

1970

## **In The Matter of the Estate Of Amasa Lyman Clark, Also Known As A. L. Clark : Brief of Appellant**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

The Matter of the Estate

of

AMASA LYMAN CLARK, also known  
as L. CLARK,

*Deceased.*

Clerk of the  
Court

## BRIEF OF APPELLATE

Appeal from a Judgment of the District Court  
Davis County

Honorable Charles G. Cowley, Judge

Arthur E. Nielsen  
Dean E. Cander  
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Clark and Respondent

FILED

NOV 2 1961

Clerk, Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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In the Matter of the Estate

of

AMASA LYMAN CLARK, also known  
as A. L. CLARK,

*Deceased.*

Civil No.  
11837

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## BRIEF OF APPELLANT

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### NATURE OF CASE

This is a case in which the Estate filed a Petition seeking to determine whether or not a contract was valid and should be recognized and carried out by the Estate.

### DISPOSITION MADE BY THE LOWER COURT

The Trial Court found that there was a valid contract and directed specific performance.

### RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse the Trial Court and have the instrument declared a nonenforceable agreement.

## STATEMENT OF FACTS

Mr. A. L. Clark, the decedent, had been a resident of Davis County for many years and an outstanding citizen of the community. He was one of the founders of the Davis County Bank and had during his lifetime owned considerable stock in the bank. This dispute involves an agreement made just prior to his death involving 530 shares of said stock which was voted, controlled and owned by Mr. A. L. Clark to the time of his death. Mr. A. L. Clark died May 25, 1968, at the age of 103 years and a resident of Davis County, State of Utah. Two months prior to his death he had signed an "Agreement for Sale of Stocks" (Exhibits "A" and "B"). It is the effect or construction of this agreement which is the subject matter of this lawsuit. Mr. Bird, the attorney for Dale D. Clark, prepared this agreement (TR. 36). After the death of A. L. Clark and on February 28, 1969, the Executor of the Estate of Mr. A. L. Clark filed a "Petition for Confirmation of Sale of Personal Property" (R-1). By this Petition, the Estate sought to have the Court confirm the sale of 530 shares of Davis County Bank stock to Mr. Dale Clark for \$31,800.00 (See R-1 and 2)

An objection to the confirmation of sale at the price indicated was filed by four of the heirs of A. L. Clark. The heirs filing the Objection indicated to the Court that they would have no objection to a confirmation of sale if the Court would accept higher and better bids. This was rejected by counsel for Dale D. Clark. An Amended Objection was subsequently filed by the same Objecters and an Answer to the Objection was filed by Dale D. Clark.

The agreement, in its entirety, reads as follows:

### "AGREEMENT FOR SALE OF STOCKS

"In consideration of the settlement of a lawsuit between Dale D. Clark and Howard S. Clark and of the promises herein contained and of the payment of \$100.00 by Dale D. Clark to A. L. Clark, receipt of which by A. L. Clark is hereby acknowledged the following agreement is made by the parties:

- "1. A. L. Clark is the owner of 530 shares of the capital stock of the Davis County Bank which he agrees is sold to Dale D. Clark for the sum of \$60.00 per share, a total price of \$31,800.00.
- "2. Dale D. Clark agrees to pay the said sum of \$31,800.00 for said stock upon demand.
- "3. The stock shall continue to be voted, controlled and owned by A. L. Clark so long as he lives or until he shall be paid in full for said stock following demand for payment and tender of stock by A. L. Clark.
- "4. If there shall be any disagreement as to the interpretation of this agreement, it shall be resolved by arbitration, each party to name one arbitrator and they two to select a third arbitrator, the decision of a majority to be binding upon the parties.

"Dated March 22, 1968, at Farmington, Utah.

