

1952

Liquor Control Commission of Utah et al v. C. V. Lack and Chris E. Athas : Answer Brief of Respondent Chris E. Athas

Utah Supreme Court

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**In the Supreme Court
of the State of Utah**

**LIQUOR CONTROL COMMISSION
OF UTAH,**

Plaintiff,

**NEW YORK CASUALTY COM-
PANY, a corporation,**

Intervenor,

vs.

C. V. LACK and CHRIS E. ATHAS,
Defendants.

**Case No.
7738**

FILED

JAN 15 1952

Clerk, Supreme Court, Utah

**ANSWER BRIEF OF RESPONDENT
CHRIS E. ATHAS**

MULLINER, PRINCE & MULLINER
Attorneys for Respondent.

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vs.

C. V. LACK and CHRIS E. ATHAS,
Defendants.

ANSWER BRIEF OF RESPONDENT CHRIS E. ATHAS

STATEMENT

Before analyzing the complaint, and the theory of liability claimed to be alleged, we will refer to some general inaccuracies in appellant's Statement of Facts.

The statement (p. 3) that this appeal is "from an order of the District Court sustaining the defendant

Athas' motion to dismiss plaintiff's complaint," is not correct. The appeal is from an order dismissing the complaint of plaintiff.

On the motion of this respondent, to dismiss this appeal, it has been now settled that this order of dismissal will be construed and applied here as having dismissed the complaint of plaintiff for (1) "failure to state a claim upon which relief could be granted," and (2) for refusal of appellant to furnish a more definite statement, as provided by Civil Rule 12(e) and as ordered by the Trial Court. This Court granted appellant's motion to amend its notice of appeal, so as to cover both matters.

It is not quite correct, as intimated (p. 4), that this action was brought prior to the adoption of the Utah Rules of Civil Procedure.

This complaint was filed (R. 11-12) April 24, 1950. The said Civil Rules went into effect January 1, 1950, and therefore, had been in effect nearly four months.

The fact is that appellant elected to adopt what has been referred to in the Federal Court practice as the "long" form of pleading, instead of what has been referred to as the "short" form. The complaint, neither in substance nor in form, pleads a cause as permitted by Rule 8(a), nor is it in substance or form in accord with any of the suggested short forms under Rule 84.

The complaint sets forth detailed facts upon which appellant relies and from which it seeks to have the Court deduce a theory of legal liability against this respondent.

We will accept the statement by appellant (p. 4) that it makes no additional claim on this appeal by reason of the second count of the complaint, alleging a joint venture, and we agree that this count adds nothing. We will, therefore, make no further reference to this second count. In other words, if the decision of the Trial Court is correct as to the first count of the complaint, we understand that it will be considered correct as to the second count also.

The statement of our position, and as to what we contended in the Trial Court (p. 5), is erroneous. We did not, and do not, contend that because 46-0-82 "provides * * * that a person contracting with the Liquor Control Commission of Utah to operate a package agency * * * must be a 'natural person' * * * that, therefore, no other kind of 'person' could be held accountable to the Liquor Control Commission for conversion."

We did claim, and will here claim, that this section has a bearing upon the meaning to be given the allegations of the complaint, and upon the question of possession or control as an element of conversion; and also, particularly, upon the point as to whether it is alleged or can be claimed that the liquor handling involved was by anyone "acting in the ordinary course of the business of the partnership" (69-1-10), when it is also alleged that the partnership business was that of operating a "retail pharmacy" and "drug store," which business is, by other statutes, registered, licensed and regulated as a different business entirely. (79-12-1 to 79-12a-14).

Another matter which it may be helpful to notice is the statement (p. 5) by appellant that the "same rule of procedure prevails under the Utah Rules of Civil Procedure as formerly, that is: that facts properly pleaded in the complaint must be taken as true under the motion to dismiss."

We agree with this statement of the general rule, but this rule has limitations and qualifications, some of which appear to have application here.

Bancroft's Code Pleading, Vol. 1, Sec. 173, p. 296:

"Sec. 173. LIMITATIONS OF RULE AS TO ADMISSIONS BY DEMURRER. — A demurrer admits only such facts as are issuable and well pleaded, it does not admit the truth of an allegation of a conclusion of law, mere deductions or opinions, or matters of law; allegations which are unnecessary or are contrary to the facts of which judicial notice is taken; * * * Nor is any inference of fact which is not presumed or which may not be reasonably or necessarily inferred from the facts alleged, admitted."

Additional cases in support of the foregoing are cited under the same section numbers in *Bancroft's Code Pleading*, Ten Year Supplement.

State v. Rolio, 71 Utah 91, 262 P. 987, is cited there by the author in support of the statements above quoted. The opinion contains this statement:

"* * * and what is judicially known may not be controverted by pleadings, or made issuable by them."

The following California cases hold that allegations which are repugnant to what the Court judicially knows must be ignored.

French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, (1905), is a leading case. The Court, at p. 1033, states the rule as follows:

“Those allegations of a pleading which are not necessary and which are contrary to the fact of which judicial notice is taken, are not admitted by a demurrer, but are to be treated as a nullity.”

House v. Los Angeles County Flood Control District, 144 P. 2d 389, (1944), cites and follows the *French* case.

Sec. 104-25-1 U.C.A. (Session Laws 1951, p. 199), Provides:

“Courts take judicial notice of the following facts: * * *

“2. whatever is established by law;

“3. public and private official acts of the legislative, executive, and judicial departments of this state and of the United States.”

This provision was formerly Sec. 104-46-1 U.C.A., of the Code of Civil Procedure.

See, also, *Warren v. Robinson*, 21 Utah 429, 61 P. 28, (1900), where the Supreme Court holds that it may take judicial notice of matters contained in its own records and file.

Brough v. Ute Stampede Assn. (1943), 142 P. (2) 670.

This case deals with the question as to what matters of general knowledge the court may, within its discretion, judicially notice. The opinion says:

“As stated in 15 R.C.L. pages 1057, 1058:
“* * * courts should take notice of whatever is or ought to be generally known, within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind.’”

The points of law, and the other and principal matters of difference, can best be presented under the respondent's points which follow.

