

1951

Willard Y. Morris v. Ted Russell and Manila Russell : Brief of Appellants

Utah Supreme Court

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IN THE
SUPREME COURT

OF THE

STATE OF UTAH

FILED

MAY 5 1951

WILLARD Y. MORRIS, Executor of
the Estate of William Shields,

Respondent,

— vs. —

Clerk. Supreme Court, Utah

Case No. 7630

TED RUSSELL and MANILA RUS-
SELL, his wife,

Appellants.

APPELLANTS' BRIEF

RICHARDS AND BIRD,
Attorneys for Appellants.

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IN THE
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WILLARD Y. MORRIS, Executor of
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Respondent,

— vs. —

TED RUSSELL and MANILA RUS-
SELL, his wife,

Appellants.

Case No. 7630

APPELLANTS' BRIEF

STATEMENT OF THE CASE

This is an appeal from a judgment against the defendants (appellants) in the amount of \$4,500.00 based upon verdict of a jury (R. 16) in a case brought to recover money for personal services rendered by William

Shields, now deceased, to the appellants both on the theory of an express contract and on the theory of quantum meruit. William Shields, now deceased, will be referred to as plaintiff, and the executor of his estate as respondent. The pages of the record will be referred to in parentheses with no other designation.

STATEMENT OF FACTS

The amended complaint of the plaintiff, William Shields, (1 & 2) alleges that plaintiff performed services for the defendants at their special instance and request from June, 1943, to August, 1949, and that appellants agreed to pay the plaintiff \$100.00 per month and room and board, of which no part had been paid except \$180.00, leaving a balance owing of \$7,220.00. As an alternative cause of action plaintiff alleged the same services of the reasonable value of \$150.00 per month but without the express contract and sought judgment in the same sum.

The amended answer (3 & 4) denies generally the allegations in the first cause of action and in answering the alternative cause of action alleges the contract between appellants and the plaintiff in which the plaintiff was to perform services and have his room and board with no cash payment nor settlement of any kind or nature; and that the plaintiff had been paid in full according to the contract. The amended answer also set up the bar of Section 104-a-23 U.C.A. 1943, a statute of limitations limiting suit to four years (R. 4). This

would bar recovery for services prior to February 23, 1946.

The case was tried before a jury and at the close of the plaintiff's case the appellants moved for non-suit or the dismissal of the plaintiff's case for failure of proof as to each count separately, which motion as to the second count was sustained and the alternative count on quantum meruit was stricken (126).

The appellants put on their case following which the plaintiff moved for reinstatement of the second cause of action, whereupon the Court vacated its ruling made at the close of plaintiff's testimony, overruled the said motion of the appellants and thereby reinstated the second cause of action (255).

William Shields, the plaintiff and respondent, testified that he was sixty years old (47); that he became acquainted with the appellants in 1941 when he was looking for work (48) and went to work for them for board and room and small wages (49) in exchange for which he took care of the chickens, one cow and some pigs (49). He also did some garden work and received from the appellants a little money for clothes, medical expenses, etc. (50). In the summer of 1943 the appellants acquired a motor court and plaintiff entered into an agreement with them to work for them for big wages, which was not made definite at that time but later was fixed at "about \$100.00 a month, board and room," which conversation took place after appellants had moved to their motor court (51). Nothing was said as to when the money would be paid (52). Plaintiff's duties included

making beds, scrubbing, mopping, painting, keeping the place clean and collecting rents (52). He also dug a sewer trench, took out the garbage, shoveled snow (53); also did some work on the sewer line for a Mr. Weedon for which he received \$17.00, approximately (57). On several occasions, the appellants left the motor court in the care of plaintiff while they took a trip (60).

During none of the time did plaintiff receive \$100.00 a month from appellants, but he did receive his board and room, although at times he got his own meals (63). For a time respondent worked for a rock wool concern about one-half day each week until he earned \$50.00 in cash which he kept, (63) and at this time he quit and rented a room in town, but at the request of appellants came back after a day or two (64). The job at the rock wool place was obtained for plaintiff by the appellants (65). During all of the time plaintiff worked for appellants, he received from them approximately \$180.00 including the \$50.00 from the rock wool company for which he gave them credit (65 and 66). Plaintiff didn't need the money and testified that he figured when appellants got ready to sell or got through with him they would pay him and in the meantime he lived on the little money he received and tips he got for deliveries of ice to the guests (67). Plaintiff didn't ask for the \$100.00 a month because he thought the appellants would pay him and he knew they needed the money on their auto court. He intended to get the money at the time he quit his employment (67).

Plaintiff left the employ of appellants at one other time and got a job at the Labor Temple which required payment of union dues of \$20.00, and when he asked the appellants for the money they talked him out of taking the job because the work was too hard (69-70) and another reason for not taking the job was that there was no place to board out on the salt flats where the job was (70). Plaintiff finally left the employ of appellants about August, 1949 (72).

