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Rulon R. West v. Terry R. West and Flora E. West : Respondents' and Cross-Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RULON R. WEST,

Plaintiff and Appellant,

vs.

TERRY R. WEST and FLORA E.
WEST,

*Defendants, Respondents,
and Cross-Appellants.*

Case No.
10251

RESPONDENTS' AND CROSS-APPELLANT'S BRIEF

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For the convenience of the Court the texts of the agreements are annexed to this brief as appendices "A" for the Articles of Partnership "B" for the Dissolution Agreement and "C" for the Supplemental Agreement. The documents are referred to in the brief however by the Exhibit numbers affixed at trial.

STATEMENT OF KIND OF CASE

Respondents adopt Appellant's statement under this heading but enlarge it to correctly show this court directed the trial court to determine the intent of the parties when they executed all agreements: Articles of Partnership, (Ex. 1) Dissolution Agreement, (Exs. 2 and 15) and a Supplemental Agreement (Ex. 16).

The chief question to be answered upon appeal is, as it has always been, were the payments made by Rulon into the partnership made as loans or as contributions to Capital?

DISPOSITION IN LOWER COURT

Respondents adopt Appellant's characterization of the disposition below.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the judgment except as to the following points raised on cross-appeal:

1. The finding and judgment that the amounts paid into the partnership by Rulon after December 3, 1958, were not contributions to capital and should be repaid him prior to distribution on the 40, 40, and 20 per cent basis should be reversed as set forth in detail under Respondents' Argument VII herein.

2. The finding and judgment that interest on a partner's capital account not paid in a given year should be credited to a liability account of the partnership, payable to the partner, and should not be credited to his capital account is not supported by the evidence, is offensive to generally accepted accounting practices and procedure, is erroneous as a matter of law, and should be reversed as set forth in detail under VIII in the argument herein.

3. The court's finding and judgment that in the calculation of "gross profits" salaries to partners should not be deducted from gross sales or income is not supported by the evidence and is erroneous as a matter of law, and should be reversed as set forth in Argument IX herein.

STATEMENT OF FACTS

While the writer conducted the trial of the case for

respondent's before Judge Jeppson, it is his first appearance in the case on appeal.

The various statements of fact heretofore presented to the court by the parties in the two appeals are exhaustive and little would be served to chronicle them anew. However, the writer believes that to bring the case into proper perspective some fuller mention must be made of the events attendant upon the dissolution of the partnership in March 1960, because the acts of the parties at that time would be definitively determinative of their intent at all stages of their relationship.

After approximately two and one half years of the running of the partnership Rulon caused his counsel to send Terry a letter on March 21, 1960 (Ex. 8) notifying Terry of Rulon's withdrawal from the partnership and advising Terry this worked a dissolution under Utah statutes.

The letter referred to paragraphs 12 and 6 of the Articles and stated that after the winding up the assets should be distributed, and 40 per cent was to be distributed to Rulon.

In the ten days following the letter, Mr. Earl M. Wunderli, Rulon's then counsel, Mr. E. L. Schoenhals, Terry's and Flora's then counsel, and Terry and Rulon themselves had conversations looking to an orderly winding up of the business. These conversations eventuated in the draft by Wunderli of the Dissolution Agreement (Exs. 2 and 15). Rulon, Terry, Wunderli, and Schoenhals met in Murray, Utah, on or about April 2 to discuss the winding up and to execute the agreement. Flora was not present, it being the apparent intention of the others that her presence was not required.

All parties seemed friendly and amiable at this juncture, although the dissolution itself had grown out of dissatisfaction with the results of the partnership venture.

All persons at the meeting knew the following:

1. That Rulon had put approximately \$150,000 into the partnership.
2. That the total value of the business was now something less than \$150,000.
3. That if Rulon had his entire contribution returned to him, there would be nothing left to divide 40%, 40%, and 20%.

Earlier, and during the running of the partnership venture, Rulon had discussed estate planning with his attorneys Wunderli and Holdsworth in Terry's presence. (R. 141-142). At the meeting in Murray, additional discussion was had with respect to the tax consequence of Terry and Flora receiving the substantial interests they were to receive from the partnership upon dissolution. These considerations revolved around the possible income tax liability which Flora and Terry might bear as opposed to the more favorable treatment of the situation if the transfer of these interests were effected by gift from Rulon to Terry and Flora and the resulting lower tax burden of the gift tax rates. (R. 334-342). Both counsel and the parties apparently agreed that the overall effect of the operation of the Articles of Partnership and the Dissolution Agreement was that a gift of some 60% of Rulon's contributions had been made to Terry and Flora. As a consequence of this, Exhibit 16, an agreement designated as supplemental to the Dissolution Agreement, was struck. This supplemental agreement was drawn under a time pressure, because Rulon was departing on a trip momentarily (R. 338) and because of the time pressure it undoubtedly lacks art. However, it expressed over Rulon's and Terry's signature that the amounts Terry and Flora were to receive were by way of gift, and Rulon, to implement this concept, agreed to forthwith execute and file gift tax returns. (Ex. 16)

Summaries of relevant testimony and the contents

of the various exhibits will be set forth in more detail in connection with the arguments hereafter.

ARGUMENT

I

THE COURT'S FINDINGS OF FACT AS TO THE INTENTIONS OF THE PARTIES AS REPRESENTED IN THE ARTICLES OF PARTNERSHIP, THE DISSOLUTION AGREEMENT, AND THE SUPPLEMENTAL AGREEMENT ARE FULLY SUPPORTED BY THE EVIDENCE.

There are two classic concepts that bear on all points to be argued herein:

FIRST: That the trial court having the parties before him in the flesh is in a better position than a reviewing court to evaluate credibility and determine ultimate fact, particularly to the extent that these evaluations depend upon those subtle human actions and reactions which are present in the trial but are strangely missing from the printed record. Moreover, the trial, however long, is stamped in the judge's mind as a cohesive unit rather than a disjointed series of subjects and events as it appears in the record and in briefs. Growing out of this venerable concept is the

SECOND: that the reviewing court will not reverse the findings of the trial court in the presence of substantial evidence on which the trial court's findings are based.

When this court remanded for the trial court to take evidence as to the intent of the parties when they executed the three agreements, it stated that in this connection "it is proper to consider the background and circumstances, including the relationship of the parties, the purposes for which the documents were made, and principles of equity and justice relating thereto."

Appellant assails the findings because, *inter alia*, the

court failed to find with respect to "actual intent." Intent is subjective. An objective trier of fact cannot, of course, look into a man's mind to determine intent. He infers from the person's words and acts what the intent is. Rulon is heard in court attempting to repudiate an intent once clearly expressed in conversations and in documents which he caused to be formulated. The court was obviously unimpressed with Rulon's current claim that his payments into the partnership were all loans, when his words and acts, and particularly those reduced to writing, were eloquent of the intent to commit his contributions irrevocably to the fortunes of the partnership, including the sharing of these contributions on a 40-40-20 per cent basis with his son and wife upon dissolution.

Taking the findings one by one, the evidence regarding intent reveals the following:

FINDING NO. 2 (R. 65)

The finding is that the intent of all the parties was that the \$47,500 equity in the real estate contract together with \$1,000 in a bank account were capital contributions by Rulon and did *not* constitute a *loan* to the partnership. This intent was expressed at paragraph 3(a) of the Articles. (Emphasis added)

Paragraph 3(a) states in unambiguous wording that "the capital of the partnership shall consist of the following property:" (a) designates the \$48,500, and (b) "Any further sums which any partner shall with the consent of the others from time to time contribute for capital purposes which shall be credited to his capital account."

It is undisputed that Rulon contributed an additional \$100,000, that it was consented to by Flora and Terry, that it was used for capital purposes and, until dissolution, was credited to Rulon's capital account.

In connection with intent at the inception of the

partnership the witnesses testified regarding the original \$48,500 and the subsequent monies to be committed to the venture as follows:

Mr. Roberts, the scrivener, said he had handled the real estate contract, that Rulon asked him to designate the buyers thereunder as Rulon and Terry. Roberts asked if Rulon wanted a designation of himself and Terry as tenants in common or joint tenants, and Rulon replied "It doesn't make much difference, because we are going to turn it over to a partnership immediately." The same day, Rulon asked Roberts to prepare an assignment of the Mortensen contract to a partnership known as "El Rancho Enterprises." (R. 92-93)

Rulon did not then designate his contributions as loans rather than capital, his chief concern being receiving interest on the money. He testified:

Q: So, in fact you and Terry agreed that interest was to be paid on the capital accounts, did you not?

