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Michael W. Strand v. Jack Cranney et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL W. STRAND,)
Plaintiff and Appellant,)
vs.)
JACK CRANNEY, CRANNEY ENTERPRISES,)
INC., and BONNIE CRANNEY,)
Defendants and Respondents.)

BRIEF OF RESPONDENTS

Appeal from a Judgment of the District Court
of Salt Lake County

Honorable G. Hal Taylor, Judge

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This was an action for the recovery from defendants of 802,000 shares of stock in Classic Mining Corporation, alleged to have been pledged as security for loans. Defendants counterclaimed that the stock was held by them as joint venturers with plaintiff, asking the court to wind up the joint venture affairs and distribute the assets.

DISPOSITION IN LOWER COURT

Following a trial, without a jury, the court dismissed plaintiff's action, declared that plaintiff and defendants were joint venturers for the purpose of investing and trading in the stock, dissolved the joint venture, and directed distribution of the stock to plaintiff and defendants.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment of the trial court.

STATEMENT OF FACTS

Respondents' Statement

[In setting forth the facts as developed at the trial, respondents will refer to pages of the transcript of trial testimony (Tr.), rather than to pages of the record (R.), for the sake of consistency with the appellant's brief.]

The appellant, Michael W. Strand, is self-employed (Tr. 183). He makes his living by trading stocks, including those of Classic Mining Corporation, trying to affect their price (Tr. 184), and putting "deals" together for companies. During the times material to this proceeding, he was putting together some deals for Classic Mining Corporation (Tr. 184). The individual defendants and respondents, Jack Cranney and Bonnie Cranney, are district managers of Shaklee Company (Tr. 229), and are also engaged in the business of making films and other aids to be used in selling products (Tr. 148). They are the principals of Cranney Enterprises, Inc., and own Cranney Distributing Company (Tr. 12). They are not in the business of making loans (Tr. 96), and were not familiar with stocks and trading (Tr. 116).

Strand regarded Bonnie Cranney as an old friend, having known her before her marriage to Jack Cranney (Tr. 151).

Jack Cranney, accompanied by Bonnie, first met Strand on about March 4, 1977, at a Salt Lake City restaurant, at which time Strand was trying to put a deal together for Classic Mining Corporation, involving uranium land. He told the Cranneys that he thought Classic was a very good

investment (Tr. 142). Jack Cranney then wrote him out a check for \$1,000 and told him to invest it for him (Tr. 143). As a result, an account was opened in Jack Cranney's name at Olsen and Company, brokers, and 4,000 shares of Classic Mining Corporation stock were purchased and placed in the account, though the evidence is in conflict as to whether the purchase was made by Jack Cranney or someone else (Tr. 197, 144, 276).

That early March social meeting led to a series of transactions between the Cranneys and Strand. Later that month, on about March 25, Strand found himself in need of additional funds, so he telephoned and asked about the possibility of a loan. The Cranneys then loaned him \$20,000, for which he gave them 10,000 shares of Classic Mining Corporation stock for making the loan, and pledged another 190,000 shares to secure the loan (Tr. 14, 19, 146-147). The loan was evidenced by a promissory note payable without interest in three installments, \$5,000 on or before April 5, 1977, \$5,000 on or before April 19, and \$10,000 on or before May 3. Strand also executed a pledge agreement (Ex. 5 and 6).

The payment due on April 5 was not made, and before April 19 arrived, Strand was in need of money again. On April 18, the Cranneys advanced to Strand an additional \$15,000 and received an interest bearing promissory note (Ex. 7), secured by 100,000 more shares of Classic Mining Corporation stock (Tr. 14, 19, 148-149). Up to this point, there are few material conflicts in the testimony, but there are substantial conflicts respecting the transactions that followed, which conflicts the trial court had to and did resolve.

On the evening of May 3 Jack Cranney received a call from Strand to the effect that Strand and Galen Ross, an officer of and counsel for Classic Mining Corporation, were coming to the Cranney home (Tr. 46). Ross was

coming along to corroborate Strand's statements about Classic Mining (Tr. 156). Cranney was told that they were in desperate need of money, that they hadn't been able to meet their prior commitments, and that if he would advance another \$20,000, they would form a partnership and get him involved in the venture, whereupon Ross negotiated for Strand concerning a partnership agreement with the Cranneys. Strand stated that both he and Ross had serious financial problems and neither one of them had any credit. They inquired about funds available to the Cranneys and whether their home had equity upon which Cranney might borrow (Tr. 47). Strand said that he would lose everything, and that he needed a partner in the business because they just didn't have the capitalization to continue what they were doing (Tr. 48).

Ross stated that they wanted to change the nature of what had happened before, and the relationship with respect to the notes would change because Cranney was becoming a partner. Cranney was told that if he put up \$20,000, raising to \$56,000 the amount he had paid in, they would put 800,000 shares of Classic Mining Corporation stock into the partnership (Tr. 50). He was told that he would have his \$56,000 back by about June 15 and that when his \$56,000 had been returned, Strand would receive the next \$56,000, and then the balance would be split down the middle. Strand also indicated that he would include Cranney in other ventures as the company became larger, and the parties discussed preparation of a written contract (Tr. 51). Ross stated that he would prepare the contract, being well acquainted with Classic Mining Corporation and with Strand's activities.