The conversation about receiving \$100.00 a month took place after Mr. Weedon had finished a sewage job and Mr. Weedon took about three years on the sewage job (89 and 90).

It was in the summer of 1947 that respondent quit his job with appellants and took a room in town, planning to go to Denver (94). Respondent made no demand on appellants for money for wages when he quit in 1947 (95).

On redirect examination the plaintiff testified that the figure of \$100.00 and board and room was established within a day or two after he first moved to the tourist court with appellants (105). And plaintiff further testified that he did not quit the employ of the appellants when he inquired about the job at the salt works (106) but he did quit in 1947 when he had an argument with the appellants over the \$50.00 (107), and after quitting that time he came back to work for appellants at the same wages (107).

Ted Russell testified for appellants that he and Mrs. Russell owned the State Tourist Court at 3114 South

State in Salt Lake County and have been acquainted with William Shields since 1941 (147). Shields was sent to them by the Salvation Army and said he had experience in farming and was willing to work for them for room and board; that Russell advised Shields that "as far as wages are concerned you may as well not come up because I couldn't pay that" (149). Russell introduced Shields to Mrs. Russell and they then told him that if he would help them they would give him board and room and incidentals, "like clothes and smoking money," which Shields agreed to with appellants (149). This arrangement continued until July, 1943, when they moved to the South State Tourist Court (150).

Just before moving to the tourist court appellants had a conversation with plaintiff in which they told him they were moving to the tourist court and if he wanted to go along under the same conditions to be yard man and to clean snow, take away the garbage, clean up around the front, pick up papers and help Russell out occasionally when needed he could come along. Plaintiff said, "Give me a day and I will think it over." And on the next day Russell asked plaintiff for his decision and Shields said, "I can't get no work anywhere now, I haven't got anything else to do, and I haven't got no money to go, so if it's agreeable with you and Mrs. Russell I will carry on the way I am, if it is agreeable with you. If it isn't, I will have to get out." (150-151). On July 15, 1943, they moved to the tourist court and Shields continued to work there and did not at any time demand any money from appellants except an occasional quarter for to-

bacco (151). He didn't demand any wages because he knew what the agreement was and that he was entitled to no wages (152).

At the tourist court plaintiff was never left in charge of the motor court and was never given the care of the cabins such as changing the linen, mopping and sweeping and so on for which purposes other persons were employed (153). Plaintiff was not a skilled workman and could not be entrusted with many tools, as the breakage he would cause was more expensive than the value of the work done (154).

When a Mr. Weedon took a contract on five cabins the appellants released plaintiff to work for Weedon and he earned \$320.00 under the agreement with Weedon, but Weedon paid him only \$47.00 (154-155).

When appellants were doing some other remodeling Russell arranged to have plaintiff employed as a carpenter and introduced in evidence Exhibit 1 to show two weeks work at \$82.50 a week, which Shields received (157).

Two or three times plaintiff complained about his work and Russell told him he was free to go anytime he wanted to and at one time offered to take him over to Wendover to work in the salt mines. When plaintiff wanted to stay in the motor court and drive to and from Wendover, Russell told him it was too far to drive to and from work (157-158). Appellants also permitted Shields to take side jobs such as feeding chickens for Mike Dragos, a neighbor, and doing the work for the rock wool man (159).

In 1946 plaintiff quit once when Russell and his wife had an argument about whether Mrs. Russell was supplying Shields with money. Plaintiff got sore and quit and went away for three or four days but came back and said he had spent the money he had on a drunk and Russell said that if he wanted to come back under the same arrangements as before he could, and he went back to his cabin and continued until July or August, 1949 (161-162).

Plaintiff quit for about three days on the occasion when he said he intended to go to Denver and that probably was in the fall or toward the end of the summer in 1947 (164, 165).

Shields many times told appellant Russell that he was a man of substantial property interests; that he had a 240 acre farm in Oregon, owned a 1/3 interest in Catalina Islands and that the city of Seymour, Indiana, was paying him rental on the city, which city has a population of 130,000 people (168), and so far as appellant knows Shields never received any money from any of those sources (168-169).

Shields smoked a lot and Russell furnished him money to buy tobacco, but Shields never made any demand for \$100.00-a-month wages. On one occasion, Shields asked Russell to take him back to Oregon and said that if he could get to Oregon, he could make out for himself (171-172).

During this time skilled work to repair and improve the motor court was hired and paid for by appellants as shown by the receipts and invoices and statements contained in Exhibit 2 (172-180).

Appellants also supplied Shields with either money for clothing or with clothing and took care of him when he was sick (181).

