

1951

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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

vs.

TED RUSSELL and MANILA RUSSELL,
his wife,
Appellants.

Case No. 7630

RESPONDENT'S BRIEF

FILED

JUN 27 1951

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Clerk, Supreme Court, Utah

Attorneys for Respondent.

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Appellants.

Case No. 7630

RESPONDENT'S BRIEF

STATEMENT OF FACTS

We find great difficulty in conforming to the pre-
scribed rules concerning the controverting of appellants'
Statement of Facts. Appellants' Statement is lengthy,
covering 13 pages, and the transcript likewise is lengthy.
Although appellants' facts as recited are correct as sup-

ported by some parts of the record, yet they are one-sided and pick out the evidence most favorable to appellants, they having omitted any reference to the testimony of plaintiff's witnesses or to the testimony of their witnesses who appeared unfavorable to them. We present our version of the facts as the most expedient method of controverting and qualifying the facts stated by appellants.

Appellants correctly relate the pleadings in the case and the trial of the cause, including defendants' moving at the conclusion of plaintiff's evidence for a nonsuit or dismissal of both causes of action, and the court's granting the motion as to the quantum meruit count.

William Shields, plaintiff and respondent, went to work on defendants' farm in November, 1941, for board and room and "small wages." He stayed under this arrangement until the summer of 1943 and made no claim for any part of the time he worked on the farm, since defendants had fulfilled that part of the employment contract.

In June, 1943, the defendants were leaving the farm, having bought a tourist court on South State Street. The war was then on in full blast. Jobs were plentiful and wages were high (52). It was plaintiff's intention to go out and get a new job (51), but defendants told plaintiff if he would go with them to the tourist court, they would give him big wages and he wouldn't have hard work to do (51-80). Before plaintiff consented to go

down there with them, he had an understanding that they would pay him "big wages" (51). The amount was set at \$100.00 per month plus board and room (52-89). Plaintiff testified that he went down with the understanding that he was supposed to do light duties (53), but when he went down to the court, he testified he had "beds to make, floors to scrub and mop, then the painting to do, then the lights, to keep the place clean, collect rents" (52). He had to gather up the garbage, burn all he could burn of it, and dispose of the rest (53). Plaintiff scrubbed walls in the cabins, changed the linen on the beds, shoveled all the snow from the premises (53). Plaintiff took care of 21 units, exclusive of the two units in defendants' home (54). Plaintiff did the necessary plumbing repairs and did the emergency electrical repairs. He painted cabins inside and out (54).

There were quite a number of trees coming down the north side of the premises, then across and up the south side. Plaintiff grubbed the trees out so they could be removed. These were big box elders and willow trees. Plaintiff then cut them up (54 & 87). He was put to work removing these trees to make way for the first five new cabins defendants were to build. Plaintiff cut the wood into fire wood lengths and sold it, and defendant Ted Russell took one-half of these proceeds from plaintiff (55).

Plaintiff all alone dug 1100 feet of 9-foot deep sewer trench (82) for the laying of pipe, commencing from the South side of the cabins on State Street down to within

50 feet of Main Street, across the driveway, and up the south side of the north cabins (56-83). Plaintiff laid the pipe in this trench (82).

Plaintiff helped tear down the first five cabins, and helped tear down and rebuild some more, but didn't remember exactly how many. Plaintiff put in the forms on which to build the new cabins (56). He was required to do all the inside digging (for installation of sewer, plumbing pipes, gas line, etc.) on *all* the cabins remodeled (56). Plaintiff installed the water pipe and gas pipe in the first five cabins (85), on which the contractor was to pay him for the inside digging.

The cabins on the south side were remodeled. He participated in that, and the rest room which was torn out and remodeled (57). On the first five south cabins remodeled, plaintiff testified Ted Russell helped plaintiff do the remodeling, rather than Shields helping Russell (58). Plaintiff assisted in the tearing down and rebuilding of approximately 19 cabins (58), he estimated.

Plaintiff got up and worked on the garbage before defendants arose, and part of the time did a lot of work on the cabins before breakfast. Plaintiff generally got up about 8:30, and sometimes quit at dark, sometimes worked until 7:00 p.m. and sometimes worked until after midnight, depending on what he was doing. He stayed with the work until it was done (59). Every morning, defendants gave him a list of what to do and he worked until he finished it (66). He was alone in charge of the

entire tourist court in the summer time when defendants went fishing two or three days at the end of each week (59). One time they went to Boston via Florida and he was left alone in charge from three to four weeks (60 & 88), and had the rental and collections, management, upkeep, and cleaning (88). Defendants hardly ever missed a week going fishing during the summer (61) and left plaintiff alone on those occasions.

During his stay with defendants, plaintiff never drew his money. He was fed and housed by defendants. He bought his tobacco and incidentals from money earned from ice tips (67) and doing little odd jobs for neighbors when he had time. In addition, plaintiff earned money by selling beer bottles and pop bottles that the tenants left, but quit when defendant Russell insisted that Shields give Russell the money from the sale of these bottles (71).

Defendants once permitted plaintiff to work unloading rockwool and he earned \$50.00 (63). Plaintiff decided to quit defendants once when Russell discovered plaintiff had this \$50.00, and got mad and accused his wife of having given plaintiff the money. Plaintiff went up town and rented a room. When he went down to breakfast the following morning, Mrs. Russell was waiting outside and told him to come back, saying, "If you don't go back, you won't get your wages" (64-66-108). Plaintiff returned and worked continuously thereafter until he became ill in August, 1949.

Plaintiff testified he had no need for his \$100.00 a month during the years he was employed (67) and never made demand upon the defendants, for the reason that he knew they needed the money to pay for their auto court which they were buying on time, and plaintiff thought they would pay him. He didn't need the money. He was getting old and thought the money would be available to him when he did need to have some money (67). There was never any arrangement as to when his wages were to be paid. Likewise, there was no evidence that he was hired to work for any specified period of time.

Plaintiff was going to quit once to get better wages. He was going to work for contractors building new homes on 21st East, but was required to pay \$20.00 for union dues (69), so the Union Hall offered him a job on the Salt Flats. But defendants talked him out of taking it because the work would be too hard (70 and 96). He was going to quit to take a job herding sheep for \$125.00 per month, room and board, but the defendants told him he would have to pay for all sheep lost. Plaintiff believed them, and so declined the employment (70 & 71).

In August, 1949, plaintiff became sick one night and threw up about two quarts of blood in an old sink and on the floor. He was taken to the hospital for seven days and fed intravenously. The doctor told him he could go home if Mrs. Russell would fix what the doctor ordered him to eat (72). Plaintiff returned home while defendants were absent, and their son gave him a cabin. The next morning defendants told him to get out (73).

Plaintiff worked seven days a week except when he sometimes took a few days off in the fall to go hunting with Russell (108). He wore common clothes, working clothes which were supplied to him by defendants (108). He never had a sick day to keep him from working, until he went to the hospital (109). Sometimes plaintiff got three meals a day, sometimes he got a sandwich, and sometimes he got only two meals when Mrs. Russell was busy with her beauty work. Plaintiff bought his own tobacco from ice tips. Mrs. Russell once gave him \$15.00 and \$10.00 another time to buy clothes (93). That was all the money he ever received from defendants. He kept a record in a book of everything paid him or received from defendants, but the book disappeared (99-103).