A: If you wish to call it capital. I don't know where you can put it. I am not a bookkeeper. I am not an accountant. All I knew (know) is that I had \$150,000, approximately, in there, and I was expecting to get 5% interest on my money, whether you name it "capital" or whether you name it something else." (R. 163)

When asked why he didn't insist that Roberts identify his contributions as "loans" he stated he was expecting fairness from Terry and when challenged on this he replied:

Q: Do you here today assert Terry West got Paul Roberts to change the wording from what you wanted it to be?

(Objection entered)

A: No, I'm not alluding (to) that in any way.

Q: You didn't, in any case, insist that Paul Roberts write the word "loan" in there, did you?

A: No, I didn't. (R. 164)

The word "loan" doesn't appear in the Articles in connection with partners' contributions.

Moreover, when Mr. Roe was attempting to lead Rulon into a statement that he discussed the return of his money with Terry, he would not be so led:

Q: (Roe): What I'm trying to find out, Mr. West, whether, at any time during the advances you and Terry talked about the method these sums would be repaid, or whether they would be treated as capital, or loans, or anything of that kind, that is what (I'm) trying to find out . . . Was there any discussion of that sort.

A.: No, there was no discussions. * * *

Q: There was no discussion?

A.: No discussion. (R. 154-S)

* * *

Q.: . . . At that time now subsequent to that occasion, were there any discussions between you and him about that? You understand what I mean by "about that"?

A.: No, I think . . .

Q.: By "about that" I mean whether the sums you paid over were to be paid back, or whether they were to be put into capital, or what was to be done with them?

A.: A few months later, yes.

Q.: Where did this conversation occur, and when, and who was present, if you remember?

A.: Again, it was out at the motel; and, again, we were alone, and I told him that I had to have *some interest returned to me* on my money.

He told me, as soon as he got the trailer court built and had it rented, that I would receive *5 per cent on my money*. (R. 155) (Emphasis added)

FLORA was deposed by Mr. Roe on April 14, 1961, just three months after the lawsuit was filed. He sought therein by leading questions her admission that she did

not intend, originally, to get an interest in Rulon's contributions. Her responses are clearly to the contrary:

Q.: Was it your thought, then, that if you received some share of the corporation (partnership) that it dated from that gift you are talking about?

A.: From the *beginning . . . from the beginning . . . from the beginning of the partnership*. (R. 179) (Emphasis added)

Nor was she uncertain about it being capital, divisible upon dissolution, as opposed to capital or loan returnable to Rulon en toto:

Q.: (Roe) It was your understanding that, if the partnership were ever terminated, by whatever means, you would get 20 cents of every dollar he (Rulon) put in?

A.: Mister, I have asked you to read that; it speaks for itself. (Referring to Articles)

Q.: I am just asking you for your understanding.

A: *That was my understanding. . . .* I figured these documents were legal. I figured they were legal all the way through; and when it was *said* and *signed*, that was it. (R. 180-181) (Emphasis added)

This is clear reference to *original talk* and *writings*.

Terry testified that at the original conversations with his father prior to forming the partnership they discussed that his father was a wealthy man, that he had given considerable thought to estate planning and distributing part of his estate to his children (R. 141-2); that if he quit college and forsook a professional career he wanted some assurance that his father would carry through with the promise to actually give him an equity in the business, upon dissolution or a business failure, not just a nebulous chance to make some profits. (R. 132-3; 320) Terry had lived for much of his life with his mother when Rulon was away most of the time and when home was continually quarreling with Flora over money and financial matters. It is obvious he had

some concern about his father's arbitrariness. (R. 327-329) Terry was agreeable that the total capital contributed by Rulon remain in a capital account in Rulon's name to draw interest if profits were made until dissolution; (R. 112-113) that at no time did Rulon ever claim his contributions would be loans:

“During my whole business affairs with my father, we have never discussed or even mentioned notes or loans.” (R. 272, line 24)

That Rulon specifically told him in the first pre-partnership meeting that he would not expect the return of his capital; (R. 111-112) and that he never received the letters requesting notes (Exs. 9, 10) Rulon said he sent to him. (R. 272)

In February 1960, prior to dissolution, Rulon took Terry to talk with Mr. Wunderli and Mr. Holdsworth, lawyers in the firm now representing him. Terry testified that Rulon told him at this meeting he wanted Terry to get most of his part of Rulon's estate through the partnership. Extensive discussion was had by Rulon, Terry and Holdsworth at this point, and by clear implication Rulon's intentions on this matter related back to the inception of the partnership. (R. 141-143)

Rulon at no time during the trial repudiated this, nor were Holdsworth and Wunderli produced at trial to change this impression.

Thus we observe substantial bodies of evidence to the effect that the parties intended at all times, and particularly at the inception of the partnership, that the sums contributed by Rulon initially and to be contributed thereafter were to be distributed upon dissolution proportionally to the parties 40, 40 and 20, but that prior to dissolution partners were to receive interest on their capital accounts as the first step in the distribution of profits.

FINDING NO. 3, (R. 65) that its was the intent

of the parties that interest at the rate of 5% per annum was to paid to partners on their capital accounts out of gross profits, has been discussed supra. The finding regarding the intent that interest was cumulative and that it should be credited to a liability account of the partnership payable to the partner earning the interest will be discussed at argument VIII infra, because respondents seek a reversal of that part of the finding.

FINDING NO. 4 (R. 66), that the parties intended that partnership profits should be distributed to, and losses borne by, the partners in the proportions of 40%, 40%, and 20% to Rulon, Terry and Flora respectively, is apparently not challenged by appellant. There is of course ample testimony that this was the intent of the parties. See especially Roberts' testimony (R. 94), where Rulon and Terry directed Roberts to so provide.

In the second part of finding No. 4, the court states "To fulfill the intent of the parties in connection with items of interest on capital accounts, and of profits and losses, it is necessary to make the following accounting entries:" Then follows the dollar amount entries to which counsel stipulated as being correct as to the court's accounting theory.

The interest amounts set forth as earned on capital balances in years when profits were made and to be credited to a liability account of the partnership payable to partners and not to a capital account, will be challenged at VIII infra, as referred to earlier herein.

FINDING NO. 5. (R. 69) The evidence regarding the intent of the parties that Rulon's payments into the partnership were on account of capital and not by way of loan has been discussed above. The findings that the payments he made prior to December 3, 1958, totaling \$119,224.00 were used in the business for capital purposes and credited to his capital account has been demon-

strated. Rulon never seriously challenged this handling of the money and when some effort at the trial was made to assert use of the money for other than capital purposes, he finally testified that of the total of \$150,000 he had committed to the venture, all but one \$60 item and one \$900 item had gone into capital expenditures. (R. 168-170)

FINDING NO. 6 (R. 69) that the payments totaling \$29,645.39 paid by Rulon after December 3, 1958, were "not intended to be paid in as contributions to capital, and were not intended to be distributed to partners upon dissolution" is challenged by respondents at VIII infra as being without evidentiary support.

FINDING NO. 7 (R. 70) is a factual statement of stipulation by the parties that the dissolution date was March 21, 1960.

FINDING NO. 8 (R. 70). The detailed wording of this finding is here commended to the Court. In substance the court found the parties intended:

1. Upon dissolution the business would be wound up by paying liabilities, including liabilities to partners not in respect of capital.

2. That, specifically, the phrase "liabilities to partners" used at paragraph 1 of the Dissolution Agreement was not intended to refer to capital accounts of the partners.

3. The net assets remaining after payment of liabilities were intended by the parties to then be distributed to Rulon, Terry and Flora 40, 40 and 20.

In this connection the witnesses testified as follows:

TERRY: Testified that the accounting entry he made subsequent to dissolution transferring the total of all capital accounts to Rulon, himself and Flora in the 40, 40, 20 proportions was pursuant to an oral agreement with his father prior to the Articles, the provisions of the Articles themselves, his father's letter of Dissolu-

tion, the Dissolution Agreement, the Supplemental Agreement, and oral commitments with his father upon the occasions of the signing of all documents. (R. 132-3)

That he, his father and attorney Holdsworth discussed, prior to dissolution, that he would receive 40% of the capital accounts of the business upon dissolution. (R. 144-5)

That in conversations with his sisters and others of the family he told them he had the following interests in the business: \$2000-3000 in his capital account, a \$500 monthly salary, and "if and when *a dissolution ever came* * * * that *at that time* I would have 40% of the capital account of *El Rancho Enterprises*, pursuant to an agreement made by myself and my father." (R. 277-8) His position has been consistent at all times on this point — that he did not come into 40% of his father's contribution until dissolution. (R. 278)

He testified he believed that all three documents embodied this intent and this concept, and particularly paragraphs 6 and 12 of the Articles as re-stated by paragraph 1 of the Dissolution Agreement (R. 280, lines 22 to 30, 282, lines 1 to 3).