Jack Cranney first saw the written joint venture agreement (Ex. 22) on May 20. At that time he had already given Strand the additional \$20,000.

no stock had been put up. He had called several times (Tr. 52) to see if the contract would be prepared, then went to Ross's office where Ross pulled out a contract and let Cranney read through it. Strand came in at about that same time, reached over Cranney's left shoulder and signed the agreement. Cranney did not sign at that time because the contract didn't state how much stock was involved, and specified that only Strand could sell the stock (Tr. 53), a provision that originated with Ross (Tr. 250). Otherwise, Cranney was in agreement with the form of the contract (Tr. 53, 58). In November or December, Cranney obtained a copy of the joint venture agreement (Ex. 8) from Ross, but this one did not have Strand's signature on it (Tr. 54). On May 3, according to Cranney's testimony, he had specified that he would like to be able to liquidate stock if they defaulted in the agreement (Tr. 56), and this was discussed in general terms (Tr. 57).

The partnership property was kept in what the parties called "the box", which was a safety deposit box maintained by Cranney. At the time Cranney went to the offices of Galen Ross on May 19 he was told by Ross or Strand that in order to bring the box up to the promised 800,000 shares it was necessary for Strand to recover some stock that he had at Olsen and Company (Tr. 23). He told Cranney that he, Strand, had \$30,000 coming on Monday and that if Cranney would give him a check for \$29,250. he would get the stock from Olsen and Company and deliver it to Cranney, so that Cranney could put the stock in the box and list it in the partnership agreement (Tr. 24). Cranney agreed to put up the \$29,250 provided he would receive a check made out by Ross at the same time which he would be able to present on the following Monday (Tr. 68). Ross agreed to this and said that his check would be good. As it turned out, Cranney's \$29,250

check was paid by his bank on the same day it was issued, a representative from Olsen and Company having driven to the bank and collected (Tr. 69), but the check from Ross was never honored (Tr. 70). At that time the Classic Mining Corporation stock was trading at 14 to 16 cents per share (Tr. 25).

Thereafter, Cranney made some efforts to get his \$29,500⁰⁰ back, but was not successful. Strand gave Cranney a check drawn on "Big Indian Associates" in the amount of \$17,000, but it bounced (Tr. 16). On May 24, Cranney called Strand and asked about the \$29,250 which he felt had been "expropriated" from him and was told that neither Strand nor Ross could come up with the money (Tr. 59). He asked what they were going to do about it and whether something additional was going to be put into the partnership for the money. On May 31, having learned that Cranney had consulted an attorney, Strand brought an additional 200,000 shares to raise the total shares in the box to 954,000 (Tr. 60), then added 80,000 shares of restricted stock borrowed from Ross (Tr. 170).

In order to come up with some money, Strand put 125,000 shares in Cranney's account and made arrangements to sell it. It was sold, and Cranney received \$20,000 from Olsen and Company (Tr. 171). There were 25,000 shares left in the account which Cranney later took out and delivered to Strand (Tr. 172).

The Cranneys' contributions to the joint venture had not yet ended. In August, while the Cranneys were in Las Vegas, Nevada, they received a call from Strand who said he needed additional cash. They arranged to have a Salt Lake City bank deliver him a cashier's check in the amount of \$12,000 (Tr. 37). Before advancing the \$12,000 Cranney had been told by Strand

that \$5,000 would go in as investment into a limited partnership, but this investment was never made.

The testimony is that the Cranneys gave \$1,000 to Strand on March 4 (Tr. 13), \$20,000 on March 25, \$15,000 on April 18, \$20,000 on May 4, and \$12,000 on August 12; also that Cranney had paid \$29,250 to Olsen and Company in the transaction of May 19 (Tr. 14). The total paid by the Cranneys to or in behalf of Strand was \$97,250.

Stock was deposited with Cranney and placed in the box in the following amounts: 4,000 shares on March 5, 1977, 200,000 on March 25, 100,000 on April 18, 450,000 on May 19, 200,000 on May 31, and 80,000 on July 4. In addition, 25,000 shares had been left in the account established for Cranney at Olsen and Company, making a total of 1,059,000 shares delivered, one way or another, to the Cranneys (Tr. 19).

Of this stock, Cranney made some sales. On June 30 and July 15, 1977, he sold 44,000 shares for \$10,017 (Tr. 17), at the end of January 1978, he sold 10,000 shares for \$5,435, and on or about February 1, sold \$13,000 shares for \$6,795 (Tr. 18).

He returned some shares to Strand, 110,000 on August 9 and 55,000 on December 23. He also gave Strand the 25,000 shares that had been left in his account at Olsen and Company. This left 802,000 shares in his possession at the time of trial.

Although Strand took the position at the trial that there was no partnership, he had confirmed the existence of the partnership on several occasions. On October 22, 1977, the Cranneys met with Strand in an attempt to get a better understanding of his view of the partnership. Strand was asked to state what they were partners in, because he had not produced the

documents. At that time Strand said they were partners in the box, i.e., the million shares, the oil well, royalties from the uranium, and oil royalties (Tr. 64). The Cranneys made notes during this conversation (Ex. 9), and both Jack and Bonnie Cranney testified to this conversation (Tr. 257). On May 25, 1977, at the home of the Cranneys, Strand asked a friend of the Cranneys, Ruby M. Heaton, if she wanted to invest some stocks. At that time he talked about oil, and said that the partners were the Cranneys, Galen Ross, and himself (Tr. 267-268). Shirley Jackson saw Strand many times in the Cranney home and would hear Strand say to Jack Cranney, "How's my partner?" (Tr. 269). She heard Strand mention that 800,000 shares were in the partnership and that the two of them were each to take out \$56,000 and then divide the balance (Tr. 270). This was at the time Strand needed the \$20,000 on about May 4 (Tr. 271).

