

1956

J. William Randall v. Tracy Collins Trust Company : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Randall v. Tracy Collins Trust Co.*, No. 8430 (Utah Supreme Court, 1956).
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IN THE SUPREME COURT

of the
STATE OF UTAH **FILE**
JUN 29 1956

J. WILLIAM RANDALL,
Plaintiff and Respondent,

vs.

TRACY COLLINS TRUST COM-
PANY, Executor of the Estate of
SARAH P. RANDALL BRERETON,
Deceased,
Defendant and Appellant.

Clerk, Supreme Court, U.

Civil No. 8430

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

This appeal is from a decree of Judge William Stanley Dunford ordering specific performance of a contract of the late Sarah P. Randall Brereton with her nephew, the plaintiff, J. William Randall, concerning, primarily, the controlling stock interest of the State Bank of Provo. Both the trial court in its Memorandum Decision (R. 34) and the advisory

jury, in reply to specific interrogatories submitted to it by the court (R. 32) found the factual issues in favor of plaintiff.

Mrs. Brereton was 95 at the time of her death in 1954. She had been a widow since 1938 and had succeeded her husband as president and principal stockholder in the State Bank of Provo. She early evidenced a desire to have an arrangement whereby she and her affairs would be cared for for the rest of her life; and in 1939, proposed to her niece, Mildred H. Brereton, that if she would take care of her for the rest of her life, she would leave all her property to her niece. Mildred rejected this offer because Mrs. Brereton's demands "were so intense I felt I couldn't follow them out * * * I felt I couldn't live a life of my own or have a home of my own * * * the demands she made of me were too great." (T. 15)

Mrs. Brereton then turned to the plaintiff, her nephew Will, to induce him to dispose of his Ogden interests and come down to Provo to take over her personal and business affairs. While she was at first unsuccessful in persuading plaintiff, he did, during the next few years, render numerous services to her for which she showed her gratitude by gifts to him of property.

In the spring of 1946, Mrs. Brereton, then eighty-seven, finally persuaded plaintiff and they

entered into an oral agreement described in the Findings of Fact (1) of the Court as follows:

“That between April 1 and September 1, 1946, plaintiff and Sarah P. Randall Brereton entered into an oral agreement by the terms of which the said Sarah P. Randall Brereton agreed that if plaintiff would sell his home and leave his business in Ogden, Utah, move with his family to Provo, Utah, become an employee of the State Bank of Provo and would devote his time, talents, energy and attention during her lifetime to caring for her business and financial affairs, particularly her bank, giving her advice and counsel in respect to other matters and caring for her personal affairs such as rendering her personal services, care and attention, caring for her home, furnishing her companionship, meals, protection during illness and the maintenance of her home and grounds in an efficient operating condition, that upon her death she would leave to him by her will her home in Provo and her stock constituting controlling interest in the State Bank of Provo. (R. 60)

Plaintiff “completely and fully” (R. 47) performed his side of the agreement, and for the balance of her lifetime, and until the day of her death, he so devoted his time, talent, energy and attention to her and her affairs, that neither he nor his family were able to enjoy a normal family and social relationship (T. 88-92).

At about the time this oral agreement was made between plaintiff and Mrs. Brereton, she, in ac-

cordance therewith, changed her will so that it provided that the plaintiff would receive, as residuary legatee, the Bank stock and the home in Provo. (T. 6)

However, in 1951, when she was over ninety, unbeknown to plaintiff and her other relatives and friends, and without using the usual channels of the Tracy-Collins Trust Company, as she had in the preparation of her will and earlier codicils, but by the use of new counsel from Bountiful, where Ross Richards lived, Mrs. Brereton executed a new codicil leaving all of her property to Ross Richards and disinheriting plaintiff entirely, except for the old home in Provo.

When the existence of this secret codicil was discovered on her death, plaintiff promptly filed claim against the estate for specific performance of his contract with Mrs. Brereton. When the Executor denied the claim, this suit was brought.

This action being one in equity for specific performance, the issues, both as to the facts and the law, were tried to the court. Because of the issues of fact to be determined in the establishment of the contract and its performance by plaintiff, the court enlisted the aid of an advisory jury. For this purpose, the court submitted the following five special questions to the jury under instructions placing on plaintiff the burden of proving the affirmative

answers to these questions by “clear and convincing” evidence. (R. 15) Under such instructions, the jury unanimously found the answers to each of these questions in the affirmative:

“1. Was there an oral agreement made between the plaintiff and Sarah P. Randall Brereton, deceased, between April 1 and September 1, 1956?

“2. If there was an agreement, was it agreed that the plaintiff would sell his home and leave his business in Ogden, Utah and move to Provo, Utah and become an employee of the State Bank of Provo, and devote his time and attention to the personal and financial affairs of the deceased during her lifetime?

“3. Was it agreed that in consideration of plaintiff’s doing as set forth in interrogatory #2 above, that the decedent, by her last will and testament, would leave her home and bank stock in the State Bank of Provo to the plaintiff?