He testified that he never at any time intended to receive only 40% of what was left after his father had been repaid his total contribution. (R. 282)

On the point that "liabilities to partners" did not include capital he was firm: He testified that at the Murray meeting with Rulon, Wunderli and Schoenhals, he specifically discussed the phrase "liabilities to partners" with Rulon and Wunderli.

Q.: Was it your intent the phrase, "liabilities to partners" included your father's capital account?

A.: Absolutely not.

Q.: Did you have any discussion with your father at that meeting?

A.: Yes.

A.: Did you discuss with him the phrase "liabilities to partners" in the Dissolution Agreement?

A.: Yes.

Q.: State in substance and effect, or if you can remember, exactly what you said and what he said.

A.: I asked my father, and his attorney, why they had included "liabilities to partners" in this Dissolution Agreement they drew up. Mr. Wunderli told me it was his knowledge that mother had made business loans, and at the time he drew up that dissolution agreement he did not know whether those loans had been paid off or not, and that this encompassed any liability that may or may not be on the books at the time of the final dissolution. I explained to him at that time there was, as of that date, April 2, there were no liabilities to partners upon the books of account. He told me rather than cross it out, that this may take a long time to wind up, and between now and actually winding up there could very possibly be liabilities to partners, such as wages to even myself. I told him I could see the possibility, and the phrase did not bother me in the least. (R. 284)

RUTH WEST FRANCIS, Terry's sister and the daughter of Rulon and Flora, was deposed in her sick bed at her home in Kaysville, Utah, by Mr. Ronnow and Mr. Roe on April 13, 1964, two days before the trial commenced. She was married, the mother of four, and the next to oldest of the West children.

She testified that on or about April 2, 1960, she was at her mother's home in Salt Lake City, and Rulon told her he had just come from a meeting with Terry and the attorneys in Murray. That he was "happy and very much relieved"; he said "they had reached a dissolution of this partnership and that they had reached a settlement"; that "out of the goodness of his heart he had given Terry his share in the partnership and Mother her share"; that the "shares" would be \$60,000

to Terry and \$30,000 to Mother; that it would be tax free; that "this was a portion of their inheritance. It was a portion of Terry's inheritance and that Terry would have it now." (R. 209-210)

She testified that in her presence the following morning Rulon stated to Donna Holmes (another sister) and Roy Holmes, her husband, substantially the same thing, including the dollar amounts of \$60,000 and \$30,000 which Terry and Flora were getting. (R. 211-12)

Neither of the Holmes', produced as friendly witnesses by Rulon, denied Ruth's testimony.

Ruth also testified that Rulon had told her at this time that he had discussed with Terry the matter of Terry buying *Rulon's portion or share*, contra that Terry was categorically to buy Rulon out as stated by Mr. Roe in his brief at page 14. (R. 257, lines 19-22) (Emphasis added)

Rulon said no word in the trial to deny this conversation with his daughter or repudiate its effect. He must be deemed to have agreed that he said these things and that he did the things that he said. Since the dollar amounts of \$60,000 to Terry and \$30,000 to Flora are 40% and 20%, respectively, of the round total of \$150,000 he had contributed to the venture, and since what he agreed to on April 2nd was fully in keeping with the wording of the original Articles, he is deemed to be supporting the contention of respondents that it was the intent of the parties at all times to distribute all capital or net assets at dissolution regardless of who had contributed it.

One brief line from Flora's testimony reflects she held the view that before dissolution she would get profits, upon dissolution a percentage of all capital, including Terry's.

Q.: It was your understanding that you would be the owner of 20 per cent of that (Terry's investment)

A.: Of what he put in?

Q.: Yes.

A.: That all depended. * * * if the *thing was sold, you know what happens*. If it isn't sold, I come in for profits. (R. 182) (Emphasis added)

MR. E. L. SCHOENHALS called by respondents and cross-examined at length by appellants testified regarding distribution as follows: That Mr. Wunderli had prepared the dissolution agreement, had sent it to Schoenhals signed by Rulon requesting immediate signing by Terry because Rulon was leaving on a trip and wanted the matter settled before he left, that Schoenhals and Wunderli agreed that a supplemental agreement stating that Terry and Flora were getting their shares by way of gift and Rulon would file a gift tax return should be prepared to clarify the estate situation; that Schoenhals prepared it and he and Wunderli rode together to the Murray meeting. (R. 337-9) That at the meeting Rulon said he wanted to get back 40% of approximately \$147,000 he had put in, (R-334-5); that there was some discussion of Terry's buying out Rulon's 40% but that nothing was done about that (R. 336); that Wunderli or Rulon discussed the point that by Terry's receiving the "gift" he would be eliminated from Rulon's will because he would be getting all he was entitled to in Rulon's estate, (R. 337); that Terry's signing the Dissolution Agreement was dependent upon Rulon's agreeing to file a gift tax return (R. 338); that he heard discussion by Terry and Wunderli regarding the phrase "liabilities to partners" but did not enter this discussion (R. 343).

Rulon was recalled in rebuttal immediately following Schoenhals' testimony and while stating that very

little was said at the Murray meeting he did not deny the specifics of Schoenhals' testimony. (R. 344-350)

Persons are deemed to intend the clear legal and factual import of the words they use in their contracts.

Rulon had his attorney Wunderli draw the Dissolution Agreement. (R. 348-9) The phrase "liabilities to partners" used therein was put to both Rulon's C.P.A., Mr. Kenneth A. Elwood, and respondents' professional witness, Mr. Paul D. Tanner, at the trial for definition. Mr. Elwood and Mr. Tanner have had 10 and 22 years experience, respectively as certified public accountants.

Mr. Roe called Mr. Elwood as an expert. He presented him as being particularly conversant with partnership accounting. (R. 190, 194, lines 19-25) He testified upon questioning by Judge Jeppson:

Q.: You used this word "liability" to refer to debts to third persons, I suppose, and also loans from partners?

A.: Loans from partners would be included in liability accounts.

Q.: As a matter of fact, isn't "liability" often used and broad enough to include an interest of partners with relation to their capital investments?

A.: *No, sir, I don't believe so.*

Q.: In common use, do they ever put liabilities to include the capital without saying "liabilities, plus capital . . . just assets and liabilities?"

A.: I have trouble following your question. I would think not.

Q.: You haven't ran (run) into that use of the word "liability" to include the capital?

A.: No. *The capital is not a liability.* (R. 195) (Emphasis added)

Mr. Tanner verified this concept:

Q.: How would you characterize or define "liabilities to partners"?

A.: Liabilities to partners, if they exist in the form of a loan, as such, to the partnership, simply show it in the general liabilities of the balance sheet, as separate and distinct from the capital account.

Q.: You almost answered my (next) question: is a liability to partners the same as his capital account?

A.: No. (R. 233)

When the court caused Title 48-1-37 U.C.A. 1953 to be read to Mr. Elwood with the implication that that part of the Partnership Act *defines* capital as a liability of the partnership, the witness responded he felt the Act showed the chronological *order of payment* rather than a *definition contra* to his testimony. (R. 199-200)

Tanner testified that there would be no difference in the "assets" distributable to partners as stated in the Articles at paragraph 12, and "net assets" distributable under paragraph 1 of the Dissolution Agreement. That in each case the phrases referred to capital or net worth. (R. 237-8) Tanner finally testified that this wording would prevail, in practice, even if one partner had contributed substantially all of the capital, because the agreement so provided. (R. 241)

FINDING NO. 10 (R. 70-71): "That the parties and particularly . . . Rulon and Terry, intended and understood that the effect of the agreements whereby Terry and Flora would receive, upon dissolution, 40% and 20%, respectively, of the amounts paid into capital by Rulon as finally adjusted and determined herein, was that such receipt was by way of gift from Rulon to Terry and Flora."

Argument here will show the affirmative intent of the parties in this regard under (A) *infra*, and will answer appellant's argument III that this finding "was not supported by sufficient evidence and was erroneous as a matter of law" at (B) *infra*.

