1968

Jerome B. Guinand v. Paul T. Walton and Thomas F. Kearns dba, Walton-Kearns : Appellants' Brief

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

JEROME B. GUINAND,
Plaintiff-Respondent,

—vs.—

PAUL T. WALTON and THOMAS F. KEARNS dba WALTON-KEARNS,
Defendants-Appellants.

Case No. 11153

APPELLANTS' BRIEF

Appeal from the Judgment of the Third District Court
In and for Salt Lake County, Utah
The Honorable Stewart M. Hanson, Judge

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APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

Respondent initiated this action claiming by a written instrument dated January 2, 1962 an interest in oil and gas leases and other property owned by Walton-Kearns, a partnership, and for an accounting.

DISPOSITION IN LOWER COURT

The action was tried to the court without a jury. The writing sued upon by plaintiff was held unenforceable because of its being vague, not sufficiently definite and not supported by any consideration (R. 46). Plaintiff was granted a 3% sales commission and an accounting. On a theory not disclosed by the pleadings or pretrial order and independent of the writing sued upon, plaintiff was declared to be the owner of 10% of the interest held by the partnership in all leases and mineral interests as of May 31, 1965, the date upon which he terminated his

employment with Walton-Kearns. An accounting was ordered with reference to such holdings and for such of the interests as might have been sold since the last mentioned date. Appellant's motion for a new trial was overruled and denied on December 27, 1967 (R. 61-66) and this appeal (R. 67-68) followed.

RELIEF SOUGHT ON APPEAL

Appellants, hereinafter referred to as defendants, do not question the ruling to the effect that the instrument sued upon by the plaintiff was a nullity and not supported by a consideration, nor do they complain of the commissions awarded plaintiff. In the context of the pleadings, the pretrial order and the evidence before the court at the time of the last Memorandum Decision (R. 52), the judgment giving plaintiff a 10% interest in oil and gas leaseholds was a gratuity and not within the issues. This court should modify the judgment accordingly. In the alternative the cause should be remanded for a new trial with defendants given the opportunity to recast their pleadings in the defense of the new theory asserted by plaintiff.

STATEMENT OF FACTS

Walton-Kearns, a co-partnership, consisting of Paul T. Walton and Thomas F. Kearns, the latter since deceased, was in existence as of November 1, 1955, engaged in the business of acquiring and exploiting lands and leaseholds for oil, gas and other hydrocarbons and in all matters incidental thereto (R. 12).

Jerome B. Guinand, plaintiff-respondent, was employed by the partnership at a salary of $600.00 a month from November 1, 1955 through December 31, 1957; $660.00 a month from January 1, 1958 through February 1959 and $735.00 a month from March 1, 1959 until May 31, 1965 (R. 13-14). Without obligation so to do (R. 199-200), Guinand continued in the employment of the partnership as a landman until his voluntary termination on May 31, 1965 (R. 109-110)). In 1957 in a conversation with Paul T. Walton, it was understood that Guinand would receive some additional compensation by way of a 3% sales commission on leases sold by him from April 9 of that year (R. 116-117).

The instrument dated January 2, 1962 attached to plaintiff's original complaint (R. 3) continued to be the crux of plaintiff's action and was adopted by reference by paragraph 5 of the amended complaint (R. 9), the plaintiff alleging that by the instrument he "became the owner of an undivided 10% interest in the partnership, subject to plaintiff's proportionate share of the partnership indebtedness, the value of said interest to be determined, both as to all assets and liabilities, as of the date of termination of plaintiff's employment with the partnership."

The writing of January 2, 1962, was admittedly signed by the defendants but they deny that it was bargained for or supported by any consideration or that it was executed and delivered as an inducement to plaintiff to remain in the employment of the partnership or for past

services allegedly rendered to the partnership by the plaintiff. It is contended that the writing of January 2, 1962 is so vague as to be unenforceable; that it lacks consideration and that it is nothing more than an agreement to agree in the future (R. 40-44).