Witness

/s/ A. L. Clark

A. L. Clark

/s/ Bonnie S. Evans

/s/ Dale D. Clark

Dale D. Clark"



At the time of the filing of the Amended Objection, the Objecters sought to have it determined whether or not this was a proceeding for the "confirmation of the sale of personal property" under Section 75-10-8, UCA 1953, or if this was a proceeding for the enforcement of a contract under Section 75-11-26, UCA 1953. Upon the hearing of the Petition to file the Amended Objection before the Honorable Thornley K. Swan on April 22, 1969, the Court ruled as follows:

"THE COURT: Well, I believe, Mr. Conder, while the petition is entitled 'Petition for Confirmation of Sale of Personal Property,' it clearly sets forth the agreement upon which the purchaser, Dale D. Clark, relies, attaches a copy of the agreement dated March 22nd, 1968. This Court has understood that the whole proceeding is for authority to perform the agreement entered into by the deceased.

"Isn't that your understanding?

"MR. CONDER: That's what I assumed they'd want to do. I want to make sure of the position, because I think the statute makes a difference between the two.

"THE COURT: Isn't that your understanding, Mr. Bird?

"MR. BIRD: Yes. Yes." (R-18, TR 4 and 5)

The trial was set for May 9, 1969, and the matter heard before the Honorable Charles G. Cowley. Exhibits "A" and "B," being copies of the agreement, were introduced into evidence and received by the Court. (TR. 3 and 5) The difference between Exhibits "A" and "B" consists simply of some additional writing on one copy

not contained on the other but both are executed copies of the same agreement, one being held by the Estate of A. L. Clark and the other one being held by Dale D. Clark.

At the trial and since the proceeding was one to enforce the "contract," the attorney representing the Objecters asserted that no claim had been filed pursuant to Sections 75-9-1 and 75-9-2 of the Utah Code Annotated 1953, and therefore the Court would have to dismiss the proceeding. There was no claim upon which the Court could act. (TR. 9 and 10) The attorney representing the Estate stated to the Court:

"MR PALMER: We are interested in knowing what we should do as an estate for this particular group of stock.

"THE COURT: You're letting these people do the fighting?

"MR. PALMER: This is correct. And this is our position.

"In other words, we have some stock on hand. There's a document that says it's been sold. We want to know what to do with it." (TR. 7)

After some discussion between Court and counsel, it was concluded that since Mr. Dale D. Clark was the one who was specifically interested in the enforcement of the "contract" he should go forward with his proof in the case. Mr. Bird then put in the exhibit, a copy of the agreement, and rested. (TR. 26). At that time, the Court then stated:

"THE COURT: (interposing) Well, the agreement was to be performed in the future when it was signed?

"MR. BIRD: Yes. The delivery of the stock.

**"THE COURT:** The delivery of the stock was to be in the future, and delivery of the money for the stock was to be in the future?

**"MR. BIRD:** Yes.

**"THE COURT:** Correct?

**"MR. BIRD:** Yes, sir." (TR. 27)

Mr. Bird, as counsel for Dale D. Clark, then determined that perhaps he should put on some evidence regarding the demand to be made pursuant to the terms of the instrument. Mr. Dale D. Clark testified that during the lifetime of his father there was never any demand made upon him for performance of the agreement (TR. 29), and that after the death of his father there has been no demand upon upon him for the performance of the agreement (TR. 29).

The agreement, shown on the face of Exhibits "A" and "B," was prepared by Mr. Bird as the attorney for Dale D. Clark. (TR. 36)

## POINTS RAISED ON APPEAL

1. UTAH'S NON-CLAIM STATUTE BARS ANY OBLIGATION OF THE EXECUTOR TO DALE D. CLARK ARISING UNDER THE "AGREEMENT FOR SALE OF STOCKS."
2. THE COURT IS WITHOUT JURISDICTION TO DIRECT SPECIFIC PERFORMANCE OF THE AGREEMENT FOR SALE OF STOCK.
3. THE ALLEGED AGREEMENT FOR THE SALE OF STOCK IS ILLUSORY AND LACKING IN OBLIGATION ON THE PART OF A. L. CLARK OR IS AT MOST AN OPTION TO SELL STOCK AT A CERTAIN SUM WHICH CEASED TO BE EFFECTIVE WITH

THE DEATH OF THE OPTIONEE, A. L. CLARK.