(A) As to the intention of the parties that the total effect of the agreements was that a gift came into being, the evidence is certainly not wanting: The unchallenged testimony was that Rulon had done estate planning, that Holdsworth and Wunderli had counselled him in this regard, and in the presence of Terry weeks prior to dissolution. (R. 141-143) Estate planning invariably involves tax considerations. At the scene of the ending of the partnership we have the two principal parties, Rulon and Terry, and their lawyers, discussing all these matters. A dissolution agreement has been drawn by Wunderli to effect the winding up. (R. 348-9) By its terms and the terms of the Articles of Partnership, which it replaced, Terry and Flora were receiving sixty and thirty thousand dollars, respectively, of money which had originated with Rulon. Discussion was had regarding tax treatment of these monies, particularly gift, as opposed to income tax consideration. (R. 293-4)

Terry testified that at the Murray meeting it was decided to sell the motel (paragraph 1 of Dissolution Agreement, Ex. 2) in the winding up. That his father then said "he didn't know how much (it was) going to be sold for, but assuming . . . assuming we sold it for book value, or in those words, what it was of that day * * * that there would be approximately \$150,000 to be distributed, and I would receive 40% of that sum, *which would be tax free.*" (R. 131) (Emphasis added)

Terry further testified he was concerned that the Internal Revenue would tax his 40% as income, and "that is what led me to have my attorney Ed Schoenhals draw up the Supplemental Agreement to show that this was a gift, tax free." That he discussed the Supplemental Agreement, and he told his father of his concern regarding income tax. That it would be a tax advantage to his father in getting portions of his estate transferred without tax. That his father said there was

no reason to pay the income tax and he was in complete agreement to sign the Supplemental Agreement for tax purposes. (R. 293-4)

On this point Rulon testified that Schoenhals presented the Supplemental Agreement to him, told him about a \$30,000 gift tax exemption in each himself and his wife, suggested he and his wife give Terry a \$60,000 gift, and he then signed the Supplemental Agreement, stating this gift concept. (R. 347) In this connection reference is again made to Rulon's report to his daughter, Mrs. Francis, following the Murray meeting: that he had *given* \$60,000 to Terry and \$30,000 to Flora, that Terry's was *part of his inheritance and would be tax free*. (See page 15 *supra*. also Schoenhals testimony regarding gift discussions of Murray meeting at page 16 *supra*). (Emphasis added).

The foregoing evidence is abundantly persuasive of the validity of the finding that Rulon and Terry "intended" and "understood" that the "effect" of the agreements was that Terry's and Flora's share came by way of gift.

(B) The questions as to whether in fact a gift was made, or when it was made are clearly outside the scope of the issues here. The writer will not be led off into the morass where Mr. Roe's will-o'-the-wisps of donative intent, capacity, delivery and consideration invite him.

The Supplemental Agreement, as this court stated, does not clearly indicate a present donative intent, but its wording could not be clearer in declaring that a completed gift had been made prior to its execution.

Mr. Roe's heading at his Argument III, first of all, wrongly states the finding. He says: "The Court's finding that amounts *awarded* to defendants were by *way of gift*, is not supported, etc." (Emphasis Added)

The court did *not* award by way of gift. Let us be clear on this. The court said *Rulon and Terry "intended*

and understood that the *effect* of the *agreements*” was that Terry and Flora received by way of gift. This distinction is real and not technical. This is an entirely different matter than the court making its award on the theory of gift.

While the parties clearly intended and believed that a gift had been made it is completely academic in the affirmance of the judgment whether a gift was made or not. The judgment does not rise or fall on gift. The total import of the findings, conclusions and judgment is that the parties agreed that Rulon was to put up capital, Terry was to change his life’s course and operate the venture, profits and losses were to be proportionately taken and borne by the parties, the parties were to receive interest on their invested capital, and upon dissolution, net assets or capital was to be distributed in the proportions herein repeatedly stated. These intentions were expressly written in the Articles, and in the Dissolution Agreement as amplified by the Supplemental Agreement.

This result is the result of rights and obligations arising from basic *contract* law. Ambiguity was originally thought by this court to obtain in regard to whether Rulon’s money was loan or capital. That ambiguity has been removed by a scholarly and arduous search on the part of the trial court.

Evidence of tax talk and of gift talk by the parties has here been adduced by the writer to show the basic contract intent, not to show gift intent per se, although it is clear that a gift had in fact been made as a result of the operation of all agreements. Rulon agreed to file a return to implement this concept.

As this court stated in *Wood v. Wood*, 89 Utah 394, 49 Pac. 2nd 416, 422, the court is impressed with “natural behavior”. What is more natural than for parties to seek, with the aid of counsel the most favorable tax treatment in a monetary situation?

Whether the taxing authorities ultimately impose income taxes upon Terry and Flora, or whether they allow the gift tax theory to prevail is of no concern here.

II

THE COURT'S FINDING AND CONCLUSION REGARDING THE DISSOLUTION AGREEMENT OF MARCH 31, 1960, AS TO INTENT AND ITS BINDING EFFECT ARE SUPPORTED BY THE EVIDENCE AND APPLICABLE LAW.

Two remarkable things about Mr. Roe's assault upon the Dissolution Agreement are, first, that his law firm prepared the agreement and urged its execution upon Terry, (R. 338), and secondly, that Mr. Roe himself in his first appeal herein argued that respondents were bound by it. ((c) page 33, appellant's 1st Brief) A fortiori, if respondents are bound by it as the accepting offerees of the provisions contained therein, then Rulon is likewise bound by it as its drafter, its original signatory, and the offeror of its provisions. So, too, will it be most strictly construed against him as its drafter. On these two points the law is so well settled as to require no reference.

A further bar to appellant's attack on this agreement is that its validity was not in issue at the trial. The pre-trial order as it relates to the agreement reads: "The pleadings herein will determine the issues with the following exceptions and amendments:

1. * * *

2. * * *

3. It appears to the court that the issues to be determined are:

(a) What is the *meaning* * * * of the dissolution agreement signed by the parties and acknowledged on the 31st day of March, 1960, by Rulon R. West?" (Emphasis Added)

This court has held that where an issue was not

framed in the pre-trial order, and not raised by introduction of evidence at the trial, it cannot be raised on appeal. *Upton vs. Heiselt et al.* 118 Ut. 573, 223 P. 2nd., 428.

Respondents by Answer and Counterclaim had asserted the operation of the agreement and appellant had replied it was never executed. Appellant did not carry this position into the pre-trial and had, indeed, argued before this Court on first appeal the binding nature of the Agreement on respondents, and had used its terms as the basis for his claim that "liabilities to partners" included Rulon's contributions which should be returned. This court apparently accepted appellant's urging of the validity of the agreement upon it, because in its remand it stated only the document was "ambiguous" and the intent of the parties in executing it should be determined by the trial court.

Thus, a determination of "intent" in execution, by the wording of the remand, and "meaning" in the wording of the pre-trial order, were the tasks assigned to the trial judge. No challenge of invalidity, of improper execution or of incomplete integration was raised.

At trial, Mr. Roe objected to the admission of Ex. 15, Terry's and Flora's copy of the Agreement, signed by all parties. The court admitted the exhibit. Mr. Roe made no motion to amend the pre-trial order to raise the issue of invalidity. Nor did he enlarge his claim beyond objecting to admission. (R. 290)

Nor did the trial court find the agreement was valid or invalid. He found that the "intent of the parties" in regard to distribution of net assets in the 40, 40 and 20 percentages was expressed at paragraphs 12 and 6 of the Articles, and at paragraph 1 of the *Dissolution Agreement*. He also found that the parties did not intend that the phrase "liabilities to partners" as used in the Dissolution Agreement should include the capital accounts of the parties which, of course, by definition is that they

affirmatively intended that capital accounts were not included in "liabilities to partners." (R. 70)

The court made no other finding regarding this Agreement. The court followed the mandate of this Court and the pre-trial order: he found intent and meaning. He obviously assumed the agreement was valid (i.e. integrated or consummated and legal) and sought only to remove any ambiguity therefrom. This is shown in his 1st Conclusion of Law: "The parties and each of them are bound by the terms and provisions of . . . the Articles of Partnership and the Dissolution Agreement, *as said agreements have been interpreted and construed* in the Findings of Fact." This was his assignment. That he fulfilled it is manifest.