Plaintiff did not contribute any of the capital to Walton-Kearns and he could have quit at any time; he continued to work for Walton-Kearns after January 2, 1962 but he "didn't have to" (R. 199-200). He was on the payroll and reported his income on the normal W-2 form (Exhibit P-8). He never participated in partnership affairs; was never listed as a partner of Walton-Kearns and had no voice or responsibility in the management of the affairs of the partnership (R. 184).

The writing of January 2, 1962 (Exhibit P-3) was handed to plaintiff in the office of Walton- Kearns (R. 183) and was preceded by Exhibit D-4. This Exhibit shows interlineations crossed out, written over and substituted for language contained in what is marked as Exhibit B (R. 31) attached to defendants' motion for summary judgment (R. 27-32). The interlineations and all of the strikeouts and crossovers on Exhibit D-4 are in the handwriting of plaintiff (R. 180). By comparison, the writing dated January 2, 1962 duplicated verbatim Exhibit D-4, giving effect to the alterations made by plaintiff. The evolution of the January 2, 1962 writing is clearly and without dispute pointed out by the three exhibits attached to defendants' motion for summary judgment (R. 30-32).

The instrument as originally drafted (R. 31) contemplated two important aspects: (1) that the interest to be acquired, whatever it might be, was geared to a time for so long as Guinand, the plaintiff, might devote his undivided time and energies to the business of the partnership; (2) that upon termination of the employment for any cause whatsoever, the interest would be determined as of said time and such interests as may have theretofore been vested would become Guinand's separate property; and (3) that the interest would be subject to the repayment of all capital contributions to Messrs. Walton and Kearns.

The instrument as interlined by Guinand, both by way of addition and subtraction, takes out the requirement of repayment of all capital contributions made by Messrs. Walton and Kearns, takes out the words "upon dissolution" and the requirement that plaintiff devote his undivided time. It is then provided that when Guinand terminates his employment, his interest "in the partnership business will be determined and discharged as of said time without resulting in a dissolution of the partnership."

The writing of January 2, 1962 (Exhibit P-3) purports to confirm the ownership of an *undivided* 10% interest in the "partnership" to include and not to be in addition to the various interests from time to time theretofore acquired by plaintiff. The impossibility of plaintiff's position in claiming to be a tenant in common with respect to an undivided 10% interest in the proper-

ties held by the partnership and yet maintaining the integrity of the language "without a disssolution of the partnership" is apparent. It was early recognized by the defendants at least, that the agreement as re-drafted by Guinand "did not mean anything" and that there would have to be a final agreement when and if Guinand ever terminated his employment (R. 164).

The evidence is in conflict as to the time, place and circumstance of the interlineations on Exhibit D-4. Defendant Walton testified that Guinand made the interlineations at the latter's desk in the office of Walton-Kearns (R. 161-164). Guinand testified that certain of the interlineations were made at the dictation of counsel and that all of the interlineations were made in counsel's office (R. 180-182). Uncontradicted testimony is to the effect that Guinand wanted to be a partner, defendant Walton wanted Guinand to be a partner but that Mr. Kearns did not agree. Mr. Kearns did not want to open up the partnership to another person (R. 156).

The findings, etc. and judgment appealed from retain the concept that the writing dated January 2, 1962 "is so vague as to be [unenforceable] and is not sufficiently definite as to be construed from its four corners" (R. 54) and that the same "is not supported by consideration" (R. 54). The trial court misconceived the parol evidence rule and this resulted in the gratuities contained in the judgment appealed from.

ARGUMENT

POINT I.

THE SUBSTANTIVE ASPECT OF THE PAROL EVIDENCE RULE HAS BEEN MISAPPLIED.

We are plagiarizing on *McCormick on Evidence*, Sections 213-220 on this subject.