4. THE AGREEMENT FOR SALE OF STOCK FAILS AS A GIFT CAUSA MORTIS.

5. THE AGREEMENT FOR SALE OF STOCK FAILS AS A TESTAMENTARY DISPOSITION.

## ARGUMENT

### POINT I

UTAH'S NON-CLAIM STATUTE BARS ANY OBLIGATION OF THE EXECUTOR TO DALE D. CLARK ARISING UNDER THE "AGREEMENT FOR SALE OF STOCKS."

The Executor of the Estate of Amasa Lyman Clark filed a "Petition for Confirmation of Sale of Personal Property" on February 25, 1969. The attorney for the Estate said that he had filed the Petition to determine whether or not there was a valid agreement and to get instructions from the Court as to what to do. (TR. 12 and 18)

Neither Dale D. Clark nor anyone on his behalf filed any claim with the Estate within the time prescribed by our statute. The Utah statute is very clear on the point. 75-9-4, UCA 1953, provides as follows:

"All claims arising upon contract, whether the same are due, not due or contingent, must be presented within the time limited in the notice, and *any claim not presented is barred forever; . . .*"  
(Emphasis added)

Dale D. Clark's position is based upon an alleged contract. This is the very foundation of his action. His whole position is that he has a contract which he seeks to have enforced. Bancroft's *Probate Practice*, 2d Ed., Vol 3, Sec. 768, p. 503, states:

“ . . . The clear effect of such provisions, as shown in succeeding sections, is to make presentment or filing in probate of every ‘claim’ which falls within the contemplation of the statutes above referred to an absolute condition precedent to maintaining an action thereon against the executor or administrator, barring forever all claims not so presented within the period of the local statute of non-claim. Frequently even the revivor of actions pending against the decedent at the time of his death is precluded by express statute unless claim on the cause of action is first presented or filed as any other demand.”

The language in the statute admits of no exceptions. All claims arising on contract must be presented, and this is so whether they are due or whether they are not due or whether they are only contingent. The Utah cases have so held. *In re Anjewierdens Estate*, 13 Utah 2d 378, 374 P. 2d 845 (1962); *Halloran-Judge Trust Co. v. Heath*, 70 Utah 124, 258 Pac. 342 (1927); *In re Agees Estate*, 69 Utah 130, 252 Pac. 891 (1927); and *In re Neff's Estate*, 8 Utah 2d 368, 335 P.2d 403 (1959).

In *In re Anjewierdens Estate*, the claim was actually received by the Executor or Probate Court several days after the expiration of the time for filing claims and the delay had resulted solely from failure of the claimant's attorney to mail the claim to the proper address. The delay was nevertheless held fatal to the claim. In *In re Agees Estate*, the Court held the provisions of the statutes requiring timely presentation of contract claims and prompt suit after presentation were jurisdictional in nature and that the Probate Court was without power to allow claims not made in compliance therewith. In *In*

re *Neff's Estate*, the Plaintiff had filed a suit before the death of the decedent. Even though the action was pending at the death of the decedent so that the decedent's Administrator and other parties interested would have had notice of it, the Court nevertheless held the statutes requiring presentation and claims to the Estate had to be complied with and that failure to so comply barred enforcement of the Judgment against the Estate, even though the Administrator had appeared in the action and defended it. The head note in this case clearly reflects the decision where it says:

“Where creditor filed unverified complaint against father and son, partners, complaint was pending at father's death and administrator of father's estate was substituted as a party defendant, that no claim was filed within time given creditors to file, judgment rendered against administrator of father's estate was not enforceable against the father's estate.”