At the time of the trial, the Classic Mining Corporation stock was trading for about 80 cents per share, but during the times of the transactions in question the price was much lower. At the time of the May 4 joint venture agreement the total amount of stock to be pledged would not have been worth much more than the \$56,000, according to Cranney (Tr. 129). Quotations of bid and asked prices in the Utah Enterprise showed the following:

<u>Date</u>	<u>Bid</u>	<u>Asked</u>
March 21, 1977	\$.28	\$.32
April 18, 1977	.15	.20
May 4, 1977	.18	.22
May 11, 1977	.18	.22
May 16, 1977	.15	.16
May 25, 1977	.17	.21

(R. 284). The prices set forth in the Enterprise are accurate enough to give a reflection of what a security did during a particular week (Tr. 225).

Some of the documents involved in the transaction contained references to loans, but these were explained by Cranney to the satisfaction of the trial court (Tr. 101-114). Notes were signed for the two loans prior to May 4, but not for moneys received by Strand thereafter.

Comments on Appellant's Statement

Respondents are in agreement with some of appellant's Statement of Facts, but it is inaccurate in many respects, and misleading in others.

On page 5, it is stated that "for some unexplained reason," Cranney was willing to advance additional moneys for a partnership although unwilling to lend any more money to Strand. The reason was explained. The stock to be put into the partnership was to be increased to 800,000 shares (Tr. 50); by June 15, Cranney would recoup \$56,000; Strand promised to include Cranney in other ventures; and Classic Mining was "really going to go" (Tr. 51).

Also on page 5, it is said that "the other participant in the meeting" denied that a partnership was agreed to. The reference is to Galen Ross, Strand's close associate, who went to the meeting to help Strand (Tr. 56), and whom the court could regard as working hand-in-glove with Strand. The other "other participant," Bonnie Cranney, confirmed the agreement (Tr. 256-260), as did a visitor in the Cranney home (Tr. 270).

On pages 6 and 7 of his brief, appellant sets out 13 "undisputed facts," each of which deserves comment.

1. The voucher copy of a \$20,000 check on the April 18 (sic) meeting did not state "partnership contribution," but "Loan on stock 400,000 shares

of Classic Mining." But Cranney testified that he used the term "loan" loosely, not having had business training (Tr. 101); that there was never an occasion on which 400,000 shares changed hands, and his secretary might have put the notation on the voucher, since she sometimes "just codes things and does them" (Tr. 103).

2. The defendant did not cancel the two previous promissory notes. True, but he did not attempt to enforce them, either.

3. When Cranney delivered some stock back to Strand, the receipt signed by Strand referred to receiving collateral. The receipt (Ex. 17) reads:

Received from Jack Cranney 100,000 shares of classic stock against the "box" held by Jack for collateral and is to be returned as soon as possible.

Mike Strand

But Cranney did not write the receipt. He testified, at Tr. 112:

I told Mr. Strand that I thought we're giving him that much stock that he should give us something back for it in the form of a hand receipt. And he wrote that one out and flipped it to me and walked out the door.

4. The plaintiff himself was unaware of all the terms of the partnership or the extent of the partnership property. He knew the essential terms: 800,000 shares, \$56,000 to him, then \$56,000 to Strand, then split the balance--and so did Bonnie Cranney (Tr. 50-51, 256). He was not sure of what else was to go into the partnership because he was being double-talked by Strand. But the court agreed that there was no enforceable agreement as to property other than the Classic stock. Strand was careful not to be too explicit about uranium and oil.

5. There was no agreement as to when the Classic Mining stock would be sold, or who would decide when to sell. Enough to generate \$56,000 would be sold by June 15, then Strand could sell enough to obtain \$56,000 (Tr. 51), then the stock would be split (Tr. 51, 256), and either party could sell after June 15 (Tr. 260).

6. The written agreement was unsatisfactory with Cranney because it gave Strand authority to decide when to sell, and it was "not known" how much stock would be in the partnership. The written agreement prepared by Ross differed from the oral agreement previously reached. The right of Cranney to liquidate stock had been discussed in general terms on May 3 (Tr. 56), and the provision for Strand to control sales was Ross's idea when he drafted the contract (Tr. 250). It was known how much stock was involved--800,000 shares--but Ross hadn't put it in the agreement.

7. Cranney did not consider himself bound by Strand's transactions in the stock. The testimony referred to relates to a single transaction in which Strand wanted to sell all of the stock to a man named Barra, but would not tell Cranney any of the specifics (Tr. 136). Cranney would have felt bound by Strand's sale of his own half (Tr. 137).

8. Cranney considered he had a right to sell without consulting Strand, until he'd recouped the \$56,000. The joint venture agreement prepared by Ross so provided (Ex. 8, Par. 2), and Cranney did not make any sales prior to June 15 (Tr. 17), some time after he'd been misled into parting with another \$29,250.

9. No Partnership books were set up. This is true, but not significant.

10. There was no authority obtained to do business as a partnership. There was no contention that any authority or license was needed.

11. Only Cranney, not Strand, had access to the partnership property. Not quite true. Cranney had the key to the box, but Strand was able to get stock on at least two occasions (Tr. 19-20).

12. Cranney's notes "how are we partners?" and testimony that he was a partner in "one-half of Strand's action" shows the indefiniteness of the partnership agreement. The notes don't show that. Cranney testified that he wanted Strand to specify what they were partners in, because he had not produced the documents he had promised Cranney (Tr. 64), and they wanted to understand why Strand had changed his ideas (Tr. 263-264).