When the trial court reopened the instant case for further evidence adduced at the September 16th hearing it did so over the objections to the effect that no extrinsic evidence was admissible with reference to the January 2, 1962 instrument (R. 150). *McCormick on Evidence* in Section 217 calls attention to the rule of Integration which makes the written instrument the sole repository of the legal transaction in the sense that the transaction must be derived from the written terms alone. In the instant matter the written transaction was ignored as witnessed by the fact that the trial court adhered to its former ruling that the writing was incapable of interpretation and was without consideration. Out of the belly of the Trojan Horse came something entirely unexpected and the substantive aspect of the parol evidence rule was entirely ignored. If we do not oversimplify the problem, the question is whether the parties intended to have the terms of their agreement embraced in the written instrument. If the writing contains the entire agreement and was intended as such, then the process of interpretation is one for the court and not for the trier of the fact:

> "The distinction between such interpretative evidence even where it consists of expressions of

> the parties to the instrument, and evidence of such expressions when offered to be used as a part of the contract, deed or other transaction, and hence prohibited by the Parol Evidence Rule, is clear. The one type of evidence concedes the supremacy of the writing and merely seeks to illuminate its meaning. The other seeks to displace, or annex itself to, the writing." (*McCormick on Evidence,* Section 217).

In the instant matter the fact that the trial court adhered to its previous memoranda and found that the January 2, 1962 writing was incapable of interpretation and lacked consideration, makes it crystal clear that the extrinsic evidence admitted and held to be persuasive was in reality of the Trojan Horse character because it neither added to nor detracted from the agreement sued upon. It interjected, that is the extrinsic evidence, a new theory and claim. *McCormick on Evidence*, Section 220, states in part:

> "The traditional view is that such declarations should be rejected because they would be likely to be used not merely for the legitimate purpose of ascertaining the meaning of the final writing, but rather would be used in the substitution for the writing. Thus, to supersede the writing by the outside expressions would violate the spirit of the Parol Evidence Rule, and would offend the policy of the statutes requiring wills and conveyances to be in writing."

In the very recent case of *Oil Shale Corporation v. Larson,* 438 P.2d 540 (Utah 1968) this court dealt with the subject of the parol evidence rule as applied to an agreement that was "deficient in terms that would render

it enforceable." Without the citation of authority this court found that "an agreement to agree" was unenforceable. This court also held, as we read the opinion, that the contract was unenforceable "because of lack of specificity of terms" and that the parol evidence rule did not permit consideration of extrinsic evidence.

POINT II.

THE JUDGMENT IS AT VARIANCE WITH THE PLEADINGS AND THE PRETRIAL ORDER.

The judgment appealed from awards plaintiff a 10% interest in all the leases and mineral interests held by Walton-Kearns as of May 31, 1965 and an accounting is ordered to determine the amount owing by defendants to plaintiff on the sale of leases or mineral interests held by the partnership as of the date last mentioned. The accounting is to be based upon the gross sales price. The plaintiff is awarded an undivided 10% interest in all leases and mineral interests held by the partnership as of May 31, 1965 and not sold as of the date of the judgment regardless of whether the lease or mineral interest as held reflects any ownership by plaintiff (R. 58).

Paragraph 6 of the findings indicates that the theory of judgment in favor of the plaintiff is taken from "the testimony" of plaintiff and of defendant Walton and which testimony is characterized as *revealing* that plaintiff from January 2, 1962 and thereafter until he terminated his employment "was the owner of a ten percent interest of the interest held by the partnership in all leases and mineral interests whether the same reflected

any ownership by the plaintiff or were held in the name or names of the plaintiff or others." (R. 54).

The foregoing is contrasted with paragraph 9 of the amended complaint and particularly the portion thereof where plaintiff relates the acccounting to assets held by the partnership on January 2, 1962, "or the cash or replacement assets purchased or received from the sale or trade of assets held by it on January 2, 1962, the relationship of the parties since January 2, 1962, being that of tenants in common in said assets. The interest claimed by plaintiff vested in him as to those properties held by the partnership as of January 2, 1962, on that date, and as to those properties acquired after said date, on the date of acquisition by the partnership" (R. 9-10).