“4. If the answers to 1 and 2 are ‘yes’, did plaintiff, in accordance with such agreement, sell his home and leave his business in Ogden, Utah and move to Provo, Utah, and accept a position with the State Bank of Provo, and devote his time and attention to the personal and financial affairs of the decedent during the remainder of her lifetime?

“5. If your answer to interrogatory #4 is ‘yes’, were the acts and conduct of the plaintiff in compliance with such contract of such

a nature that their value cannot be measured in money? (Verdict, R. 32-33)

After opportunity was had for counsel and court to secure and examine copies of the transcript of the evidence, the issues of fact and law were argued to the court. The matter was then taken under advisement and the court subsequently issued its Memorandum Decision, finding the issues of fact and law in favor of the plaintiff. In accordance with this Memorandum Decision, a decree was entered specifically enforcing the contract and directing the defendant-executor to deliver over the bank stock and home to plaintiff.

It is from this decree based on evidence which has passed the test of "clear and convincing" before both the jury and the trial court, that this appeal is taken.

STATEMENT OF POINTS

POINT I. THE EVIDENCE ADEQUATELY SUPPORTS THE FINDINGS OF THE TRIAL COURT.

POINT II. THE EVIDENCE PROVING THE EXISTENCE OF THE CONTRACT WAS CLEAR AND CONVINCING AND THE CONTRACT ITSELF WAS SUFFICIENTLY DEFINITE AND CERTAIN FOR SPECIFIC PERFORMANCE.

- A. The services rendered by plaintiff cannot be measured in money.
- B. The Statute of Frauds is not applicable.

POINT III. THE RULINGS ON THE ADMISSION OF EVIDENCE WERE CORRECT.

POINT IV. THE USE OF THE JURY WAS PROPER.

ARGUMENT

POINT I. THE EVIDENCE ADEQUATELY SUPPORTS THE FINDINGS OF THE TRIAL COURT.

In appellant's brief under Point I, attack is made on both the pleadings and the evidence. From what is said on pages 10-13 of that brief with respect to the pleadings, it is assumed that what appellant contends is that the words "personal affairs" as used in the complaint, are not broad enough to include an allegation that the plaintiff had agreed to render to decedent, Sarah P. Randall Brereton the personal services, care and attention as detailed in paragraph 1 of the Findings of Fact. It would appear to be the height of sophistry to contend seriously that "affairs", meaning, according to Webster's New International Dictionary, 2d Ed., "that which is done or is to be done", is not a short and plain statement of the claim as required by Rule 8 (a), URCP. See *Wilson v. Olroyd*, 1 U. 2d 362, 267 P. 2d 759. In any event, under Rule 15(b), this question of semantics need give no further pause. *Seamens v. Anderson*, 252 P. 2d 209, 212 (Utah, 1952). The fact that we have devoted this much space to answering this first item of plaintiff's statement of points is only to indicate that this first point

has about as much merit as the remaining seven.

Appellant then devotes over ten pages in purporting to review the evidence to indicate its insufficiency to support the judgment. This guerilla attack of avoiding the main body and detouring the strong points can hardly support the statement made on page 13 of appellant's brief that "there is very little, if any competent and material testimony" of the existence of the agreement between Mrs. Brereton and plaintiff.

A more pedestrian yet fairer approach to the issue raised as to the sufficiency of the evidence would be to do as the trial court did in its Memorandum Decision, and review the testimony of each of the witnesses, bearing in mind the five ultimate issues of fact raised by the five special interrogatories submitted to the jury. (supra, p. 5)

First of all, consider the will itself and the codicils thereto which were identified and explained by the trust officer of Tracy-Collins Trust Company, the executor. Mrs. Brereton's will was executed in April, 1940. By its terms, the bank stock was left in trust for ten years, the beneficiary during the trust as well as the remainderman being her nephew, the plaintiff herein. The first codicil in June, 1941, made no change with respect to the Bank stock. The second codicil in August, 1941, changed the terms of the trust so that if plaintiff did not survive the

ten year term, the stock was to be distributed to others. The third codicil was executed on May 7, 1946. It cancelled the trust so that the bank stock and the home would pass directly to plaintiff as the residuary legatee of the will. This change is an affirmation of the agreement in issue made at about the same time between Mrs. Brereton and her nephew, the plaintiff (Finding, No. 3, R. 61). The final, secret codicil, in October, 1951, cancelled the bequest to J. Will Randall and left the residue of the estate to one, Ross Richards, a half cousin of Mrs. Brereton.