Defendants' counsel showed plaintiff defendants' proposed "Exhibit 1" dated March 19, 1948, according to Ted Russell, (188), and listing first the statement, "Received \$82.50 for carpenter work," and signed by R. L. Shrewsbury, listing second, "Received \$82.50 for carpenter work," and supposedly signed by William Shields, and listing third, "Received \$5.00," signed by William Shields. Plaintiff admitted that the bottom signature was his, but denied that the signature above it covering the receipt of \$82.50 for carpenter work, was his.

Mr. Louis Gabardi testified for plaintiff and said that his home is south of the Russell property. He had lived there for the last fourteen years, and from his home he could see the front of Russell's house and part of their yard, including the two east cabins, and had seen

plaintiff there from 1943 to 1949. Gabardi testified that whenever he saw plaintiff, Shields was always busy working (111), and was often working after sundown. He saw Shields on the job as early as he, the witness, got up in the morning. From witness's limited view of the Russell yard, he had seen plaintiff shoveling snow, raking leaves, cleaning up, working on a sewer, and hauling garbage (112).

Mrs. Joseph Kaufman was called by plaintiff and testified that from 1943 to 1946 or 1947, she had resided in an apartment in Mr. Gabardi's home. Her view of Russell's premises was limited to the front of the Russell home and yard. She saw Shields in and out of the Russell premises from 1943-1946, and from her limited view, she saw Shields in and out front working around the front yard, and at the times she saw him, he was busy. She testified she attended Mrs. Russell's beauty parlor and that Mrs. Russell used to do the hair all around there (116).

Plaintiff called George A. Zee who operated a 18-unit motel in Salt Lake City, Utah, operating it from 1942 until the present. He testified that he maintained a minimum of two employees during the winter and a minimum of three employees during the summer to help him maintain his tourist court. His minimum prevailing wage rate from 1943 to 1949 was from \$.50 to \$.85 an hour (118). He testified that his pay rate for a general handyman or custodian from 1943 to 1949 was \$120.00 per month for a 48-hour week, plus a room of the value of

\$30.00 per month. On occasions, he had a person employed as a simple handyman only, doing none of the duties of changing linens or renting cabins, who received \$125.00 per month for a 6 day week, but his hours varied so that some days he worked only 4 hours a day and sometimes he might work 8 hours a day (123).

Plaintiff then rested his case and the heretofore described motion of defendants for nonsuit or dismissal was made, and granted as to the quantum meruit. Plaintiff's counsel presented authorities to the court in chambers challenging the granting of the nonsuit, which the court took under advisement, and the defendants proceeded with their case.

George Ungricht, son of Manila Russell, was called by defendants and testified that from 1943 to 1944 when he left for the service, Shields took care of the garbage and was the handyman around the place and helped Russell with whatever was going on around the place. On direct examination, the following ensued.

“Q. Did he do the sewer job he testified to earlier?

A. “That sewer job was done. But the septic tank, when the septic tank was put in and the sewer was laid behind the cabins, it was when I got a fifteen day leave out of the Navy. Ted, Bill, and I, all worked on *that* sewer, and we put *that* in during the time I was on furlough from the Navy” (132).

The witness then testified in rebuttal to plaintiff's statements, that he had never observed plaintiff left in

charge of the tourist cabins—that Mr. and Mrs. Carlaw were left in charge from 1946 to 1949 when the witness returned to the court. He said Mr. Emmett Fletcher was left in charge when the Russells went to Boston (134); that plaintiff did not put in over 7 hours a day working and it did not involve heavy work. The witness testified that the terms of employment involved board and room, clothing, and a little spending money because Shields had told him that in 1941 (135). Following 1943, Mr. Shields had never again made that statement to him (135), but he knew that if contrary arrangements had been made, he would have been informed of them (135). He didn't know how much money his mother gave Shields, but he knew that she was always giving him money (136). He estimated that plaintiff smoked a can of tobacco every two days. His mother, not Shields, cleaned the cabins and changed the linen (137).

In addition, he testified his mother took care of the five rooms the family occupied, did her beauty work, and cooked three meals a day for them (138). Later the witness testified that he had helped Shields dig the sewer line Shields claimed he had dug alone (139), then later said he and Shields and Russell had dug it (140). Plaintiff watered the lawn, and shoveled snow to clear paths to the cabins (142), and Shields helped Russell tear down one cabin that the witness knew of (143). He testified that Shields helped Russell with the plumbing and gas repairs, *and that between Mr. Russell and Mr. Shields all the work of the 24-cabin motor court was done that required doing about the premises.* They did all the work

on the 24 units and the premises, except change the linens and keep the cabins clean (144).

Ted Russell was called as a witness in his own behalf and testified that he took the plaintiff to the tourist cabins as a yard man for clearing snow, removing garbage, picking up papers and anything general, in exchange for board and room only (150). Russell was extensively examined by his counsel concerning the work for which plaintiff sued in quantum meruit, (153 to 183), 29 pages of testimony on direct examination alone. Very little of his testimony concerned a denial of plaintiff's alleged express contract and affirmance of the express contract alleged by defendants.

Witness was asked (153) as to whether he had ever left plaintiff in charge of the tourist court and witness replied that "Shields destruction purposes was so great, I seen I couldn't give him no responsibility. I did not give him tools to work with. He would break them. He broke a couple of lavatories. I had to take all my dies away. I paid \$38.00 for two dies he ruined for me doing plumbing work and electric work." Russell claimed that as early as September, 1945, he learned that Shields could not handle implements or act with any degree of competency in anything higher than manual labor (185) and so entrusted only manual labor to him. However, defendants "Exhibit 1" a receipt whereby defendant tried to prove that he hired Shields to perform specialized carpenter work and paid him \$82.50 per week therefor (157), was dated March, 1948 (188).

Russell explained he hired Shields as a carpenter and paid him that kind of money out of sympathy (188).

Russell impeached the testimony of his own witness and stepson, George Ungricht, who had testified that Shields dug the sewer trench. Russell denied that Shields had dug any part of the trench; that plaintiff had done nothing but move a few rocks out of the path of the trench (156 and 187).

Russell apparently attempted to prove that plaintiff's later illness was induced by too much smoking (171), and contrary to Ungricht's testimony that plaintiff smoked a can of tobacco every two days, Russell testified that Shields smoked two cans of tobacco every day (171). Then to illustrate his generosity toward plaintiff, Russell testified that when he was back East, he went to the tobacco dryers in Richmond, Virginia, and brought back 25 or 26 pounds of dry tobacco leaf as a gift to Shields and testified this tobacco lasted plaintiff one week, a result which would have plaintiff smoking the equivalent of about 16 cans of tobacco per day (171). When this anomalous result was pointed out to Russell on cross-examination, he changed his story and said he had brought back only 8 or 10 pounds, and that it had taken plaintiff two weeks to smoke it (197).

Russell claimed he went fishing on Friday nights and would come back Saturday night or Sunday morning and on those occasions did not leave plaintiff in charge (160). Mrs. Carlaw was left in charge and

Emmett Fletcher took charge when there was some work to be done in the cabins (160). Russell admitted that he and Shields did all the maintenance work on the premises, but that Shields' only part therein was to fetch and carry the tools for Russell (186).