It may clarify the general situation somewhat to state that, as to appellant's three points (p. 6), we do not dispute the general statement of law, as contained in Point I, but we do deny its application here, or that the facts alleged bring this respondent within the Rule stated.

As to Point II, we admit that 46-0-82, among other things, is a restriction on the power of the Commission, but the balance of that point is directed to an issue which is in no way involved. The complaint affirmatively shows that appellant made Lack, and not the partnership, its “vendor,” and that he continued to be such in the business in which the loss occurred.

We deny, and, under the last subdivision of our brief, will refute the conclusion stated as Point III.

We directly challenge the claim of appellant's brief (p. 9) that it “has alleged conversion by the defendants of a portion” of liquor, “of the value of \$37,805.17.”

And, as we cannot be entirely sure that they claim this solely by reason of respondent's partnership with Lack in the drug store, but may possibly claim this by reason of the allegation as to conversion in Para. 7 (R. 3), we will deal with each of these separately.

POINTS RELIED UPON

I.

The Trial Court did not err in sustaining the respondent's motion to dismiss, and dismissing appellant's complaint on the ground that it did not state a claim upon which relief can be granted.

This, basically, is because :

(a) The recital of conversion, in the complaint (R. 3), is a conclusion of law, and it is not supported, but is nullified, by the specific facts alleged; and

(b) The claim of conversion, based on the theory of the partnership relation of Lack with respondent in the pharmacy, is unsupported, and is unsound in law.

II.

The Trial Court did not err in granting respondent's motion for a more definite statement based on the ground that the complaint "is so vague and ambiguous" that respondent "could not reasonably be required to frame a responsive pleading," nor in dismissing plaintiff's complaint for refusal to furnish a more definite statement when so ordered by the Court.

ANALYSIS OF THE COMPLAINT

Allegations and Theory of liability pleaded :

By three separate lines of allegation the complaint covers three things. These, briefly, are :

1. The relationship existing by statute and contract between the appellant, Liquor Commission, and the defendant, Lack, and the relation of both to the delivery and sale of liquor through the package agency business.
2. The relationship between the respondent and C. V. Lack, as partners in the business of a "retail pharmacy" and "drug store."
3. Then, the separate and confusing paragraph 7 (R. 3) which presumably attempts to allege some theory of partnership liability, and also vaguely suggests some breach of duty on the part of the *individual defendants*, Mr. Lack and Mr. Athas.

1. Allegations as to Package Agency :

These allegations are contained in paragraphs 3, 4, (R. 1) and 6, (R. 2), and in the contracts pleaded and incorporated.

Para. 3 alleges the entering into the written agreement by which Lack "was authorized to sell and distribute liquor for the plaintiff *pursuant to the provisions of the Liquor Control Act.*"

The agreement designates Lack as the “vendor,” as does the statute, and recites that he is also engaged in retail merchandising as a retail druggist. (R. 10)

This is a recital of a necessary qualification because 46-0-S2, which authorizes these “package agencies” says, that appellant may create such “by authorizing persons engaged in the business of conducting a retail merchandising store to sell *at* such store in sealed packages liquor to be furnished by the Commission, * * *.”

The contract then recites respective covenants and agreements to be performed by the appellant and defendant, Lack. The Commission agrees to “furnish liquor” for the purpose of the operation of the agency and Lack agrees to sell it at prices fixed by the Commission and account to it for the retail prices so fixed. It was agreed that: “The said package agency shall be carried on and conducted *at* the present place of business operated by the vendor *at* Brigham Street Pharmacy store located at East South Temple Street in Salt Lake City, Utah; and shall be designated as package agency No. 78.” Lack was to receive from the Commission “a minimum monthly salary * * * of \$1,000.00, and such additional salary” as the Commission determined.

In par. 4 (R. 1), it is alleged that by the agreement pleaded, Lack agreed to operate the agency “*In* that certain drug store * * * owned by the *defendants* as a partnership,” etc. The “in” may be a little propaganda, as the contract, quoted above, says “*at* the Brigham Street Pharmacy store.” The contract is controlling

as to what it says. And by statute (46-0-82) it had to be in a part of a retail store premises, designated and duly noticed by the Commission.

Then, para. 6 (R. 2), alleges that between 1945 and 1948 “pursuant to the terms of said agreement, plaintiff * * * delivered to the *defendants* at the Brigham Street Pharmacy liquor of the total value of \$1,057,763.94 * * * and that the *defendant* (Lack) received and took possession of the same, pursuant to the terms and conditions of said agreement, Exhibit A.” That is how all the liquor was handled and this includes the \$37,800.00 worth not thereafter accounted for.

The use of “defendants” in the first clause, and in this paragraph which is dealing with the contract between Lack and the appellant, appears likely to be a typographical error. It has no importance, anyway, in view of the last clause, that all the liquor was “received” by and taken into the “possession” of the defendant Lack, “pursuant” to the contract with him. Any inference of delivery into the possession of this respondent, or the partnership, is thus clearly negated. Any delivery to the partnership would have been contrary to the contract, and, of course, a violation of the statute by the appellant itself, and will not be presumed.

Liability against respondent is not alleged or claimed by reason of *his* having or asserting possession of any liquor. The partnership is not a defendant, and so this term “defendants” cannot mean or include it.

So, too, there is no default by anyone claimed, until after Lack got possession of the liquor, and it was sold, and then the default is the failure "to account." (R. 3)

We refer now to some of the Liquor Control statutes, for two purposes. One is to aid in the interpretation of the contract and allegations, and the other is to show that the conduct of Lack indicated by the complaint and attempted to be attributed to respondent consists of not acts of simple conversion, as to which one partner may bind another, so as to make him civilly liable; but would be acts in violation of statutes, which make them criminal acts, and for which another partner would not be generally chargeable.

Sec. 46-0-50 places the responsibility for the distribution and storage and for the delivery of alcoholic beverages upon the Commission, and under (r) the governing of the "conduct, management, and equipment of any premises upon which alcoholic beverages may be sold

* * * ."

