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

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

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THE VALLEY MORTUARY, a
Corporation,
Plaintiff and Respondent,

vs.

LIONEL FAIRBANKS,
Defendant and Appellant.

CLERK, SUPREME COURT, UTAH

CASE NO. 7350

RESPONDENT'S BRIEF ON APPEAL

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NEW CENTURY PRINTING CO., PROVO, UTAH

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In the Supreme Court of the State of Utah

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LIONEL FAIRBANKS,

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CASE NO. 7350

RESPONDENT'S BRIEF ON APPEAL

The matters appearing in the Judgment Roll are set forth in extenso in the first 14 pages of Appellant's Brief, and reflect the background and basis for the issues involved on the appeal. For convenience of the Court in keeping clear the matters involved in the discussion, we shall, in this brief, refer to the parties by name; the defendant and appellant as FAIRBANKS and the plaintiff as THE VALLEY. As we understand the pleadings, the record, and Fairbanks' brief, there is really only one question involved on this appeal which arises as follows:

Fairbanks, a mortician or undertaker, at Eureka, sold his establishment, stock in trade, and good will, to The Val-

ley for a consideration of \$5,500.00 under a written agreement containing, inter alia, a provision, that Fairbanks would not for a specified period operate a "mortuary or funeral business in Utah or Juab Counties, in his own name or through a subsidiary or third party." Fairbanks received his money, turned the physical property to The Valley, and left the restricted area. Sometime thereafter he sought and was granted a modification of the agreement eliminating from the restricted area that part of Utah County lying north of Provo City. He then set up an establishment and entered into a mortuary, funeral, or undertaking business in Orem, north of Provo. Shortly thereafter, in the operation of the mortuary business, Fairbanks began an invasion of Provo, Utah County south of Provo, and Juab County, for undertaking business; receiving bodies, embalming, selling caskets, arranging and conducting funerals and burials in the restricted area. His activities in this regard continued to increase and expand until this action was commenced by The Valley to enjoin Fairbanks from violating the restrictive clauses of his contract of sale, and as an incident, sought damages for the past breaches of contract. The principal issue involved, the nub of the controversy, the crux of the case, is as to whether or not injunctive relief is a proper remedy in the action. All other matters raised or discussed are merely incidental to this question. Fairbanks raises and argues this question in three of the five points (first, third and fifth) discussed in his brief. Point 2 admittedly loses its significance if the action sounds in equity, and Point 4 consists of a single statement that in Fairbanks' opinion the Court did not give enough weight to some of his testimony.

POINT 1

Is equitable or injunctive relief a proper remedy for the Court to apply in this action? Fairbanks assails the injunction: first, from a standpoint of pleading; second, as a matter of construction of the contract.

The question of pleading is posed by Fairbanks' contention that the complaint does not lay a basis for the interposition of the Court's equitable powers. Like many other activities of man, the art of pleading under common law gradually moved and degenerated itself into a formalism, a rule of thumb, a practice where a rule and not a reason was the guide. The pleader was required to make his facts fit the stereotyped form of pleading, rather than the pleading fit the facts. The basis and objective of the code—the innovation brought about by it—was to make the facts and not the form the invoking power, the force that calls and brings into play the powers and facilities of the Court. A pleading is to be tested, not by its form, but by its content. It follows, therefore, that facts and not conclusions must be pleaded. It is from the factual substance, not the conclusions the pleader may have drawn, that a pleading must be tested.

What must be alleged in a particular case depends upon what is essential to a cause of action in that sort of case. In any given case we are not helped much by references or citations to general rules of pleading. The application of such rules vary with the nature of the cause of action. We do not mould our facts to fit rules of pleading—we plead the facts, and then through the processes of legal reason, determine if the facts stated show a picture or condition which calls for the Court to determine the rights involved,

and to react in a certain way to achieve that purpose. 3 Bancroft Code Pldg., 2553, 4. The first question, therefore, as to the sufficiency of any pleading is: What is essential to a right of action in a case of that kind? The second question: Are those essentials found within the pleading?

Let us apply these tests to the pleading in the case at bar. In an action brought for violation of a contract to refrain from entering business in competition with the person to whom the violator of the contract has sold his business and good will, what facts are essential to show a proper cause or justification for the exercise of the equitable powers of a Court? In short—what facts must plaintiff plead in a case such as this to lay a foundation for injunctive relief? He must show: An interest in the subject matter; an invasion by defendant of a right plaintiff has therein; and facts from which the Court may say that equitable relief is the most efficient and effective remedy to be applied in the situation to protect the parties in their rights.