Paragraph 5 of the amended complaint predicates the relief demanded upon the January 2, 1962 writing (R. 9). Also, it was stipulated in the pretrial conference and the pretrial order so indicates that the plaintiff's action was based upon the writing dated January 2, 1962 (R. 40-44). No theory of a contract separate and distinct from the writing was presented or reserved in the pretrial order. The issues of law specified in the pretrial order relate solely to the legal consequence and effect of the January 2, 1962 writing (R. 41). As is customary and appropriate, and in accordance with Rule 16, *Utah Rules of Civil Procedure*, the final sentence of the pretrial order specifies:

> It is ordered that this pretrial order may be modified *at the trial* of the action *or prior thereto* to

> prevent manifest injustice and that this pretrial order, as subsequently modified, if such modification is made, shall supersede the pleadings herein and govern the trial of this action (R. 44). (Emphasis added).

It has already been pointed out that the court specifically held the January 2, 1962 writing to be so vague as to be unenforceable and that it was not supported by consideration (R. 54). Therefore, plaintiff bases whatever he thinks he is entitled to not upon a writing but upon his testimony and the testimony of Paul T. Walton. The finding (No. 6, R. 54) is rather skimpy so far as a factual statement is concerned, but we must assume that it is intended thereby to set forth a factual basis for recovery entirely different from the theory with respect to the January 2, 1962 writing propounded by the plaintiff in his pleadings and made a part of the pretrial order.

In the instant case there has been the widest possible deviation from the pretrial order, the pleadings supplanted thereby, and the judgment. The new and different theory was subsequent to the actual trial of the cause and there was no effort to amend either the pleadings or the pretrial order.

In *Reliance National Life Insurance Company v. Hansen*, 15 Utah 2d 400, 393 P.2d 793 (1964) it was held that the plaintiff could not interject "at the eleventh hour" findings as to deceit, an issue not covered by the pretrial order. The court stated:

> "We think the issue was iced in the pretrial order, being 'termination for cause,' not rescission for fraud. Although the September findings talked about fraud, it based its judgment on termination 'for cause,' a conclusion it consistently had espoused in several previous judgments and amendments thereto."

In *Rumsey v. Salt Lake City*, 16 Utah 2d 310, 410 P.2d 205 (1965) it was held that the trial court cannot deviate from the pretrial order after the trial of the action and that under Rule 16, *Utah Rules of Civil Procedure*, the pretrial order cannot be modified at the trial except to prevent manifest injustice.

In *Citizens Casualty Company of New York v. Hackett*, 17 Utah 2d 304, 410 P.2d 767, the ruling of the trial court refusing issues not covered by the pretrial order was sustained obviously on the point that Rule 16 has a definite meaning and purpose. The purpose of the definitive pretrial order is stated in *United States of America v. An Article ofDrug, etc., Acnotabs*, 207 F. Supp. 758 (D.N.J. 1962) as follows:

> "The purpose of a definitive pretrial order is to make specific the legal theories on which each party is proceeding and to crystallize and formulate the issues to be tried. * * * There was no application by claimant to amend the pretrial order at any time prior to or during the trial of the case, and, at this time, the right to inject a new issue must be denied."

To the same effect is *Wiggins v. City of Philadelphia*, 331 F.2d 521 (3d Cir. 1964) where the court stated:

> "To have permitted him to have asserted a new position by claiming deficiency in design would impair the efficacy of the pretrial conference procedure and would have been manifestly unfair to the City. The trial judge ruled correctly in excluding evidence based on such a theory."

POINT III.

THE MINERAL INTERESTS AND LEASEHOLDS AWARDED TO PLAINTIFF REQUIRED A WRITING UNDER THE STATUTE OF FRAUDS.