It is clear that the statute is mandatory even when a contract is still executory following the death of the decedent. In *Halloran-Judge Trust Co. v. Heath*, supra, the decedent's Executors had taken over management of a building after the death of the decedent in violation of a contract decedent had made with Plaintiff, under which Plaintiff was to manage the building. The Plaintiff failed to present a claim to the Estate's Executors prior to the commencement of suit and the Court denied Plaintiff recovery since his claim was a contingent claim within the terms of the Non-claim Statute and was barred, not having been properly presented. To the same effect are *Lieber v. Sherman*, 130 Colo. 216, 274 P.2d 816; *James v.*

*Corvin*, 184 Wash. 356, 51 P.2d 689; and *Lundy v. Lemp*, 32 Idaho 162, 179 Pac. 738. The cases are collected in annotations appearing in 41 ALR 144 and 47 ALR 896.

In *Lundy v. Lemp*, the purchaser of real estate under a contract with a decedent failed to present a claim to decedent's Executor. The purchaser had not fully paid the purchase price when the seller died. The Court held the purchaser's suit barred by the Non-claim Statute and also by the purchaser's failure to present his claim to the Executor prior to commencing suit.

Counsel for Dale D. Clark argues that the Executor was aware of this claim. We submit, however, that the mere knowledge of the Executor that someone is orally asserting a claim is insufficient.

The Utah Supreme Court in the case of *Clayton v. Dinwoodey*, 33 Utah 251, 93 Pac. 723, 14 Ann. Cas. 926, had before it the question of whether or not a claim for taxes due the Estate had to be presented to the Court pursuant to the statute cited. The Utah Supreme Court said:

"Had the claim here been barred by the general statute of limitations, or by the special statute, such as where a claim had been presented and rejected by the executors and suit was not commenced within the time provided by the statute, or where no claim had been presented nor suit commenced within the time in which a claim would have been properly presented, the bar of the statute would be a complete defense. . . . (Emphasis added)

In the *Dinwoodey* case, the Supreme Court held that the filing of a verified Complaint within the time pre-

scribed constituted a sufficient claim. In the subsequent case of *In re: Jones Estate*, (1940), 99 Utah 373, 104 P. 2d 210, at p. 212, the Supreme Court again cited the *Dinwoodey* case and said:

"In *Clayton v. Dinwoodey*, 33 Utah 251, 93 P. 723, 14 Ann. Cas. 926, we used this language: 'Mere knowledge on the part of the executor or administrator of the existence of a debt \* \* \* is not sufficient to dispense with the necessity of presentation. \* \* \* the defense that the claim is barred by the statute of limitations cannot be waived by the executor or administrator.'"

At the trial, Dale D. Clark's counsel argued that the nonfilling of the claim was not timely raised. We submit, however, that this is something that cannot be waived and thus goes to the very heart of this issue of whether or not there is any "agreement" that can be specifically enforced by the Court.

In the *Clayton v. Dinwoodey* case, this Court said:

"... This principle, however, must not be confused with that involved, where the claim is barred by the general statute of limitations, and because of the bar cannot be allowed by the executor or administrator or the judge, as provided in section 3857, or where the claim was neither presented nor suit commenced within the time in which the claim could properly have been presented. For the defense that the claim is barred by the statute of limitations cannot be waived by the executor or administrator. *Fullerton v. Bailey*, 17 Utah, 85, 53 Pac. 1020; *Reay v. Heazelton*, 128 Cal. 335, 60 Pac. 977."

