **operate.**"

The word **mortuary** is defined as a "dead house," and the Court has determined there is no question about the operation of a mortuary.

Business, in the same dictionary, is defined as follows:

"The state of being busy; also, that with which one is busy or occupied; a matter of special concern at a particular time; a particular mission; charge, purpose, etc.; something to be done or attended to; an affair in which one has the right to act or interfere, or the right itself; any matter, affair, or thing as (This is bad business; tired of the whole business); also a matter of habitual concern or interest; one's occupation, profession, or trade; also, action which requires time, attention and labor; serious employment as opposed to intercourse generally; esp., commercial dealings, mercantile pursuits collectively; trade, commercial transactions or engagements; also, a commercial enterprise or establishment."

The word **funeral** is defined as follows:

"Of or pertaining to the ceremonial burial (or, sometimes, cremation) of the dead; used, spoken, etc., on such an occasion (as, funeral rites, a funeral sermon). The ceremonies connected with the disposition of the body of a dead person; obsequies; also, a funeral procession."

The Court will undoubtedly take judicial notice of the fact that no one is exclusively in the business of conducting funerals only. They also will take judicial notice of the fact that mortuaries are very often known as funeral homes.

We submit that the contract either refers to operating a mortuary or funeral business as a physical establishment or plant or it is ambiguous.

If it refers to the establishment itself, therein lies the solution of this case. That is what defendant claims, but if

it means to do any funeral business in the sense of the picking up of bodies, receiving calls, etc., that is another thing. It is not enough to say that the contract definitely includes some of the acts claimed by the plaintiff; the whole meaning is the thing in doubt. Does it mean receiving telephone calls, taking the hearse to Eureka, responding to requests of residents of Orem to go to Provo, taking a body from out of the City of Provo? It is not enough to say that there is no violation where the decedent is a resident of Orem even though the death and burial is in Provo. That is an artificial, strained construction by the Court.

There was an interesting Washington case recently between Merlin et ux., vs. Rodine et ux, 203 Pac. 2d 683. Here the Supreme Court held that a contract was not ambiguous, but in the course of its opinion states:

> "We have consistently held that we cannot, upon general principles of abstract justice, make a contract for the parties that they did not make for themselves."

Here there would not even be principles of abstract justice in the contract the Court is attempting to make for the parties.

We submit that the only way the contract could be unambiguous is to hold that the contract meant and means that the defendant would not operate a physical establishment in Provo or in Utah County south of Provo or Juab County, either in the nature of a mortuary itself or a funeral business in connection with his home. Certainly one would not call his home from which he might conduct his funeral business a mortuary. It is certainly unclear and equivocal that the contract meant only as the Court found.

To aid in the interpretation of this particular contract, we would like to quote from 12 Am. Jr. 791, paragraph 250, which reads as follows:

> "Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language. In the transactions of business life, sanity of end and aim is at least a presumption, though a rebuttable one. A reasonable interpretation will be preferred to one which is unreasonable. When the evidence of the agreement furnished by the contract itself is not plain and unmistakable, but is open to more than one interpretation, the reasonableness of one meaning as compared with the other and the probability that men in the circumstances of the parties would enter into one agreement or the other are competent for consideration on the question as to what the agreement was which the written contract establishes. When the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. The interpretation of any instrument ought to be broad enough to allow it to operate fairly and justly under all the conditions to which it may apply. A court will not place an unjust interpretation upon a contract, unless the terms thereof compel it to do so. An agreement will not be interpreted so as to render it oppressive or inequitable as to either party or so as to place one of the parties at the mercy of the other, unless it is clear that such was their intention at the time the agreement was made. An interpretation which is just to both parties

> will be preferred to one which is unjust. Every intendment is to be made against the interpretation of a contract under which it would operate as a snare. The inconvenience, hardship, or absurdity of one interpretation of a contract or its contradiction of the general purpose of the contract is weighty evidence that such meaning was not intended when the language is open to an interpretation which is neither absurd nor frivolous and is in agreement with the general purpose of the parties."

It does not seem that under the reasonable facts and the reasonable circumstances of this case that the plaintiff should be entitled to force the defendant to do any more than not maintain a physical establishment closer than 57 miles from the mortuary building sold by defendant to plaintiff in order to protect the plaintiff.

The Court admitted testimony of Aura C. Hatch, president and manager of the plaintiff mortuary, that he prepared the contract in question (Tr. 192). It should have been construed most adversely against the plaintiff instead of most favorably to it, as its officer made the contract. General Mills, Inc., vs. Cragun, et al, 102 Utah 239, 134 Pac. 2d 1089.

In this case part of the transcript of the deposition of Aura C. Hatch, president of the plaintiff mortuary, which deposition was taken January 28, 1949, was offered in evidence for the purpose of showing what Hatch, when he drew the contract, undoubtedly meant by operating a business. Hatch, in answer to the following questions, made the following answers:

"Q. Where do you live, Mr. Hatch?