It is not an uncommon practice to quote the old worn, hackneyed expressions that one must plead inadequacy of legal remedies, and irreparable injury before equity intervenes. Such expressions originated and became shopworn, if not hallowed, in the days and practice when law and equity were separate and distinct, administered by separate tribunals, under different rules of practice; and when equity was considered not a right but a benevolence of the King, which he could refuse or extend in those cases where the law and its procedure, because of its universality, was inadequate. With the adoption of our code, the distinction between legal and equitable forums, between legal and equitable practice, was abolished, and law and equity is now administered by the same Courts, in the same actions, be-

tween the same parties, being parts of the same jurisdiction, and applied by the Court as seems proper, to accomplish the results which the facts indicate the parties are entitled to, and which should therefore be the results of the action. Constitution of Utah, Art. VIII, Sec. 19; Norbach vs. Board of Directors, 84 Ut. 506, 37 Pac. (2) 339; Spanish Fork West Field v. District Court, 99 Ut. 527, 104 Pac. (2) 353.

It thus appears that the adequacy of the complaint is determined by this test: Are there **facts** stated from which the Court can say that suit for damages would not be an adequate, efficient and effective remedy to protect the rights plaintiff has under its contract?

The complaint alleges and shows that Fairbanks sold a going business to The Valley for a substantial sum of money, and that part of the consideration The Valley received for the money so paid Fairbanks was the good will of Fairbanks and of the business sold in the restricted area, coupled with a covenant by Fairbanks not to enter or engage in competition with The Valley within the restricted zone for a specified time. It alleges in definite and positive terms that Fairbanks is actively and openly violating his restrictive covenant, injuring The Valley's business, and undermining the good will he had sold and for which he had been paid; and concludes with a prayer for an injunction; then for damages and costs. In an assault such as this upon the complaint those facts are admitted, as they are upon demurrer. (At the time the injunction was granted Fairbanks had answered, admitting he was operating a funeral business in the restricted area, and alleging in effect that he intends to continue so to do. See paragraph 5 and subdivisions (a) and (c) of Fairbanks' further and affirmative defense.)

Fairbanks states that the only basis for equitable relief is the prayer, and that the prayer is not a part of the complaint. True, the prayer is not part of the allegations, but it is the assertion of the kind, nature, and extent of relief plaintiff seeks; and the relief he can obtain is limited by the prayer. It is therefore to be considered by the Court in construing and interpreting the pleading, since the Court must determine whether the party has stated a case for the relief which he seeks.

“The character of the bill depends upon the prayer, which defines its objects, and points out the defendants and the remedies and redress sought.” 10 Ency. Pldg. and Prac. 961.

The prayer serves to show the kind of relief to which plaintiff conceives himself to be entitled, and indicate the object which he seeks to accomplish. *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722; *Rochester v. Wells Fargo*, 87 Kan. 164, 123 Pac. 729, 40 L. R. A. (N. S.) 1095.

O. G. Merager v. Alex Turnbull, 2 Wash. (2d) 711, 99 Pac. (2) 434, 127 A. L. R. 1142, 1151, a case involving a sale of undertaking business, the Court says:

“The argument of appellants that the respondent’s failure to raise in the pleadings or argue at the trial the issue of the right of Bruce Turnbull to use the new building precludes the relief of enjoining use of the building by Bruce Turnbull is answered by the prayer of respondent in his complaint for injunctive relief against both appellants and for such other and further relief as might to the court appear just and equitable in the premises. Under that prayer the trial court had the right to grant any and all relief which was deemed justified under the circumstances.”

Where the complaint sets out facts which will support either an action at law or a suit in equity, the character of the action may be determined by the relief demanded. Ency. Pldg. and Prac. 16; 777-8.

“Where the facts stated entitle the plaintiff to elect between two remedies, to either of which the facts show him to be entitled, the prayer may determine the character of the action, because it is in itself an election. Corry v. Gaynor, 21 O St. 277.”

“Whether a petition is at law or in equity is to be determined by the prayer and conclusion. Pella Christian Church v. Scholte, 2 Ia. 27.”

Where there are two statutes prescribing the same form of complaint in (1) an action for the recovery of money judgment and (2) an action foreclosing a lien for taxes, the prayer of the complaint will determine the nature of the action. People v. Mier, 24 Cal. 61.

1 Bancroft Code Pldg. 35. The prayer may be consulted in determining whether a pleading was intended to include any specific character of relief, or in interpreting the language of a complaint or petition. Where the facts may constitute two or more different causes of action, and may authorize different judgments, the prayer becomes significant, and may determine the nature of the action. Aid v. Bowerman, 132 Wash. 319, 232 Pac. 297; Nevada County, etc. Canal Co. v. Kidd, 37 Cal. 282; Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722; People v. Mier, 24 Cal. 61.

“In case the pleader has stated a cause of action in equity and also one at law in such a manner as to have it uncertain which one he intends to pursue, resort may be had to the prayer for relief to determine the character of the action. Kinns v. Gaslin, 24 Neb. 310, 38 N. W. 797.”