13. The parties treated the transaction as a loan and not a partnership. Although Strand had executed notes for the two loans in March and April, he did not do so thereafter. He thinks he may have signed a note for the \$12,000 he obtained from Walker Bank in August, he was unable to produce any note (Tr. 195). The Cranneys' books were set up by Dennis Beal, a CPA, who assigned a code number to Strand, which never changed. The codes were placed on Cranney checks by the CPA or a secretary (Tr. 151-152). The endorsement on the \$10,000 Nuepetco check given to Cranney by Strand was a self-serving statement placed on the check by Strand, without discussing it with Cranney (Tr. 205), not long before suit was brought. Strand admitted that Cranney talked about taking 55,000 out of Cranneys' side and 55,000 out of his side for \$10,000 each (Tr. 205).

The appellant's characterization of the \$29,250 transaction in late May (page 8), is not accurate. Cranney testified that the \$29,250 was to bring the box up to 800,000 shares, not to buy and sell stock (Tr. 23). The money

was requested by Strand, but Ross agreed to put up his check--to be paid on the following Monday.

Page 11 refers to sales of stock by Cranney without the consent, or even advice, of his partner, Strand. But this was permissible under the agreement, June 15 having come and gone (Tr. 51, Ex. 22).

Other inaccuracies appear on pages 11 and 12, but they are repetitious and already have been discussed.

ARGUMENT

I

THE COURT PROPERLY FOUND THAT THE PARTIES WERE JOINT VENTURERS IN THE STOCK OF CLASSIC MINING CORPORATION.

Appellant has conceived a paradigm of a joint venture agreement and, confusing the necessary with the desirable, argues that there couldn't have been a joint venture agreement because the parties did not follow Rabkin and Johnson's checklist. But the argument must fail. The courts simply have not required that degree of precision in order to find the existence of a joint venture.

Although we have found no Utah cases establishing the specificity required for an enforceable joint venture agreement, other state and federal courts have spoken frequently. Replogle v. Ray, 48 Cal. App.2d 291, 119 P.2d 980, 983 (1942), involved litigation between an attorney-at-law who was also an inventor, and an associate of his who furnished financial assistance. It was established without substantial dispute there was an agreement of joint venture by which the parties were to share in the proportions of two-thirds to the inventor and one-third to the investor, but the other details of the

agreement relating to the scope and duration of the joint venture were issues in the litigation. In discussing the joint venture agreement, the California Court of Appeals said:

Preliminarily, it may be stated that there was never any formal written agreement between the parties defining precisely their respective rights and duties in their joint venture. * * * As the details of the agreement of joint venture had not been reduced to writing, it was necessary for the trial court to determine the question of the scope and duration of the joint venture from the above-mentioned testimony of Replogle [the inventor] and the inferences which might properly be drawn therefrom. Even the testimony of Replogle on the details of the arrangements between these men was not very definite and certain. He used such expressions as "the arrangement as near as I can define it was * * *", and "the arrangement was something like this * * *". But these considerations are not fatal to the finding of the existence of a joint venture with the necessary incidental findings of the scope and duration thereof. As was said in Andrews v. Bush, 109 Cal. App. 511, at p. 517, 293 P. 152, 154: "The law requires little formality in the creation of a joint adventure. Anderson v. Blair, 202 Ala. 209, 80 So. 31, 35. Such an agreement is not invalid because of indefiniteness in respect to its details. 33 C.J. 848. * * * In considering whether or not a relationship such as that of joint adventurers or partners has been created, the courts are guided, not only by the spoken or written words of the contracting parties, but also by their acts."

In upholding the joint venture agreement, the court observed that since existence of the joint venture had been established, "it was necessary for the trial court to determine the scope and duration of that venture," which is somewhat the case here. There is compelling testimony by both of the Cranneys, supported by a draft version of a joint venture agreement and testimony of two visitors in the Cranney home, that the parties had agreed upon a joint venture involving a fifty-fifty division of the profits after each of them had recovered \$56,000 from sale of stock in Classic Mining Corporation. It was, therefore, the court's duty to determine the scope and duration of the joint venture and to rule upon the parties' rights in the property of the joint venture.

In Dean Vincent, Inc. v. Russell's Realty, Inc., 268 Ore. 456, 521 P.2d 334, 338 (1974), one real estate broker claimed to be a joint venturer with another broker in the sale of real property. It was established that the defendant, which had a listing on the property in question, had told the plaintiff that it was a practice of the defendant to work "on a 50/50 co-op basis, all things being equal." In other correspondence, also, an even split was mentioned. As a result, the plaintiff produced some prospective buyers, but the sale was made, ultimately, by the defendant with little help from the plaintiff because of a personality conflict between the plaintiff's salesman and the purchaser. Because of this, the defendant claimed that the plaintiff was not entitled to an even split of the commission, but to some lesser amount. The defendants contended that there was no express agreement concerning commissions, and no joint venture.

After noting that a joint adventure is never presumed and that the burden of establishing it is upon the party alleging it, that joint ventures need not be expressed but may be implied in whole or in part, and that equity would look through the entire transaction in order to promote justice, the Supreme Court of Oregon said:

It has also been said that the usual rule of contract law to the effect that the terms of a contract must be definite and certain is enforced less vigorously in contracts of joint venture than in other types of contracts, particularly in cases in which the joint venture is not wholly executory, but has been wholly or partly executed
* * *

Thus, even though there has been no express agreement on the subject of dividing the profits of a joint venture, the law may imply an agreement for equal division of any profits. Indeed, when two parties enter into a joint venture the prima facie inference is that they are equally interested and entitled to an equal share of any profits, in the absence of evidence to the contrary. [Citations omitted]

The court held that the plaintiff real estate broker was entitled to share equally in the \$50,000 commission earned on sale of the ranch.