Throughout the proceedings the terms "leasehold interests," "overrides," "reversionary interests," "working interests" and "mineral interests" are used by the parties as descriptive of various types of interests premised upon the usual oil and gas lease. In *Judy v. Lentz*, 149 N.W. 2d 478 (Mich. 1967) it was held that an oral contract for obtaining certain oil and gas leases for defendants was void under the Statute of Frauds, the agreement not being in writing.

The Michigan statute cited by the court in *Judy v. Lentz*, supra, is comparable to Section 25-5-4, *Utah Code Annotated* (1953), which provides in part as follows:

> "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:
>
> * * *
>
> (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation."

The case of *Kesler v. Casebolt,* 278 S.W. 2d 325 (Tex. 1954) holding that a brokerage contract in obtaining and buying designated oil and gas leases was required to be in writing under the Statute of Frauds is annotated in 4 *Oil and Gas Reporter,* 1381. The annotator stated:

> "As held in the principal case, Article 3995a, Texas Rev. Civ. Statutes, which was promulgated in 1939, requires that a brokerage contract involving a mineral or oil and gas leasehold interest providing for a commission must be in writing as a prerequisite to enforcing the claim for a commission. This is but an extension of the Statute of Frauds to oil and gas transactions. The defense that such an instrument is not in writing is an affirmative defense; hence, the burden of asserting the defense is on the defendant. Conversely, if the defense is not asserted by the defendant, the fact that the contract for a commission is oral will not preclude recovery thereof."

In *Enyeart v. Board of Supervisors,* 427 P.2d 509 (Calif. 1967) it was held that the word "land" included leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth and that such was consistent in terms of the common law classification in California and the applicable statutory materials. There is an extensive annotation following the *Enyeart* case in 26 *Oil and Gas Reporter,* 625, on the nature of rights created under oil and gas leases. The annotator calls attention to the fact that in California, as in other jurisdictions, there was a period of uncertainty as to the nature of oil and gas inter-

ests in the development of oil and gas jurisprudence. At one stage in the legal history of oil and gas leases, separate interests in oil and gas were treated as personalty rather than realty. At present, however, interests in oil and gas are usually treated as interests in real property.

Williams and Meyers, Oil and Gas Law, Volume 1, Section 214, lists the various classifications of interests in oil and gas by states. The 1967 Cumulative Supplement cites *Chase v. Morgan,* 9 Utah 2d 125, 339 P.2d 1019 (1959) as classifying oil and gas leases as real estate within the meaning of the statute governing licensing of real estate brokers. In *Chase v. Morgan,* the court stated:

> "Undetached minerals are part of the earth and therefore realty."

Section 25-5-1, *Utah Code Annotated* (1953) relating to the Statute of Frauds as pertains to an estate or interest in real property provides:

> "No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.

The applicable Statute of Frauds can be pleaded defensively to the claim that the plaintiff has an interest created by some oral contract with the defendant Walton.

These and other matters were pointed out by defendants' motion for new trial or in the alternative for amendments of judgment and other relief (R. 61-65) which motion was overruled and denied (R. 66).

POINT IV.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUDGMENT IN FAVOR OF PLAINTIFF.

Paragraph 7 of the findings (R. 54) is to the effect that prior to January 2, 1962 the plaintiff had a 5% interest in the partnership of Walton-Kearns. This finding is not supported by the evidence. Defendants' answer to the amended complaint called attention to an undivided 3/100ths working interest in favor of plaintiff which was confirmed in writing under date of November 1, 1955 (R. 12-13). Defendants alleged on information and belief that plaintiff had succeeded to a 2% similar interest originally in favor of Homer H. Hagius. These interests are characterized as "carried working" interests. At the hearing in September, 1967, plaintiff disclaimed any writing covering the alleged 5% interest and disclaimed any assignment from Hagius (R. 192)). The claim of a 5% interest is therefore based upon "conversation" with defendant Walton (R. 192) and this we contend to be wholly insufficient.