When the appellants and plaintiff moved into the tourist court, it was understood that plaintiff was to have his board and room and tobacco money and there was no conversation about paying Shields \$100.00, besides board and room (183). It was in February of 1948 that Shields was employed as a carpenter for two weeks at \$82.50 per week as shown on Exhibit 1 (188). The argument between appellants over the money which plaintiff had, totaling a sum of \$50.00, was not because Mrs. Russell had paid wages to plaintiff but because Russell suspected that his wife had given him too much money from time to time and that Shields had accumulated \$50.00 or \$60.00 (190).

Russell estimated that plaintiff received the equivalent of \$145.00 to \$165.00 per month, represented by the value of board and room, tobacco, clothes and everything, of which about \$50.00 would be board and room, (191) and at different times he averaged it up to equal approximately \$120.00 per month (192). The Social Security Taxes paid by Russell on Shields' employment was at the rate of \$50.00 per month and Russell paid both his tax and Shields' tax (192).

William Carlaw testified that he and Mrs. Carlaw have lived at the State Tourist Court for eight years and have known Mr. Shields while they have been there, and that many times when the Russells went away they left Mrs. Carlaw in charge of the motor court (205, 206).

Shields claims to have been in charge of the motor court at times, but he never was, so far as Carlaw knows, as his wife was always left to take care of it (209).

Clarence Rodda testified that he has lived at the State Tourist Court for six or seven years and has known plaintiff there, and that in conversation with Mr. Shields, Shields has said he wasn't making any money there but only his board and room, and he would like to get out and get a job (219-220).

Mrs. Manila Russell testified that she became acquainted with Mr. Shields in 1941 when they got him from the Salvation Army, and that he worked on the farm for a while until they moved to the State Tourist Court in 1943 (222-223). Shields took his meals with the Russells and ate right at the table with their family. Mrs. Russell made no arrangements with Shields about wages, just told him that if he would like to come to the tourist court with them it would be all right (224). The arrangements for Shields' employment were made by Mr. Russell through the Salvation Army and there was no arrangement for \$100.00 a month, and the only money he received was when it was given to him by Mr. or Mrs. Russell to buy clothes or to permit him to keep change after going to the store, and he never asked for wages at the rate of \$100.00 per month (227). Shields also did an ice business by buying ice a block away and delivering it to each of the tenants. His business was good enough that the ice company brought a little wagon out and put it in front of the tourist court for Shields' con-

venience (228). But plaintiff said it would be too much work to fix it up so the ice company took it back (228).

The money which Mrs. Russell gave to Shields was out of generosity and not because he had wages coming to him (233). It would probably amount to \$10.00 per month between money and clothing provided for him (234).

At the close of the testimony, the plaintiff moved that the second cause of action which had theretofore been stricken be reinstated, whereupon the Court vacated its ruling and reinstated the second cause of action (255).

The Court instructed the jury that the case involved parts of the years 1943 and 1949 and all of the years 1944, 1945, 1946, 1947 and 1948 (5 & 9) and instructed the jury that the case was submitted on alternative theories; one, an express contract and the other an implied contract, and that under the express contract there were two possibilities; one, that the contract was for board and room and \$100.00 per month, and the other, that the contract was for board and room and incidentals only (8 & 9).

Appellants excepted to instructions 1, 4, 5, and 8, and particularly to references of the court in its instructions to all of the years 1944, 1945, 1946, 1947 and 1948. Also to instruction No. 4 in referring to the possibility of either an express or an implied contract, and to reference in the instructions to the reasonable value of services rendered (257).

The jury verdict was in favor of the plaintiff for \$4,500.00 (16).

Appellants' motion for a new trial alleged error in instructions to the jury, in excluding instructions prayed for by appellants, also in permitting the quantum meruit count to go before the jury, and further on the grounds of misconduct of the jury in determination of the verdict by chance. This motion for new trial was based upon the grounds also that respondent was under a legal guardianship when the suit was instituted and was incompetent to sue and also that the respondent was incompetent (17 & 18). This motion was denied November 17, 1950 (21). In the meantime Shields died and his administrator was substituted as party plaintiff.

With reference to the first motion to strike, respondent filed counter affidavits showing that the jurors had each placed a figure on a slip of paper. The figures had been totaled and divided by the number of jurors and that figure was used as the beginning point for the deliberations as to the amount of verdict to which respondent was entitled (S-2 to S-6).

Thereafter, and on December 11, 1950, a further motion for a new trial and for reconsideration of the error in ruling was filed in which further facts were alleged with reference to plaintiff's insanity and letters from the superintendent of a mental hospital at Pendleton, Oregon, were attached to the motion in which the opinion is expressed that Shields, having escaped the hospital on August 11, 1941, had the type of insanity recovery from which was improbable (22-26). This motion was denied on December 15, 1950.