Hoge v. George, 27 Wyo. 423, 200 P. 96, 18 A.L.R. 469, 474 (1921), involved the purchase and sale of real property for a profit, in connection with which the plaintiff claimed to be a joint venturer with the defendant who had put up the money, purchased the property, and sold it. Evidence of the joint venture was found in a note written to Hoge, and testimony of discussions concerning purchase and sale of the property, but there was no express agreement with respect to the division of the profits or the sharing of losses. The plaintiff had in fact assisted defendant in the purchase of the property and in locating a purchaser to whom to sell it, but the defendant contended that the evidence was insufficient to establish a joint venture and that the trial court should have directed a verdict in his favor. In holding that there was a joint venture, the Wyoming Supreme Court said:

We have stated the evidence sufficiently, we think, to show that there was substantial ground for a finding that the parties to this action intended to, and did, join their efforts in the venture of buying and reselling the Riverside ranch, and that they were to share the profits. To justify such a finding it was not necessary that the rights and duties of the parties to the contract of joint adventure should have been more particularly specified or defined. In Goss v. Lanin, 170 Iowa 57, 152 N.W. 43, cited by this court in Reece v. Rhoades, supra [25 Wyo. 91, 165 P. 449], it was said: "It is true that it is not necessary that there should be a specific, formal agreement to enter into a joint enterprise, or that the interests of the parties should be definitely settled in such agreement or that there should be a formal agreement as to the sharing in the profits. If there be a joint enterprise proven, either by direct evidence of a mutual agreement to that end, or by proof of facts and circumstances from which it is made to appear that such enterprise was in fact entered into, the law fixes their rights."

In Robie v. Ofgant, 306 F.2d 656, 659 (1 Cir. 1962), the parties were both experienced automobile dealers. The plaintiff informed the defendant of

an opportunity for an automobile agency in San Juan, Puerto Rico, if the defendant would finance it. After defendant allegedly promised to provide the financing plaintiff moved to San Juan and took steps to start the business but defendant did not perform and plaintiff brought suit and obtained a verdict. On appeal defendant claimed the evidence was too indefinite as to terms to permit a finding that any contract was entered into, but the Court of Appeals affirmed, saying:

* * * It is true that the details of the loans had not been determined, nor the extent that defendant's capital participation would be represented by stock and by indebtedness. But we think that the jury could be permitted to find that since defendant's chief contribution was the financing, plaintiff's share of the net profits was to be computed before all financing charges. [Citation omitted.] Hence it was a matter of indifference whether or how defendant divided his share, if any, between dividends and interest. Nor was the agreement illusory because no term was stated for plaintiff's employment. Even though there was no specified term, having in mind that plaintiff was the finder and entrepreneur we think the jury could well find an implied undertaking that defendant's support, and plaintiff's participation, would last a reasonable length of time. * * *

In Lord v. Pathe News, Inc., 97 F.2d 508 (2 Cir. 1938), Judge Swan quoted from a leading Alabama case as follows:

"It may be said, no doubt, of the great majority of contracts of joint adventure and of partnership, that they do not point out precisely what each party is to do under them. Such a provision is quite unusual, and, we should say, quite impossible in many cases.
* * *"

In his argument to this court, the appellant has pointed out certain matters that he believes were essential for a joint venture: the right to control, and the sharing of losses as well as profits. But these matters, like others, may be implied, or may be provided by legal principles found in the partnership act, which has been held to govern where the rights of the parties have not been made explicit in the joint venture agreement.

In Holtz v. United Plumbing and Heating Co., Inc., 49 Cal.2d 501, 319 P.2d 617, 620 (1957), the Supreme Court of California said:

It has generally been recognized that in order to create a joint venture there must be an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control. Such an agreement, however, need not be formal or definite in every detail relating to the respective rights and duties of the parties but may be implied as a reasonable deduction from their acts and declarations. * * *

* * * The matter of losses apparently was never discussed, but, since this was a cost plus transaction, the chance of loss was rather remote. Moreover, an understanding as to the division of the profits ordinarily carries with it, in the absence of an express agreement to the contrary, an implied obligation to share losses in the same proportion. * * *

Similarly holding that an express agreement with respect to the sharing of losses is not essential is Minute Maid Corp. v. United Foods, Inc., 291 F.2d 577 583 (5 Cir. 1961), and in Foster v. Keating, 120 Cal. App.2d 435, 261 P.2d 529, 539 (1953), the California Court of Appeals rejected a contention that there could be no joint venture where the parties have unequal control of operations, citing Sime v. Malouf, 95 Cal. App. 2d 82, 95-96, 212 P.2d 946, modified 213 P.2d 788 (1950).

The appellant also has argued, at some length, that the partnership agreement was too uncertain because of the uncertainty with respect to the assets other than Classic Mining stock that would be in the joint venture. This argument is answered by the fact that the trial court did not find a joint venture agreement with respect to the uranium and oil, which had been left indefinite and uncertain, but only with respect to the stock, which not only had been agreed upon but which had in fact been delivered to the Cranneys.

In Lasry v. Lederman, 147 Cal. App.2d 480, 305 P.2d 663, 667 (1957), plaintiff relied upon an oral agreement whereby he and defendants had formed a partnership or joint venture for the purpose of purchasing, exploiting, and reselling real property. The trial court's finding that the oral understanding was too indefinite to create a joint venture was reversed on appeal. The appellate court said:

It is true that the agreement to which plaintiff testified was indefinite with respect to the improvements that would be found desirable in order to place the property in satisfactory condition for occupancy. This, however, was a matter as to which agreement was not required before the property was purchased. It was something that might have required a considerable amount of study and the consideration of the needs of prospective tenants. If these were matters as to which the parties did not disagree the fact that they did not agree or attempt to agree on a definite plan of improvement would not render incomplete the agreement to engage in a joint venture. The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its detail.