The next witness was Mildred H. Brereton. She was a niece of Mrs. Brereton and had married a nephew of Mr. Brereton. Both she and her husband had visited Mrs. Brereton, referred to in the testimony as Aunt Sade, on numerous and frequent occasions and Mildred had lived with her aunt prior to her marriage. Mildred testified to an offer of her aunt made to her in 1939 (T. 15) and to a trip Mrs. Brereton made to Ogden that same year to induce the plaintiff, without success, to go to Provo and look after her personal affairs. (T. 17) She also testified to the idiosyncrasies and demands of Mrs. Brereton which became more exacting and more difficult as she grew older. (T. 20) She stated that Aunt Sade frequently mentioned that her plan was to have Will come down and take over her interests. Finally

in the spring of 1946, when Mildred was working for a real estate company in Provo, Aunt Sade told her to look out for a house for Will as he was coming to Provo (TR-22); that she had worked out an agreement with him, that he was to take over her business and personal affairs and, in return, was to get the bank stock and her home. (Tr. 22-3) Aunt Sade referred to this agreement "frequently". (T. 23-27). Mildred especially remembered three occasions when it was discussed by Aunt Sade. Once, when the bank was being re-capitalized (T. 23), once when Will had taken Aunt Sade's lunch to her when Mildred was visiting and Aunt Sade had said in response to a comment, "Yes, they are good to me. They look after my needs, but they owe it to me because of my agreement". (T. 24) The third occasion was when her husband offered to fix the furnace on a cold day and Mrs. Brereton said it was "Will's job." (T. 24) Mildred even stated that Mrs. Brereton had told her of the agreement "so definitely that I thought it was in writing until this will was read. I had no idea it wasn't written up." (T. 35)

She testified that Will came down in September, 1946, and took over management of the Bank. (T. 23) Mildred also testified that the personal care Will and his wife rendered Aunt Sade included fixing the furnace, caring for the house and lawn, doing

her washing and ironing, fixing lunches and having her at their home for dinner, spending Sundays with her, staying with her at night for periods as long as a month at a time when she was ill and during intervals after a housekeeper had quit and generally looking after all of her "personal affairs" (T. 26).

Mildred further testified that Mrs. Brereton failed rapidly after her illness in 1950 when she was ninety-one, but that in 1951 Aunt Sade had told her that she couldn't change her will after she was eighty, but that she had attached a codicil on it to make Ross Richards the administrator of her estate (T. 27). It takes little inference from that naive statement and consideration of Mrs. Brereton's failing strength of mind and body to understand how the execution of the secret 1951 codicil came into being, and to conclude that Mrs. Brereton had not intended thereby to violate her agreement with Will Randall.

Cross examination of Mildred developed only that Mrs. Brereton both before and after 1946, had had numerous housekeepers, off and on, (T. 32) some who stayed at night only; that these women would "just leave" on short notice after they "would get so discouraged trying to satisfy Aunt Sade; (T. 25) and that Mr. and Mrs. Randall stayed with her night and day during intervals between housekeepers. (T. 34) It was also shown on cross examination

that Mildred's opportunity to observe was based on weekly or monthly visits to her aunt at her home in Provo. (T. 33)

The next two witnesses A. E. Money and Charles H. Dixon, were officers in the Commercial Bank of Utah at Spanish Fork. They both testified that in 1940 they approached Mrs. Brereton about buying her interest in the State Bank of Provo, that she put them off at that time because she liked being bank president, but invited them to come back and talk the matter over with her later on. They approached her again in the late summer or early fall of 1946, just before or just after Mr. Randall came down to take over operation of the bank. At that time, she told them she had turned her interests over to Mr. Randall and that he was coming down to take care of the bank interests and also to take care of her, and that she was well along in years and had to have some one look after her. (T. 39-41) Both of these gentlemen were so certain in their minds, after this second conversation, that Mrs. Brereton had made a "deal" with Will, that they dropped the proposed purchase project. On cross examination Mr. Dixon stated that he had expressed surprise to learn that there was "any disagreement as to his [Mr. Randall] being able to procure her interest in the bank." (T. 44)

Mrs. Zenger, the wife of the superintendent

of the Utah Valley Hospital testified to having observed the Randalls daily taking Mrs. Randall's meals to her (Mildred Brereton having mentioned in her testimony that Aunt Sade kept no food in the house, using the refrigerator to store dishtowels), or bringing her to their home for dinner. Mrs. Zenger had become acquainted with Mrs. Brereton in 1949 when the old lady had made a gift to the hospital and she visited with her about fifteen times between that occasion and 1953. During these visits Mrs. Zenger frequently remarked on the care, attention and services Mrs. Brereton was receiving from Will and his wife, Bea. To these remarks Mrs. Brereton replied: "That she knew she was lucky, but felt she had it coming to her because the Randalls were going to be taken care of" (T. 50).