This Court has previously held on several occasions that the statute of limitations cannot be waived by the



Executor even though it is not pleaded as a defense. The case of *Gulbranson v. Thompson*, 118 Utah 452, 222 Pac. 590, held:

“It is next contended that plaintiff’s claim is barred by our general statute of limitations except as to those services that were rendered within the four years immediately preceding the death of plaintiff’s mother, our statute barring actions upon express or implied oral agreements or accounts, where an action is not brought within four years after the conclusion of the services or the last item of an account. Plaintiff’s counsel, however, insists that this defense is not available to the defendant, for the reason that the statute of limitations was not pleaded in the answer. If this were an action between two living adversaries, then, according to the decisions of this court counsel’s contention would be sound. In view, however, that the action is against the administrator of a deceased person’s estate for a claim arising during the lifetime of the deceased, the general rule that the statute must be pleaded in order to be available does not apply. This court has at least in two cases expressly held that an administrator cannot waive the defense of the statute of limitations under our statute, *and hence his failure to plead the same cannot avail the claimant*. Fullerton v. Bailey, 17 Utah 85, 53 Pac. 1020; Clayton v. Dinwoodey, 33 Utah 251, 93 Pac. 723, 14 Ann. Cas. 926. Such is also the rule in California. Reay v. Heazelton, 128 Cal. 335, 60 Pac. 977, and cases there cited.” (Emphasis added)

It follows that inasmuch as Dale D. Clark failed to present a claim of any nature whatever to the Executor within the time limited by the Notice to Creditors he is now barred from obtaining any relief under the Agreement for Sale of Stocks executed by the decedent.

## POINT II

THE COURT IS WITHOUT JURISDICTION TO DIRECT SPECIFIC PERFORMANCE OF THE AGREEMENT FOR SALE OF STOCK.

*A. Proper pleadings are a jurisdictional prerequisite to the determination of a claim for specific performance under Section 75-11-26 through 75-11-31, UCA 1953.*

Section 75-11-27, UCA 1953, provides:

*"On the presentation of a verified petition by any person claiming to be entitled to such conveyance, assignment, transfer or delivery from an executor or administrator, setting forth the facts upon which the claim is predicated, the Court or Clerk must appoint a time and place for hearing the petition, which shall be upon notice." (Emphasis added)*

Section 75-11-28 refers to a full hearing "upon the petition and objections" and Section 75-11-29, UCA 1953, refers to "the petitioner." In *Rogers v. Nichols*, 75 Utah 290, 284 Pac. 992 (1930), no proper petition to the Probate Court for a Decree of Specific Performance had been made by a claimant who asserted his entitlement to a conveyance of real property. The Probate Court had nevertheless decreed specific performance, assuming the issue was before it on certain Affidavits and other papers. The Utah Supreme Court held the Probate Court entirely without proper jurisdiction to direct specific performance of a contract to sell real property where no proper pleadings had been presented in the Probate Court and, in particular, where no Petition had been filed by the

buyer for such relief. Similarly, in *Free v. Little*, 31 Utah 449; 88 Pac. 407 (1907), the Supreme Court held the failure to file the Verified Petition as required by statute within the time limits proved fatal to the right of specific performance, even though under the terms of the contract the time for buyer's performance had not expired when the seller's Estate was probated.

Dale D. Clark has never filed a Verified Petition here, in and has made no Petition nor filed any pleading in the Probate Court requesting a Decree of Specific Performance. The only Petition filed is that of the Executor and that Petition is wholly out of order and is not in proper form.

No proper pleadings having been presented to the Probate Court, the Probate Court is without jurisdiction to further proceed.

*B. Deceased was not bound by contract to convey or transfer anything to Dale D. Clark as required by Section 75-11-26, UCA 1953.*

Section 75-11-26, UCA 1953, provides:

*“When a person who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignment, transfer or delivery; and in all cases when such decedent if living, might be compelled to make such conveyance, assignment, transfer or delivery, the court may make a decree authorizing his executor or administrator to convey such real estate, or to*

assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto." (Emphasis added)