And 46-0-82, *supra*, after providing, as above stated, that a liquor package agency must be in a retail store operated at the premises at which the agency is located, says:

"The authorization shall be by certificate of the Commission, and such certificate shall designate the person in charge of such agency who shall be a 'vendor' under this act. The said person shall be a natural person and the exact location and description of the *part of the premises* where such liquor may be kept and sold shall be

designated in the certificate, *and liquor shall not be kept at any other place than as in the certificate designated.*"

There is no allegation that any of this liquor was delivered, received, or kept in any part of the pharmacy premises other than that "part" designated for the liquor agency; and, too, it must be presumed that, when the defendant Lack "received and took possession of" the liquor in question, he did so in the "part of the premises" so legally designated.

Under 46-0-244, the violation of any of the liquor statutes would have resulted in the forfeiture of the pharmacist and pharmacy licenses of the partnership; and under 46-0-237, the delivery to or keeping of the liquor here described in the partnership premises would have constituted these premises an abatable public nuisance; and under 46-0-197, and many other provisions of this statute (see: 46-0-107, 46-0-156, 46-0-157, 46-0-157a), if Lack, while acting for this partnership, had done anything by way of handling this liquor, such would have constituted a crime. And, further, 46-0-58 expressly prohibits any person, authorized to sell liquor, to, by clerk or agent or otherwise, "sell or furnish liquor in *any other place* * * * than as authorized by this act."

Before leaving this first line of allegation, we point out that, not only is there no allegation that any of this liquor was kept or sold in "any other place" than that "designated" by the Commission, but there is no allegation that this respondent was ever in this place, or ever

had anything to do with the operation of it. If there could be claimed to be any such, appellant does not seem to rely upon them here.

Its point (p. 6) is that respondent is liable, whether he "knew of or participated * * * or not."

Likewise, there is also no allegation that the partnership was engaged in the operation of this package agency business, or that it ever received possession of any of the liquor involved. Far from it, the partnership, as a distinctly separate line of business is alleged. And, particularly, there is no allegation that respondent was a member of any partnership which, "*in the ordinary course of its business,*" *could*, or ever did handle this, or any, liquor, in any way.

It is important, also, we think, to point out that Exhibit "B," set up and incorporated in the complaint by plaintiff, recites that "it is mutually understood that there is an establishment on said premises used in the operation of a retail liquor store, and that the equipment used in its operation *is not included* or subject to this sales agreement."

This is the agreement by which the partnership took over the pharmacy Dec. 13, 1945. (R. 10) And thus, the partnership did not contemplate the liquor business; and, also, it is plainly indicated that the, or at least a, package agency was operated in these premises prior to the commencement of the operation of the pharmacy by these defendants.

In this connection, also, this document, Exhibit "B" (R. 10), also recites that the party who sold the pharmacy to these defendants had, for some time, operated this drug store business at that address. It may also be noted that, as to the portion of the premises designated for the liquor agency (R. 9), Lack agreed "to keep such premises open to the public for business purposes" on each day that the appellant permitted the sale of liquor. And it also recites, as indicated in the allegation above referred to, that the "said package agency shall be * * * conducted *at* the present place of business * * * at Brigham Street Pharmacy store."

Thus, it is indicated that the conditions as to the separate portions of the premises used respectively by the package agency and by the pharmacy were not changed by the formation of, or during the existence of, this partnership, nor were these distinctly separately owned and operated businesses changed. There is no allegation that they were, and the inferences which may be fairly drawn are that they were not.

2. Allegation as to the Business of the Partners:

Except for the mention in the allegations just referred to of the Brigham Street Pharmacy in par. 4 (R. 2), and which are put there in explanation of the contract between the appellant and Lack, and of his right to so contract, because the package agency was to be in the "retail store" premises, the only other allegation as to the business of the partners is contained in par. 5. This paragraph alleges, in substance, that about Dec.

13, 1945, these two defendants entered into an agreement with one Hedrick for the "purchase of the retail drug store" known as Brigham Street Pharmacy, and gives the location.

Then (R. 2), "that at all times herein mentioned, the said defendants owned and operated said Brigham Street Pharmacy as partners, and shared in the profits and losses thereof." That is all as to the nature or "the ordinary course of the business of the partnership" (60-1-10). No connection, whatsoever, between this business and that of the foregoing package agency business is anywhere intended.

Yet, this allegation seems to furnish the only basis for appellant's partnership theory, connecting respondent Athas with the liquor business of appellant and defendant Lack. It seems that from this relationship appellant argues that, what was done by Lack, the "vendor," in receiving or selling liquor, and failing to remit the receipts therefrom, may be imputed to this partnership in the drug store business. Or that the mere existence of a partnership in one business makes each partner therein liable for the defaults of the other in any other separate business undertaking of his.

3. Allegations as to Breach of Duty:

All of the allegations relating to breach of duty or upon which any liability may be claimed are contained in para. 7 (R. 3).

This alleges that between December of 1945 and March of 1948, the *defendants* “sold and otherwise disposed of liquor belonging to the plaintiff of the retail value of \$37,805.17, for *all* of which the said defendants *failed, neglected, and refused to account* to this plaintiff, and that, *therefore*, the said defendants wrongfully converted the *value thereof*, to-wit: the sum of \$37,805.-17 to their own use, * * *

This paragraph follows immediately after the above quoted direct allegation that Lack, as the package agency operator, “received and took possession” of all the liquor including this, and that he did so “pursuant to * * * said agreement, Exhibit A.” That could not, of course, be as a drug store operator.

And it cannot be claimed, that this or any allegation referring to “defendants” is an allegation that charges the partnership as such . Such references can have no relation whatsoever to appellant’s theory of partnership liability of respondent. The partnership is not a “*defendant*” at all. So this allegation actually says only that the liquor was delivered to Lack *at* the pharmacy location.

Now, let’s see if any more can be claimed for the use of “defendants” in par. 7 (R. 3), that “defendants sold and otherwise disposed of” the mentioned portion of all the liquor received by Lack? We think not.

First, to get its partnership theory of liability to attach to this respondent, plaintiff must get the partnership into the liquor handling “business.” This appellant

does not attempt to do, and this allegation has no tendency to do it, because "defendants" cannot mean the partnership.