Despite Russell's claim that plaintiff was to work for board and room and nothing more, he testified on direct examination that he gave plaintiff an average of \$145.00 to \$165.00 a month, including board and room, clothing, tobacco, and everything (166), and yet, when asked whether he made any individual payments of cash to the plaintiff over and above tobacco, clothing, etc., Russell could only state that during the entire nine years, he gave the plaintiff \$10.00 when Mr. Shields was in the hospital (151).

Of the \$145.00 to \$165.00 per month that Russell claimed he gave Shields, Russell said about one-half of that would be board and room (191), but admitted that he reported the value of the board and room to the Social Security Board as being worth only \$50.00 per month (192). Plaintiff claimed that the other one-half, or \$72.50 or \$82.50 a month, covered tobacco, clothing, and cash given to plaintiff, but he would have to go home to get his receipts and figure out just how to account for the disbursement of that monthly amount (194).

Russell admitted that 10 wooden cabins (198) were torn down and complete new cinder block cabins were built (198), and on the remaining 14 cabins he installed

new showers, tile floors, tile baths, new sinks, new electric fixtures, and new plastering therein (198-199). He had screens made and installed in his home, replastered his home, had new cement front steps put in, sawed the trees in front of his house and throughout the premises, and that all of this work was done by outsiders—none of it by Shields (200). On direct examination, Mr. Russell produced a number of receipts (Defendants' "Exhibit 2") to various contractors, supply houses, and workmen, to indicate that outsiders had necessarily done all of the work completed on the premises. We submit that the total of all such receipts, \$2,649.71, could never approximate the figure Mr. Russell would have had to pay for all of the foregoing construction, remodeling, addition, fixtures, and repair if it had all been done by outsiders.

William Carlaw was called by defendants and testified that George Ungricht was left in charge of the cabins on the occasions when the Russells were away (206). When asked the leading question if Mrs. Carlaw was left in charge at any time, he said he guessed Mrs. Carlaw had been left in charge about six or seven times. When asked what type of work he had observed Mr. Shields doing the eight years Carlaw observed him at the court, he testified he saw Shields picking up the garbage and sweeping around; that he helped Mr. Russell do the plumbing work around the court (209), helped dig the sewer and helped put in the line (210). Carlaw testified that he didn't know whether Shields had ever been placed in charge of the court (209). Carlaw

stated that the Russells were gone sometimes two or three days and sometimes a week at a time, but admitted he had no idea as to how many times they had gone (213).

Mrs. William Carlaw was called by defendants and stated that she was left in charge of the cabins during the Russell's absence during the last three years. During those times, Mr. Shields took care of the yard and was working around taking care of the court, but she admitted that she didn't know what plaintiff did do when he went in the cabins (216). She denied that either Mrs. Harper, Mrs. Young, or Emmett Fletcher tended the cabins in the Russells' absence since she took over in 1946-1947 and 1948 (218).

Emmett Fletcher was called by defendants and testified that since 1945, he spent two weeks with defendants about twice a year, that he never took care of the place in the Russells' absence, except to help Mrs. Carlaw when the Russells were in Boston (222).

Mrs. Manila Russell was called and sworn and was asked by her counsel concerning exactly what work Mr. Shields did after he reached the auto court. She stated he gathered up around the yard at all times and did little duties around the place under Mr. Russell's direction. She repudiated Mr. Shield's contract claim and asserted that he was to work for room and board. Outside of change from groceries that she let plaintiff keep, she gave him only \$10.00 once and only \$15.00 once (227).

She admitted that Shields did a thriving ice business (228). She admitted that Shields wore working clothes and was out there *at all times* with Russell *working* (230), and that Shields packed the laundry from the cabins up to the house (232). She testified that Shields never quit his employment with defendants as far as she knew (234). Shields was around the court 7 days a week, but witness said he did not have to work. He could do as he pleased (237).

Fred Weedon was called by plaintiff as a rebuttal witness. He was a contractor and built five cabins for defendants over a year's time, from January 28, 1946, to March, 1947. He was on defendants' premises approximately four months, spread over that period of time. He testified that Shields did a limited amount of work on his payroll and was a fine worker (242). Weedon testified that plaintiff was busy all of the time that he and his men were down there. Shields cleaned up around, cleaned out the main lavatory every morning, helped do a lot of the plumbing around there, helped put in the water pipes in the cabins, worked a good deal with the different crews Russell hired. He noticed that Russell helped plaster one of the cabins (243). Shields helped lay the floor in one of the cabins and worked in the cabin where the wooden floor was torn out (244).

Witness had seen Shields take tourists to their cabins and take care of the tourist court when the Russells were gone. Mr. Russell went fishing quite often during the summer (245) and stayed two or three days

at a time. During the period that the Russells were in Boston, Weedon saw nobody else but Shields take care of the tourist court. He showed the people to their cabins and prepared their cottages and did all of the rest of the work around the court (245).

He saw Shields dig trenches for the water in each of the five cabins Weedon constructed. These trenches were 18 inches deep and Weedon said that Mr. Shields and Mr. Russell did all of the plumbing for those five cottages. This did not consist of Mr. Shields simply carrying the tools around (246). Weedon was on defendants' premises from 8 to 4:30 p.m., and never saw plaintiff laying around—always doing something—always busy (247). Weedon was to dig the trench for gas and water lines up to 3 feet from the foundation of the cabins. Plaintiff dug the 15 feet from that water line, under the foundation and over to the far side of each cabin where the sinks were, about 18 feet per cabin (207), 18 inches deep (246). Russell and Shields laid the gas and water lines and did the plumbing to connect the water line which involved threading pipe, screwing it together, etc. (246 and 250). The work plaintiff was hired by Weedon to do for him consisted of digging the sewer ditching behind each of the five cabins (247). Mr. Weedon testified that during the times he was on the premises, he observed that Russell was not around there one-tenth a part of the time that Mr. Shields was (252).

POINT I.

IT WAS PROPER TO SUBMIT THE CASE TO THE JURY ON THE THEORY OF QUANTUM MERUIT, SINCE

THE PLEADINGS SET FORTH SEPARATE COUNTS OF EXPRESS CONTRACT AND QUANTUM MERUIT, AND THE EVIDENCE ADDUCED WAS CONFLICTING AND COULD SUPPORT EITHER COUNT, AND IT WAS FOR THE JURY TO DETERMINE WHICH COUNT WAS PROVEN.

The amended complaint in the first cause of action alleges an express agreement that plaintiff was to work at defendants' 22-cabin tourist court making beds, sweeping and mopping floors, painting cabins, tearing down old cabins, building forms for new cabins, performing all plumbing and gas repairs, shoveling snow, watering lawns, removing garbage, and all other general handiwork about the premises for the sum of \$100.00 per month and room and board (1). Defendants in their amended answer denied such express contract and set forth an express agreement whereby they employed plaintiff as watchman and occasional handy man only around the tourist court for room and board only without cash payment or settlement of any kind or nature beyond said room and board (3). Plaintiff's amended complaint set forth a second cause of action, that plaintiff performed services for defendants at their special instance and request between June, 1943, and August, 1949, of the reasonable value of \$150.00 per month (1), and admitted the receipt of board and room during said period as part payment (2).