The injunction here involved is not an injunction pendente lite, but one entered after issue joined and full hearing had, and submission of the cause upon the merits. There is no claim that the evidence before the Court did not, or does not, justify the injunction. The contention is that the complaint did not set forth facts showing the need of equitable restraints. Fairbanks argues the point as though the question were one arising upon a temporary writ issued upon the complaint, rather than a writ issued after trial upon the merits. We shall advert to this fact later. At the moment we shall confine ourselves to appellant's position.

For a pleader to say that "he has no adequate remedy at law" or that "his legal remedies are inadequate" adds nothing to his pleading; it states no facts and is merely a conclusion of the pleader. 3 Bancroft Cook Pldg. 1548; McBride v. Newlin, 61 Pac. 577; 129 Cal. 36; McLean v. Farmers Highline Canal, 44 Colo. 184, 96 Pac. 16; Davitt v. American Bankers, 124 Cal. 99, 56 Pac. 775; Wicks v. Metcalf, 83 Ore. 687, 163 Pac. 434; L. R. A. 1918A 493. What he must show are the facts from which the Court may deduce conclusions with respect to what are proper or necessary remedies. Utah Assn. Creditmen v. Jones, 49 Ut. 519, 164 Pac. 1029; 3 Bancroft Code Pldg. 1548; Schuyler v. Broughton, 65 Cal. 252, 3 Pac. 870; Van Buskirk v. Bond, 52 Ore. 234, 96 Pac. 1103; Galbreath Gas v. Lindsey, 35 Okla. 235, 129 Pac. 45.

From the facts may not the Court conclude that damages would not be an adequate, an efficient or an effective remedy?

In determining whether an action is a law case, or one sounding in equity, the Court looks at the plaintiff's right,

the grievance complained of, and considers the question: What is the proper and effective remedy to protect plaintiff in his rights? If an award of damages, a money judgment, will properly protect plaintiff's rights, the case is one at law; if such judgment would not amply protect plaintiff's rights and redress his wrongs, the action sounds in equity and the Court will administer its equitable powers to achieve the necessary, desirable and proper end. In actions under restrictive covenants in connection with the sale of a business, or of good will, the Courts uniformly hold that the action is equitable, and that the remedy at law is inadequate, and the continued injury in its nature irreparable; that such conclusions are impelled from the type of the case and the wrong complained of, and need not be further pleaded. In a recent case, involving the sale of an abstract business, answering the same point raised here, the Court said:

"It was not necessary, in this kind of case, for the plaintiffs to show irreparable injury, or that they had no adequate remedy at law. *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911; *Goldberg vs. Soltes*, Tex. Civ. App.; 32 S. W. 2d 246; *Lomax v. Trull*, Tex. Civ. App. 232 S. W. 861; *Red Ball Stage Lines v. Griffin*, Tex. Civ. App.; 275 S. W. 454; *Clay v. Richardson*, Tex. Civ. App.; 290 S. W. 235. We refer especially to the opinion in *Anderson v. Rowland*, supra.

That plaintiffs need not prove the extent to which they have been injured by the violations of the contract, or that they have been injured at all, may be demonstrated by stating that a threatened violation of this contract might have been enjoined, even though no violation had yet taken place, and though no injury had yet been suffered. The purchasers of a business and good will, where the seller had agreed not to com-

pete, are not bound to wait until the contract has been breached and the damage has been done before seeking an injunction.

As is recognized by the authorities above cited, an injunction may be the only satisfactory relief available in a case of this kind. In no other way can plaintiffs obtain what they purchased from defendant." *Moore v. Duggan Abstract Co., et al*; 154 S. W. 2d 519, 520, 1. We quote from *Anderson v. Rowland*, 44 S. W. 914:

"The mere fact that a breach of the covenant is intended is a sufficient ground for the interference of the court by injunction. A covenantee has the right to have the actual enjoyment of the property *modo et forma*, as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept, as far as he is concerned, or whether he will permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract, the court will protect the complainant in the enjoyment of the right he has purchased. 2 High, Inj. Para. 1158."

In *Angier v. Webber*, 14 Allen 211, 92 Am. Dec. 748, the Massachusetts court said:

"For this violation of this covenant the plaintiff is entitled to relief in equity. An action at law will furnish no adequate remedy. The damages are, in their nature, such as not to be susceptible of proof or exact computation, and the injury caused by the acts of the defendants is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy. 2 Story, Eq. Para. 925; 2 Daniell, Ch. Prac.

1760; Williams v. Williams, 2 Swanst. 253." To same effect 2 High, Inj. (3d Ed.) Para. 1142-1158.