Respondent filed a motion to strike the second mo-

tion of the appellants for new trial alleging that the evidence as to insanity was not newly discovered (32, 33).

Appellants filed a statement of points on appeal in the District Court (35-36).

STATEMENT OF POINTS RELIED ON

POINT I

SINCE THE PLEADINGS AND THE EVIDENCE OF BOTH PARTIES ESTABLISH AN EXPRESS CONTRACT, IT WAS ERROR TO SUBMIT THE CASE TO THE JURY ON THE THEORY OF QUANTUM MERUIT.

POINT II

IT WAS ERROR FOR THE COURT TO VACATE ITS JUDGMENT OF INVOLUNTARY DISMISSAL MADE FOLLOWING THE CLOSE OF THE PLAINTIFF'S CASE.

POINT III

THE COURT ERRED IN PERMITTING THE JURY TO AWARD DAMAGES FOR THE PERIOD PRIOR TO FEBRUARY 23, 1946, UNDER SECTION 104-2-23 U. C. A. 1943.

POINT IV

THE COURT ERRED IN REFUSING TO GRANT A NEW TRIAL ON THE EVIDENCE OF INSANITY AND PRESUMED INSANITY.

ARGUMENT

POINT I

SINCE THE PLEADINGS AND THE EVIDENCE OF BOTH PARTIES ESTABLISH AN EXPRESS CONTRACT, IT WAS ERROR TO SUBMIT THE CASE TO THE JURY ON THE THEORY OF QUANTUM MERUIT.

The amended complaint in paragraph 2 and 3 of the first cause of action definitely alleges an express agreement to pay for plaintiff's services \$10.00 per month and room and board (1). The amended answer denies these allegations and then proceeds to allege in paragraph 5 that there was a specific agreement for plaintiff's services as watchman and handy man "for which the defendants agreed to furnish the plaintiff a cabin to live in and his board during the period that the plaintiff was so employed, it being expressly understood that plaintiff was free to leave at any time and that he was to receive no cash payment nor settlement of any kind or nature; that the plaintiff agreed to the terms of such arrangement * * *" (3-4).

The plaintiff testified that in the summer of 1943 he entered into an agreement with respondents to work for them for wages of \$100.00 a month and board and room, which conversation took place after they had moved to their motor court (51) although nothing was said as to when the money would be paid (52).

The appellant Russell also testified that an agreement was made with the plaintiff shortly after they moved to their motor court. He spoke to the plaintiff

about it. The plaintiff asked for a day to think it over and the next day advised appellants, "I can't get no work anywhere now, I haven't got anything else to do, and I haven't got no money to go, so if it is agreeable with you and Mrs. Russell I will carry on the way I am" (150-151). He thereby continued the agreement he had had with the appellants while they still lived on their farm which was also an agreement for services in exchange for board and room and incidentals (149). The appellant Mrs. Manila Russell confirmed this agreement (224).

It thus appears that both by the pleadings and testimony the parties established that there was an express agreement for plaintiff's services and the point of difference and actually the issue of the evidence in this law suit was whether the agreement was for board and room and incidental moneys or for board and room and \$100.00 per month.

A comparable situation was involved in *Millar v. Macey Company*, 263 Mich. 484, 248, N.W. 879, in which the plaintiff sued for the value of services rendered in the first cause of action on the common counts and in the second cause of action under an express contract for a commission on all sales at a specific percentage. The defendant denied any indebtedness on the common counts and in answer to the allegations of express contract denied that the contract was as pleaded between plaintiff and alleged that if there was a contract, it was for commissions on the sale of certain lines of products only. At the trial testimony on the common counts was at first held inadmissible and later received on the theory

that if plaintiff failed to establish his contract he might still recover on common counts. The plaintiff recovered a judgment and the defendant appealed. On the question of whether evidence should have been received on both theories the court held:

“The law in this state seems to be well settled that where an express contract is entered into between parties, but they differ as to the terms thereof, and there is evidence tending to support the claim of each of them, it is for the jury to determine what the terms of the contract were and there can be no recovery on the quantum meruit. In *Swarthout v. Lucas*, 101 Mich. 609, 612, 60 N.W. 306, 307, it was said: ‘There was no room for the jury to find an implied contract, each claimed an express contract, and the sole questionable fact was, which was the correct one?’ ”

The court reversed the judgment of the trial court and ordered a new trial holding that the evidence in support of quantum meruit might have influenced the jury and been reflected in the verdict. Other Michigan cases to the same general effect are *Schurr v. Savagny*, 85 Mich. 144, 48 N.W. 547; *Shaw v. Armstrong*, 88 Mich. 311, 50 N.W. 248; *Ruttle v. Foss*, 161 Mich. 132, 125 N.W. 790. These cases were cited in *Millar v. Macey*.