The foregoing should be dispositive of the point. But to advert briefly, if academically, to Mr. Roe's argument re validity, his challenge seems based chiefly on Flora's failure to sign the agreement promptly. (Appellant's brief pp 21-22)

Let us be practical here, and adult. Every person in this case, including the two trial judges, and Mr. Roe, knows that this grieving woman has at all times been virtually on the sidelines as to negotiations and participation. Terry and Rulon set up a 20% interest for her almost without her knowledge, and explained to her what she was getting in the Articles she was signing. (R. 174-5)

Moreover, she affirmatively consented to be bound by their decisions in partnership matters:

A.: Well no; he (Rulon) knew . . . I just told him, I told them both, I said, "whatever you and Terry do in these matters of money *or anything else is okay with me*". (R. 182) (Emphasis added)

First of all there was absolutely no intent proven at trial that all three parties had to sign. Mr. Roe asserts that the only "reasonable inference is that none was to be bound until the dissolution agreement had been executed

by all". This inference comes right out of "Alice in Wonderland", because he produced no word of testimony to this effect at the trial. Moreover, the actions of the parties, viz., Rulon and Terry in going forward with the winding up pursuant to the terms of the agreement, particularly the intervention of Ray Holmes in the situation as Rulon's agent, and Flora's assent and acceptance of benefits under the agreement are eloquent of total intent that Flora's signature was not necessary to render the agreement binding.

In this situation, Flora's signature is not required by law:

17 Am. Jur. 2d, page 408: SIGNATURE, reads: "In the absence of statute requiring a signature, *or an agreement that the contract shall not be binding until it is signed*, parties may become bound by the terms of the contract, where their assent is otherwise indicated, such as by the acceptance of benefits under the contract." Further: "The fact that one of the parties has signed the contract does not necessarily require that the other party should do likewise," citing WILLISTON, CONTRACTS 3rd Ed., para. 90A, and cases, including *U.S.F. & G. Co. v. Reno Electrical Works*, 43 Nev. 191, 183 P. 386, where it was stated: "Parties may adopt a written contract and thus make it binding as though formally executed by both, without signing it." (Emphasis Added)

See also *Red Fish Boat Co. v. Jarvis Press, Inc.*, 361 S.W. 2d, 588, 1963, stating: "A person may sign contract and be bound by writing though other party to agreement signifies acceptance only by acts, conduct or acquiescence" and *N.L.R.B. v. Local 825 Intern. Union of Operating Engineers, AFL-CIO*, 315 F. 2d, 695 (1964): "A written contract though signed only by one party binds the other if he accepts it and both act in reliance on it as a valid contract."

Flora did, in fact, sign. (Ex. 15)

She also accepted the provisions of the agreement, and the benefits accruing to her thereunder. (R. 23-25) She was named a defendant in this action upon the theory she claimed under this and the other documents adversely to Rulon's interests.

The human, practical reasons for her not signing immediately seem clearly that Rulon and Terry were making the arrangements for her benefit, and did not in fact, ask her to sign, (she was not even invited to the Murray meeting) and that she affirmatively believed she was part of the dissolution agreement without signing.

Q.: When did you do it? (sign) Was it after this case was filed?

A.: Oh yes, I guess it was. I don't know just when it was. I couldn't say just when it was. But I do know that . . . I do know that . . . as I remember it . . . that *before* there was any signing or anything *as far as I was concerned the gift was given to us.*" (Flora Desposition)

Mr. Roe argues that since "the agreement is not necessarily "beneficial" to her (if she really believed herself already entitled to 20% of Rulon's capital), her assent cannot be presumed" (Appellant's brief p 22) This is ridiculous. The agreement is highly beneficial to her, because it ties Rulon more closely than ever to his original commitment that Flora will receive 20% of the net assets upon dissolution. This is the husband who for years has contested money matters with her, has been substantially estranged from her and with whom she would now, *naturally*, seek the most binding arrangements. (R. 151, 300, 301, 320, 321, 323-330)

III

APPELLANT'S ARGUMENT HEREUNDER IS
ANSWERED BY RESPONDENT'S ARGUMENT ON
PAGE 18 SUPRA.

IV

NO ERROR WAS MADE BY THE COURT IN REFUSING TO GRANT APPELLANT'S MOTION TO AMEND FINDINGS, CONCLUSIONS AND JUDGMENT.

That the court found the intent of the parties as it was directed by the remand of this court has been demonstrated herein, particularly at argument I supra.

The requirement of Rule 52, Utah Rules of Civil Procedure, that the court shall find the facts specially has likewise been met as shown in the entire argument herein but particularly I supra, and as will be shown further at VI infra.

The court did not ignore the judgment of the Master's findings herein entered February 27, 1963. He took particular notice of it in the last paragraph of the judgment and therein specifically tied the two judgments together (R. 74) The receiver will have no difficulty disbursing funds upon termination of the receivership because it is, by the conclusions and judgment herein, directed to proceed in conformity with the procedures enunciated. (R. 72, 74) Dollar amounts are set forth in the judgment on the Master's findings and in the judgment herein appealed from. No difficulty will be experienced by the receiver in arriving at final figures other than possible slight dollar amounts that can be reconciled by a modicum of intelligent application.

The argument regarding Terry's salary will be answered fully at IX infra, where it will be shown that Terry's salary was an expense and not dependent upon profits as Mr. Roe seems to believe.

V

COSTS WERE PROPERLY AWARDED TO RESPONDENTS.

Rule 54(d), Utah Rules of Civil Procedure provides

that costs "shall be allowed as of course to the prevailing party, unless the Court otherwise directs." Appellant's argument that he prevailed by having a dissolution, winding up and distribution effected is specious and, under the facts, forlorn. He sought not a winding up and distribution per se, but these steps as incidental to his main goal of getting back all the money he had contributed to the venture. He sought to prevent respondents from having any distributive share. The court gave them some \$69,000 of the \$150,000 capital. The respondents are the prevailing parties on the ultimate issue litigated.

VI

THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ARE IN FACT THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE COURT AND ARE CONSISTENT WITH HIS MINUTE ENTRY AND WITH THE EVIDENCE.

Mr. Roe's assertion that counsel for defendants prepared the findings of fact herein with the implication that the court signed them with indifference, if not blindly, is unwarranted.

Judge Jeppson exhibited particular interest in this case. Prior to trial his attention was called by counsel to the requirement of this Court in its remand to determine the intent of the parties in executing the three agreements. He entered actively into the interrogation of witnesses himself during trial, as the record shows, — particularly the accounting witnesses — and in some instances the family witnesses. (R. 195, 225-231) He prohibited leading questions by counsel and voluntarily struck questions and answer in such cases where no objection was entered. (R. 336) At the conclusion of the trial he entertained lengthy argument — two and one half hours to the side.

He entered his Minute Entry of Decision on April 21, 1964, four days after the trial closed. His main topic sentence in the Minute Entry states "The *intention* of the parties to the Articles as to the meaning of the Articles requires the following:" thence setting forth the accounting entry adjustments he had decided were necessary to comport with the evidence and with law.

The wording of the Minute Entry is in traditional brevity.

The court invited counsel for respondents to prepare detailed findings and conclusions and himself set conferences with counsel to discuss the wording once it had been formulated. At least two such conferences were held with both Mr. Roe and the writer, at which both Terry and Rulon were present at least once each. The court indicated at the first conference he had given considerable study to the wording of the findings and conclusions submitted to him and desired to make several changes therein. The wording of the findings was then discussed by the court at length — indeed, even argued out among counsel and the court. The court struck some wording, revised other wording and actively indicated the final wording he would approve.

Prior to the signing of the final judgment and for about six weeks subsequent to the submission of the draft of findings to the court by the writer, both counsel worked on a dollar amount accounting which was stipulated to as representing the court's legal and accounting theory in the case and appears in the findings in No. 4.

Subsequent to signing the judgment and upon hearing Mr. Roe's Motion To Amend, the court heard another two hour argument by Mr. Roe and still refused to adopt his theory of the case.

The writer realizes that both his averments here, as well as Mr. Roe's regarding this point are outside the written record, but he submits them in good faith

in response to the unfortunate charge that the court abdicated his responsibility.

ARGUMENT ON CROSS APPEAL

VII

THE COURT'S FINDING NO. 6, THAT THE AMOUNTS PAID INTO THE PARTNERSHIP BY RULON ON AND AFTER DECEMBER 3, 1958, WERE NOT INTENDED AS CONTRIBUTIONS TO CAPITAL NOR TO BE DISTRIBUTED PROPORTIONATELY TO PARTNERS UPON DISSOLUTION, IS NOT SUPPORTED BY THE EVIDENCE AND IS ERRONEOUS AS A MATTER OF LAW.