Will Brereton, the husband of Mildred, and a grandnephew of Aunt Sade's husband, also had visited Aunt Sade frequently both with his wife, Mildred, and on other occasions by himself. On these visits Mrs. Brereton had mentioned the agreement with Will Randall on several instances—the gist of the agreement being that Will was to get the bank stock and home in return for taking care of her and her business. On cross examination counsel tried to confuse the witness with reference to his description of the agreement in his deposition. But despite such tactics the witness was "definite" that the

agreement included her home and her bank and that Will was to look after her affairs. (T. 66)

Appellant asserts in his brief that the testimony of Mr. Brereton was “vague, uncertain and contradictory”. It may be admitted that the statements of any witness as to the terms of an oral agreement related to him in casual conversation by one of the parties would not be as certain as a written document, but we submit that this witness was certain in his mind as to the impression thereof she did give him—that she had an agreement with Will Randall—that under its terms, he was to look after her affairs and in return, receive her home and bank stock. It might be observed that any more explicit description might well raise in the mind of the trier of the facts a question as to the credibility of a witness’s testimony as to the conversations had some years earlier.

Clyde Sandgren testified as to conversations he had with Mrs. Brereton while he was acting as attorney for the Bank in a recapitalization program. Leaving aside the voir dire examination on the issue as to the confidential attorney-client relationship raised by appellant, Mr. Sandgren testified that Mrs. Brereton told him she had promised to leave Will Randall a controlling interest in the Bank through her will in return for coming to Provo to look after her interests. (T. 81)

Appellant contends that the testimony of Sandgren, Dixon and Money does not establish the existence of the contract as these witnesses refer only to the Bank stock in their description of the agreement of which Mrs. Brereton had told them. Of course, that is all that Mrs. Brereton mentioned to them, as that is all they were interested in! Plaintiff does not contend that each witness proved *all* the terms of the contract or its performance by him. It is Hornbook law that the evidence must be looked at as a whole. The testimony of Sandgren, Dixon and Money described conversations where the William Randall "deal" with respect to the Bank stock came up naturally, as an explanation for Mrs. Brereton's position with respect to sale of stock or recapitalization of the Bank. The other witnesses, Mildred Brereton, Will Brereton and Mrs. Zenger had natural occasions to discuss with Mrs. Brereton other aspects of the contract and its performance by plaintiff. The testimony of all of them together, clearly and convincingly established the contract, its terms, and its full performance by plaintiff.

Other than plaintiff, whose testimony was excluded under the "dead man" statute, (TR. 102) the final witness was Kenneth (Kay) Randall. He testified to the close personal attention his father rendered to Mrs. Brereton until her death, to the derogation of a normal family and social life. (T. 88-92).

On cross examination he described her eccentricities and demands and the difficulty in keeping housekeepers.

From a review of all the evidence, the trial court concluded in its Memorandum Decision:

“There is no direct evidence to dispute any of this testimony, and a careful examination of the transcript certainly would not justify a concept that the effectiveness of the testimony had been destroyed on cross examination. The court thus finds that after the decedent had attempted to induce her niece to come to Provo to live with her and care for her in her old age, that she did make a proposal to the plaintiff to the effect that if the plaintiff would dispose of his home and responsibilities in Ogden and would move to Provo and would devote his time and talents, his energies and attention to caring for her business, particularly her bank, giving her advice and counsel respecting other matters, caring for her home and providing her with personal services such as company, meals, protection against illness, the keeping of her home and grounds in an efficient operating condition, that upon her death she would leave to him, by her will, her home in Provo and her stock in the State Bank of Provo. The foregoing agreement is sufficiently definite and certain, under the decisions of our own Court, for proper remedy for its violation.” (R. 43)

Appellant cites an old case, *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 166 P. 309 (1917), on the scope of review by this court of

the evidence in an equity case. It might be more accurate to accept the modern doctrine of review of equity decrees as announced in more recent decisions of this court.

The leading case on the subject is *Stanley v. Stanley*, 97 Utah 520, 94 P. 2d 465 (1935). With respect to the scope of review on appeal in equity cases, the opinion of the court in that case stated:

“The scope of the review on appeal in equity cases is clearly settled in this jurisdiction. ‘This court is authorized by the state Constitution to review the findings of the trial courts in equity cases, but the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.’ *Olivero v. Eleganti*, 61 Utah 475, 214 P. 313, 315.

“To the same effect are *Klopenstine v. Hays*, 20 Utah 45, 57 P. 712; *Singleton v. Kelly*, 61 Utah 277, 212 P. 63, 66; *Holman v. Christensen*, 73 Utah 389, 274 P. 457; *Zuniga v. Evans*, 87 Utah 198, 48 P. 2d 513 101 A.L.R. 532; *Wilcox v. Cloward*, 88 Utah 503, 56 P. 2d 1; *Hoyt v. Upper Marion Ditch Co.*, 94 Utah 134, 76 P. 2d 234.”

Mr. Justice Wolfe, in a concurring opinion reviewed at length the Utah cases on the issue and concluded:

“In short, as held in *Wilcox v. Cloward*, 88 Utah 503, 56 P. 2d 1, if after we review the record we cannot say that the court came

to a wrong conclusion we should affirm. We do not reverse if we find the court's findings supported by a fair preponderance of the evidence, or if supported only by a slight preponderance, or if the evidence is evenly balanced. Or if there is in the record a slight preponderance the other way, for the reasons above set out."