Secondly, the sale and delivery is neither by this allegation, nor by the complaint nor by plaintiff's brief, claimed to be the conversion relied upon here. Nor can it be so claimed.

Let it be noted, in this connection, that one of the individual defendants so charged in this complaint with "selling and disposing of" liquor, is Mr. Lack. He is appellant's vendor; and appellant has already, in this complaint, alleged a contract, (Ex. A) by the specific terms of which *he* is required to sell, and thus also dispose of, all this liquor.

It was his duty to sell it. That was the purpose for which appellant delivered it to him, and it was what appellant was paying him for doing. (R. 8)

Keeping in mind, then, the lack of any allegation that the partnership ever possessed or engaged in selling any liquor, and also the fact that the allegations referring to Lack's conduct show that he was acting "pursuant" to the package agency agreement, not as a pharmacy partner, nothing can be claimed as against respondent, by merely including him individually by the use of the plural "defendants," in connection with sales.

Since no wrong-doing is remotely indicated by the allegation of sales, as applied to Lack, and he is alleged to have engaged in the sales, how could a conversion

arise as against respondent, by reason of the fact that he might have joined or helped Lack in this rightful act, or acts? It seems that the most that could be taken as an inference or presumption of fact would be that respondent helped Lack to do something which Lack had a right and duty to do.

It is not alleged, or claimed, that the sales constituted a conversion, anyway. And a most conclusive elimination of any claim of conversion by this plural use of "defendants," as to "delivery" or sale, is that appellant does not, either by this or any other allegation, or by the points raised in its brief on this appeal, claim a conversion by reason of possession or sales, wrongful or otherwise.

In fact, the very next allegation departs from any intention to claim a conversion of the liquor itself, or a conversion by reason of the sale of it.

There the complaint (R. 3) states the value of part of liquor so alleged to have been sold, and then says:

"for all of which the said defendant failed, neglected and refused to account to plaintiff and that, THEREFORE, the said defendants *wrongfully converted the value thereof*, to wit: the sum of \$37,805.17 to their own use, * * *" (emphasis ours.)

So, while the retail value is probably not the value which could rightly be claimed for conversion of the liquor by the respondent, under the general rule, the amount Lack was required to remit upon sale by him under his contract was the "retail value." (R. 8) And,

taking the ordinary meaning of this allegation and any definition or use of the word "therefore," this clearly says, that, by reason of defendants' failure to account, said defendants "converted the value of" so much liquor to their own use. It then adds, and this is plainly correct, that it is this failure to account for the "sum" due the Commission that caused its alleged damage.

This is the only time "converted" is used in the complaint and this is the only thing alleged as a "conversion," therein.

Thus, from the facts alleged in this complaint, it is plain that Lack is sufficiently charged with a claim, at least for breach of his contract. This complaint says he has failed to do exactly what it recited in the contract pleaded, that he would do, in this respect, to protect appellant against this loss.

And for this, he gave the statutory bond. And so, as appellant alleges (R. 8), it collected on this bond. And so, too, all plainly understood that it all had to do with the package agency business, not the drug store business. But, this is not an allegation of conversion by anyone, as we shall further show.

And respondent, by the complaint, had no duty "to account" for all or any of the liquor received by Lack from appellant "pursuant to this agreement." Failure to account is not conversion, and there is no allegation that respondent ever had possession of any "sum" or amount of money received from the liquor. And appellant does not claim liability on such basis.

It does allege that, at the time of the failure to account, Lack was appellant's partner in the drugstore business. But yet, it is nowhere alleged, or intimated, that this partnership, or this drug store, ever had possession or control of any of the liquor, or of any "sum" of money from it, or ever "failed to account," or ever "converted" anything.

The brief, in fact, seems to eliminate any possibility of any claim or inference that the loss resulted from any operation of the drug store, by the affirmative statement that the loss was from the operation of the package agency. It says (p. 4) :

"This action was brought to recover the sum of \$37,805.17 which was lost to the State of Utah THROUGH THE OPERATION OF the Brigham Street Pharmacy LIQUOR PACKAGE AGENCY, in the years 1946 to 1948."

This mixing of the pharmacy name with that of the liquor package agency designation seems to be another attempt, by mere insinuation, to involve the partnership. The contract plainly states how this agency shall be designated. It says that it "shall be designated as Package Agency No. 78."

Before leaving this, we point out, also, that the above quotation from their brief, as to this action, and as to loss, does not claim the loss of any liquor, but alleges sale of liquor and failure to account, and loss of a "sum" of money, and recites that this action was brought to recover such a "sum."

On the same page of the brief (p. 4), near the end thereof, it again states the "value," as above quoted herein, and then says, "that this sum had been converted by defendants." So that it is clear that there is no claim of conversion of liquor by the sale of it, or, in fact, at all.

So it is clear that the loss claimed was "through the operation of" the "package agency," and by reason of a "failure to account."

What Appellant Claims It has Alleged:

Before the argument, we will quote what the appellant, in its brief, claims it had alleged as a basis of claim here.

Strikingly, although perhaps naturally, appellant makes no mention of the first set of allegations above referred to and analyzed by us. These are the elaborate allegations constituting about four-fifths of its complaint, which amply show that it was "in the ordinary course of the business" of the liquor package agency that the loss really occurred.

Appellant, in its brief, (p. 9), says the "complaint alleges":

1. "The existence of a partnership known as Brigham Street Pharmacy."
2. Sets "forth * * * the delivery to the defendants *at* the Brigham Street Pharmacy of liquor, the property of plaintiff." (This is the whole \$1,057,000.00 worth.)
3. "Furthermore, it has alleged the conversion by the defendants of a portion thereof of the value of \$37,805.17."

We have quoted and have tried fully to analyze what actually has been alleged as to these matters, and wherein the allegations are lacking. We will deal with some law on the last of these claims, under Point I-A immediately, and with the law on the others more generally under Point I-B later.

ARGUMENT

POINT I-A

The complaint does not allege a claim because (a) “The recital of a conversion, in the complaint (R. 3), is a conclusion of law, and is not supported, but is nullified, by the specific facts alleged.”