In its opinion the court noted that even though the parties may have reached no definite agreement for management of the property, it would not necessarily follow that they did not reach an agreement to acquire it. In the present case too, even though the court might find that the parties reached no definite agreement with respect to the acquisition of uranium property and oil wells, they did reach a definite agreement with respect to the acquisition and sale of Classic Mining Corporation's stock. There is nothing in the evidence to suggest that the venture in the stock was dependent upon the venture in the other property.

The appellant has cited a number of cases from this court which touch, marginally, upon joint ventures, but none of them suggests a different result in this case than that reached by the trial court.

Four of the cases are cited only for the proposition that joint ventures are in the nature of partnerships, subject to the law of partnership, and with this we have no serious disagreement.

McMillan v. Whitley, 38 Utah 452, 113 P. 1026 (1911) involves an agreement among six people to unite in the purchase and sale from time to time of the stock of the Daly West Mining Company, the court being called upon to determine the rights as between the various parties with respect to contributions under the agreement. The court was not called upon to give a name to the relationship between the various parties, and did not discuss the elements of a joint venture, but the agreement was upheld.

Bates v. Simpson, 121 Utah 165, 239 P.2d 749 (1952), involved two used car dealers who operated separate businesses out of the same car lot. There was no agreement to share any profits, there was no sharing of profits, and the parties did not operate in any joint manner. There was no evidence that either of the parties acted or intended to act as joint venturers. The court recognized that a joint venture is in the nature of a partnership but could not find any facts indicating that the parties' contiguous but several operations were in any wise like a partnership. In the present case, there is believable evidence of an intention on the part of both Strand and the Cranneys to enter into a joint venture agreement for investment and sale of the stock of Classic Mining Corporation.

In Johanson Bros. Builders v. Board of Review, 118 Utah 384, 222 P.2d 563 (1950), the question was whether some contractors were employers of young workmen or were partners with them, for purposes of liability for unemployment contributions. The evidence established that while the Johanson brothers entered into arrangements by which their workmen were

share in the profits, the Johanson brothers operated the contracting business as their own. The entrepreneurs referred to the association as a "brotherhood," they entered into the contracts and received the money, controlled the bank account, owned the equipment and did all of the contracting. The compensation was not on any fixed percentage basis, and was determined by the group, based on experience and so forth. The young workmen did not consider themselves to be partners, believing that they were just working for Johanson. The court determined that for the purposes of the Employment Security Act the Johansons were not joint venturers with the workmen and were liable for the statutory contributions.

Vern Shutte and Sons v. Broadbent, 24 Utah 2d 415, 473 P.2d 885 (1970), involved a cattle feeding contract under which one Fredrickson was to take possession of and feed, at his sole cost and expense, Broadbent's cattle, and as compensation was to receive 15 cents per pound gain in weight made by the cattle during the period in which he was feeding them. Frederickson also fed cattle under similar arrangements for other people. There was no agreement to share profit as such, and when an action was brought against Broadbent for indebtedness incurred by Frederickson, the court properly held there was no joint venture. This court's opinion did indicate that an agreement, express or implied, for the sharing of profits is necessary, and that "the profit accruing must be joint and not several." The court didn't explain what that meant, and the appellant suggests that the profits were several, rather than joint, in the instant case, but it is difficult to see how he comes to this conclusion. The arrangement here is very different from that in the case cited. After the two \$56,000 sums were paid to Strand and the Cranneys, the parties would each own one-half of the remaining securities and would share equally in the profits, which should be "joint" enough.

Bassett v. Baker, 530 P.2d 1 (Utah 1974), contains some language, which the appellant regards as helpful, to the effect that the agreement must be such as to permit the court to infer that the parties intend to share losses as well as profits in order for the court to find a joint venture agreement. We submit that it is ill-advised dicta, inasmuch as the Uniform Partnership Act, which is frequently applied to joint venture agreements, provides that partners must "contribute toward the losses, whether capital or otherwise, sustained by the partnership according to his share in the profits." But this language is modified by the preface that the rights set out in the section are "subject to any agreement" between the partners. 48-1-15 Utah Code Annotated 1953. An agreement that losses are not to be shared may be some evidence that the parties are not engaged in a joint venture, but it certainly should not be regarded as conclusive evidence of that fact. Bassett doesn't help the appellant in this case, anyway, because an agreement to share in the losses is implied.

Other cases cited by the appellant do not help him. We agree with Paul v. North, 191 Kan. 163, 380 P.2d 421 (1963), that some form of agreement is necessary to establish a joint venture relationship, but there the trial court on disputed evidence found there was no agreement, whereas in the present case the trial court on disputed evidence found that there was an agreement.

West v. Soto, 85 Ariz. 255, 336 P.2d 153 (1959), was an automobile accident case in which the two defendants were in an automobile for social purposes, and the plaintiff was trying to recover damages from both. It doesn't have much relevance to a business transaction such as involved in the present case.

In his brief, appellant has made statement which simply are not borne out by the evidence, such as "there was no express joint venture." There is abundant evidence that there was an express joint venture. What the appellant has done, as so many appellants do, is refer to the testimony of his own witnesses as if that testimony were gospel, ignoring contrary testimony.