In Lutz v. Western Iron and Metal Company, 190 Cal. 554, 213 Pac., on page 965, the court states thus:

"From the nature of the situation the injury or damage that will accrue to respondent if appellants are permitted to do the threatened acts in the name attempted to be appropriated is plain. A pleader is not required to describe in extenso by a superfluity of words a result that must inevitably follow, provided the premises of a stated proposition be acceded to. Can there be any doubt as to the natural and logical effect the competition described in the complaint would have on respondent's business?"

The same court, in Moore v. Massini, 32 Cal. 595, says:

"Should the threat be fulfilled the plaintiff would be deprived of a part of the substance of his inheritance which could not be specifically replaced * * * the injury is irreparable in itself. Inasmuch as plaintiff's rights to the remedy by injunction has its origin in the nature of the injury complained of, it was of course, unnecessary to aver matters merely adventitious."

The court goes on to point out that where a threatened injury goes to the substance of plaintiffs rights, not the equivalent of money, it is irreparable by the definition of that term.

In Charles T. Granger v. Lawrence L. Craven, (159 Minn. 296, 199 N. W. 10) 52 A. L. R. 1356, the court said:

"We do not so far forget that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties

thereto to escape their obligation on the pretext of public policy, unless it clearly appears that they contravene public rights or the public welfare. *James Quirk Milling Co. v. Minneapolis & St. L. R. Co.*, 98 Minn. 22, 116 Am. St. Rep. 336, 107 N. W. 742, following *Baltimore & O. S. W. R. Co. v. Voiget*, 176 U. S. 498, 44 R. ed. 560, 20 Sup. Ct. Rep. 385.

We consider that public policy requires the enforcement of this contract as the parties wrote it, rather than judicial permission for another surgeon to practice in Rochester.

If defendant had bought out the plaintiff, he certainly would have exacted a covenant preventing plaintiff from re-entering practice in competition with him. That is, he would have protected his newly purchased good will from invasion by its former possessor. That sort of a covenant, otherwise reasonable, has never been successfully challenged.

It would be most uncomplimentary to defendant to suppose that he would not, were he to open an office in Rochester, attract to himself at once and automatically, a substantial number of plaintiff's patients.
* * * That consideration shows both the propriety of the restrictive covenant, and the sureness with which irreparable injury to plaintiff will follow unless defendant is restrained by injunction from a breach of that covenant. **We need no evidence to show that substantial injury would follow otherwise, and it would be the kind of injury for which the legal remedy is inadequate. (Boldface ours.)**

There is so much authority on this subject that any attempt here to review it is prohibited by propriety. The task has been admirably performed in the annotations appearing in 9 A. L. R. 1456 and 20 A. L. R. 86. The latter supplements and brings down to date (1922) the former.

But, given a legitimate interest protected to a reasonable degree, where damage beyond the power of law to prevent or make good is reasonably sure to follow a breach of the protecting covenant, its breach should be prevented by injunction. This is such a case."

The rule is laid down in 43 C. J. S. 567, as follows:

"Where a nestablished business has been sold with its good will, and there is a valid covenant not to compete, a breach is regarded as the controlling factor, and injunctive relief follows almost as a matter of course. In such cases the damage is presumed to be irreparable, and the remedy at law is considered inadequate." See also: *Peterson v. Johnson Nut Co.*, 204 Minn. 300, 283 N. W. 561; *Malakoff Gin Co. vs. Riddlesperger*, 108 Tex. 273, 192 S. W. 530; 32 C. J. 217, note 11 and 12."

Where the injury complained of is one which is in its nature irreparable or one which from its nature damage is not an adequate remedy, allegations of irreparable injury for inadequacy of legal remdy are unnecessary. *Cal. Jur.* Vol. 14, para. 66; *Burris v. Rodriguez*, 22 Cal. App. 645, 135 Pac. 1105. In *Cal. Jur.* 67, it is said:

"If the ultimate facts pleaded warrant the granting of an injunction, or the ultimate facts proved warrant the granting of an injunction, it is the duty of the court to grant such relief."

We may summarize this matter in a series of terse statements from 10 *Encyc. Pldg. and Prac.*, as follows:

"P. 943. Whether the bill shows a plaintiff entitled to relief must be considered with reference to the nature, character and condition of the property or

rights to be protected. Citing *Shipley v. Ritter*, 7 Md. 408.

P. 952. An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefore in damages, or when the damages which result therefrom cannot be measured by any certain pecuniary standard.

In determining what is an irreparable injury regard is had not only to its magnitude but to its character and it is irreparable in the sense herein when the plaintiff could not be considered as in the same position after a money judgment as he was had the wrong not been committed. There are rights which though exercised over property and dependent on it, the violation of which cannot be adequately redressed by any recovery of a mere sum of money. See *Jones v. Brandon*, 60 Miss. 556.