Examples of the application of the Stanley doctrine in recent decisions of this court include the following:

In *Morley v. Willden*, et al., 120 Utah 453 (1951), 2d 500, Justice Henriod said:

The voluminous record in this case contains considerable uncontroverted and much controverted evidence. A careful examination thereof leads us to conclude that the trial court's findings and decision are supported by a fair preponderance of the evidence and should remain undisturbed, under the principle repeatedly enunciated by this court and reflected in *Stanley v. Stanley*, 1939, 97 Utah 520, 94 P. 2d 465. The judgment is affirmed with costs to respondents."

In *Perry v. McConkie*, 1 Utah 2d 189 (1953), 264 P. 2d 825, Justice Henriod states:

"Although we may have decided otherwise had we been the initial fact finders, we believe and hold that there was sufficient evidence of fraud * * * as would justify the lower court's decision — a decision we cannot disturb under principles enumerated by us in *Stanley v. Stanley* * * *."

Finally, in *Youngren v. King*, 1 Utah 2d 386, 267 P. 2d 913 (1954) this court said:

“This case being one in equity, we are of the opinion that the principle and law stated in *Stanley v. Stanley*, 97 Utah 520, 94 P. 2d 465 applies. This rule is again restated in *Morley v. Willden*, Utah, 235 P. 2d 500, and this court will not disturb the decision of the trial court unless there is an abuse of discretion and misapplication of the evidence, and that by reason thereof the trial court committed prejudicial error.”

The issue, then, is whether the trial court abused its discretion in finding the evidence clearly and convincingly established the facts. It is submitted that it is clear from the record and from the memorandum opinion of Judge Dunford that he fully considered all the Utah cases on the subject and correctly applied their principles.

POINT II. THE EVIDENCE PROVING THE EXISTENCE OF THE CONTRACT WAS CLEAR AND CONVINCING AND THE CONTRACT ITSELF WAS SUFFICIENTLY DEFINITE AND CERTAIN FOR SPECIFIC PERFORMANCE.

Appellant in its brief appears to confuse and mingle two different issues. No distinction is made between the question as to the quantum of proof required by plaintiff to prove the evidence of the contract and the question as to whether the contract, once proven, is sufficiently definite and certain that a court may frame a decree specifically enforcing it.

As to the nature of the proof necessary to establish a contract of this nature there is no dispute and never has been. As the trial court stated in its Memorandum of Decision, "There is no dispute between the parties as to the rule that an oral agreement sought to be established against the estate of the decedent must be proved by the claimant by evidence which is clear and convincing." (R. p. 36) This court has been most specific on this question. It is well established that the existence of such a contract must be proved with "a greater degree of certainty than is required in an action at law," *Clark v. George*, 120 Utah 350, 234 P. 2d 844 at 848. The quantum of proof required has been variously described but suffice it to say that it must be something more than a mere preponderance—in other words, it must be 'clear and convincing' *Van Natta v. Heywood*, 57 Utah 376, 195 P. 192, at p. 194, cf. *Lovett v. Continental Bank & Trust Co.* 286 P. 2d 1065. This phrase is the most generally accepted wording for a standard of proof over and above that generally required in a civil action. This Court has made no distinction between this test and the term 'clear, unequivocal and convincing', but treats them as having synonymous meaning. (e.g. 'if the evidence of invalidity is clear and convincing, or, as has sometimes been said by this Court, 'clear, unequivocal and convincing.' *Ulibarri v. Christenson*, 2 Utah 2d 367, 275 P. 2d 170, 1954.'")

It was this standard which was given to the advisory jury (R. p. 15, Inst #2) and the one accepted and applied by the trial judge. The application of this rule to the facts has been made. As we have shown above, unless appellant can show abuse of this application within the scope of this court's duty to review the facts in such case, the finding must stand.

It is submitted that by any standard there could be no question in this case as to the existence of a contract between plaintiff and defendant. Each witness who knew the decedent spoke of such a contract, whether they termed it a "deal", "understanding", "obligation", or simply an "agreement". There was no disputing their testimony, nor were they shaken or weakened with regard to this point in cross examination. This evidence was corroborated by the codicil executed shortly before plaintiff's moving to Provo by which plaintiff was left the property, the subject of his agreement. See 69 A.L.R. 202. Nor did a unanimous advisory jury and the trial judge find any difficulties in determining the existence of the basic terms of the contract under the higher standard of clear and convincing evidence.

Nor do we quarrel with the well-established rule cited by appellant that "neither the court nor the jury can make an agreement for the parties."

Andrews v. Aiken, 44 Idaho 797, 260 P. 423, 69 A.L.R. 14. The court must know what the terms of the agreement are in order to frame its decree. As this court has said:

“While it is not essential that all the elements of the contract should be detailed as having been formally declared or expressed by the parties, yet from all the facts and circumstances as disclosed by the evidence the chancellor must be able to read sufficient terms and conditions to make a definite and complete contract and one founded upon a valuable consideration.” *Price v. Lloyd*, 31 Utah 86, 86 P. 767.