The foregoing analysis and the authorities cited later under Point I-B will dispose, we believe, of every possible claim of liability against this respondent, except such as may possibly be claimed by the general allegations of conversion under paragraph 3, as just above quoted.

There is only the one mention of “converted” or “conversion.” This is in paragraph 7 of the complaint, and seems to be the only thing to which this claim, just quoted as No. “3,” above, could refer.

It is our position that the foregoing deduction that “defendants failed * * * to account to this plaintiff, and that, therefore, the said defendants *wrongfully converted* the value thereof,” is a conclusion of law, which is not admitted by our motion, and it is not supported, but is nullified, by the detailed allegations of fact from which it is deduced.

The following authorities show that the rule is the same under the former Code practice and the Rules of Civil Procedure, and is to the effect that, where such a conclusion is alleged as a deduction from facts alleged, and the facts pleaded do not sustain the conclusion, the facts pleaded are controlling, and the conclusion will be disregarded.

1 *Bancroft Code Pleading, Practice and Remedies* (1937 Ed.), p. 60, states the rule as follows:

“Where a pleading contains both general and specific averments which are inconsistent, or where there is alleged a conclusion and also the facts from which it is drawn, and such facts are inconsistent with and do not sustain the conclusion, the specific averments or special facts are controlling, and the general allegations will be disregarded as immaterial.”

See, also, *Id.*, p. 28, as follows:

“The mere presence of a conclusion, if a logical deduction from facts alleged, will not render a pleading insufficient. But a conclusion has no greater force than the premise upon which it is founded, and it is inadequate when it is unsupported by the recited facts upon which it depends.”

This rule of pleading has been repeatedly recognized in the Federal Courts under the Federal Rules of Civil Procedure, which are the same as ours, on this.

For example, in *DeLoach v. Crowleys*, 128 F. (2) 378, (1942), it is said, at p. 380:

“Under this rule a petition may be dismissed on motion if clearly without any merit, and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or *in the disclosure of some facts which will necessarily defeat the claim.*”

Burns v. Spiller, 4 F.R.D. 299, aff'd. 161 F. (2) 377, (App. D.C. 1947), certiorari denied 332 U.S. 792 (1947).

This case also illustrates the application of this rule of pleading. Here, although the complaint contained conclusions to the effect that the conduct of the defendants was wrongful, unlawful, and malicious, the complaint was dismissed because the facts set forth in support of this conclusion failed to show that such conduct was, in fact, tortious.

This rule of pleading is analogous to the principle which has been consistently applied in the Federal Courts, that where a complaint alleges a conclusion which, by itself, may state a cause of action, if other facts are set forth which disclose a defense to the claim asserted, the complaint cannot be sustained as against a motion to dismiss. See, for example, *Abram v. San Joaquin Cotton Oil Co.*, 46 F. Supp. 969, 974 (1942), (Statute of Limitations); *Hartford-Empire Co. v. Glenshaw Glass Co.*, 47 F. Supp. 711, 714 (1942), (Statute of Limitations and Laches); *Hoover v. Lacey*, 80 F. Supp. 691, 693 (1948), (Release of a Contract Claim).

Eddings v. Southern Dairies, 42 F. Supp. 664 (1942).

This case involved a suit under the Fair Labor Standards Act. In order for that Act to be applicable, the employee plaintiff must have been engaged in interstate commerce. The complaint alleged, generally, that the employee was engaged in interstate commerce. The complaint went on further, however, and more particularly described the nature of plaintiff's duties.

It was held that the complaint must be construed in the light of the particular facts alleged, which were controlling, and, since those facts disclosed that the employee was not engaged in interstate commerce, the complaint was dismissed, despite the presence of a general allegation, in the form of a conclusion, to the contrary. The court said, at p. 665:

“While the complaint in this cause alleges in general terms that the plaintiff, and those for whom he sues, are engaged in interstate commerce, the allegations so alleging must be taken in connection with the other allegations of the complaint where plaintiff attempts to particularize the duties of the employees involved in this controversy, and to state in what manner they are engaged in Interstate Commerce * * *.”

Robbins v. Zabarsky, 44 F. Supp. 867 (1942).

This case is a suit for liquidated damages under the Fair Labor Standards Act (29 USCA, Sec. 207). Under Sec. 213(b) of that Act, Sec. 207 did not apply to employees subject to the jurisdiction of the Interstate Commerce Commission, and employees were subject to the

jurisdiction of the Interstate Commerce Commission if their duties involved the safety of operation of interstate motor carriers.

While the complaint alleged, generally, that the Federal Court had jurisdiction of the case under Sec. 207, it also alleged, more particularly, the duties of plaintiff as a mechanic, involved in repairing and servicing the trucks and equipment. It was held that the general allegations of jurisdiction were nullified by the particular allegations of fact indicating that plaintiff was subject to the jurisdiction of the Interstate Commerce Commission. The complaint was, therefore, dismissed.

At p. 869, the court said:

“The plaintiff objects to dismissal of the complaint on the ground that the question whether he is within the exemption should not be decided on a motion to dismiss. I do not believe that this objection is well-grounded. ‘Failure to state a claim,’ Rule 12(b), Federal Rules of Civil Procedure, 28 USCA, following Sec. 723(c), *may be due to setting up too many facts as well as too few.*”

The court also said, at p. 870:

“It, therefore, seems that if *facts* are alleged in the complaint which make it possible to determine whether the exemption applied, the legal question of applicability of the exemption may be determined on a motion to dismiss. Cases cited by the plaintiff (citations omitted) * * * are distinguishable on the ground that there the allega-

tions of the complaint were *insufficient* to enable the court to determine the question of law raised by the motion to dismiss."

The court also said, at p. 870, in refutation of another argument, also here made by appellant (p. 9):

"I cannot agree with the plaintiff's further contention that his allegations are insufficient to justify the action here taken because the *proof* might show he was not within the jurisdiction of the Interstate Commerce Commission. The plaintiff's description of his job is sufficiently minute to give an ordinary person a clear impression of the nature of his duties."

Additional authorities on this point might be cited at length, but, as we find no exception to the rule as stated, this would seem to serve no purpose.

We believe these dispose of any claim that direct liability, or conversion by any acts or conduct of this respondent, has been alleged. It seems that such is not claimed.