P. 9554. By the term 'The inadequacy of the remedy by damages' is meant that the damages obtainable at law are not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood. The fact that the amount of damages cannot be accurately ascertained may constitute irreparable damage. The question in all cases is whether the remedy at law is under the circumstances of the case, full and complete. See *Western Union Tel. v. Rogers*, 42 N. J. Eq. 311.

The test to the right of equitable interposition is not merely that there is a remedy at law; but it must be plain and adequate, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Erwin v. Louis* 50 Miss 363.

The irreparability of a wrong is a conclusion which the law draws from the character of the wrong, and where the character of the wrong is exhibited in

a statement of the facts which constitute it, it is for the court to determine from the character of the act whether it is irreparable. See cases cited P 954.

We look at the particular acts charged and threatened, and the circumstances under which they were done and threatened, to discover whether the damages from them might be irreparable." *Sidner v. Haw Creek Tunrpike* 91 Ind. 186; *Cooper v. Hamilton* 8 Blac. F. (Ind. 377)

The court examines the facts charged and the nature and the character of the injury which may be inflicted by the acts complained of and thus determine whether the injury may be irreparable, vel non. *Puckette v. Hicks* 39 La. Ann. 901.

Page 945. It is sufficient that facts are alleged disclosing that plaintiff is entitled to injunction without alleging that the injury will be irreparable or the plaintiff will be without any adequate remedy at law. *Weiss v. Jackson County*, 9 Ore. 470; *Rood v. Mitchell County*, 39 Ia. 444; *Martin v. Jewell*, 37 Md. 350.

Page 962. On the final hearing the court may decree a perpetual injunction, if it is necessary for complete justice, although not prayer for in the bill. *Sanderlin v. Backster*, 76 Va. 299, citing *Kerr inj.* 637.

Page 962. An injunction may be granted on the final hearing under a general prayer for relief.

Gaines v. Hale 26 Ark. 168.

African Me. Church v. Conover, 27 N. J. Ek. 137.

Fairbanks argues the contract does not use the words, "good will" as part of the property sold to Valley. Contracts such as this one are generally construed as covering and including the good will. If they were otherwise con-

strued, what would the purchaser gain by the restrictive covenant?

The California Court in *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162, held that in a contract for the sale of a business, a stipulation not to reengage in the business for a fixed time, manifested an obvious intention of such contract to sell the good will of such business. In *Wall v. Chapman*, 84 Okla. 114, 202 Pac. 303 and 304, we read:

“It is contended the contract does not refer to the ‘good will’ and the Court cannot read that into the contract. This contract like all others must be interpreted so as to give effect to the mutual intention of the parties. The same kind and character of contract was upheld by this Court in *Threlkeld v Steward* 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888.”

The identical kind and character of contract was before the Court of Appeal of California, being *Shafer v Sloan* 3 Cal. App. 335, 85 Pac. 162. The Court in the third syllabus stated as follows:

The obvious intention of a contract for the sale of a business, coupled with an agreement by the seller not to engage in the business so long as the buyer continues in the business is to sell the good will of the business. Under the facts pleaded and the contract itself it is apparent it was the intention of the parties that the sale of the good will of the business was within the terms of the contract.”

In *Yost v. Patrick*, 245 Ala. 275, 17 South (2) 240, 44, the Court says:

“It is not essential that the contract for the sale of a business expressly include the good will thereof. Covenants designed, in the nature of them, to protect

the good will of the business being sold, imply a sale of good will."

To the same effect see *Maddox v. Fuller*, 233 Ala. 662, 173 South 12; *Davs v. Christopher*, 219 Ala. 346, 122 South 406; *Smith v. Webb*, 40 L. R. A. (N. S.) 1191, 4, 40 South 913, 176 Ala. 596; *Nelson v. Johnson*, 38 Minn. 255, 36 N. W. 868, 9. 24 Am. Jur. 810 gives a positive statement of the rule as above stated and host of citations. Anno. 18 Ann. Case 433; Anno. Ann. Cass. 1917A, 1015 ff.

It seems to us that it does appear from the complaint that the injury complained of cannot be compensated in damages, and that it further appears that the remedy at law would not be an efficient remedy, from the fact that it clearly appears from the complaint, and the answer, that the wrong complained of is a continuing wrong, and if an action for damages had to be relied upon it would necessarily work a multiplicity of suits; this court, in common with all other courts, has decided that where an injury is a continuing one an injunction is the proper remedy. The statement of facts set forth in the complaint conclusively shows an injury and damage to the plaintiff. And from the facts stated in this complaint it is so evident that the plaintiff would be damaged and the money judgments would afford no adequate protection, and that the acts complained of, without injunction, will be continuing ones, that further argument on the subject would be idle. See *Silver v. Washington Inv. Co.*, 65 Wash. 576, 118 Pac. 749; *Galbreath Gas Co. v. Lindsey*, 35 Okla. 235, 129 Pac. 45; *Sickles v. Manhattan Gas Light Co.*, 64 How. Proc. (N. Y.) 33.