A. 85 East 3rd South.

Q. What is your business?

A. I am a mortician, president and general manager of the Valley Mortuary.

Q. And is that a corporation, Mr. Hatch?

A. Corporation.

Q. Who are the other officers in the corporation?

A. LeRoy Johnson.

Q. What is his position?

A. He is the treasurer, William R. Jex, Secretary. Walter M. Rigby, Vice President.

Q. Where does Mr. Johnson reside?

A. Here in Provo.

Q. Is he also a director?

A. Yes.

Q. And where does Mr. Jex reside?

A. At Spanish Fork.

Q. Mr. Rigby?

A. Payson.

Q. How long have you been incorporated, Mr. Hatch?

A. Since 1943.

Q. And have you had the same officers during that time?

A. Yes, sir.

Q. Do you have your **business** here in Provo?

A. Yes, sir.

Q. And do you **operate** at any other place?

A. Yes, we **operate** at Payson, and Eureka we have a place." (Tr. 193-194). (Boldface ours).

The Court, we believe, erroneously sustained the objection to the admission of the testimony from the transcript of the deposition.

It would be strange to say, would it not, that because we, as counsel, take a case down in Sanpete County that we are operating our law business in Sanpete County, even though the physical plant of our office is located in Provo, Utah. Certainly we are operating our law business in Provo, Utah, as an establishment or calling.

The defendant offered to show by the testimony of Fairbanks that the tangible property specified in the contract, (plaintiff's Exhibit "A"), including the property inventoried upon the exhibit attached to the contract, was of a reasonable money value in excess of Fifty Five Hundred and NO/100 ($5,500) Dollars. The Court declined the offer. (Tr. 184). In interpretation of the contract, the Court certainly should have accepted the testimony that the physical property conveyed itself was of a value in excess of Fifty Five Hundred and NO/100 Dollars. The Court erred in refusing that testimony.

That testimony would not go to vary the terms of a written instrument, but would show some of the surrounding circumstances, and would go to the reasonableness as to whether or not the defendant would have executed such a contract with the meaning that the Court has so artificially interpreted it to have.

The Court, in interpreting the contract, failed and refused to give any weight to the following testimony of Lionel Fairbanks, which was neither rebutted or denied:

"Q. Directing your attention to the time the contract was changed by interlineation, did you have a conversation with Mr. Hatch?

A. Yes, yes, I did.

Q. And will you state what was said?

A. Well, I went to his home in Provo and told him that I had decided to build a mortuary in Orem or American Fork, and that I would like the contract modified permitting me to build a mortuary there.

Q. What did he say?

A. He said, 'Well, I see no reason for you not building a mortuary in Orem. We don't have any places north of Provo.' And we went into some detail about modifying it and he said, 'Well, if we put it that you can't build a mortuary south of Provo would that be satisfactory, or Provo and South?' And I said, 'That will be fine with me, Mr. Hatch.' So he modified the contract.

Q. By the interlineation appearing in pen?

A. Uh huh."

Certainly after Hatch, who was negotiating for the plaintiff corporation, had a conversation with respect to where a mortuary might be built, the contract could not have meant what the Court interpreted it to mean.

Assignments of Error numbered 4, 5, and 6, we believe, will not require further separate treatment, other than to say that the Court should have taken into consideration evidence of the circumstances surrounding the making of the contract, testimony with respect to the value of defendant's mortuary built in Orem, and testimony with respect to the financing thereof after an appraisal by an officer of the Valley Mortuary, should have been received. (Tr. 65).

The Court should have received testimony with respect to the value of the tangible assets conveyed under the contract, such value being in excess of $5,500 (Tr. 80-89, 110-112).

This testimony would go to the facts surrounding the making of the contract, and should have been received by the Court.

Assignments of Error numbered 7 to 16 inclusive are all based upon whether or not the Court was correct in denying a jury trial to the defendant, and thereafter whether or not he was correct in the interpretation of the contract. If the Court erred, as we feel he did, in denying a jury trial to defendant, and also erred in his interpretation of the contract, as we also feel he did, then there was error as to the matters assigned No. 7 to 16 inclusive.

4. The Court erred in disregarding the testimony of witnesses of the defendant as to whether or not they would have given funeral work to the Valley Mortuary.

In spite of the direct testimony of the defendant's witnesses that even if the services of Lionel Fairbanks had not been available they would not have given their funeral work to The Valley Mortuary, the Court, in all but one instance, disregarded it. (Judgment Roll, pages 35-36; Tr. 137-138, 148-149, 151-152, 155-156, 162, 164).

5. The Court erred in interpreting the contract to include the sale of good will.

The contract (plaintiff's Exhibit "A") was prepared by Aura C. Hatch, president of the Valley Mortuary (Tr. 192). He specified matters to be sold under the contract and under the inventory. If good will were intended to pass under the contract, we submit that the writer thereof would have specified it. The fact that he failed to state that the good will passed, and specified everything else that did pass, should be, in our opinion, ample support for the

view that good will did not pass. All that the defendant agreed was not to operate a physical establishment, a mortuary or funeral business in Provo and Utah County, south of Provo, and in Juab County.

CONCLUSION

We submit that the Court erred in holding that the case was primarily equitable, and in denying the defendant a trial by jury. We further submit that the Court erred in the interpretation of the contract and in refusing the admission of testimony as to the facts surrounding the execution thereof.

We further submit that the case should be remanded and the defendant granted a trial by jury, and, in any event, that the contract should be interpreted to only prohibit the defendant from operating a mortuary or funeral business in Provo or Utah County south of Provo or in Juab County as a physical establishment, and that the decree and judgment of the District Court should be reversed.

Respectfully submitted,

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and Appellant.