The subject "Agreement for Sale of Stocks" does not by its terms bind A. L. Clark or his Executor to do anything. The agreement does not contain a single word obliging A. L. Clark to transfer the stock. At most, it gives him the right, but not the obligation, to make demand for payment and tender the stock to Dale D. Clark, in which event Dale D. Clark was bound to pay A. L. Clark \$60.00 per share. Could the decedent have been compelled to make an assignment, transfer or delivery? No! Paragraph 3 of the agreement specifically provides that "the stock shall continue to be voted, controlled and owned by A. L. Clark for as long as he lives or until he shall be paid in full for said stock *following demand for payment by A. L. Clark.*" (Emphasis added) Under this provision of the agreement, A. L. Clark clearly intended to retain entire control over the matter of his performance. He could not have been compelled to do anything. Further, the agreement nowhere provides that A. L. Clark or his Executor shall transfer and deliver the stock upon or after his death. Nowhere does it give either his Executor or Dale Clark the right to demand payment and tender the stock or require the same. The agreement is solely conditioned upon demand for payment and tender of stock by A. L. Clark himself. The agreement totally and completely fails to meet the standards required by Section 75-11-26, UCA 1953, for specific performance, and hence such could not be decreed by the Court even if proper pleadings had been filed so as to enable the Court

to exercise appropriate jurisdiction in the matter. In *Wilson v. Fackrell*, 54 Idaho 515, 34 P.2d 409, the Court held that "in order for appellant to be entitled to relief sought the proof must show the decedent was found, by contract in writing, to convey . . . and that it was such a contract that he, if living might be compelled to make the conveyance." 54 P. 2d at 411. See also *In re Lewis Estate*, 2 Wash. 2d 458, 98 P. 2d 654.

C. *The Court is without jurisdiction to decree specific performance where the right of the Petitioner is in doubt.*

Section 75-11-29, UCA 1953, provides:

"If upon a hearing as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful the court must dismiss the petition . . ."

*Bancroft Probate Practice*, Section 532, points out that statutes similar to those of Utah, which allow a Probate Court to decree specific performance of a contract regarding personality, are unusual and a "distinct innovation." Since it is settled law that such contracts are not specifically enforceable in equity absent very unusual circumstances, Bancroft further points out that the provisions allowing specific enforcement by the Probate Court appear to be practically useless, particularly since it is also provided that where a Petitioner's right to specific performance is found to be doubtful by the Probate Court it must dismiss the proceeding. Here, not only do we have no proper Petition but rights and doubt alone compels dismissal of even a proper proceeding.

### POINT III

THE ALLEGED AGREEMENT FOR THE SALE OF STOCK IS ILLUSORY AND LACKING IN OBLIGATION ON THE PART OF A. L. CLARK OR IS AT MOST AN OPTION TO SELL STOCK AT A CERTAIN SUM WHICH CEASED TO BE EFFECTIVE WITH THE DEATH OF THE OPTIONEE, A. L. CLARK.

*A. The subject agreement is illusory and lacking in obligation.*

Mr. Dale D. Clark testified as follows:

“Q. Mr. Clark, I asked you if you could recognize the handwriting that appeared on the back of Exhibit ‘B,’ and as I recall you said you could not recall that handwriting.

“Do you recall who prepared Exhibit ‘A’ and the front part of Exhibit ‘B,’ dictated it or drafted it?

“A. Yes. This was drafted. This is one of the drafts prepared by my attorney.

“Q. Is that Mr. Bird?

“A. Yes.” (TR. 36)

It is elementary that in the interpretation of the contract it is construed against the drafter — in this case, Dale D. Clark. 4*Williston on Contracts* (3rd Ed.) Sec. 621. Therefore, any ambiguities in the subject agreement will be interpreted in favor of the heirs and Executor. When a promissor retains an option concerning the extent of his performance or promises to do a thing only when it pleases him, he is not bound — the agreement is only illusory, no enforceable legal promise having been made. *Tatsch v. Hamilton-Erickson Mfg. Co.*, 76 N.M.