There is no question but that plaintiff was entitled to plead different counts in order to meet the exigencies of the case as presented by the evidence. Utah Rules of Civil Procedure, Rule 8(E) 2 specifically permits the

pleading of multiple and inconsistent claims. Said rule provides:

“* * * A party may also state as many separate claims or defenses as he has regardless of inconsistency or whether based on legal or equitable grounds or on both.”

The plaintiff was entitled to instructions on both counts, express contract and quantum meruit, it being for the jury to decide what plaintiff had proved under all the evidence. It appeared from the evidence that plaintiff might have proved all of the work he was supposed to perform for \$100.00 per month. Yet, the jury may have determined that he did not fulfill all of the obligations required to be performed for \$100.00 per month. Defendants claimed an express contract that plaintiff was to be the watchman and occasional handy man only in exchange for room and board alone. However, by defendants' own testimony and the testimony of all of the witnesses introduced in their behalf, it was obvious that plaintiff had performed work of a nature and extent far greater than what he was to perform for room and board alone. Obviously he was entitled to compensation for the excess. It was for the jury to determine which of the two express contracts, if either, was substantiated by the evidence. If they found against both claimed express contracts, then they could properly find and award the reasonable value of the services they determined plaintiff performed. Thus Instructions 4, 5, and 8, excepted to by defendants and concerning the implied contract of employment, were proper. As a

matter of fact, under the evidence as it stood at the time the jury was instructed, under Rule 54(c)(1), the court had a duty to instruct the jury as to whether plaintiff rendered any services to defendants under an implied contract and, if he did, that defendants should pay the reasonable value of such work and labor rendered by plaintiff. Rule 54(c)(1) of the Utah Rules of Civil Procedure provides:

“Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the court requires it, determine the ultimate rights of the parties on each side as between or among themselves.”

In view of the foregoing rule now prevailing in our jurisdiction, we feel that the Michigan cases and some few other cases cited in appellants' brief holding that where an express contract is sued on, recovery on the theory of quantum meruit is not obtainable or not applicable, are superseded. We feel that the Utah Supreme Court gave efficacy to the present rule cited when it decided the case of *Young v. Hanson* (Utah, May, 1950), 218 Pac. 2d 666, cited in appellants' brief, where the court permitted a recovery on the theory of quantum meruit, even though there had been no pleading of quantum meruit. The new Rules of Civil Procedure attempt to do full and complete justice between the parties in one suit, as adduced by the evidence, whether such relief is sought by the pleadings or not.

Further, in spite of appellants' limited support of the view that where an express contract is sued on, recovery on the theory of quantum meruit is not obtainable, *Bancroft on Code Pleading*, Vol. 1, Sec. 106 to 110, announces the "well-settled rule that causes of action arising from contracts, express or implied, may be united. For example, a claim upon an express contract and a claim upon quantum meruit may be united." *Bancroft* in Sec. 108 says:

"It is now clearly settled by the weight of authority that a count upon a quantum meruit may be joined with one upon a special contract, although each states only a separate ground for substantially the same recovery. This may often be necessary and is allowed for the purpose of meeting the exigencies of the proof. There is, under the code practice, no legal incompatibility in declaring separately upon the two causes of action. They need not correspond or be consistent with each other. As illustrative of the rule just stated, it is proper to bring a count for the reasonable value of services with a count based upon an express contract to pay a stated commission or salary,"

citing numerous cases from Arizona, California, Colorado, Idaho, Kansas, Montana, Washington, Wisconsin, Missouri, Ohio, and New York in support of this principle.

Bancroft's Code Pleading, Vol. 1, Section 705, speaks on the variance between a quantum meruit count and proof of express contract, where only one cause of action has been pleaded.

“Under certain authorities, it is the rule that a party declaring upon an express contract cannot recover on an implied contract or on a quantum meruit. In other states, however, it is the settled law that where the complaint alleges a special contract only and the proof fails to establish it, but does in fact show the rendition of services, a recovery may be had upon quantum meruit,”

citing many cases from Montana, Nevada, New York, Washington, and Wyoming in support. Our new code provision, 54(c)(1), would permit such a recovery.

Appellants at p. 17 of their brief state that 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. Appellants claim 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. *Bancroft on Code Pleading*, Section 706, continues:

“It is, however, a general rule that where a contract has been fully performed by the plaintiff and nothing remains to be done but the payment of the money by the defendant, the liability of the defendant may be enforced under a count for the reasonable value of the services; in such case, the contract may be used as evidence, the effect of such proof being to make the stipulated compensation the quantum meruit in the case,”

citing numerous cases in support of this principle from California, Montana, Nevada, and Oregon.

POINT II.

NO PREJUDICIAL ERROR WAS COMMITTED WHEN THE COURT VACATED ITS JUDGMENT OF INVOLUNTARY DISMISSAL MADE FOLLOWING THE CLOSE OF PLAINTIFF'S CASE, SINCE APPELLANTS HAD BEEN APPRISED OF THE POSSIBILITY THAT THE STRICKEN COUNT MIGHT BE REINSTATED AND PROJECTED THEIR DEFENSE BASED ON THAT CONTINGENCY, AND THEMSELVES ADDUCED EVIDENCE ON THE BASIS THAT THE STRICKEN QUANTUM MERUIT COUNT WAS OPERATIVE.

As related by appellants, at the close of the plaintiff's evidence, appellants moved for a nonsuit or dismissal of the plaintiff's case for the reason that plaintiff had not sustained the proof of the elements that go to make up the cause of action stated in the amended complaint, particularly as to the first count covering the express contract. The court granted a nonsuit as to the quantum meruit.

Plaintiff and his witnesses had testified to the kind and extent of services plaintiff had performed. Plaintiff called Mr. George A. Zee as a witness. Mr. Zee operated an 18-unit motel in Salt Lake City during the years plaintiff had worked for defendants at their motel in Salt Lake City. Mr. Zee (117 to 124) testified as to the wages he paid his employees doing work of a comparable nature as plaintiff during the period of time sued on by plaintiff. On re-cross-examination (124), Mr. Zee acknowledged that his testimony concerning wages and labor was confined to the experience in his own court and admitted that he was not acquainted with the same situation generally throughout the tourist courts in the city.

Following Mr. Zee's testimony, plaintiff rested and defendants made the motion for nonsuit or dismissal. The court felt that Mr. Zee was called as an expert witness and had failed to prove the prevailing wage for services similar to plaintiff's in Salt Lake City during the pertinent period of time, and therefore, apparently felt that plaintiff had failed in a necessary element of proof of the reasonable value of the services under the quantum meruit cause of action. The Court granted the motion as to the quantum meruit count, although the court (125) had previously overruled defendants' motion to strike the testimony of Mr. Zee on the grounds that it was not probative, the court stating that the motion was not timely made. The court said if plaintiff had a qualified witness and wanted to reopen for that purpose, it would allow plaintiff so to do, but then refused plaintiff time in which to produce such witness (127). The court then informed defendants' counsel he could limit his proof to matters under the express contracts, and court recessed for the day. The following morning in chambers and in the presence of defendants' counsel, plaintiff contested the court's granting of the nonsuit and produced authorities:

20 Am. Jur., Sec. 386, Page 349: "In an action to recover the value of services rendered under an implied contract, evidence of what others received for like services may be properly considered and, in the last analysis, is the proper criterion."