Additional law, applicable to both Points I-A and I-B, will be cited *infra*, under Point I-B.

POINT I-B

"The claim of conversion, based on the theory of the partnership relation of Lack with respondent in the pharmacy, is unsupported, and is unsound in law."

Except for the one or two references in plaintiff's brief, and which we have thought might possibly be construed as claiming that it has alleged a direct conversion,

all that is alleged or claimed is that this respondent is liable, by reason of this partnership relationship.

Of course, the statement in the brief (p. 9) that "it has alleged conversion," may well be intended, also, to mean no more than that it has done this by alleging the partnership relation, as this relationship is recited immediately before this statement.

In fact, it is plainly said (p. 5): "The theory of plaintiff is that where a conversion occurs in the course of operation of a partnership, each partner may be held liable * * * regardless of knowledge * * *." And, again (p. 6): "Plaintiff's position is * * * if one partner converted a portion thereof, then all partners may be held * * *;" and (p. 6): "This theory is fundamental to plaintiff's position so far as defendant Athas is concerned."

This theory, alone, is argued in the brief. And, since it is the only one on which any law is cited, it is possible that we have been over-cautious in discussing the point of any claim of direct conversion, at all.

In any event, the complaint is not based upon any claim of misconduct by this defendant Athas, or any claim of knowledge of any such. If such was intended, it would have been easy to allege conversion against him by the short form of complaint provided for by the Rules, which would have carried an implication of possession by him and of knowledge on his part. But, appellant has elected to allege many facts, including these as to this partnership, and its business, and to rely upon a theory based thereon.

There was apparently a reason and purpose, and perhaps a commendable one, in appellant's not claiming conversion by any act of this respondent himself. And, also, in attempting this theory of vicarious liability, which is now repeated throughout the brief (pp. 5, 6, 14, 15), and which rests upon C. V. Lack's conduct alone.

One reason probably is that no personal contact by this defendant with the liquor involved, and no knowledge by him as to the handling or disposition of liquor by Lack could be proved, if it were alleged.

Another reason, we think it may fairly be assumed for the State's hesitancy to allege that the loss of the liquor described in this complaint was due to any conduct of this respondent, is that such allegations would be entirely contrary to the whole history of this particular liquor package agency, and the handling of this liquor as heretofore publicly aired for some months, and as established by the State in two recent cases.

This factual history, and the conclusions as to responsibility for this loss, was there presented to this Court, on briefs presented by the Attorney-General and the Assistant, who have prepared this pleading and appellant's brief here, in this case, or who have participated in both.

These cases are: *State v. Lack*, 221 P. (2) 852 (decided August 26, 1950), and *State v. Harries*, 221 P. (2) 605.

They dealt with this same liquor and alleged loss. Witnesses testified in great detail as to what transpired at the premises where the appellant and Lack operated this package agency. Many people were mentioned as participants, in different phases of the liquor handling, but the respondent Athas was apparently never present, or involved, or mentioned.

Because this has other bearing here, we will pursue these cases a little further. It was stated (853) that Lack's shortage amounted in retail value to \$37,805.00. This is the same dollar value as the loss alleged here. (R. 3).

(Incidentally, it is stated by this Court, as there established, that \$10,888.00 of this shortage and loss occurred before Lack's drug store partnership was formed. We merely wonder, in passing, how appellant would work its partnership agency theory as to this.)

The opinion goes on to recite various criminal conduct and embezzlement, as charged against Lack, and also his intent to defraud. It recites the concealing of this shortage by "padding sales reports," also, the illegal selling to clubs, and that a "burglary was faked" by him to conceal his shortage.

The opinion says of him :

"Defendant was an *agent* of the State of Utah to sell the liquor in accordance with the liquor laws."

As to the quantity of liquor lost, it is again stated in the opinion (613) :

- “To show the scope of the operation, we have roughly computed the sales made to only three of the clubs involved.” These “three clubs paid Lack at least \$35,000.00 for whiskey.”

As to responsibility for the alleged loss, we cannot refrain from quoting from the opinion again (613):

“That *he* (Lack) could operate and carry on such a large volume of business from a package agency in such a notorious manner suggests either participation by someone in the Enforcement Division or unequaled laxity in upholding the law.”

So, as we have said, it is doubtful that appellant, or its counsel here, would want to, or did, attempt to allege or prove a factual story contrary to what they established in these cases. But, appellant seems to feel justified in attempting to attach a liability to this respondent, if this can be done, on a technical theory of partnership agency alone; or feels justified, at least, in putting that question up to the Court.

So, it argues, that because there was a partnership in the pharmacy, Lack's misconduct can be attributed to this respondent, at least to the extent necessary to establish liability to appellant for the loss of the proceeds from a portion of the liquor delivered to Lack, as its agent, at the same general premises.

So, too, the allegations of the complaint here aptly show again that Lack was, in fact, “an agent of the State of Utah to sell this liquor in accordance with the liquor laws.” And, we think, the entire factual basis of

appellant's claim, and its full claim, is, as we stated, after careful analysis in the Lower Court, just this:

“Plaintiff claims by this complaint that, if the Liquor Commission agrees with a person to operate a package agency as its vendor, and if such vendor happens to be a member of a partnership which, at the same time, is operating a retail drug store, and if such package agency is operated in a designated portion of the same premises in which said partnership retail business is operated, then the partner in the retail business, because of his partnership relation therein, is responsible for the default of the package agency vendor, in failing to remit receipts from sales made in his conduct of the package agency.”

We may now add that this is the claim now presented, and relied upon, by appellant in this Court.

After the complete allegations showing the arrangements for, and the conditions of, delivery and handling of this liquor business, and also the allegations showing a different partnership line of business entirely, and after noting the absence of any allegations or inference or intimation that the partnership ever was intended to, or that it ever did, engage in the business of handling liquor in any way, it seems unnecessary to cite authority on this Point I-B.

It is true, of course, that if the liquor had been, in fact, handled in the “usual course of business” of the partnership, and if it had then failed to account for part of it, both partners would be liable; but the complaint actually negatives any inference or intimation that it was.