Other cases holding that where an express contract is sued on recovery on the theory of quantum meruit is not obtainable are *Greif v. B. L. B. Motor Repair Company*, 182 N.Y.S. 765; *Brown v. Wrightsman*, 176 Okla. 189, 51 Pac. 2d 761.

The same rule approached from a different point of view is stated in *Williston on Contracts*, Revised Edition, Section 1459 and *Restatement of the Law of Contracts*, Section 350. The restatement says:

“The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt.”

This is the same rule stated by Williston at the place indicated.

Under the facts of the case at bar, Shields the plaintiff had performed his contract in full and there remained only for him to recover the money constituting performance on the part of the appellants. This is not a proper action on quantum meruit, but must be an action on the contract which was pleaded and proved and admitted by the appellants but with a difference of opinion as to what the rate of pay was.

A recent Utah case is cited because it probably should be distinguished from the case at bar. In *Young v. Hansen* (Utah, May, 1950) 218 Pac. 2d 666, this court allowed recovery on the theory of quantum meruit where the plaintiff had sued to recover on a contract which had been partially performed. The court observed that the defendant would not be allowed to retain the property which was to be operated by the parties under the agreement pleaded as well as the money which the plaintiff

had paid to the defendant because this would result in unjust enrichment to the defendant. For this reason the court permitted a recovery on the theory of quantum meruit although it had not been specially pleaded. This is the very point made in *Williston* and the *Restatement of Contracts* at the places cited. Where full performance is given the only recovery is under the contract; but where an agreement has been partially performed, it is proper to bring a suit for the value of the services rendered and it was this rule which this court recognized in *Young v. Hansen* and recognized it even though there had been no specific pleading of quantum meruit.

POINT II

IT WAS ERROR FOR THE COURT TO VACATE ITS JUDGMENT OF INVOLUNTARY DISMISSAL MADE FOLLOWING THE CLOSE OF THE PLAINTIFF'S CASE.

At the close of the plaintiff's evidence the appellants moved for a nonsuit or dismissal of the plaintiff's case for the reasons that plaintiff had not sustained proof of the elements that go to make up the cause of action stated and the motion was made separately as to the two counts and particularly as to the first count but directed also to the second count. The court denied the motion as to the first count and said:

“At the present state of the record, I am inclined to grant the motion as it pertains to the second count.” Whereupon counsel asked, “The

entire quantum meruit is stricken?" And the court replied, "Yes" (126), and then said, "The motion for a nonsuit, so far as it pertains to the second count, is granted. You may limit your defense, Mr. Burnham, to matters alleged under the first count, under an express contract." (127).

And then, after the appellants had put on their defense under the court's ruling that the quantum meruit count was out of the case, counsel for the plaintiff moved that the second cause of action be reinstated for the reason that the grounds stated by the court were improper there being sufficient evidence of the value of the services rendered by the plaintiff to enable the jury to decide the case. Thereupon the court replied: "I am going to vacate my ruling made at the close of the plaintiff's testimony for a nonsuit, upon the second count, and now I will overrule the motion." (255).

This reversal of the court's ruling and reinstatement of the second count was specially made a basis for motion of new trial, the motion assigning also error in giving instructions on this point to the jury (17).

Under Rule 41 (b), Utah Rules of Civil Procedure, a dismissal of an action at the close of the plaintiff's evidence is said to be an involuntary dismissal, and "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

This court held in *Robinson v. Salt Lake City*, 39

Utah 580, 109 Pac. 817 with reference to the granting of a nonsuit:

“If a motion is granted, the only judgment that is permissible is one dismissing the action; that is, one which arrests any further proceeding in that action except on appeal. Such judgment is not a bar to a future action on the same cause of action, and cannot be pleaded as such.”

The difference between that case and the present rule of civil procedure is that a dismissal such as was made in the case at bar at the close of plaintiff's evidence is a dismissal on the merits and would, therefore, go beyond the ruling of the court in the *Robinson* case.

And in *Tintic Standard Mining Company v. Utah County*, 80 Utah 491, 15 Pac. 2d 633 the court granted a nonsuit upon which findings of fact and conclusions of law were made and a judgment was entered. On appeal of this case this court said:

“We are at a loss to understand why the court handled this case in this manner, because, upon granting of a motion for nonsuit, the court thereupon divested itself of the power to do more than enter judgment of dismissal, or upon motion for new trial to grant a new trial or to deny the motion.”