If the facts stated in this complaint do not entitle Valley to invoke the equity jurisdiction of the Court and to receive the negative and preventive relief of injunction, then

a statement to obtain such relief must needs be one either replete with conclusion of the pleader or be filled with a pleading of evidence. The Valley is without an adequate remedy at law. A court of law could not prevent Fairbanks from continuing the violation of his contract, as his answer and defense indicates he intends to do, nor could it restore the Valley to the position it would have were the restrictive covenants observed; and the damages which the Valley would sustain in the future by being faced with the business competition of Fairbanks, in violation of his covenant, would not only require a multiplicity of suits but would impose upon Valley the constant duty of seeking to recover damages, the amount of which is difficult to ascertain, and could not with any certainty be estimated. We conclude with a statement from *Dingley v. Buckner*, Sheriff, 104 Pac. 480:

“In reply to the criticism of respondent that there is no allegation of the insolvency of defendant, it is sufficient to say that this is a false quantity where it appeared in legal contemplation that the damage is irreparable.”

We submit the following additional citations as containing some terse and well reasoned statements and law upon the matter: *Crutchett v. Lawton*, 139 Cal. App. 411; 33 Pac. (2) 839; *Herrington v. Hackler*, 181 Okla. 396 74 Pac. (2) 389; *Youngman v. Calhoon*, 321 S. W. 647.

Annotations: 58 A. L. R. 156-75; 3 A. L. R. 242; 82 A. L. R. 1033; 91 A. L. R. 985; 31 A. L. R. 1174 supplemented in 12 Pac. (2) 990; 99 Pac. (2) 434; 133 Pac. (2) 291; 127 A. L. R. 1152; *Rowe v. Toon*, 185 Ia. 848, 169 N. W. 38; *Lashus v. Chamberlain*, 6 Ut. 385, 24 Pac. 188.

POINT 2

Question of Jury Trial

Another point noted, but scarcely argued by Fairbanks, is the fact that the court denied a jury trial. The brief apparently concedes that if the action was primarily equitable then the court committed no error in denying a jury. We think, in view of what has been said in this brief, there can be no question but that the action was primarily equitable for injunctive relief, and the matter of damages merely incidental to the main purposes of the suit. Had a jury been empaneled, its verdict would only have been advisory and could have been disregarded by the court. We quote from The California Court of Appeals in *Meek v. Delatour*, 2 Cal. App. 264, 83 Pac. 300, where the court says:

“In such a case the verdict of the jury would be advisory only, and neither party is entitled to a trial by jury as a matter of right. *Richardson v. City of Eureka*, supra; *Fisher v. Zumwait*, supra. The demand for damages is but incidental to the main purpose of the suit (*Courtwright v. Bear R. W. & M. Co.*, supra); but, if it should be conceded that defendant may have been entitled to have the question of damages determined by a jury, no such demand was made; but the demand was for a jury to try the entire case.

It is not error to refuse a general demand for a jury to try a cause consisting of legal and equitable issues. 6 Am. & Eng. Ency. of Law, 975; *Greenleaf v. Eagan*, 30 Minn. 316, 15 N. W. 254; *Lace v. Fixen*, 39 Minn. 46, 38 N. W. 762; *Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.”

In the light of the legal reasoning and of the legal authorities as shown in the preceding pages of this brief, we

think it is definitely established that this action is primarily equitable; that it is basically an action for injunction and not for damages. If Fairbanks has been violating the restrictive provisions of his contract it seems plain that the only effective and efficient remedy to prevent continuance of such breach is by an equitable interposition, judgment for damages could not be presumed to stop further breaches, nor could it be presumed to place The Valley in the position it would have been were there no breaches of the contract. In the light of these conditions, we see no escape from the conclusion that the action is one in equity. If Fairbanks is breaching his contract, The Valley is entitled to injunctive relief as of course. If Fairbanks is not breaching his contract, The Valley would not be entitled to a judgment for damages. Since Valley must prove its right to injunction before it can make any kind of a show of its rights to damages, it must follow that the action sounds in equity and that damages are merely incidental to and dependent upon the determination of the equitable issues in favor of The Valley. The action must therefore be held primarily one for injunction and the right to damages merely incidental to, and dependent on, Valley's right to injunctive relief. In such cases, the parties are not entitled to a jury trial on the question of damages. 50 C. J. S. 751; *Monmeier v. McCallister*, 153 S. C. 422, 8 S. E. (2) 737, 129 A. L. R. 880. *Union Oil v. Reconstruction Oil*, 20 Cal. App. (2) 170, 66 Pac. (2) 1215. *Bellavance v. Plastic Craft*, 30 F. Supp. 37.