It is fully alleged that the liquor business is the business of Lack and the appellant. It could not legally be otherwise. And the business of the partnership is also alleged (R. 2), and liquor handling is not legally, or at all, "appropriate to" or within the scope of the "ordinary course or usages" of that business. Any pleaded or inferable acts of Lack, pertaining to liquor, would plainly be appropriate to and within the ordinary course of that business, and would not be within the agency of these partners.

See: *Salt Lake Brewing Co. v. Hawke*, 24 U. 199, 207; 66 P. 1058.

It is impossible to see how handling or selling of liquor could be "in the ordinary course of the business" of a drug store, when any such business conducted therein would be a crime. It certainly could not be presumed to be in such ordinary course of business.

And this partnership could not have been in, or have been dealt with in this liquor business, except in violation of the statute (46-0-82) which authorizes operation of a package agency by a "natural person" only.

If the liquor from 1945 through 1948 had been handled in the "ordinary course of the drug store business," of course, the Liquor Commission would, of necessity, have known of it, and this loss is strung out over this whole period. The liquor delivered by, and not accounted for to, the Commission is only 3½% of that

furnished to Lack at this agency. The other 96½% was paid for after Lack "received and took possession" (R. 3) of it.

The law and the contract, under which this liquor business was operated, required that all the liquor handled be furnished and delivered by the Commission to Lack. And appellant alleges (R. 3) that it "performed all of the conditions and obligations on its part to be performed."

The Commission collected over a million dollars for this liquor, so delivered to and sold by him. It cannot be assumed or inferred that the Commission entered into and engaged in all this business in violation of the law, and we do not believe that any such is intended to be alleged. This was never the "ordinary business" of a drug store.

So it again comes down simply to what appellant has argued in its brief, which is this: If a person, who is an agent engaged in one line of business, is also a partner in one or several other and distinctly different lines of business, then everyone of his partners in every other line is liable for any tort he commits in the "ordinary course" of the first business.

Or, stated another way, where a person is a partner in one or more lines of business, and also operates one or more businesses of his own, any partner of his is liable for any tort that he may commit in the course of his own business or businesses.

We agree that a partner in a business, in the course and furtherance of which a tort is committed by his partner, may be charged therewith, without an allegation that he had knowledge of his partner's tortious conduct.

But we confidently deny that he would be so liable, unless he at least had knowledge that he was a member in an existing partnership which was engaged in the course of a business in which it is alleged the claim of loss occurred.

This is the obvious weakness of appellant's contention here. It alleges that this partnership was one engaged in a legitimate business, which is universally and by statute recognized as a distinct and different business from the liquor business alleged, and in which this loss occurred, and then it has to argue that Lack's misconduct in the liquor business puts his drug store partnership into that liquor business, and makes it liable for his acts therein.

No authority can be found for such a position or theory.

Appellant first cites (p. 8) 69-1-10 of the Utah Code. This does not refer to conversion directly, but does state that: "Where by any wrongful act or omission of any partner, acting in the ordinary course of the business of the partnership * * * loss or injury is caused to any person * * * the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

Then, 69-1-11, which says that: "*Where the partnership, in the course of its business, receives money or property of a third person, and the money or property so received is misapplied by any manner * * * the partnership is bound to make good the loss.*"

The agency theory by which one partner binds another applies only while a partner is "acting in the ordinary course of the business of the partnership." And 69-1-11, referring to a situation where the "partnership receives" money or property in the course of its business, has no application here.

There is no allegation or claim that this drug store partnership, either in "the course" of its business or in any manner, ever received any money or property of the plaintiff, or that anybody converted either of these.

One question is what is meant by "acting in the ordinary course of the business of the partnership," and what is quoted as the test on this, in an Annotation in 175 *A.L.R.*, p. 1311, is the following from *Am. Jur.*:

40 *Am. Jur.*, p. 261:

"Sec. 190. CIVIL LIABILITY FOR TORTS.

* * * *The test of the liability is based on a determination of the question whether the wrong was committed in behalf of and within the reasonable scope of the business of the partnership.*"

The liability of a non-acting partner rests upon the principle of agency. See:

47 *C.J.*, p. 826.

Mechem on Agency, Vol. 2, Sec. 1879.

In this section, this author points out, also, that "the scope of the business," as applied in partnership cases, is a "corresponding term" to that of "within the course of his employment," as applied to an agent.

Mechem, Vol. 2, Sec. 1960.

This section further points out that a principal may be liable for even wanton or malicious acts of his servant, if the servant were actually acting within the course of his employment, and in the execution of his authority, and says:

"But, in general terms, it may be said that an act is within the course of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account."

47 *C.J.*, p. 837, Sec. 300.

This section also points out that an act by an individual, even though he be a member of a partnership, if done "in his individual capacity and on his individual credit as principal, it is binding on him only, even though it accrues to the benefit of the firm."

See, also, *Lowenstein v. Whitelaw, et al.* (Wash.), 34 P. (2) 1108, which case is cited in support of the above quotation. There is no benefit to the firm claimed here.

40 *Am. Jur.*, p. 261, et seq.

This work discusses the matter of a partner's liability, commencing with debts, and continuing through torts, negligence, conversion, misappropriation, libel, slander, malicious prosecution, and up to criminal conduct. The last of these will be discussed briefly later.

It is unnecessary to go into a discussion of all of these. In each paragraph, and in all the works on agency and partnership, it is emphasized that wrongful conduct, to bind an innocent partner, must be in, and in furtherance of, a partnership business in which they are both engaged. The facts alleged here do not come even close to creating a partnership liability, or to bringing this respondent within any rule of agency liability.

The complaint, in fact, affirmatively shows:

1. That this respondent was not even a member of any existing partnership engaged in the liquor business, in the operation of which this loss occurred, at all.
2. The loss occurred in the conduct of a business with which neither this respondent nor the partnership of which he is a member had any connection, at all. It is fully shown to be the separate line of business of Lack and appellant.
3. Any wrongful acts by which the loss could have been, or was, caused were not "commit-

ted in behalf of and within the reasonable scope of the business of the partnership," but were utterly foreign thereto.