A quite similar situation was before the court in *DiGregorio v. Skinner*, 351 Penn. 441, 41 Atl. 2d 649, where at the close of the plaintiff's case the court granted a motion for nonsuit against one of the defendants and

then after the defendant had put on his case, it appearing to the court that the ruling had been erroneous and that there was some possibility that the defendant dismissed out of the case should have been held, set aside the nonsuit and granted a new trial as to both defendants. As to this matter the Supreme Court stated:

“The trial court was convinced that justice required that defendants, Mrs. Daniels and Burg, be given an equal opportunity to show for whom Skinner acted at the time of the accident. To do this it was necessary to grant a new trial to Burg and take off a nonsuit entered as to Mrs. Daniels.”

It thus appears from these authorities that if the trial judge believed he had committed error in granting the involuntary dismissal of the second count the only jurisdiction in the trial court was to grant or deny a motion for new trial. It is difficult to perceive how the court could regard it as a fair ruling to reinstate the quantum meruit count and submit that count to the jury after ordering the appellants to try their case on the theory that the quantum meruit count was out of the case. It is hard to see how any situation could be more prejudicial to a litigant than this one. Regardless, therefore, of the question of jurisdiction it is submitted that the motion for new trial on this assigned error should have been granted so that appellants could offer their proof on the issue of quantum meruit before the jury shall have that theory given to them.

POINT III

THE COURT ERRED IN PERMITTING THE JURY TO AWARD DAMAGES FOR THE PERIOD PRIOR TO FEBRUARY 23, 1946, UNDER SECTION 104-2-23 U. C. A. 1943.

This section of the statute of limitations provides that an action must be commenced within four years upon "An action upon a contract, obligation or liability not founded upon an instrument in writing * * * also, on an open account for work, labor or services rendered, or materials furnished * * *." The last portion of this quotation has been included to anticipate the argument of respondent that the matter sued on in this case was an open account. This seems to be answered by *Bishop v. Parker*, 103 Utah 145, 134 Pac. 2d 180, where this court was construing this same statute as applicable to a claim for services by an attorney against a corporation and rendered over a period of some nine and one-half years. The court quoted from a decision of the Kansas Supreme Court in *Spencer v. Sowers*, 118 Kan. 259, 234 Pac. 972 at 973, 39 A.L.R. 365, the following definition:

"A mutual, open, current account may be defined as an account usually and properly kept in writing wherein are set down by express or implied agreement of the parties concerned a connected series of debit and credit entries of reciprocal charges and allowances, and where the parties intend that the individual items of the account shall not be considered independently, but as a continuation of a related series, and that the account shall be kept open and subject to a shifting balance as additional related entries of

debits or credits are made thereto, until it shall suit the convenience of either party to settle and close the account, and where pursuant to the original, express, or implied intention there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits, which liability is to be fixed on the one part of the other as the balance shall indicate at the time of settlement or following the last pertinent entry of the account."

It is quite apparent that the particularity required of an open account under this definition was not present in the case at bar and that the plaintiff's cause of action must therefore succeed if at all as an action upon a contract not founded upon an instrument in writing.

A number of cases have been analyzed in each of which there was a suit brought or a claim rendered against an estate for personal services rendered over a long period of time and in which the application of a statute of limitations was made. One such is *McFweepers v. Cecil*, 177 Okla. 454, 60 Pac. 2d 801. That case was an action against an administrator for services rendered for thirteen years at the rate of \$100.00 per year and for an additional eight years at the rate of \$250.00 per year. The court instructed the jury that the plaintiff's right was limited to recovery within three years next preceding the death of the deceased. This was the principal question involved on the appeal. The Oklahoma Supreme Court found that cases on this general subject fell into three categories: The first one applies the rule that the law implies a promise to pay for such services when

rendered and that a cause of action may be brought at any time during the course of their rendition and no recovery can be had therefore after the statutory period has run following the rendition of any such services; the second group was found to involve the situation where there was no mention of the period of time for which the services were to be rendered and no measurement of the compensation to be paid and that in those cases the employment would be regarded on a year to year basis with wages payable at that time; the third group of cases were found to involve employment where there is a single hiring with a fixing of the service to be rendered and the time when the compensation shall become due as at the death of the employer or at some other fixed time in which case the services are to be considered continuous and the statute of limitations will not commence to run until the services bargained for have been completed. A Utah case classified in the third group is *Gulvranson v. Thompson*, 63 Utah 115, 222 Pac. 590. This was an action for services rendered by a daughter to her mother commencing in 1908 and running continuously until 1922 with temporary intermissions in 1915 and 1916. This court held that the mother was inflicted with an incurable ailment and that the daughter agreed to stay with her and take care of her until she should die. For this reason it was held that only one period of time was involved and that was from the commencement of services until the death of the mother and that there were no periodic payments re-

quired to be made and that no suit could have been brought by the daughter for any services until the death of the mother.