Where the facts are not conceded and trial is necessary to determine plaintiff's right to the equitable relief demanded, the court may retain jurisdiction and assess the damage, even if plaintiff does not prove a case for injunc-

tion. *Miller v. Edison Electric*, 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. N. S. 1060, 6 Ann. Cass. 146. *Tucker v. Edison Electric*, 91 N. Y. S. 439, 100 App. Div. 407, affirmed 76 N. E. 1110, 184 N. Y. 548.

In the instant case, since The Valley proved and established its primary right to equitable relief, the Court had the right to assess the damages without a jury and therefore no prejudice resulted to Fairbanks and no error was committed by the Court in denying his motion for a jury trial. Incidentally, we again call attention to the authorities *supra* to the effect that had Fairbanks been entitled to a jury, which he was not, on the question of damages, the Court was justified in denying his demand which was made for jury trial of the whole cause and not merely of the damage issue.

POINT 3

Interpretation of the Contract

Fairbanks contends in Point 3 that the contract only bound him not to build or maintain within the restricted area a physical plant in which he would conduct a general undertaking establishment and business; that as long as he did not maintain and operate the physical plant—the building commonly called an undertaking parlor or a funeral home—within the restricted area, he was free to engage in all the activities in which morticians, undertakers, embalmers and funeral directors usually engage; in other words, he could run free competition to The Valley within the area as long as he kept his building outside of the area. A simple statement of the proposition is its own answer and establishes its inconsistency and incongruity. The Court takes judicial notice of the fact that in these days of free movement, good roads, and fast and easy travel, the

undertaker is not confined in his business to the narrow limitations of a single community; that the corpse is no longer washed, embalmed and kept in the home by "wake" until time for the obsequies; that the usual practice is for the undertaker to remove the body promptly after death to an establishment specially fitted and equipped for convenience in performing the duties he must perform in preparation for the final obsequies and interment of the body. The court will also judicially know that it is the common practice for the undertaker (mortician, he now prefers to be called) to provide convenient and comfortable transportation for the family of deceased to his establishment or other convenient place for selection of caskets, clothes, etc.; and that he generally procures the death certificate, the burial permit, and makes the arrangement for the grave. In the instant case Fairbanks testified that he generally did all those things; that they were included in his services and charges. After Fairbanks has done all these things for deceased, or the family, what remains for the person who bought the business to do? But that is not all: he also claims the right to conduct the obsequies, direct the funeral procession and inter the body. The only thing he does not claim the right to do is to speak the funeral sermon. All other things he claims he may do, as long as he does not maintain an embalming house, his physical plant, within the restricted area.

We presume The Valley would have no cause for complaint, nor make any, if Fairbanks built a mortuary building in every town of the district, as long as no business was done therein. Fairbanks sold to Valley a physical plant, a stock of goods, and a going business, with its good will, and he covenanted that he would not operate or engage in

the "mortuary or funeral business" within the restricted area. Good will is an incident to business; it is part of the intangible assets of a business; it cannot be segregated or sold apart from the business, because it does not exist apart from the business. 24 Am. Jur. 804, 5; Anno. Ann. Cass. 1914 B 879; Utah-Idaho Sugar Co., v. Salt Lake Co., 60 Ut. 491, 512, 210 Pac. 106, 27 A. L. R. 874. It cannot attach to or be a part of the building; it cannot pass by a sale of real estate. Its value as an element of value in the purchase of a business lies in the fact that the seller thereby eliminates himself as a competitor, so the purchaser can build his trade free from competition with the seller. Many Courts say the seller is obligated not only to refrain from competition but to use his influence if occasion presents to recommend to his trade or patrons or customers that they deal with the purchaser.

For the court to construe the contract as Fairbanks now contends would require it to make a new contract for the parties. Fairbanks agreed not to operate or engage in the "mortuary or funeral business." In his brief he gives one of the definitions of the word "funeral", but he does not define "funeral business." This term is defined as all business done in procuring the interment of a corpse. See Vol. 2, Bouvier, 1329; also Black's Law Dictionary. Mortuary is defined *inter alia* as pertaining to the burial of the dead; "it is applied to many subjects connected with death and burial." Ency. Brittanica Vol. 15. The New York Court in *People v. Ringe*, 110 N. Y. S. 923, 1235 App. Div. 572, holds that a funeral covers the matter of disposition of bodies of human beings after death, or the work of the undertaker. A mortician is an undertaker; a mortician's business is an undertaker's business; an undertaker's or mortician's

business is the business of doing the thing, or rendering the services, or parts of them, connected with the disposal of the dead bodies of human beings from death to interment. *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 Pac. 923.