Finding No. 6 (R. 54) finds plaintiff to be the owner "of a ten per cent interest of the interest held by the partnership" in all leases and mineral interests and that such is based upon the testimony of the plaintiff and of the defendant Walton. Finding No. 6 states that

the testimony "reveals" the interest now claimed by plaintiff and which is carried forward into the judgment. The word "reveals" is a subtle expression and gives little assistance as a determination of *fact*. In any event, the revelation must concern itself with a contractual situation separate and apart from the January 2, 1962 writing because in Findings 4 and 5 the court found that writing to be unenforceable.

Whatever the scrivener had in mind as having been "revealed" by the testimony at the September 1967 hearing, the fact of the matter is that the testimony was directed solely to the intention of the parties as related to the January 2, 1962 writing, and never in express terms to a search for a separate verbal promise. Counsel referring to Exhibit D-4 put answers in the mouth of defendant Walton:

> "Q. Your testimony today is that after this meeting in Mr. Gustin's office Mr. Guinand brought 'Exhibit D-4,' the one you have in your hand, back to his office, made the changes, and brought it to you and said, 'This is what I want.' Is that your testimony?
>
> A. That is generally it, yes.
>
> Q. You said it is all right with you and go down and talk it over with Harley?
>
> A. I said, 'You will have to clear it with Harley.' I didn't say it was all right with me. I said, 'If it is all right with Harley, it is all right with me.'" (R. 162).

Not only does the concept of a different contract offend against the parol evidence rule but the so-called

different contract is as vulnerable to the defense of no consideration as is the writing of January 2, 1962. The findings do not attempt to support the so-called 10 % agreement that is said to have been "revealed" by the "testimony" of plaintiff and defendant Walton by a stated consideration and there is none shown by the record.

The concept of *tenancy in partnership* precludes an assignment in specific partnership property except in connection with the assignment of rights of all the parties in the same property. This is reiterated in the Uniform Partnership Act, Section 48-1-22 (2) (b), *Utah Code Annotated* (1953). The philosophy of the rule is stated in 1 *Rowley on Partnership* (2d Ed.) at page 561 to the effect that all a partner has, subject to his power of individual disposition, and all that is subject to the claims of his separate creditors, is his interest, not in specific partnership property, but in the partnership itself. The partnership property is kept intact for partnership purposes and creditors. The statutory incidents of the partnership co-tenancy are attached thereto for that purpose, "which will be *pro tanto* thwarted as effect is given to an attempted disposition of a partner's interest in specific partnership property. The aim of the statute is to prevent such an assignment. The only way, therefore, to apply it according to its plain purpose is to nullify all attempts at such assignments."

Rowley on Partnership, supra, in the same section and at the same page in making the positive statement

that no partner has the right or power to dispose of or to apply partnership property for his own use or individual benefit without the consent of his co-partners makes the following statement:

> "He does not have the power of disposal; he has no proportionate share since his interest in the partnership is his share of the profits and surplus, and the nature of a partner's lien which requires that partnership property be finally applied in discharge of the debts and liabilities of the common business prevents it. This applies also to use of the firm funds and to payments of money belonging to it. 'The title to partnership property is not in the individual members of the firm so that either may assign or transfer to another an undivided share in any specific articles, but it is in the firm as an entirety, subject to the right of the partners to have it applied to the payment of the debts of the firm and the equities of the partners.' No single partner can transfer an undivided interest in any particular piece of firm property."