By contrast, in the case at bar, the contract was expressly shown to be one on a monthly basis with board and room of \$100.00 per month if the plaintiff is to be believed (and, of course, if the appellants are believed there was no money at all owing to the plaintiff) and there certainly was no testimony that the plaintiff was to render services to the appellants until a certain specified time with an implication that there could be no recovery of wages until that remote time had been reached.

In *Shuler vs. Corl*, 39 Cal. App. 195, 178 Pac. 535, an action was brought to recover compensation for services rendered to the defendant over a long period of time. Prior to the employment the plaintiff had been working at a drugstore and the defendant in writing asked the plaintiff to render labor and services in general housework "for as long a period as the plaintiff should choose to work for the defendant, whether a month or years." The court found that there was no specific agreement as to when the services should be paid for but the plaintiff alleged that she was promised that she would receive at least \$30.00 a month in excess of the amount she had been receiving at the drugstore. The plaintiff worked for eleven years and then after some delay brought the action and the statute of limitations was pleaded. The court held that the facts established a contract to continue for as long as both parties wanted it to and it could have been terminated at any

time, and that under these facts it was the only reasonable construction "that the various sums of money which would become due to the plaintiff would accrue at the end of each month during the period of her employment" and held that the statute of limitations barred all claims for months earlier than the statutory period.

In re Steuer's Estate, 77 Cal. App. 584, 247 Pac. 211, action was brought for board and room and care furnished by the plaintiff to the deceased for 36 months for \$70.00 per month and the accounting was protested by the heirs of the deceased under the claim that these charges were payable at a monthly rate and that the two year statute instead of the three year statute of limitations applied. The Supreme Court held:

"Here the claim shows plainly on its face that it was a monthly charge for services rendered from November 27, 1920 to November 27, 1923. Because of this fact, it follows as of course that the portion of the claim covering services rendered beyond the two year limitation of the statute are barred, and was improperly allowed by the administratrix and the probate judge."

In re Porter's Estate, 110 Pa. Super. 27, 167 Atl. 490, a claim was made against an estate for stenographic and general office services performed for a period in excess of six years. The court held that:

"Where services of a very general character are rendered for a long continuous period of time and the rate of compensation is uncertain, the

statute of limitations bars a claim representing wages earned in the performance of such services more than six years before the filing of the account of the debtor's estate."

The courts hold generally that where a contract for personal services is indefinite or uncertain as to the rate of compensation or the periods to be covered by a specific amount of compensation the statute of limitations is held to bar claim for compensation for the services after the statutory period has run following the rendition of any particular item or portion of such services. *In re Koonce's Estate*, 105 Pa. Super. 539, 161 Atl. 578; *McConnell vs. Crocker*, 217 S.C.334, 60 S.E. 2d 673; *Maxfield vs. Dertadian*, 66 N.Y.S. 2d, 346; *In re McCormick Estate*, 8 N.Y.S. 2d, 179; *Scott vs. Walker*, 141 Texas 181, 170 S.W. 2d 718; *Etchas vs. Orena*, 127 Cal. 588, 60 Pac. 45.

And it follows a fortiori that where the agreement calls for monthly or other periodic payments of compensation the statute commences to run at the expiration of any such month or other period and an action is barred on a claim for compensation for such month or other period after the statutory time has run from the close of the month or other period. Such cases are *McMillan vs. Miller*, 108 Wash. 390, 184 Pac. 352; *In re Bate's Will*, 225 Wis. 564, 275 N.W. 450; *Harris v. Whitworth*, 213 Ark. 480, 211 S.W. 2d 101.

Just why the answer of the appellants pleads the statute of limitations as barring plaintiff's recovery

prior to February 23, 1946 does not appear, since the amended complaint was filed on February 14, 1950, but no contention will be made that the statute bars anything subsequent to February 14, 1946. The cases plainly hold that where services are rendered on a monthly basis the cause of action accrues at the end of each month and is barred with the running of the statutory period on each such item or monthly claim.

It cannot be argued successfully that no prejudice resulted to the appellants through submitting the case to the jury for the entire period of time back to the middle of 1943 because the verdict of the jury was in excess of the amount recoverable if the plaintiff had been limited to going back to February 14, 1946. The plaintiff quit work in August 1949 according to the amended complaint (1) and the period of time from February 1946 to August 1949 inclusive would be 43 months which at \$100.00 per month would be \$4300.00 or less than the jury's verdict of \$4500.00 without giving any credit for incidental moneys given to the plaintiff by the appellants, admitted to be \$180.00 (1).

POINT IV

THE COURT ERRED IN REFUSING TO GRANT A NEW TRIAL ON THE EVIDENCE OF INSANITY AND PRESUMED INSANITY.

The first motion for new trial alleged discovery of evidence that the plaintiff was under a legal guardian-

ship in the State of Oregon and was an incompetent person and an escapee from an Oregon mental hospital (17-18). The affidavit supporting this motion gave no specific information concerning the insanity or confinement in mental hospital (19).