Rulon paid \$119,224.00 into the partnership prior to December 3, 1958 and \$29,645.35 after that date. (R. 69)

Over respondent's objections that they were self-serving the Court admitted a copy of a letter Rulon claimed to have sent to Terry on Dec. 3, 1958 and another dated December 10, 1959. These are Exhibits 9 and 10 respectively. Exhibit 9 contains a list of some 29 checks by date and amount representing the payments made by Rulon into the partnership venture to that date. The letter recites that Rulon is enclosing a series of notes as per "our mutual understanding" to bear interest at 5% and to represent his payments theretofore made into the company. Exhibit 10 is another reference to the same matter.

It is obvious from the pleadings and the trial record that Appellant did not claim December 3, 1958 as a cut-off date when capital contributions changed to loans. He presented the two exhibits and the testimony regarding them as proving his basic claim that *all* monies he had advanced were by way of loan.

The writer believes that Appellant and Mr. Roe were as surprised as he that the Court deemed Dec. 8,

1958 as a date when a relationship changed. The letters themselves make no claim for December 8, as a cut-off date. Deciding that all monies paid in by Rulon prior to said date were capital contributions while all monies paid in thereafter were loans is completely out of context with the pleadings, the weight of the evidence and the contentions of the parties at all stages of litigation. "It is improper to make a finding which is not warranted by the pleadings, evidence, or stipulated facts, and *wholly at variance with the claims of either party.*" 89 C.J.S., 462. (Emphasis added)

The decision was particularly unfounded as to the evidence.

As to law it is erroneous and cannot stand: (1) It is based solely on self-serving and inadmissible evidence, and (2) it seeks to impose a contract of loan which is always bilateral, upon the parties by proof only of a unilateral intent of one party.

As to (1): The admission of this type of self-serving evidence violates the rule against hearsay.

20 Am. Jur. § 558, evidence: "Self-serving declarations: There is a general rule that self-serving declarations, defined as statements favorable to the interest of the declarant, are not admissible into evidence as *proof of the facts asserted*, whether they arose from acts and conduct or were made orally or *were reduced to writing*. The vital objection to the admission of this kind of evidence is its hearsay character. Furthermore, such declarations are untrustworthy; to permit their introduction in evidence would open the door to frauds and perjuries." (Emp. Added) The notation cites many cases, including *Dempsey v. Dobson*, 174 Pa. 122, 34 A. 459, 32 L.R.A. 764, wherein it was held: "An unanswered letter containing the writer's argumentative presentation of his view of his rights * * * is a declaration in his own behalf and inadmissible in his favor."

To the same point is the opinion of our court cited favorably in other jurisdictions that: "The letter from plaintiff to deceased is purely a self-serving document, and *aside* from the effect of the statute (dead man) or *other connecting evidence*, was properly rejected by the trial court." *Clayton v. Ogden State Bank*, 82 Utah, 564, 26 P2, 545. In *Clayton* the letter was offered to show a contract with the deceased and in addition to its being in violation of the so-called dead-man's statute, it was inadmissible as self-serving. (Emphasis added)

The cases are legion on the point. In some courts where there was proof the addressee had received the letter the tendency is to be less strict on admissibility, but, the great weight is against admissibility, and the total weight seems against admissibility where it is just a carbon of a letter alleged to have been sent with no independent proof of its having been received.

No independent evidence of receipt was adduced and Terry categorically denied receiving the two communications or either of them, and denied emphatically he had discussed loans with his father at any time. (R. 273)

This court has apparently not more recently than *Clayton*, supra, ruled on the point but a well reasoned opinion in the State of Washington is here commended. In *Conner Co. v. McCollister and Campbell Inc.* 115 P.2, 370, we read: "So, if plaintiff is to recover, it must be on the theory that there was an *express agreement* on the part of McCollister and Campbell to pay a commission. The only evidence that there was any such agreement is contained in appellant's (plaintiffs) letter of May 3rd, in which it laid claim to a commission. This letter, of course, was a self-serving declaration and was inadmissible;" (Emp. Added) citing cases and 2 JONES, COMMENTARIES ON EVIDENCE (2nd. Ed.), 1636 § 895: " * * * I would obviously be unsafe if parties to

litigation, without restriction, were allowed to support their claims by proving their own statements made out of court. Such a practice would be open to all the objections which exist against the admission of heresay in general, *and would also open the door to fraud and the fabrication of testimony.*" (Italics by the Washington Court.) The court finally ruled that even though the letter in that case had been admitted without objection, it should not have been and could possess no probative value.

But, even if exhibits 9 and 10 were admissable, taken in the light most favorable to appellant, their weight is merely added to the weight of this entire record, namely that *Rulon wanted some interest on the money he had put into the business.* No more, no less.

The courts' decision that these two letters effected a cut-off date as between capital and loan is completely unfounded. This thought didn't even enter Rulon's mind. If he ever wrote such letters he was saying he wanted interest. In court he is now asking these self-serving letter copies to create a loan situation, not *as of December 8, 1958*, but as of October 15, 1957, the date the venture was born.

In order to have made this cut-off, the trial court must have believed that December 3rd was the first time Rulon had expressed his intent to his partners that he considered his payments as loans. If this be so, and it is the only plausible conclusion, then by definition the court must have believed that all talk and expressed intent theretofore sounded in capital, distributable, not loans.

(2) That a loan is a bilateral contract arising from the mutual consent of two or more parties, and cannot be created by a unilateral intent or notion of one is so basic in law as to require no recitation of case or text law here.

The finding should be changed to show all monies

contributed by Rulon, before and after December 3, 1958 were paid in as capital and not as loans.

VIII

THE COURT'S FINDING (NO. 3) THAT INTEREST ON A PARTNER'S CAPITAL ACCOUNT NOT PAID IN A GIVEN YEAR SHOULD BE CREDITED TO A LIABILITY ACCOUNT OF THE PARTNERSHIP, PAYABLE TO THE PARTNER, AND SHOULD NOT BE CREDITED TO HIS CAPITAL ACCOUNT IS NOT SUPPORTED BY THE EVIDENCE, IS COUNTER TO GENERALLY ACCEPTED ACCOUNTING PRACTICE AND IS ERRONEOUS AS A MATTER OF LAW.

In partnership accounting practice payment to a partner of annual interest on his capital account is a standard method of distributing profits.

MASON, FUNDAMENTALS OF ACCOUNTING, 2nd Ed. p 151 reads: "Frequently, however, the method of distribution (profits) will attempt to make allowances for differences in the positions of the partners as to such matters as *Capital investment* or time contributed to partnership affairs. An "interest allowance" is often used to reflect the difference in capital investment; a designated percentage is applied to the balances of the capital accounts at the beginning of the period or to the average capital investment for the period and the results constitute a *preliminary distribution* of a portion of the net income." (Emphasis added)

Accountant Tanner was asked if this were common practice, and he answered:

"A. It is quite common; frequently a situation where partners will provide in the *distribution of profits*, one of the facts to be considered in the *distribution of*

profits in the matter of interest on capital accounts.”
(R. 219) (Emphasis Added)

* * * *

“Q. You said this type of interest (payment) is clearly a distribution of profits; is that a fair statement?

A. It is in the absence of any agreement to the contrary — it is considered a distribution of profits.”
(R. 223)

Paragraph 4 of the Articles providing for the payment of 5% interest to partners on capital accounts out of gross profits and providing that the interest should be cumulative was read to him. When asked how a partner would be paid his interest payment under such contract terms he replied:

“A. Paid directly at the time, or *credited to his capital account*, subject to drawings from time to time.”

Q. And — we are again talking about that interest being considered, accounting wise, as a distribution of profits to him; is that correct?

A. Yes. (R. 229) (Emphasis Added)

The Court challenged Mr. Tanner’s opinion that interest if not paid to the partner, should be credited to his capital account. The record from page 224 to page 231 reflects what the writer believes to be the Court’s opinion that such interest should be carried in a liability account of the partnership payable to the partner, rather than in the partner’s capital account. The Court so held in the finding, even though these pages will show the Court did not move Mr. Tanner from his opinion. We submit Mr. Tanner’s is the correct position.

The Court and Mr. Tanner were at variance as to what should be done about interest on partners capital accounts in years where the partnership made no profit from which to pay the interest. The Court argued that interest being “cumulative” would have to be carried

in a contingent liability account, but Mr. Tanner consistently argued that it should not, that since the payment of such interest was a distribution of profits, in the years no profits were made, no interest was earned by the partner. That this did not affect its cumulative aspect: In years when profits were made interest for the current as well as past years would be paid from profits. (R. 224-231)

That Mr. Tanner persuaded the Court on this point is evident from the absence of any "contingent liability" finding.