729, 418 P. 2d 187 (1966); *R. J. Daum Construction Co. v. Child*, 22 Utah 194, 247 P.2d 817 (1952); *Lawrence Block Co., Inc. v. Palston*, 123 CA 2d 300, 266 P.2d 856; *Mitchell Novelty Co. v. United Mfg.*, 94 F. Supp. 612 (Ill. 1950). The subject agreement is illusory as regards the performance of A. L. Clark because it nowhere provides that A. L. Clark is compelled to do anything. Under it, he has the right to determine when and if he should sell his stock. He had no obligation to do anything unless he felt so inclined. It follows that the agreement must fail because it is illusory.

B. *The subject agreement at most is an option to sell stock.*

If the subject agreement is not completely illusory, lacking in obligation, ineffectual, it is at most by its terms an option to sell stock at such time as A. L. Clark should elect, upon the exercise of which Dale D. Clark would have become obligated to pay \$31,800.00. The agreement is necessarily a unilateral contract which bound the optionee (A. L. Clark) to do nothing but granted him the right to sell his stock before his death in the manner specified in the option. 1 *Williston On Contracts* (3rd Ed.) Sec. 618. The agreement, by its terms, is exactly this and no more. Particularly is this so when it is construed most strongly against Dale D. Clark. By its terms, Dale D. Clark did not become absolutely obligated to deliver cash but became obligated to do so only upon demand for payment and tender of stock by A. L. Clark. The agreement, by its terms, gives A. L. Clark all of the rights involved and placed upon Dale D. Clark all of the duties which duties were callable at the option and at the time

that A. L. Clark should elect.

The Trial Court in its Findings of Fact finds that Dale D. Clark was not the owner of the stock when it found as follows:

"3. Following the appointment of Zions First National Bank as executor of the estate, Dale D. Clark, contacted the executor and advised it that he wanted to buy the stock and was prepared to go forward with his agreement, and that he was able to perform."

There can be no specific performance of an unaccepted option.

"There can be no specific performance of an unaccepted option. An option holder cannot enforce it until he elects and binds himself to perform it, thereby transforming it into a mutual contract to sell and to buy, whereas before such election it was unilateral. It is the contract consummated by the acceptance of the option which the courts enforce." 49 Am. Jur. *Specific Performance*, p. 140.

See also *Fletcher Cyclopedic Corporations*, Vol. 12A, Secs. 5634 and 5635, to the same effect.

C. *The option to sell expired with the death of A. L. Clark.*

It is clear that no demand has ever been made by A. L. Clark during his lifetime nor his Estate since his death. Nowhere in the agreement is it provided that the right to exercise the option should survive to the Executor of the Estate of A. L. Clark. Rather, it is specifically provided that the demand for payment and tender of stock should be made "by A. L. Clark." A. L. Clark not



having made demand nor tendered the stock prior to his death, the option or the offer was terminated. Such is the general rule. As Williston points out,

“Assuming that the formation of a contract required mutual mental assent of the parties and offer and acceptance were merely evidence of such assent, it would be obviously impossible that a contract should be formed where either party to the transaction died before this assent was obtained. That such assent was formerly thought necessary seems probable, and as to death, this theory is still maintained. Accordingly, it is generally held that the death of the offeror terminates the offer. Since an offer can be accepted only by the person to whom it is made, the death of the offeree also has the effect of precluding the possibility of the contract as does the destruction of the subject matter.” 1 *Williston on Contracts*, (3rd Ed.), Sec. 62.

A. L. Clark having died prior to the time of his assent to a firm contract was obtained, no contract ever arose and the option terminated.

D. *If the option did inure to the benefit of the Executor, it would be improper for the Executor to exercise it.*

Assuming the Executor does have the right to exercise the option, which it plainly does not, no tender and demand having been made by it, there is no predicate upon which specific performance may be decreed. *Rude vs. Levy*, 43 Colo. 482, 96 Pac. 560. A further problem is presented by the fact that the option is not particularly valuable to the Estate and in point of fact has a negative value. As pointed out in *In re Fullmer's Estate*, 203 Cal.