58 Am. Jur., Sec. 63, Page 560: "The jury may from their knowledge of business and the value of the labor, in assumpsit for work and

labor, find a verdict for the value of the work done upon request without an express contract, notwithstanding there is no evidence of the worth of labor at the time and place the work was performed."

The court thereupon informed counsel for plaintiff and defendant that he would take the authorities and the matter under advisement and permitted the trial to proceed.

Defendant proceeded with his evidence and in effect completely disregarded the court's original advice that he could limit his defense to matters under the express contract. Appellants complain that they were prejudiced when the court at the conclusion of defendants' case reinstated the quantum meruit count, claiming they had no opportunity to try their case and meet the proof required if the quantum meruit count had been in effect. Their complaint of prejudice is not consistent with the facts. Defendants proceeded to introduce witness after witness and each witness was examined under direct examination concerning the character and nature and extent of the work plaintiff performed, to establish that work plaintiff actually performed and to rebut the evidence of the work plaintiff claimed he did. Plaintiff made no objection whatsoever to the introduction of this whole line of testimony which served to rebut plaintiff's evidence. Defendants tried their case as if the quantum meruit had never been stricken. Their defense was in no way limited to whether or not express contract was the only issue, and the record so shows.

As the best and most convincing proof of that fact, the record clearly shows (255) that defendants had throughout their defense conducted their case as if the quantum meruit had never been expunged, for at the conclusion of defendants' case, the following took place (255): Defendants moved the court to direct a verdict in favor of the defendants upon the *issues* raised in the *pleadings*, for the following reasons:

"FIRST: (Defendants, contending the Statute of Limitations had run, requested a directed verdict as to all matters prior to February 23, 1946.)"

"SECONDLY: That the plaintiff has a failure of their proof in this particular case, *particularly as to the quantum meruit* question on work and labor performed at the specific instance and request of the defendants."

So, beyond a doubt, defendants cannot claim prejudicial error where it is obvious they projected a full and complete defense to both causes of action, and did so consciously, believing that the court was apt to reinstate the quantum meruit.

Following defendants' motion for directed verdict, which the Court took under advisement (225), plaintiff moved that the second cause of action theretofore stricken be reinstated, and the court granted this motion. If appellants would claim error, it appears that it then became incumbent upon them to ask the court to permit them to reopen to introduce evidence in defense of that cause of action, if they felt they were prejudiced in any

way. Defendants and their witnesses were still present. But defendants, knowing full well that such a request was sterile and that they could produce only redundant and repetitious evidence, having already fully covered their defense to the quantum meruit count, when the court asked, "Anything further?", Mr. Burnham answered, "That is all." (255)

In addition, the court had a duty to reverse its ruling on the nonsuit of the quantum meruit, for, under Rule 61 of the Utah Code of Civil Procedure:

"No error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

We submit that for the court to have refused to reverse itself would have been inconsistent with substantial justice, under both the law, under which the court should never have granted a nonsuit in the first instance, and under the evidence, where the defendants themselves undertook a defense to the quantum meruit count by rebuttal and positive exposition of what plaintiff actually performed, and themselves made out a case supporting quantum meruit recovery by plaintiff.

We will not here undertake a duplication of the evidence which we have heretofore summarized in our statement of facts, other than by recapitulation. Defendants' witnesses, George Ungricht, Ted Russell, William Car-

law, Mrs. Carlaw, and Mrs. Manila Russell, on direct examination were all examined at length concerning the type and extent of the service performed by plaintiff. Plaintiff made no objection to the introduction of this testimony, although it was all in rebuttal of plaintiff's evidence.

We submit that under the evidence defendants introduced, defendants made out a case of quantum meruit for plaintiff and it was mandatory on the court, under Rule 54 (c) (1), to give the jury an instruction on quantum meruit, whether the court ever reinstated the stricken quantum meruit cause of action or not. On Ungricht's testimony alone, where he testified that Shields and Russell together did *all* of the work required of 24 cabins and the premises, exclusive of cleaning the cabins and the changing of linens, the court had a duty to instruct the jury on quantum meruit recovery, the new code provision permitting a party to all the recovery to which he is entitled from the evidence, whether pleaded or not.

In *Robinson v. Salt Lake City*, 39 Ut. 580 and *Tintic Standard Mining Co. v. Utah County*, 80 Ut. 491, cited by appellants, the question here involved was not raised. There, at the conclusion of plaintiff's case in each instance, nonsuits were granted, and nothing further was done. Obviously, the court in these instances had nothing further to do than enter judgments of dismissal.

In all events, the error claimed by defendants has not been prejudicial, the record showing that defendants

offered all their proof on the issue of quantum meruit and conducted their defense and made their motion for directed verdict on the theory that the quantum meruit cause of action was never stricken.

POINT III

NO ERROR WAS COMMITTED IN INSTRUCTING THE JURY TO AWARD DAMAGES FOR THE PERIOD PRIOR TO FEBRUARY 23, 1946, THE 4 YEAR STATUTE OF LIMITATIONS FOR WORK AND LABOR PERFORMED, FOR THE REASON THAT THE STATUTE OF LIMITATIONS HAD NOT COMMENCED TO RUN, PLAINTIFF'S EMPLOYMENT HAVING BEEN A CONTINUOUS ONE.

Appelants cited a Utah case in anticipation of an argument by respondent that the matter sued on is an open account, *Bishop v. Parker*, 103 Utah 145, 134 Pac. 2d 180, wherein the Utah court construed Section 104-2-23, Revised Statutes of Utah, 1933, by quoting from a decision of the Kansas Supreme Court in *Spencer v. Sowers*, 118 Kan. 259, 234 Pac. 972, at Page 973, 39 ALR 365, concerning the definition of an open account. The Utah case concerned a claim for services by an attorney against a corporation and rendered over a 10 year period. After the court set forth the *Spencer v. Sowers* definition of open account, quoted in appellants' brief at P. 22, our court denied the claim, stating as follows: "The account drifted on for ten years without payment or credit. The evidence tends rather to show that each item if not constituting a separate employment, was susceptible of that interpretation." (Claimant had admitted he was not employed on a general retainer basis). The court stated

that a series of charges for *unrelated items*, except that they were related to the same party against the other with no credits or counter-charges, did not constitute an open account contemplated by the statute.

In support of the *Bishop v. Parker* case, appellants cite *Spencer v. Sowers*, *supra*, where three separate, independent, and wholly unrelated loans of money were made at separate intervals of time and no payments on account were made, nor was any acknowledgement thereof in writing made by the borrower. This was held not to be an open account, and we agree with the court's holding under such facts, but those are not the facts of the case at bar.

It is our contention as supported by the evidence (99 & 108 concerning book account kept by plaintiff of amounts received) that payment on account tolls the statute of limitations, even were the statute of limitations otherwise applicable in the case at bar. There is an annotation in 36 A.L.R., particularly at Page 350, in point. The annotation says:

“In *Smith v. Velie*, 60 NY 106, in which the intestate let the plaintiff have every year various sums of money and different articles of goods, of which he kept an account against her which was to apply upon her wages, the court says: ‘Whenever he did this, her services being continuous and no time fixed by agreement for the payment of any part, the presumption is that it was to apply upon the balance he at that time owed her, and not upon the wages of any particular year * * * The payment by the intestate upon the balance due the

claimant took the entire balance out of the operation of the statute.' In *Pursell v. Fry*, 19 Hun (NY) 595, 58 How. Pr. 317, an action against an estate on an account for services, the court says * * * that payment by the intestate upon the balance due took the entire balance out of the operation of the statute.