The Cranneys and two others testified that an oral agreement for a joint venture was made on May 4, 1977. Thereafter Galen Ross prepared a joint venture agreement as requested by both parties to it. In addition to the testimony as to the occurrences on May 4, 1977, Galen Ross, Strand's associate, did prepare a joint venture agreement (Ex. 22), which contained a number of provisions which are customary in such agreements. The agreement was labeled "Joint Venture Agreement" and describes the venture as for the purpose of buying and selling stock. There is a provision for sale upon mutual agreement but that if it is not sold by June 15 in sufficient quantity to permit repayment of Jack Cranney's \$56,000, he might at his discretion sell sufficient stock to recapture that investment. It was provided that the physical possession of the stock would be held by Jack Cranney, that after repayment of the two \$56,000s, the "balance shall jointly belong to the parties and shall become the capital assets of the partnership between the parties, to be shared in equal parts." It provided that proper books and records would be kept and that neither party would lend, spend or otherwise encumber the assets without the consent of the other party. There is a provision that additional money or stock might be added to the venture on such terms as mutually agreed upon, that the venture might be terminated by mutual agreement, and that upon termination the assets would be distributed in an equal basis "provided that each party has received \$56,000 from the proceeds of sale of the venture stock."

Evidence introduced on the part of the defendants was to the effect that Mike Strand read the agreement and signed it in the presence of Jack Cranney, and that Jack Cranney read the agreement and was in agreement with its terms except for two matters: the number of shares--800,000--to go into the venture, and inclusion of a provision that Mike Strand would be responsible for the selling and buying of stock. Thus there is evidence that the parties were in agreement upon all of the elements necessary to form a joint venture, even under the appellant's theories.

It may be argued that the joint venture agreement represented by Exhibit 22 has no significance because it was not signed by both parties. But it is evidence of what they had in mind, and if they were agreed on what they had in mind, it didn't make any difference whether the joint venture agreement was signed or not. There is no evidence that the parties intended the written agreement to be a condition precedent to existence of the joint venture that had been agreed upon in the May 4 meeting.

In General Realty Corporation v. Douglas Lowell, Inc., 233 Ore. 244, 354 P.2d 306, 310 (1960), two real estate companies had negotiated a contract and agreed that a written contract would be prepared. A written contract was drawn, and was signed by one of the parties, but not by the other. With respect to the enforceability of the oral agreement entered into prior to preparation of the written contract, the court said:

Where parties agree to reduce their agreement to writing, the question arises as to whether their negotiations constitute a contract. This question usually depends upon their intention, or, as it is sometimes expressed, upon whether they intend the writing to be a condition precedent to the taking effect of the agreement. If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until

the written draft is finally signed. Where the terms of the contract have in all respects been definitely understood and agreed upon, the failure subsequently to embody such terms in a written contract, as agreed, does not prevent the contract, where no statutory objection interposes, from being obligatory upon the parties. In other words, where all the substantial terms of the contract have been agreed on and there is nothing left for future settlement, the fact alone that it was the understanding that the contract should be formally drawn up and put in writing does not leave the transaction incomplete and without binding force, in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed.

(Accord: Restatement of Contracts, § 26.)

Inasmuch as the May 4 agreement, as expressed and as implied, in light of the Partnership Act, was complete, changes made by Mr. Ross did not affect the enforceability of that agreement.

II

EVEN IF THE AGREEMENT DID NOT AMOUNT TO A JOINT VENTURE, STRAND AND THE CRANNEYS NEVERTHELESS BECAME CO-OWNERS OF THE STOCK, AND WERE BOUND BY THEIR AGREEMENTS RELATING TO IT.

In many cases it makes a difference whether the parties are joint venturers rather than joint owners, principal and agent, or merely engaged in a common effort. This is true when third parties seek to impose liability on one or more of the parties, or where one of them claims that the other occupies a fiduciary relationship. In those cases liability may depend upon whether or not the parties are joint venturers.

In this case there was certainly evidence that in the meeting of May 4, 1977, the parties had agreed that Strand and the Cranneys would become owners of 800,000 shares of stock in Classic Mining Corporation, subject to the right of the Cranneys to recoup \$56,000, and the right of Strand, thereafter, to obtain a similar amount, and that they would be co-owners

thereafter. There is also evidence that additional shares were put into the partnership because of Strand's having induced the Cranneys to put up, first, \$29,500 for the acquisition of additional shares, and then an additional \$12,000 needed by Strand. It can certainly be implied that when the additional funds were put up, that the amounts put up would be returned, and that when additional shares were put in, they would be divided in the same manner as the original shares, and this is just what the court did in its decree.

If the agreement is there, or the court finds it is there, what difference does it make whether it was a joint venture or something else? It is possible to determine the rights of parties inter se without pasting labels. The rights of the parties would be the same, as it developed, whether they created a joint tenancy in the stock or a tenancy in common, and it is possible to create such tenancies in almost any kind of personal property.

As stated in 20 Am.Jur. 2d, Co-tenancy and Joint Ownership, § 6:

While it appears that joint tenancies were originally confined to interests in real property, it became settled at an early date that a tenancy of such character can exist in any kind of property that is susceptible of being possessed in severalty. Accordingly, it is now generally recognized that there can be a joint tenancy in almost any kind of personal property, whether it is corporeal, such as goods, wares, and merchandise, or incorporeal, such as insurance policies, bank accounts, building and loan association deposits, United States government bonds, corporation securities, and the equitable interest of a vendee under contract of purchase of real property. Furthermore, there may be a joint tenancy of a safe deposit box.