The intent of the parties regarding interest payments as written in paragraph 4 of the Articles is shown to co-incide with Mr. Tanner's delineation:

Mr. Roe asked Terry if there was any discussion with Rulon about payment of interest, at the time the partnership was being formed. Terry answered:

"I think I answered it; answer again — he said that, where he was contributing most of the capital out there — actually all of it except for a few dollars — that he would expect, upon a distribution of profits, before I would get 40%, that the *first step would be to give him a 5 per cent* — or anybody a 5% interest on the capital balance, first; and then, the remainder would be distributed 40, 40, 20 under distribution of profits (par. 6, Articles). I said it was alright with me." (R. 112-113) Rulon did not deny this talk. (Emphasis added)

Terry testified also under Mr. Roe's questioning that all interest payments to partners were in fact credited to the capital accounts. That Rulon had been paid some \$6,000 is reflected in the partnership income tax returns exhibits 4, 5, 6 & 7. (R. 137-138)

The finding and judgment should be reversed, and ordered that in the accounting, interest when not paid to a partner should be credited to his capital account;

not to a liability account of the partnership, payable to the partner.

IX

THE COURT'S FINDING (NO. 3) THAT IN THE CALCULATION OF "GROSS PROFITS" SALARIES TO PARTNERS SHOULD NOT BE DEDUCTED FROM GROSS SALES OR INCOME IS NOT SUPPORTED BY THE EVIDENCE AND IS ERRONEOUS IN LAW.

Article 5 reads: "The said Terry West shall be the manager of the partnership business and shall be entitled to draw up to but not exceeding the sum of \$500 per month for his services, all amounts so drawn *to be charged as a partnership expense and deducted before* any division of net profits is made." (Emphasis added)

This unambiguous wording clearly shows the intent of the partners in drafting the original Articles to be that Terry's salary was an expense item and not a distribution of profit to him.

No evidence was adduced to establish another interpretation.

The Court asked Mr. Tanner if in the *ordinary* partnership salary to a partner would be something deducted from income in order to determine profits. Mr. Tanner replied that *unless otherwise agreed upon* salaries to partners would be a distribution of profit rather than an expense item. (R. 247) This is the only testimony the writer can find on which the Court could have based his finding that salary to a partner should not be deducted as an expense in determining profit. It is clearly erroneous because here we have the clear wording of the parties showing they had "otherwise agreed", to use Tanner's words.

The finding should be reversed, and the accounting

ordered to reflect Terry's salary as an expense item to be subtracted from partnership receipts in calculating profits.

CONCLUSION

This Court on remand was concerned about the intent of the parties in executing contract documents measured against a background of their relationship to each other, "the purposes for which the documents were made, and principles of justice and equity relating thereto." The evidence has clearly shown a wealthy husband and father approaching an age when prudence dictated getting property out of his estate into the hands of members of his family, in this instance his wife and son. His agreement was generous, but in view of the personal relationship it is not offensive to equity to interpret his commitment as the trial court has done.

Moreover, as to Terry at least, with whom Rulon chiefly bargained, there was full contractual consideration for Rulon's promises. Terry changed his life's work, terminated graduate work in college, gave full time to management of the venture, and received only a nominal wage from the partnership for three years in exchange for his father's promise that upon a business termination he would receive 40% of his father's contributions. Terry was promised a \$500.00 salary but in fact drew less than 25% of this amount. Equity is clearly not offended here.

As to law, Rulon's commitments to Terry and Flora were plainly delineated in the agreements, which in the light of the evidence are not ambiguous. He agreed with them at paragraph 3 of the Articles that his contributions were by way of capital, and he agreed at paragraphs 12 and 6 that upon dissolution his son and wife would get 60% of the assets which he had committed, after the obligations were paid. He consented anew to this

result in the unambiguous provisions of the Dissolution Agreement at a time when, if he had had any change of heart, he would have then declared it. Lastly, he affirmed again this specific intent and consent in an agreement Supplemental to the Dissolution contract.

Appellant would not, as he says in his conclusion, like a remand to the trial Judge to “himself” prepare the findings based on his impression of the evidence for the simple reason the trial Judge would find as he already has, except perhaps to vacate his finding on the December 3rd cut off date and allocate the \$30,000.00 contributed by Rulon after that date to capital as the evidence shows it should be.

Neither the Receiver, the parties nor the Judiciary will experience any real difficulty in making dollar amount calculations and disbursements based on the present state of the record, nor as it will stand after this court orders reversal on the three points argued by respondents at VII, VIII and IX herein.

Respectfully submitted,

CHRISTIAN RONNOW

Mabey, Ronnow, Madsen & Marsden

574 East Second South

Salt Lake City, Utah

Attorneys for Defendants,

Respondents and Cross-Appellants.

APPENDIX "A"

ARTICLES OF PARTNERSHIP

This AGREEMENT, made and entered into as of the 15th day of October, A.D. 1957, by RULON R. WEST, TERRY R. WEST and FLORA E. WEST,—WITNESSETH:

That the above named parties have associated themselves as partners under the firm name of EL RANCHO ENTERPRISES for the purposes and on the conditions herein recited.:

1. The partnership business shall be that of operating motels, auto camps, trailer camps, tourist camps and allied businesses and shall be carried on at 5203 South State Street, in Murray City, Salt Lake County, State of Utah, or at such other place or places as the partners may from time to time agree upon.

2. Said partnership shall continue until dissolved by the mutual consent of the partners or terminated by operation of law.

3. The capital of the partnership shall consist of the following property:

(a) A real estate contract covering the purchase by the partnership and the sale by Reed P. Mortensen and Ann S. Mortensen, his wife, of the Murray El Rancho Motel, including approximately four (4) acres of real property situated at 5203 South State Street, in Murray City, Salt Lake County, State of Utah, including the personal property located in the sixteen motel units situated upon said real property upon which contract the said Rulon R. West has paid the sum of \$47,500.00 and the sum of \$1,000.00 cash in bank account also furnished by the said Rulon R. West.

(b) Any further sums which any partner shall with the consent of the other from time to time contribute for capital purposes which shall be credited to his capital account.

4. Interest at the rate of five per cent (5%) per annum shall be paid to each partner on the capital for the time being standing to his credit out of the gross profits of the business, and such interest shall be cumulative, so that any deficiency in one year shall be made up out of the gross profits of any succeeding year or years.

5. The said Terry R. West shall be the manager of the partnership business and shall be entitled to draw up to but not exceeding the sum of \$500.00 per month for his services, all amounts so drawn to be charged as a partnership expense and deducted before any division of net profits is made.

6. The net profits of the business shall be divided between the partners in the following proportions: Rulon R. West, forty per cent (40%); Terry R. West, forty per cent (40%) and Flora E. West twenty per cent (20%); and the partners shall in like proportion bear all losses, including loss of capital.

7. The usual books of account shall be kept properly posted up, and shall not be removed from the place of business without the consent of all partners. Each partner shall have free access to them at all times, and shall be at liberty to make such extracts therefrom as he may think fit.

8. On the 15th day of October, A.D. 1958 and on the 15th day of October in each succeeding year during the continuation of the partnership, an account shall be taken of all the capital, assets and liabilities for the time being of the partnership, and a balance sheet and profit and loss account making due allowance for depreciation and for recouping any lost capital shall be prepared and a copy thereof furnished to each partner. t any time agreed upon by all of the partners, after the preparation of the said balance sheet and profit and loss account, the net profits, if any, shown by such account may be divided in the proportions set forth in paragraph 6 above hereof.

9. The partners agree: (a) That Terry R. West shall diligently attend to the business and devote such portion of his time thereto as is necessary to properly and economically operate said business. (b) each partner shall punctually pay his separate debts and indemnify the other partners and the asset of the partnership against the same and all expenses on account thereof; (c) each partner shall forthwith pay all moneys, checks, and negotiable instruments received by him on account of the firm into the bank or banks selected by the partners to the firm account; (d) each partner shall be just and faithful to the other partners, and at all times give to such other partners full information and truthful explanations of all matters relating to the affairs of the partnership, and afford every assistance in his power in carrying on the business for their mutual advantage.

10. No partner shall without the consent of the others (a) Lend any of the moneys or deliver upon credit any of the goods of the firm to any person or persons whom the other partners shall have previously in writing forbidden him to trust; (b) Give any security or promise for the payment of money on account of the firm unless in the ordinary course of business; (c) enter into any bond, or become bail, indorser or surety for any person, or knowingly cause or suffer to be done anything whereby the partnership property may be seized, attached, or taken on execution or endangered; (d) assign, mortgage, or charge hi share in the assets or profits of teh partnership, or any part of such shae; (e) draw, accept, or indorse any bill of exchange or promissory note on account of the firm; (f) sign any check on behalf of the firm for a sum exceeding \$500.00; (g) buy, order, or contract for any goods or property exceeding the value of \$500.00 on behalf of the partnership; (h) compromise, or compound, or, except upon payment in full, release or discharge any debt due to the partnership.