To sum up, the payment operates not because it is an item of an account, but by virtue of an independent principle that a payment tolls the statute of limitations. This principle operates whether the payment is on an account, or on a note or other debt."

In the case at bar, the defendants allege their express contract to be for board and room and no cash payment nor settlement of any kind or nature. Plaintiff's pleadings and evidence admitted, and defendants themselves testified, that cash and clothing were paid to plaintiff, which we submit were payments on account which tolled the statute of limitations, if such were applicable. However, we cannot overlook the implication of the Utah case, *Bishop v. Parker*, supra, as well as the positive holding of the *Gulbrandson v. Thompson* case hereinafter cited, that the statute of limitations in this case cannot and would not be applicable.

It is possibly superfluous even to consider appellants' third point relied on concerning the statute of limitations for the reason that the court cannot speculate as to which theory or theories the jury employed to permit recovery. There are unlimited possibilities as to how the jury determined its verdict, and if quantum

meruit was their basis, the statute of limitations could be inapplicable, for who knows how much and for which period of time the jury gave verdict.

Ted Russell alleged plaintiff quit and came back in 1946 (161). The verdict could have represented the reasonable value of the services plaintiff performed after 1946. It may have represented recovery under plaintiff's express contract for a period of time less than the whole, if the jury felt he may have quit. The jury may well have founded part of their verdict on plaintiff's express contract and felt that a different contract of hiring arose following the quitting and rehiring. They may have turned plaintiff down entirely on his claimed express contract if they felt he had not performed all of the services required for \$100.00 per month plus room and board, and then have awarded him the reasonable value for the services he did perform. They may have disbelieved plaintiff's express contract and believed defendants' express contract, but yet have found that plaintiff performed services in excess of the limited duties defendants' express contract of hiring called for, and given plaintiff a verdict for the reasonable value of the services performed over and above defendants' claimed express contract.

The possibilities upon which the jury predicated its verdict are innumerable, and it is not for the court to speculate as to what was in the jury's mind. In the absence of any special interrogatories which would have shed some illumination, the judgment must be upheld

if there is a legal foundation for upholding any theory under which the jury may have arrived at its verdict.

Appellants claim to have analyzed a number of cases in which suit was brought for a claim rendered against an estate for personal services rendered over a long period of time and in which an application of a statute of limitations was made, citing first the case of *McFeeters v. Cecil*, 177 Okla. 454, 60 Pac. 2d 801, allegedly in support of their position. The case as they recite was an action for services rendered for 13 years at \$100 per year and for an additional 8 years at \$250 per year. The court instructed the jury that the plaintiff's right was limited to recovery within 3 years (Okla. statute of limitations) next preceding commencement of suit. However, the facts in the *McFeeters* case do not coincide with ours in any respect. The case states:

"The trial court held that the evidence does not show a single hiring for the continuous performance of the work and services during the period of years involved. The record bears out the holding, as the evidence shows many intervals in which no service was rendered by the plaintiff, and particularly was this true as pointed out by the trial court when the same services or substantially the same were rendered by another. Also it was true in the year 1917, when plaintiff was away and lived for some time in eastern Oklahoma."

As appellants recite, the Oklahoma Supreme Court found that cases on the general subject fell into three factual categories, one of which is directly in point and

the law thereon stated affirms our position. The court said:

“In Kansas, *Grisham v. Lee*, 61 Kan. 533, 60 Pac. 312, and *Mayborne v. Citizens' Trust & Savings Bank*, 46 Cal. App. 178, 188 Pac. 1034, the following rule is applied: ‘If there is a single hiring and the term of service of the employee and also the time when his compensation shall become due, are not fixed by agreement or understanding, and the hiring and service continue without interruption or payment until the death of the employer, the employment, in the absence of evidence of a general custom or usage, may be deemed continuous, and the statute of limitations will not begin to run against a claim for compensation until the services are ended.’

“This rule has been followed in other cases in Kansas and California and in *Gulbranson v. Thompson*, 63 Ut. 115, 222 Pac. 590, * * * and in other states. But in all these cases, there was but a single hiring and the services were continuous, or substantially so.”

Then the Supreme Court went on to state that the rule in *Grisham v. Lee*, etc., was not applicable under the facts of the Oklahoma case, since there was no evidence of a single hiring and the services were intermittent.

Our case falls squarely within the rule announced in the *McFeeters* case, since the evidence showed that plaintiff's services were performed under general hiring without any express agreement as to the time of compensation or the term of employment and there was a single hiring and the services continued for a series of years without interruption or substantial payment.

At p. 27 of appellant's brief they state, and we submit improperly so, that the courts hold generally that where a contract for personal services is indefinite or uncertain as to the rate of compensation for the period 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, and cite several cases thereafter. One such case cited, *McConnell v. Crocker*, 217 S.C. 334, 60 SE 2d 673, says:

"The cited decisions from this court and those from No. Carolina and Virginia which reflect the rule that the statute of limitations applies to claims for services to a decedent which were rendered without agreement that payment should be made at death or by will, *appear to be out of line with many other courts, possibly the majority* (italics ours) but we do not think that we should in this case depart from our rule, under which the alleged services were rendered in this case. The right, if any, arose under that law and should be confirmed by it. Numerous cases are collected which illustrate the conflicting views in other jurisdictions in 7 ALR 2d 198."

Another case cited therein by appellants is *In re McCormick Estate*, 8 NYS 2d 179. This case is not even in point for the reason that the claim in said case was barred because not filed within the pertinent statute of limitation of the probate code.

The rule and the proper one is set forth in 56 Am. Jur. p. 556:

"Where a claim for work, labor, or services performed is based upon distinct contracts for the

items specified, it would seem that the statute of limitations would commence to run as to those items represented by each contract. But where the matters specified in the claim are the outgrowth of entire contract for continuous labor or services, the demand will be considered as an entire one and the statute will not attach until the completion of the contract. Where services are rendered under a contract of employment which does not fix the term of service or the time for payment, the contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated," citing in footnote 15, p. 556, cases in support from U. S., Georgia, Iowa, Ky., Mass., Oregon, Washington, West Virginia, Nebraska, and RCL.

The case of *Re Baker*, 144 Neb. 797, annotated in 155 A.L.R. 950, states a similar rule citing:

Phifer v. Estate of Phifer, Neb., 199 N.W. 511; In re Estate of Skade, Neb., 283 N.W. 851; Harmon v. Smitch, Ind., 157 N.E. 284."

Appellants' contention concerning the statute of limitations is squarely met and blocked by the Utah case of *Gulbrandson v. Thompson*, supra, which oddly enough, they profess in support of their position. Recovery therein was upheld, according to appellants, because of an agreement that claimant would care for her ailing mother until death, so that, according to appellants, no action could have been brought until such certain specified time had been reached. Those facts as recited by appellants could not be further from the truth. The *Gulbrandson* case, in light of the facts, is absolutely in point with the

case at bar and holds squarely against the appellants. They have perverted the facts and represent that there was an agreement for the claimant to care for her mother until death. There is not one iota of fact in the case to support such a statement.