And in 20 Am.Jur. 2d, Co-tenancy and Joint Ownership, § 25, a similar view is expressed with respect to tenancy in common:

A tenancy in common may exist in every species of property--real, personal, or mixed, and corporeal or incorporeal. Thus, for example, two or more persons may become tenants in common of growing crops; of grain or cotton commingled in storage; of livestock; of a motor vehicle or a vessel; of chattels generally; of a

bank account; of a lease; of a mortgage; of mining, and gas and oil rights; of riparian water rights; of a literary work; of a patent for an invention; of a church pew; and of a cemetery lot. * * *

Thus, if there was sufficient evidence to make out an agreement, and there was, there is no reason why the agreement shouldn't be enforceable by one of the parties against the others either as a joint venture or as a co-tenancy in the stock under an agreement pursuant to which certain of the stock is to be used for repaying investments, and the stock is thereafter to be divided on an equal basis.

III

STRAND HAD THE BURDEN OF PROVING THAT HE WAS ENTITLED TO POSSESSION OF THE STOCK.

On page 15 of his brief, the appellant asserts that the burden of proof was upon the Cranneys to establish that a joint venture existed, which is true. But from that he jumps to the conclusion that if the joint venture is not proven he is entitled to return of the stock, failing to give any consideration to the burden he bears in attempting to gain possession and control of stock that is in possession of the Cranneys.

In Srdar v. Vrooman, 483 P.2d 976 (Colo. App. 1971), an action was instituted to recover savings account funds and shares of stock that had been transferred to the defendant by the plaintiff's predecessor in interest. The action was begun and tried on the theory that the transfers of such funds and stock were procured through fraud and unlawful taking on the part of the defendant. A jury returned a verdict for the defendant, and on appeal the plaintiffs contended that the jury verdict could not stand because there was no evidence that the transfers were made to defendant in exchange for a

valid consideration or in discharge of an implied contract for her services.

In rejecting this notion, the court said:

As stated, this action was brought to nullify the transfers to defendant on the theory of fraud and unlawful taking. The burden of proving the elements of those assertions rested with plaintiffs. [Citation omitted.] The transfers to the defendant were completed, and there was no burden upon her to plead affirmatively and prove consideration or a contractual basis for them. The trial court properly restricted the determination of the case to the issues raised by the plaintiffs.

The present action is essentially a replevin action. In Henderson v. Lacey, 347 P.2d 1020 (Okla. 1959), the court said:

* * * In a replevin action the burden is upon the plaintiff to prove that he is the owner of the property in question or has a special interest therein; that he is entitled to the immediate possession of the same; that the property is in the possession or under the control of the defendant; and that the defendant has wrongfully detained the same from the plaintiff.

In Crystal Recreation, Inc., v. Seattle Association of Creditmen, 34 Wash.2d 553, 209 P.2d 358, 361 (1949), the court said:

The plaintiff in a replevin action must prove its title and right to possession in order to be successful in the action. The plaintiff can only succeed on the strength of its own title and right to possession, irrespective of the title or right to possession of the defendant.

The above cases are in accord with the general rule as stated in 66 Am. Jur. 2d, Replevin, § 98:

The plaintiff in an action of replevin, like every other action, has the burden of proving his case by the preponderance or greater weight of the evidence. Thus, the burden is upon him to show that at the time of the commencement of the action he was the owner of the property sought to be replevied, that he is entitled to the immediate possession of the property, and that the defendant wrongfully detains it. The burden does not shift where the answer pleads property in the defendant. * * *

See also, Herl v. State Bank of Parsons, 195 Kan. 35, 403 P.2d 111 (1965), and Bill Dreiling Motor Company v. St. Paul Fire and Marine Insurance Company, 28 Colo. App. 313, 472 P.2d 153, 154 (1970).

According to the above authorities, the appellant cannot get from where he is to where he wants to be simply by showing that the Cranneys had the burden of proof on their counterclaim. The court found that an agreement had been entered into which precluded the plaintiff from recovering the stock from the Cranneys and concluded that the plaintiff's action against the defendants should be dismissed, with prejudice and on the merits--that is, the action of replevin to recover the stock. The only relief the plaintiff was entitled to was that asked for in the counterclaim of the Cranneys, that is, that the joint venture's affairs be wound up and that the plaintiff and defendants be distributed their respective shares of the assets. Certainly the evidence does not establish that Strand was entitled to immediate possession of the stock of Classic Mining Corporation.

(Respondents recognize that the point is academic, their burden of proof having been easily carried.)

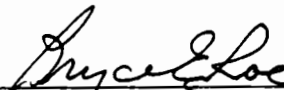
CONCLUSION

From the evidence adduced, it is fairly inferrable that a plan to pluck pigeons failed. A promoter who was making deals for Classic Mining Corporation, and working to affect the price of its stock, needed capital to accomplish his goals. The Cranneys, business people who knew little about stocks and trading, were thought to have money. If the transactions were properly cast, and Strand was the one who cast them, he would have two options: If the stock increased substantially in value, the Cranneys would be lenders, but if the bottom fell out, they would be investors.

But things didn't quite work out, because Strand talked of the joint venture and its terms, and about his partner, before too many people, and because the law holds him to his bargain despite the absence of many details.

On the basis of the evidence, much of it disputed, much of it dependent upon credibility, the court properly found a joint venture, meticulously divided the assets and achieved a just result. The judgment should be affirmed.

RESPECTFULLY SUBMITTED,


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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 1979, I served the attached Brief of Respondents upon Richard J. Leedy, Esq., attorney for appellant, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Richard J. Leedy, Esq.
610 East South Temple Street
Salt Lake City, Utah 84102

SUBMITTED