But what are the uncertainties claimed here? Plaintiff alleged that Mrs. Brereton agreed that in exchange for services to be rendered her by plaintiff that she would “leave to him by Last Will and Testament all her stock in the said State Bank of Provo which she should own at the time of her death, together with her residence in Provo, Utah.” (Complaint R. p. 4) The advisory jury by special interrogatories #2 and #3 found that decedent so agreed. (R. p. 32) What uncertainty is there in such an agreement which precludes the drafting of a decree? The trial court found none, (R. 43) as its decree (R. 52) shows. The house in Provo was easily ascertained. There is no dispute as to the number of shares of bank stock involved. Appellant in grasping for alleged elements of uncertainty asks only three questions (Appellant’s Brief p. 25). First,

it is asked "was the Plaintiff to receive the bank stock and home of decedent or was he to receive all of her property?" Obviously, as found and alleged, Plaintiff was to receive only the bank stock and the house.

Secondly, it is asked "did decedent understand that she was not merely promising specifically to do something now, relinquishing her rights subsequently to change her mind if she so desired?" What the decedent's state of mind was, has, it is submitted, no bearing on the certainty of the terms of the understanding between the parties. In any event the issue is, of course, not the subjective one of what decedent understood, but what she in fact did. Plaintiff has alleged and the trial court has found that the parties made an agreement which created an *in praesenti* interest for consideration, rather than a mere ambulatory revocable statement of disposition.

Thirdly, it is asked, "Was the Plaintiff moving from Ogden to Provo to take a job in the bank for his own financial and pecuniary benefit or for the financial and pecuniary benefit of the decedent?" Again it is difficult to see how this bears on the certainty of the terms of the agreement. Indeed, it would seem unnecessary to have to decide alternatively whether the contract benefited Plaintiff or decedent. Assumedly the move benefited both par-

ties—most contracts are entered into with the concept of mutual benefit.

The question before the court should be whether plaintiff proved the existence of a contract, and if such contract, as proved, is sufficiently definite so the court can enforce it. Each portion of evidence does not have to confirm the alleged contract in detail. Thus, in *Van Natta vs. Heywood*, supra, plaintiff sued for specific performance of a contract allegedly to devise and bequeath the residue of decedent's estate, less a \$500 amount. The fact that several of the witnesses testified to an agreement by which plaintiff was to get the entire estate, thus not confirming the exact contract as alleged by plaintiff, was treated by this court as corroborative of plaintiff's allegations and not as a sign of inconsistency. To hold that a witness' failure to corroborate each and every detail of an alleged contract is a basis for impeachment of the contract on grounds of uncertainty would mean that a claimant could use witnesses only at his extreme peril. It would make the discovery of acceptable witnesses, already taxed by the Dead Man Statute, all but impossible, *Lovett v. Continental Bank and Trust Co.* supra. The bizarre result of such logic is its own answer.

- A. *The services rendered by plaintiff cannot be measured in money.*

At the insistence of Appellant's counsel, the advisory jury was asked to determine whether the acts and conduct of plaintiff, the evidence of which the jury had heard, was "of such nature that their value cannot be measured in money." (Verdict, Sp. Inter. No. 5, R. p. 33) The advisory jury answered affirmatively. The trial court after extensive review of the evidence stated in its Memorandum of Decision: "Clearly this type of service is completely adequate to meet the requirements of authorities cited and to establish that there would be no adequate remedy in damages." (R. p. 46).

A laborious review of the services rendered by plaintiff is unnecessary because Appellant's argument is disposed of by its own brief. Appellant concedes the type of services which are measurable by money are those which can be procured from a hired servant (Appellant's Brief p. 28). Appellant then reprints testimony as to the succession of housekeepers who stayed with Mrs. Brereton. (Appellant's Brief, p. 30-31) In other words, Mrs. Brereton had hired servants in her house and continued to employ them after plaintiff's arrival in Provo. What more convincing evidence is there that the services which decedent expected from Plaintiff were something *more* than mere menial tasks to be measured in money. In addition, we must remember that we are not dealing here with the claim of a nurse, hired

man or janitor. We are discussing the services rendered by a nephew who was sought out by Mrs. Brereton as someone whom she could trust and rely upon and who could and would perform significant executive functions in the bank and act as financial confidant and advisor. (TR 30)

The services required to permit specific performance are those “as to invoke the conscience of the court in behalf of the promisee”. (69 A.L.R. 57)

“ . . . it must appear that the obligation assumed by the promise require some sacrifice upon his part but *it is not essential that the performance should involve a pecuniary sacrifice on the promisee's part*; the fact that he was previously in humble circumstances, so that the position was in itself advantageous, is not sufficient to warrant a denial of relief if the promisee has fully and faithfully carried out the obligations he assumed, and they were of a character, the value of which cannot be estimated by any pecuniary standard.” (69 A.L.R. 58-59, emphasis added)