The tenancy in partnership doctrine is especially applicable to Thomas F. Kearns not only during his lifetime but also after his death. In the instant record the only time that Mr. Kearns consented to anything and the only evidence of consent on his part is the writing of January 2, 1962. The writing was cast aside by the trial court and the judgment now in favor of the plaintiff is based on the testimony of defendant Walton and of the plaintiff. Nowhere in the record does defendant Walton purport to speak for his partner Thomas F. Kearns whose death was noted by the pretrial order and the

Executor, Walker Bank & Trust Company, substituted in his stead (R. 43-44.) Plaintiff is confronted with the additional burden of showing specific authority on the part of Paul T. Walton to commit the partnership interest, which authority would have to come from the co-partner Thomas F. Kearns. Section 48-1-7, *Utah Code Annotated* (1953) provides in part as follows:

> "Where title to real property is in the name of one or more but not all of the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property, if the partners' act does not bind the partnership under the provisions of Section 48-1-6(1) ***."

Section 48-1-6(1) referred to above provides:

> "(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority."

It was established at an early date in this jurisdiction that a plaintiff whose action is based upon a transaction with an individual partner, which transaction is not "carrying on in the usual way the business of the partnership" has the burden of showing the partner with whom

he has transacted business has specific authority to act for the other partners. In *Peterson v. Armstrong*, 24 Utah 96, 66 P. 767 (1901), the court stated:

> "The law is well settled that a partner without special authority, has no power to bind the firm in any transaction which is without the ordinary or apparent scope of the partnership business. Of this the plaintiff was bound to take notice, and, having entered into a transaction with one partner, which was not, as clearly appears from both the pleadings and proof, within such scope, and having brought this suit to establish liability on the part of the other partners, the burden was upon her to show either that the contracting partner had special authority, or that the transaction was afterwards ratified by the other partners whom she seeks to hold liable. We are of the opinion that the proof disclosed by the record is wholly inadequate to show either special authority or ratification."

See *Cavanaugh v. Salisbury*, 63 P. 39 (Utah 1900); *Guthiel v. Gilmer*, 63 P. 817 (Utah 1901). Section 48-1-6 (2), *Utah Code Annotated* (1953) similarly provides:

> "(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership, unless authorized by the other partners."

The findings, and particularly Finding No. 6, (R 54.) not only fail to show that the necessary authority had been given by the co-partner Thomas F. Kearns but inject the element of utter confusion in the statement that plaintiff was "from at least January 2, 1962 * * * the owner

of a ten per cent interest of the interest held by the partnership in all leases and mineral interests whether the same reflected any ownership by the plaintiff or were held in the name or names of the plaintiff or others." The judgment (R. 58) clouds interests held in the name of Thomas F. Kearns and others not parties to the action by paragraph 3 and the language "regardless of whether the lease or mineral interest as held reflects any ownership by plaintiff."

Exhibits P-5, P-6 and P-7 are examples of the resulting confusion of title, particularly in the absence of some writing or other adequate authority from Thomas F. Kearns. Plaintiff has failed to carry the burden of proof necessary to bind the partnership to the purported oral conveyance said to have been committed by Paul T. Walton in favor of the plaintiff. The record does not disclose that Thomas F. Kearns ever consented to the transaction, or ratified or otherwise authorized it. The transaction was not one in the ordinary course of partnership business.

This court should reverse for the reason alone that there is no sufficient evidence to support paragraphs 6 and 7 of the findings or paragraph 2 of the conclusions or the judgment with respect to the alleged interest.

CONCLUSION

The inconsistency between the judgment as entered on November 1, 1967 and the trial court's memorandum decision of September 18, 1967, without any intervening

biparty discussion, analysis or court sanction of record leaves the entire proceeding vulnerable to serious and basic questions of judicial regularity. By this we mean that the end point arrived at by the trial judge cannot be rationalized from the record or by any accepted standard of judicial proceeding. These matters were pointed out by the motion for new trial which in turn was peremptorily denied (R. 66). The judgment as entered by the lower court has no relationship to the pleadings or to the pretrial order. On the face of things, the judgment appealed from is not the result but is the exact opposite of due process. The cause should be remanded with such directions as to this court may seem proper and if a new theory is to be advanced, the parties should be permitted to recast their pleadings in the assertion and defense thereof.

Respectfully submitted,

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