The court recites these facts: plaintiff's mother was afflicted with an ailment which, while intermittent, could and thereafter did recur from time to time. Plaintiff had gone to California upon attaining her majority and was earning a fair living there. She came home and commenced to care for her mother and cared for her whenever the ailment became acute or active, and it developed over a period of years that her services were fairly continuous because of the frequency of her mother's attacks. The court found her services to be continuous from 1908 until the mother's death in 1922, despite a 6 months' intermission from December, 1915, until May, 1916, which the court considered a temporary intermission and not a cessation. The court said:

"Under these facts, the services could not have been considered otherwise than continuous so far as the statute of limitations is concerned * * * She must be allowed compensation for the full period of time during which she rendered such services."

As pointed out, no mention whatsoever is made of any agreement to perform services until a specified period, that is, until the mother's death.

The *Gulbrandson* case is identical with the case at bar, it has never been overruled in Utah, and it is in agreement with the controlling majority view in the United States. It is therefore pointless to argue further the applicability of the statute of limitations to this case. As a matter of fact, the *Gulbrandson* case is cited in 37 Corpus Juris sec. 175, footnote 41 at p. 824, together with *Grisham v. Lee*, supra, *Mayborne v. Citizens' Trust Bank*, supra, and other cases from Indiana, Iowa, Kansas, Michigan, Mississippi and Washington, in support of the premise that the contract of employment is a continuing one, and that the employee's right of action accrues and the statute begins to run when and only when the services are fully performed or the employment otherwise terminated.

We feel it unnecessary to answer appellant's contention that appellants were prejudiced through submitting the case to the jury for the entire period, since the verdict was \$200 in excess of the maximum allowance of \$100 per month during the period not barred by the statute of limitations (under their contention), inasmuch as there is nothing to indicate but that this verdict was rendered on a quantum meruit basis during the period of time in which they admit the claim was alive.

POINT IV

NO ERROR WAS COMMITTED IN REFUSING TO GRANT A NEW TRIAL ON THE EVIDENCE OF INSANITY AND PRESUMED INSANITY, FOR THE REASON THAT THERE WAS NO VALID ADJUDICATION OF PLAINTIFF'S

INSANITY IN EXISTENCE, AND THE SO-CALLED EVIDENCE WAS NOT NEWLY DISCOVERED AND THE OBJECTION WAS NOT TIMELY MADE.

Appellants claim error because their Motion for a New Trial on the basis, among other things, of newly discovered evidence concerning plaintiff's insanity, was denied. Briefly, there is no doubt that the trial judge acted well within the discretion permitted him to deny such motion, if he determined from the evidence presented him that information concerning plaintiff's sanity or lack thereof was not newly discovered evidence. Among such evidence presented to him for consideration was this: plaintiff's counsel filed an affidavit in objection to defendants' said Motion for New Trial (S-8) setting forth that defendants' counsel, *during the trial of said cause*, confronted plaintiff's counsel with information concerning plaintiff's incarceration in an Oregon asylum. The affidavit stated further that defendants under oath at the trial admitted that they knew plaintiff had come from Oregon in 1941, and that for nine years thereafter had lived with them continuously and had taken all his meals with them and had been "one of the family." Those facts in said affidavit were never controverted by defendants in the presentation of their motion, leaving no doubt that the trial judge could properly have found that defendants' evidence was not newly discovered.

It appears to the writer that whichever horn of their dilemma appellants seek to grasp, their position is not improved. If they sought a new trial because the plain-

tiff might have been presented to the jury as insane and incompetent, how could they overcome having lived with him intimately nine years and never having a suspicion concerning his sanity. On the other horn, if his insanity existed and was of such palpable nature as to affect the outcome of their case, then they had a duty to raise the objection in timely fashion as required by law. In that respect (even if the Utah court were required to give full faith and credit to a foreign insanity adjudication if such existed at the time of trial), Bancroft on Code Pleading at p. 332 states the following:

“Incapacity of plaintiff to sue is a ground of special demurrer. The want of capacity to sue which is apparent on the face of complaint must be taken by demurrer,” citing among other cases *Tooele Meat & Storage Co. v. Elite Candy Co.*, 47 Ut. 1, 168 Pac. 427. “If the objection does not so appear, it must be taken by answer,” (citing the *Tooele* case) “and if it is not raised by either method, it is waived” (citing again the *Tooele* case among others).

In *Blumauer v. Clock*, Washington, 64 Pac. 844, plaintiff minors in their own names sued to foreclose a mechanic’s lien. The objection that the minors had undertaken to sue in their own names without the intervention of a guardian was not raised until after the trial. Held: “After pleading to the merits, the objection cannot be raised, for the defendant is deemed to have thereby admitted that plaintiff is *rectus in curia*. 14 Enc. Pl. & Proc., 1019 and cases cited.”

In *Tooele Meat v. Eite Candy*, supra, judgment by plaintiff was affirmed on appeal. Plaintiff in error sought to set aside the judgment on the ground of fraud, alleging that plaintiff fraudulently alleged in its original complaint that it was a corporation of the State of Utah when there did not and had not existed any such corporation. The court said:

"There is still another reason why this appeal must fail. The objection that the plaintiff has not legal capacity to sue, or to maintain or prosecute an action is one that, under all of the codes, must be taken at the proper time and in the proper manner or it will be deemed waived. Such an objection is like one that the plaintiff is not the real party in interest. That objection must be taken by special demurrer if it appears on the face of the complaint, and, if it does not so appear, then advantage of it must be taken by answer, and if not taken either by answer or demurrer the objection is waived. The objection of want of legal capacity to sue is also waived unless made either by answer or demurrer," citing a long list of cases.

"A judgment, however, in an action in which the plaintiff did not have the legal capacity to sue or to prosecute the same is not void, and, as we have seen, is a matter that may be waived, and, under all the authorities, unless the objection is made at the proper time and in the proper manner is waived. The plaintiff, not having made the objection in the former action, it has waived its right to interpose the same in this action * * * Again, even though it were conceded that the judgment in the former action was obtained through a misstatement of the facts respecting

the legal capacity to sue, yet that standing alone, would not be sufficient cause to set aside the judgment in this case. The rule in that regard is well and correctly stated in 15 RCL sec. 215, pp. 762-764 inc."

Thus, even if appellants are to say that because of their ignorance of the facts upon which they could have raised a timely objection, that they should be allowed to raise the objection now, their position is untenable under the ruling of our Supreme Court above, where the plaintiffs in error not only claimed ignorance of the true facts, but set forth grounds of actual fraud and misrepresentation on the part of the plaintiff which later caught them by surprise.

Also, in *San Luis Obispo County v. Simas*, 34 ALR 224:

"It was unsuccessfully urged upon appeal from a judgment in eminent domain proceedings that the court erred in signing the findings and judgment after counsel for the defendant owner of the property condemned, had requested time within which to make proof of such owner's insanity, the court stating that the cause had been tried and submitted and verdict returned, and the rights of the parties were to be determined as they existed at the time of such submission."