As the Supreme Court of Idaho stated:

“From all the testimony it is shown that deceased did not want respondent for any sort of menial services alone, and the question is not presented by the pleadings but that he wanted her to brighten his life, and to take her place in his home again as his own child, and the deceased was the best judge of the value of these things. The loss to respondent of the companionship of Mrs. Peterson and the value to the deceased of the child living

with him cannot be measured or compensated for in money, and such pay was not contemplated by deceased . . . It is clearly established that deceased made the contract, and that respondent had performed her part, and, while the services performed in the home by respondent in the way of household duties might possibly have been compensated in money, those things that respondent gave up, and the value of respondent living with the deceased as his child, are impossible of measurement in money value, and respondent cannot be placed in statu quo. The only way possible of compensating respondent is by specific performance of the contract, or doing what the decedent wished and agreed to do.” (*White v. Smith*, (Idaho) 253 P. 849, 854)

Appellant seems to make much of the fact that Plaintiff did not live in the same house with decedent.

Whether service is of a personal or even filial nature cannot be measured by mere mechanical tests, such as the place where the promisee lives while rendering the services. The nature of the services has no relation to the place the promisee lays his head at night, nor do the authorities so hold. (See 69 A.L.R. 57 et seq)

Not only does the law not require a common residence in order to establish a sufficiently intimate relationship between the parties, but the evidence makes it quite clear that the instant agreement between the plaintiff and decedent specifically did

not contain such a provision. Thus Mildred Brereton testified (TR. 22) that while she was working in a real estate office at about the time plaintiff moved down to Provo in accordance with the agreement, decedent requested that the witness look around for a house for plaintiff's family located close by that of decedent. It is clear from this that decedent never anticipated nor expected plaintiff to share her house with her.

The evidence is undisputed that plaintiff and his family worked ceaselessly for the care and comfort of decedent, not only performing certain menial tasks, but providing her with companionship and personal attention under most demanding circumstances. Plaintiff clearly conformed his life and that of his family to these attentions. The Trial Judge in his Memorandum (R. 45-6) ably summarizes the nature of plaintiff's services and the sacrifices he made which made money damages inadequate.

B. *The Statute of Fraud is not applicable.*

Appellant devotes the principal portion of its section of the brief on the Statute of Frauds to a re-argument as to whether the services were measurable in money. Except for a reference in one quotation, the issue of part performance, which is dispositive of this issue, is not mentioned.

Section 25-5-8 Utah Code Annotated, 1953, provides as follows:

“Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.”

The Utah Supreme Court has at least twice summarily dismissed arguments addressed to the statute of frauds in fact situations similar to this. *Van Cott v. Brinton*, 33 P. 218; *Van Natta v. Heywood*, supra. As the court said in *Van Natta v. Heywood*:

“Nor do we think that under the undisputed facts and circumstances as shown by the record this is a case coming within the statute of frauds . . . The contract between the deceased and the plaintiff, although an oral one, was taken out of the statute of frauds by reason of part performance by the plaintiff.”

We are not dealing with a mere executory contract in the instant case. The contract was fully performed in every sense of the term by plaintiff. The evidence evinced at the trial does nothing but corroborate plaintiff's contention that he fully performed his obligation under the contract. The trial court wholly concurred in its analysis. (R. 47)

Appellant cites the case of *Startin v. Madsen*, (1951) 120 Utah 631, 237 P. 2d 834. We need only point to the obvious distinction in this case from

the instant one, which the trial judge ably pointed out:

“The Defendant refers us to *Startin v. Madsen*, but two things distinguish that case from the instant one. In the first place, the Plaintiff at no time maintained that her compensation was immeasurable, but sued for a specific amount, and, second, there was no contract claimed between the parties by which the decedents promised to leave property to the person performing the services and in compensation thereof.” (R. p. 46)

Appellant cites an Illinois case which states that the bar of the Statute of Frauds is not removed by part performance if the services sued on are not unique, but measurable in money. *Hols v. Stephen* 362 Ill. 527, 200 NE 601. Plaintiff does not dispute this proposition. But either plaintiff's services are not unique, in which event he had no right to bring this action in equity anyway, or they are not measurable in money, as the advisory jury and trial court found. If the former is true plaintiff's case has failed before reaching the question of the Statute of Frauds. The very case cited by appellant concedes that if such services *are* unique, a matter concerning which we have already given detailed discussion, part performance eliminates any issue as to the Statute of Frauds. Thus by appellant's own authorities, the Statute of Frauds presents no question not already resolved.

POINT III. THE RULINGS ON THE ADMISSION OF EVIDENCE WERE CORRECT.