The agreement involved in this action provides that Fairbanks will not operate or engage in the mortuary or funeral business. It is urged that the Court should disregard the word **business** and construe the provision as just prohibiting a physical plant. There is no rule of interpretation that sustains this view. Business does not mean a building, or stock, or machinery, or capital, or caskets and the like. While business pertaining to the dead cannot be done without these, in commercial language it is as distinct from them as labor is from capital. In speaking of the **business** that may be done by a mortician, undertaker, or funeral director, the mind does not contemplate or dwell upon the character, or quality of the means used, but upon the operations, whether great or small, complex or simple, numerous or few, for one or the other of these conditions may arise from much or little stock or capital. In other words, **business** does not mean caskets, coaches, embalming fluids or the like. **Business** is not these lifeless and dead things, but the activity in which they are employed. When in motion, then the owners or actors are said to be in business; and then it is that undertakers and others speak of being in business. Business denotes the employment or activity in which one engages to make a living for profit. The testimony of Fairbanks narrating his activities within the restricted district and the charges he made therefor, certainly manifests that he was engaged in it for profit; it is not consistent with the thought of it being a

charitable act. In *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628, a seller sold his abstract business and good will, agreeing not to carry on a similar business. The court held that searching for titles was a business and enjoined the same. If the contract were construed as Fairbanks would have it, the whole restrictive clause would be nugatory, and an absurdity.

POINT 4

Matter of Testimony

The remaining point, number 4, in Fairbanks' brief, is the statement that the Court disregarded the testimony of witnesses for the defendant that had the services of Fairbanks not been available to them they would not have given their funeral work to The Valley. We are unable to say from a perusal of the judgment of the Court that he disregarded such testimony, because the Court does not indicate whether he did or did not disregard it; whether he did or did not consider it. However, we think the Court was justified in, and should disregard it because the testimony was wholly irrelevant and immaterial. Furthermore, if the Court did disregard the testimony, and if he should have regarded it, the judgment should still be affirmed. This being an equitable matter, the Court may try the matter here de novo on the record, and we think if the Court did so it would come to the same conclusions as the trial court, except, we believe, Valley was entitled to a greater judgment for damages than was awarded by the trial court. The measure of damages recoverable for breach of the covenant such as that herein involved, is the value of the business lost to the plaintiff. As indicated in the authorities cited before in this brief, such damages are difficult of

measurement, and many courts have said that itself is amply sufficient to make the case one in equity and to lay full basis for injunctive relief. Generally such damages are largely speculative, like damages awarded in tort cases for pain and suffering. There is no gauge by which they can be measured with any certainty whatever, but that does not detract from a right to recover damages, although it may be added reason why the court and not the jury should determine them. *Cooper v. Anchor Securities*, 16 Wash. 2d 306, 133 Pac. (2) 291, is a case passing upon the measure of damages in a case involving breach of restrictive covenants such as here and cites other leading cases on the subject. We also direct attention to the annotation on that question in *Ann. Cass.* 1914 A on Page 1153, where the courts indicate the elements that enter into such measurement.

Citing *Lashus v. Chamberlain*, 5 Ut. 140; 13 Pac. 361. See also *Merager v. Turnbull*, 2 Wash. 711, 99 Pac. (2) 434, 127 A. L. R. 1154

We submit that The Valley in its complaint stated an action primarily and essentially in equity, with a claim for damages for past breaches incidental to its case for injunctive relief; that upon the trial The Valley amply sustained the burden of proof upon every issue; that Fairbanks failed to show any meritorious defense, that his pleading and his own testimony conclusively establish that The Valley was entitled to the injunction and to their damages, even in a larger amount than the trial court awarded; that there is no error appearing in the record, on the part of the trial court, unless it be in the smallness of the damages awarded against Fairbanks for his willful and deliberate breach of his covenants and that the judgment should be affirmed.

The books are replete with cases where parties have sold their business, their good will, and entered into a covenant, for which they received valuable consideration, to refrain from entering into business in competition with the person to whom they had sold their business and good will, and then repenting of what they had done, or, as here, deliberately disregarding their covenant. In such cases the courts have uniformly enjoined further breaches and usually made an award of damages, all in equity. Fairbanks ventures the suggestion that he should not be held to his contract because he thinks now he may have made a poor bargain, and that to hold him to the contract might be hard on him financially. That question, too, has been raised before, and the courts have said, in sound logic, that is no ground for relief. See *Yanka v. Goldberg*, 110 N. J. Eq. 170; 137 Atlantic 645; *Dellacorte v. Gentile*, 98 N. J. Eq. 194, 129 Atl. 739; *Streeter v. Bush*, 25 Calif. 68, 72. See note on page 890 of 138 Am. St. Rpts.

Fairbanks may think that he sold his birthright for a mess of pottage, but it is not recorded in Holy Writ that the other Esau was allowed to, or ever tried, to welch on his bargain, and we submit that the Court is not going to let Fairbanks do so either.

Respectfully submitted,

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