Appellants set forth in their brief the varying and conflicting authorities as to the effect of a rendition of a sanity adjudication in another state. To hold with appellants in accordance with the authorities most favorable to them—that an Oregon adjudication should be

given full faith and credit—is of no help to them, for the reason that there was no binding adjudication in Oregon in existence at the time of this trial. The amended complaint herein was filed February 10, 1950, and trial was commenced April 27, 1950. Appellant's affidavit of Dr. Donald Wair, Supt. of the Eastern Oregon State Hospital (26) shows that plaintiff escaped from said institution on August 11, 1941, was absent continually thereafter and was discharged from said hospital on Feb. 21, 1950, just 11 days after the commencement of this suit and more than two months before the trial of this cause. Plaintiff was discharged from the institution and his guardianship immediately thereafter terminated. So there is no merit to appellants' claim that Utah must recognize a foreign insanity adjudication, for none such existed when plaintiff was produced as a witness and as a party plaintiff, thus killing appellants' contention that plaintiff had no power or capacity to commence this action because of Sec. 104-3-6, UCA 1943.

Furthermore, such statutes requiring that an infant or insane or incompetent person who is a party must appear by guardian, are held to be procedural only, not jurisdictional, and not mandatory in any sense, for the reason that such statutes are designed to protect the interests of the incompetent, rather than from the standpoint of capacity to institute a suit.

There is a lengthy annotation in 140 ALR at page 1336, "Mental Incompetency at Time of Rendition of Judgment in Civil Action as Ground of Attack on it."

Generally, the annotation iterates the accepted rule that a judgment rendered *against* an incompetent who appears for himself without guardian or next friend, is not void but merely voidable upon proof of rather stringent requirements which must be found in favor of the incompetent. When such a harsh rule is maintained in favor of upholding a judgment *against* an incompetent who appears improperly, how then can the court upset a judgment *in favor* of an incompetent who appeared improperly and could only have harmed himself by his defects. The accepted rule as laid down in the cited annotation is further repeated in a lengthy annotation in 34 ALR at page 221.

As hereinafter stated, the word "must" is not considered as mandatory, and the annotation in 140 ALR 1336 recites as follows, quoting from the case of *Backley National Bank v. Boone*, 1940-CCA 4th, 115 F 2d 513:

"The rule that a judgment against an insane person not represented by a guardian or committee will not be set aside, even upon direct attack, unless a meritorious defense to the action is shown, applies even in states where it is provided by statute that in a suit against an insane person a guardian ad litem for the defendant *must* be appointed, since such requirement is *procedural* and does not affect the *jurisdiction* of the court."

The annotation further cites, *Home Life Insurance v. Cohen*, 1936-278 Mich. 169, 270 NW 256:

"Failure to appoint guardian ad litem for an insane defendant under a *Statute* providing that, after service of process, the action shall not be

further prosecuted until the appointment of such a guardian, renders the judgment against such defendant merely voidable, since such statute is *procedural* only."

Where the plaintiff was insane and appeared by himself without guardian or next friend as required by statute to do, just as in the instant case, courts have held that the plaintiff was properly before the court and have allowed the judgment to stand after the defect was pointed out. No leniency was shown even to such incompetents who had, by virtue of their very incompetency, waived the rights enacted for their benefit. 34 ALR at page 224 declares this result under circumstances where the incompetent alone appears as plaintiff, and no conflicting authorities are found therein. We cite therefrom particularly two cases:

"In *Hubbard v. Williams*, 144 Ga. 566, 87 SE 780, the court dismissed a petition to set aside a judgment rendered against an idiot in an action instituted by her without a guardian, where it appeared that the action was brought by the idiot and two plaintiffs to enjoin a process directed against all of them."

"In *Leonard v. The Times*, 51 Ill. App. 427, where it appeared that, after the commencement of an action, the plaintiff was adjudged to be temporarily insane and confined to an asylum at the time of the dismissal of the action for want of prosecution and, after regaining his liberty, moved to set aside the order of dismissal, the court held that the fact of his insanity and confinement at the time of the dismissal afforded no ground for relief."

These cases are even more damning against appellants than a similar result (which is what we pray for) would be to us, since these plaintiffs were unfortunately incompetent and unprotected from the inception of suit right through adjudication of the cases on the merits. The decisions aforesaid expressly reject a contention much stronger than appellants' contention (that the judgment should be set aside, or a new trial granted) because of failure merely to *commence* plaintiff's action by guardian.

For the reasons hereinabove set forth, we feel the lower court properly denied defendants' motion on such ground. Sec. 104-2-37, UCA 1943, expressly allows an incompetent to maintain this action within one year after his disability is removed, and certainly appellants were not prejudiced in any way by the mere premature filing of this action when it was brought to fruition within a period expressly reserved to plaintiff for this very type of action.

However, since the evidence projected as a basis for new trial was not newly discovered and there was no Oregon adjudication in existence, and the motion was properly denied, it becomes unnecessary for the court to pass upon the effect of an adjudication of insanity rendered by a sister state, but in passing we cite that the better rule would be in line with the authorities holding that such an adjudication is not binding and will not be recognized at all in other states, and that to establish in another state the condition or status determined there-

by, there must be an independent inquisition. The views of the varying decisions are set forth in 28 Am. Jur. Sec. 23, and the language of this section is completely annotated in 102 ALR commencing at p. 444. The annotation says:

“Insanity is not a status. If insanity is found at the domicile, it does not affect the condition of the person in another state; if he is to be treated as insane in the other state, he must there be found insane,” citing *Re Jones*, 1935, N.D., 263 NW 160; *Cates v. Bingham*, 49 Conn. 875; *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S.E. 36, 43 L.R.A. 806.

“A theory sometimes advanced against the conclusive recognition (of such adjudication) is that from its very nature it is intended to be not permanent or immutable, but subject to change both in the state where it is rendered and in other states, as in the course of nature changes in the mental condition of the person in question may warrant or require,” citing *McNeill v. Harlow*, 81 Fla. 401, 88 So. 127.

Because there was no valid existing adjudication of plaintiff's insanity at the time of his trial, appellant's complaint at p. 31 of their brief that plaintiff could not be a witness under Sec. 104-49-2 (1), UCA 1943, likewise fails.

Appellant's next argument that if plaintiff was insane, his contracts, including the contract sued upon in this case, would have been void, 28 Am. Jur. p. 695, is unsound, for even an insane person is entitled to compensation for his labors under quantum meruit.

CONCLUSION

Appellants had a full and fair trial on the merits of both causes of action pleaded and proved by plaintiff, and lost. The jury awarded plaintiff a verdict which amounted to about \$60.00 per month plus board and room for six years. A motion for new trial was heard by the trial judge, and he acted properly within the discretion given him in denying it. Thereafter, in violation of our statute forbidding the bringing of a further similar motion before a different judge, defendants moved again for a new trial, but the second judge likewise ruled against them.

For the reasons heretofore set out, we feel that there is no merit whatever in any of the contentions of error of appellants. They are sham, smoke, and red herring. The writer feels that this appeal is somewhat akin to the last desperate effort of a drowning man to clutch a straw—a last ditch stand for a new trial because the dead man's lips are now sealed.

Respondent respectfully prays that the judgment of the lower court be affirmed because there is ample law and evidence to support one or all of the theories under which the jury founded its verdict, and no prejudicial error was committed.

Respectfully submitted,

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