Appellant raises two issues as to the rulings of the trial court on the admissibility of evidence. The first refers to refusal of the court to allow the son of the plaintiff, Kenneth Randall, to testify as to the salary his father was receiving as an officer of the State Bank of Provo. Appellant coupled his statement as to the relevancy of that fact with reference to the quality of plaintiff's home in Provo as compared with his former home in Ogden (T. 96). Yet, when Kay testified as to the comparative sales price of the two homes (T. 108) appellant's counsel objected on the grounds of hearsay, immateriality and irrelevance (T. 109). Surely, Kay's testimony as to the salary his father received is subject to the same objections!

It is submitted that the trial court's ruling on the salary question adequately disposes of the issue. Judge Dunford said:

"THE COURT: I think probably everybody in the courtroom, between those years, got more than they did before. I don't think it has any significance at all what he was paid. We don't know what his duties were. It is a collateral issue. Maybe he had a lot of extra duties given to him by the bank at the time he went in there. We won't go into that. It will be sustained."

Appellant's second issue on rulings of the trial

court relates to the testimony of Clyde Sandgren. Mr. Sandgren, a Provo attorney, testified as to conversations with Mrs. Brereton in the course of which she described the contract with plaintiff. The first of these conversations was in May, 1949 while he was employed by the State Bank of Provo to handle a recapitalization matter for the bank. The second was on July 12, 1949, in the course of a social ride to Payson (T. 81).

The following day Mrs. Brereton employed Mr. Sandgren to advise her in connection with her will. In the course of such service he prepared a letter to Tracy-Collins Trust Company (Exhibit "A"). This letter was admitted without objection by appellant and appellant's counsel proceeded to cross examine Mr. Sandgren relative to communications from Mrs. Brerton to him concerning the preparation of this letter and the problems presented by her will (T. 82-84). Certainly, if any privilege there was, counsel for appellant waived it by examining Mr. Sandgren as to conversations with Mrs. Brereton after he was employed by her. In offering Sandgren's testimony, plaintiff was careful to confine it to the period *before* July 13th, the date Mr. Sandgren fixed as beginning his employment. It is submitted that appellant, by going into the clearly privileged conversations, has waived any privilege growing

out of the relationship between Mrs. Brereton and Sandgren.

But in any event, there was no privilege as to the early conversations on May 4th and July 12th. The attorney-client relationship between Mrs. Brereton and Mr. Sandgren had not commenced until that date. As recognized by this court in *Burton v. McLaughlin*, 117 Utah 483, 217 P. 2d 566, and by Wigmore's great work on *Evidence*, § 2304, a communication is not privileged if made *before* the relationship was entered into or *after* it was ended. The trial court so ruled in admitting the evidence (T. 80 and 104). With respect to the conversations on the social ride to Payson, the comment of Professor Wigmore is particularly apt:

“Sec. 2303. An attorney may often be brought into a conversation upon the law without any purpose of treating his expression of opinion as a service rendered professionally. Such a conversation is not privileged, because the reason for the privilege is to secure only the freedom of resort to an attorney where some applicable interest of the client is to be protected and the advice is sought or given with a view to its protection.”

The approach to the claim of privilege is well stated in *City and County of San Francisco v. Superior Court*, 31 Cal. 2d 227, 231 P. 2d 26, 25 ALR 2d, 1418, cited by appellant. The California court in that case stated: (1) that the privilege is strictly

construed since it suppresses relevant facts that may be necessary for a just decision, (2) the privilege cannot be invoked unless the client intended the communication to be confidential (here Sandgren testified only to the same thing Mrs. Brereton had told numerous other people), and (3) only communications made to an attorney in the course of his professional employment are privileged (here all plaintiff asked of Sandgren was with respect to conversations *before* any employment by Mrs. Brereton).

It should also be pointed out that Mr. Sandgren's testimony was merely corroborative of other witnesses and the Memorandum of the trial judge would indicate that he gave no greater weight to that testimony than he did to others. If the court erred in any respect as to the admissibility of Sandgren's testimony, it was not prejudicial. It was the court and not the jury which was the ultimate finder of the facts.

POINT IV. THE USE OF THE JURY WAS PROPER.

Finally, appellant makes the astounding proposition that the lower court erred in using an advisory jury. We state "astounding" as the trial court clearly kept the special function of the advisory jury in its proper place. The court asked no general verdict but submitted five special inter-

rogatories with appropriate instructions as to the quantum and quality of the evidence required and did not enter judgment on the verdict, but waited until a transcript of the evidence was available and then heard argument of counsel on the law and facts. It then took the entire matter under advisement and prepared a detailed Memorandum opinion reviewing the evidence and the law at length. It later heard argument on the objections to the Findings of Fact and approved certain amendments.

It is difficult to see from this record where in any respect the court improperly delegated or sought to avoid its duty to decide the issues of fact as well as law.

CONCLUSION

It is submitted that under the facts and the law of this case, the trial court reached an eminently just decision—one amply supported by the evidence. That decision should not be disturbed.

Respectfully submitted,

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