11. If any partner shall die during the continuance of the said partnership, the survivors or survivor may purchase the share of the deceased partner in the capital and assets of the business on the following terms: (a) The purchase price shall be the amount at which such share shall stand in the last balance sheet which shall have been prepared prior to the death of said partner plus ten per cent (10%) thereof; (b) such purchase of any deceased partner's interest, if made by the surviving partners or partner, shall be

effected within one year from the date of death, and in addition to the purchase money, the surviving partners or partner shall pay a sum equal to interest on the amount of said purchase price computed from the date of the then last preceding annual account up to the date of death of the deceased at the rate of 5% per annum in lieu both of interest on capital, including any arrears of such interest for preceeding years, and profits during such period, credit being given for any sums drawn out by the deceased partner during the then current year.

12. If the surviving partners or partner shall not exercise the option of purchasing the share and interest of the deceased partner, or if the partnership shall be determined or expire during the joint lives of the partners, then the partnership shall be wound up, and the assets distributed in the proportions set forth in paragraph 6 above hereof.

13. All rents, taxes, cost of repairs, alterations, or improvements, insurance and all other costs, charges and expenses which shall be incurred in or about the business or in any wise relating thereto, and all losses which shall happen in respect to the business, shall be paid out of the income or capital of the partnership, and in case of any deficiency thereof by the partners in the proportions set forth in paragraph 6 above hereof.

14. Notwithstanding the death of any partner, the partnership between the surviving partners shall continue under these articles of partnership.

15. At the end or sooner determination of the partnership the partners, each to the other, shall make a true, just and final account of all things relating to their said business, and in all things adjust the same; and all stock, as well as the gains and increases thereof, including all real and peronal property, which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise shall be divided between them in the proportions set forth in paragraph 6 above hereof.

16. Any decisions and major arrangements required or necessary in the operation of said business which are not in the ordinary course of operations shall only be made and effected by and with the unanimous agreement and consent of all the partners.

IN WITNESS WHEREOF, the partners above named have hereunto set their hands and seals the day and year first above written.

/s/ Rulon R. West

/s/ Terry R. West

/s/ Flora West

COUNTY OF SALT LAKE }
STATE OF UTAH } ss

On the 1st day of October, A.D. 1957 personally appeared before me the said Rulon R. West, Terry R. West and Flora E. West, signers of the above instrument, who duly severally acknowl-

edged to me that they executed the same.

(Seal)

My Commission Expires:

Sept. 10, 1959

Paul S. Roberts

Notary Public

Residing at Murray City, Utah

APPENDIX "B"

AGREEMENT made this.....day of....., 1960,
by and between RULON R. WEST, FLORA E. WEST, and
TERRY R. WEST.

WHEREAS, the parties hereto are partners under those certain Articles of Partnership dated the 15th day of October, 1957, and

WHEREAS, said partnership has been and is hereby declared to be dissolved, and

WHEREAS, the parties hereto desire to make an agreement with respect to certain matters pertaining to the winding up of the partnership affairs,

NOW, THEREFORE, the parties hereto agree that Rulon R. West and Terry R. West shall have authority to wind up the partnership affairs, shall concur in all matters pertaining to the winding up of the partnership affairs, and shall proceed to wind up the partnership affairs in accordance with the following provisions:

1. Elements and Completion of Winding Up. The winding up of the partnership affairs shall consist of selling all real and personal property of the partnership, paying all partnership liabilities (including liabilities to partners), and distributing the net assets of the partnership in cash to the parties hereto in the following proportions:

Rulon R. West	40%
Terry R. West	40%
Flora E. West	20%

When all the net assets of the partnership have been distributed in cash in accordance with the preceding sentence, the winding up of the partnership affairs shall be completed.

2. Operation of Partnership Business Pending Sale. Each business of the partnership shall be operated until such time as such business is sold. Rulon R. West and Terry R. West and Flora West shall concur in all management decisions pertaining to the operation of said businesses. Terry R. West shall diligently attend to the business in the daily operation of the businesses, which operation shall include the renting of accommodations, the maintenance of all partnership property, including the interior and exterior of all buildings, rental units, signs, fences, sidewalks, driveways and other real and personal property of the partnership, in good repair, working order and appearance, and the maintenance of the motel and trailer camp premises, including the lawn, shrubbery and trees, in a state of good, neat and attractive

appearance, having such assistance as is reasonably necessary to accomplish same. Terry R. West shall receive reasonable and periodic compensation for his services pertaining to the daily operation of the businesses, which compensation shall be on the same basis as heretofore taken and no additional compensation unless said compensation is agreed upon from [time] to time by all of the parties hereto.

3. Receipts and Disbursements. All receipts obtained from operations of the motel, trailer sales, and trailer park shall be deposited in the usual account and checked out only for payment of employees salaries, utilities, and ordinary expenses, including expenses to Terry R. West as above specified. All receipts involving sales of capital assets or realization from trailer sales where equities aside from the obligation and any other capital assets sales shall be placed in a special bank account, from which no proceeds can be taken except over the signatures of Terry R. West and Rulon R. West, or instead of Rulon R. West, Leroy E. Holmes.

4. Sale of Partnership Property. All partnership property, including the good will, shall be sold as soon and for a price as near to the fair market value thereof as is reasonably possible under the circumstances. Any offer for the purchase of any part or all of the partnership property which is made by a reasonably dependable and solvent offeror, on reasonable terms and for a reasonable amount shall be accepted. No property shall be accepted in trade as either part or full payment for the purchase of part or all of the partnership property unless such property can be expected to be sold with reasonable promptness at a price equal or in excess of the value for which it was accepted in trade. The sale of the partnership property shall be advertised in a reasonable manner, consistent with the desires to make a sale with reasonable promptness and to attract the attention of as many as possible of those persons who would and could qualify as purchasers.

5. Distribution of Partnership Assets. The parties hereto shall determine from time to time during the period of the winding up of the partnership affairs the amount of the partnership assets which may be distributed to the parties hereto in cash in the proportions specified in Paragraph 1 hereof, taking into consideration the absolute and contingent liabilities of the partnership.

6. Statements. On or before the 3rd day of April, 1960, and each six (6) months thereafter until the winding up of the partnership affairs is completed, Terry R. West shall prepare and shall distribute to each of the parties hereto an accurate, detailed and complete statement of all partnership assets, liabilities, receipts and disbursements. The partnership books shall be kept current by Terry R. West. Each of the parties shall have access to the partnership books at any reasonable time.

7. Authority of Leroy E. Holmes. At all times during which Rulon R. West is away from Salt Lake City, Utah, during the

period of the winding up of the partnership affairs, Leroy E. Holmes, of 1381 Brookshire Drive, Salt Lake City, Utah, shall, so long as he is in possession of a written and effective power of attorney from Rulon R. West, have the right to act for and in behalf of Rulon R. West in all matters pertaining to the winding up of the partnership affairs, and shall have the rights, powers and privileges which Rulon R. West has under this agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names the day and year above written.

/s/ Rulon R. West

/s/ Flora West

/s/ Terry R. West

COUNTY OF SALT LAKE }
STATE OF UTAH } ss

On the 31st day of March, 1960, personally appeared before me RULON R. WEST, one of the signers of the within and foregoing instrument, who duly acknowledged to me that he executed the same.

Jane Roberts

Notary Public

Residing at Salt Lake County, Utah

My commission expires:
April 9, 1961

APPENDIX "C"

AGREEMENT

This supplemental agreement to the dissolution agreement made and entered into the 2nd day of April, 1960, wherein it is mutually agreed as follows:

1. The contribution made by Rulon R. West with respect to the 40 per cent interest acquired by Terry R. West was and is a gift from Rulon R. West to Terry R. West, and Rulon R. West does agree to file a gift tax return in connection therewith so stating.

2. Should the motel or the businesses be sold at a loss wherein the net recoveries are less than the sums due thereon, all loss will be absorbed and paid by Rulon R. West.

3. The undersigned, Rulon R. West, further certifies that the interest in the El Rancho Enterprises was not only a gift to Terry R. West, but also to Flora West and their interests were acquired by virtue of the gift.

Dated at Salt Lake City, Utah, this 2nd day of April, 1960.

/s/ Rulon R. West

/s/ Terry R. West