But the second motion which was entitled "Motion for New Trial and for Relief from Order Denying Defendants Prior Motion for New Trial" was more specific. It alleged incarceration in a state mental hospital in Pendleton, Oregon, and that Shields was an escapee and was incurably insane in the opinion of the medical doctor who was the superintendent (22-23, 25, 26). For instance, the medical superintendent wrote in one letter, "Mr. Shields was still insane when he escaped from the hospital. In view of the long duration of his mental illness and lack of improvement, I would not anticipate that he would ever recover" (25).

It, therefore, appears that these motions for new trial gave sufficient evidence for the court to assume that the plaintiff had been insane and had been committed to a mental hospital in Oregon with no indication that he would recover from his mental illness and regain his competence. And in addition, it is presumed by the courts that established or adjudicated incompetency and particularly insanity continues until an adjudication of a change of status. *Johnson vs. Gustafson*, 96 Kans. 630, 152 Pac. 621; *Johnson vs. Johnson*, 124 Oregon 480, 264 Pac. 842; *In re Redferns Estate*, 64 Mont. 49, 208 Pac. 1072; *Roberts vs. Pacific Telephone & Telegraph*

Company, 93 Wash. 274, 160 Pac. 965; *Witthoft vs. Commercial Development Company*, 46 Idaho 313, 268 Pac. 31.

Whether adjudication of insanity in Oregon shall be accorded full faith and credit in Utah is a question of some doubt as the decisions of the various states are in conflict. See 28 American Jurisprudence, Section 23; "Insane Persons" page 670. The weight of authority is said to favor full faith and credit and is supported by the following cases, among others: *Poorman vs. Carlton*, 122 Kans. 762, 253 Pac. 424; *In re Baster*, 191 Iowa, 407 182 N.W. 217. See also 44 C.J.S. "Insane Persons" Section 32 d, page 92. The giving of full faith and credit to adjudications of insanity by the sister states seems to be required by Section 102-13-49 U.C.A. 1943 which recognizes both non-resident guardians and non-resident wards having property in this state.

Great importance must be attached to the issue of insanity. If Shields was insane he had no power or capacity to commence this action, under Section 104-3-6 U.C.A. 1943 which provides:

"When an infant or an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed in the particular case by the court, or judge thereof, in which the action is pending."

The statute was held to apply to both resident and non-resident persons in *Schuyler vs. Southern Pacific*

Company, 37 Utah 581, 109 Pac. 458. The cases hold simply that an incompetent person cannot maintain a suit in his own name. *Parish vs. Rigell*, 183 Ga. 218, 188 S.E. 15, 107 A.L.R. 1385; *Linderhold vs. Walker*, 102 Kans. 528, 171 Pac. 603; *Chavennes vs. Priestly*, 80 Iowa 316, 45 N.W. 766, 9 L.R.A. 193; *State ex rel: Yilek vs. Johlick*, 66 Kans. 301, 71 Pac. 572; 28 American Jurisprudence, pages 737-738 and 735.

Another important effect of insanity is that the plaintiff was not competent to testify. Section 104-49-2 (1) U.C.A. 1943 specifically provides that among those who cannot be witnesses are "those who are of unsound mind at the time of their production or examination." See *Hull vs. Lullough*, 190 Ind. 315, 10 N.E. 270, 58 Am. Rep. 405; and 58 American Jurisprudence, pages 92-94.

Furthermore, if Shields was insane his contracts, including the contract sued upon in this case would have been void. 28 American Jurisprudence 695.

Because of all of these effects of the adjudication of insanity a new trial should have been granted so that the bearing of insanity on this entire case could have been considered both as it involves institution of the action, the capacity of the plaintiff to enter into a contract, and his competence to testify. It is apparent that the course of a new trial would have been vastly different from the one which resulted in the verdict forming the basis of this appeal.

CONCLUSION

The court cannot modify the judgment because it cannot be determined whether the jury awarded a verdict on the theory of an express contract or quantum meruit, and if appellants' appeal is sound in any particular a new trial must be granted.

The case should have gone to the jury to determine the terms of the express contract between the parties and recovery should have been limited to four years prior to commencement of the action. Having dismissed the second count at the close of plaintiff's case, the court should not have reinstated it without giving appellants opportunity to offer evidence thereon. And the presumptive insanity of the plaintiff requires that the trial court now determine his sanity during the working period and at the time of suit and determine therefrom whether the plaintiff, now deceased, had capacity to contract, to litigate or to testify.

Appellants submit that all four of the points urged are sound and require reversal of the judgment of the district court as originally entered and in denying the motion for new trial.

Respectfully submitted,

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