693, 265 Pac. 920, an option can be an asset of the Estate which should be preserved, but only if it is actually valuable. The option is not valuable and the Executor would therefore be liable to the Estate for the loss occasioned to the Estate by its exercise. *Bancroft, Probate Practice*, Sec. 529. The clear duty of the Executor is to sell personal property only if such is in the best interest of the Estate and those interested. Sections 75-10-1 and 75-10-8, UCA 1953. It is the obligation of the Executor to obtain maximum value for that sold. Sections 75-10-7 and 75-10-15, UCA 1953.

#### POINT IV

#### THE AGREEMENT FOR SALE OF STOCK FAILS AS A GIFT CAUSA MORTIS.

It may be argued that the agreement shows an intent on the part of A. L. Clark that Dale D. Clark should have 530 shares of the capital stock of the Davis County Bank upon the death of A. L. Clark and that the difference between the value of said stock and the sum Dale D. Clark agreed to purchase was the subject of a gift. Any such contention must fail because the law is clear that there can be no valid donation causa mortis without actual manual delivery to the donee personally, or to some third person as his agent, of the subject of the gift—in this case, 530 shares of the capital stock of the Davis County Bank. The failure of the decedent to part absolutely with the shares of stock in his lifetime is fatal. As stated by the Court in *Basket vs. Hassell*, 107 U.S. 602, 27 L. Ed. 500:

“A delivery in terms which confers upon the donee power to control the fund after the death of the donor and by the instrument itself, it is presently payable, is testamentary in character and not good as a gift.”

The subject agreement does not operate *inter vivos*. In fact, it does not indicate any intent to operate after the death of A. L. Clark. If such an intention be implied, still any such attempted disposition fails for failure of the decedent to relinquish control prior to his death. *Allen vs. Hendrick*, 104 Ore. 202, 206 Pac. 733; *Hillman vs. Young*, 64 Ore. 73, 127 Pac. 793; *Nobel vs. Garden*, 46 Cal. 225, 79 Pac. 83 (1905); and *Norton vs. Norton's Estate*, 41 CA 614, 183 Pac. 214.

#### POINT V

#### THE AGREEMENT FOR SALE OF STOCK FAILS AS A TESTAMENTARY DISPOSITION.

The Statute of Wills provides that a testamentary disposition must be subscribed at the end thereof in the presence of two attesting witnesses; that the Testator must declare to the attesting witnesses that the instrument is his Will and that the two attesting witnesses must sign their names as witnesses at the end of the Will, each, at the Testator's request, in his presence and in the presence of the other. Section 74-1-5, UCA 1953. The subject instrument does not comply with these standards. Further, it is elementary that a Will must show the intention of the Testator to leave certain property or it will fail. The subject instrument does not show by its terms that the Testator, A. L. Clark, intended to bequeath anything to Dale D. Clark.

## CONCLUSION

The statutes and other authorities cited above make it clear that any obligation of the Executor to Dale D. Clark is barred by the Non-claim Statute; that the Court is without jurisdiction to direct specific performance since proper pleadings have not been filed; that specific performance cannot be decreed inasmuch as the subject agreement does not obligate A. L. Clark or his Estate to transfer shares to Dale D. Clark and A. L. Clark could not have been compelled to make such a transfer in his lifetime as required by statute; that in case of doubt as to the availability of specific performance the Probate Court must dismiss the proceedings; that the subject agreement is illusory in nature and not enforceable as a contract; that at most the subject agreement was an option to sell stock, exercisable only by A. L. Clark, which became void and unenforceable at his death; that even if the option had not expired at the death of A. L. Clark, it would be inappropriate and wrongful for the Executor to attempt to exercise it under the circumstances; and that the instrument totally fails as a gift causa mortis or as an attempted testamentary disposition.

The Trial Court should be reversed and the Petition should be denied.

Respectfully submitted,

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