It requires no further citation of authority to establish that the mere partnership with a person does not make one liable for any acts such person may commit. The following cases go much farther than we are required to go here, in disposing of this contention and, also, in disposing of any claim of partnership liability here.

Rouse v. Pollard, et al., 130 N.J. Eq. 304, 21 A. (2) 801, 136 A.L.R. 1105.

A member of a law partnership, acting for the firm, was, at the same time, acting on his own account. He was a member of the partnership firm sued. The firm, acting by him, had handled a divorce matter for the plaintiff. In the divorce settlement, the firm obtained for her some \$28,000.00. She turned this money over to the acting partner.

By agreement with her, he took \$350.00 of this as the firm's fee, which it received. Then, pursuant to her instruction, he kept the balance of the funds to invest for her, and, after paying her interest thereon for ten years, and having returned \$7,000.00 of the fund to her, he absconded with the balance.

He had also represented to her that the firm was, in fact, engaged in the business of investing the funds of clients.

The Court held that such was not a “characteristic function of the practice of law” and, therefore, not within the scope of authority or agency of one of the partners. And that the partner, therefore, in making such representation and receiving the funds involved, was not acting within his authority, and that he did not bind the partnership, nor was it liable. The opinion, and the Annotation following it, cite additional cases.

Prairie Oil and Gas Co. v. Shanblum, 294 F. 894 (5 CC).

This case is cited by 47 *C.J.*, p. 884, in support of the statement that “the fact of partnership alone does not render one member liable for the torts of another.”

In the case, there was a partnership for the buying, selling, threading, and handling of second-hand pipe and oil well supplies. The plaintiff brought the action against the partnership, to recover for pipe stolen from him, and which was purchased and disposed of by two of the partners. The other two defendant partners did not participate as to this, and did not ratify or approve the handling of the stolen pipe, and the Court held that they were not liable to plaintiff.

Even though the Court said the partnership was actually formed for handling the kind of product and engaged in the same line of business that these two partners, so acting, were engaged in, the Court held that the partnership to buy and sell did not include within its scope the dealing in property known, by the partners acquiring the same, to have been stolen.

Here, as we have above said, neither the conduct of Lack, the business in which it occurred, or the product handled, had any relationship to the partnership business.

See, also, *Iron v. Sauve*, 179 P. (2) 327 (Wash. 1947). At p. 330, the Court says:

"It is not enough for appellants to establish an agency relationship; it must be established that Halterman (the partner) was doing something *in furtherance* of the purpose for which the relationship was created. In other words, it must be within the scope of the partnership."

The cases cited by appellant give no support to the contention actually made here that this respondent is liable by reason of his membership in a partnership with Lack, in a separate business.

Each and all of these cases show that the conduct of the acting partner was within the usual business of the partnership and in furtherance thereof. For example, the *Brokaw case* cited and quoted from (P. 8) was simply one where a brokerage firm engaged in the handling of securities received the securities of a client and one of the partners converted them.

The *Clark case* cited from Colorado (P. 9), was one that rested upon innkeepers' liability. The innkeeper was a partnership and the law of Colorado made the partners liable for money of a guest deposited with them. The partner responsible for the loss of the money, the opinion says, was acting within the ordinary scope of partnership business.

The Appellants, at p. 9 of their brief refer the Court to an annotation in 67 Am. St. Rep. 38, and particularly to p. 42 and 43 thereof. At p. 39 and 40, however, the principles applicable to the instant case are set forth, wherein the author says:

“A tort committed by one partner will not bind the partnership or the other co-partners unless it be authorized or adopted by the firm or be within the proper scope and business of the partnership: (citations omitted). *Hence, if the partner commits a tort, not as a partner, but as an individual in respect to a matter entirely foreign to the business of the partnership, the other partners are not answerable for his wrong:* (citations omitted).”

Again at page 41, the author says: “If one member of a firm purchases cotton, which is liable for rent, and such purchase is not made for the firm, but for himself alone, and the cotton is converted to his own use, the other partner is not answerable where he had nothing to do with its conversion and received none of its proceeds: *Stokes v. Burney*, 3 Tex. Civ. App. 219.” See also p. 44, where, after referring to the cases cited by appellant at p. 42 and 43, the Court says: “On the other hand, if money or property comes into the hands of a partner in the course of some transaction unconnected with the firm business, his appropriation or mis-application thereof will not affect his innocent co-partners, where the firm does not receive the benefit of the wrong: (Citations omitted). Thus, if a promissory note is delivered to one

member of a firm, as collecting agent, his refusal to re-deliver the note does not make his co-partners answerable for the amount thereof. *Linn v. Ross*, 16 N.J.L. 55."

In *Nisbet v. Patton*, cited at p. 9 of appellant's brief, the Court merely approved an instruction given in the lower court. That instruction clearly told the jury that "the defendants having, *as partners in business*, received the notes for a particular purpose, they were bound, when that purpose was accomplished, to surrender the notes."

It does not appear that in that case the conversion occurred in the course of an unrelated business activity of one of the partners, and consequently that case does not support the appellant's position.

It is Not Alleged that the Acting Partner was Acting for the Partnership:

Appellant, in its brief (p. 9), makes the following statement as to this partnership claim:

"Plaintiff, in its complaint, has alleged the existence of a partnership known as the Brigham Street Pharmacy * * * Whether the disposition of this liquor occurred 'in the ordinary course of the business of the partnership,' we submit, is a matter of proof, * * *"

So, first, we have an admission that this complaint does not allege "any wrongful act * * * of any partner acting in the ordinary course of the business of the

partnership.” As it clearly does not. Yet the only principle of law (69-1-10) cited or relied upon is in this quotation.

And, now, since the only allegation as to the partnership is that one existed for another kind of business, and since it is frankly stated in the brief (p. 4) that the loss occurred “through the operation of the * * * Liquor Package Agency,” it affirmatively appears that liability is claimed purely by reason of the *existence* of this partnership. In fact, in stating its “theory” and its “position” throughout its complaint (see PP. 5, 7, 13), appellant uses this language: “Where a conversion occurs in the course of operation of a partnership, each partner may be held.”

This is not a statement of the law quoted and relied upon, or a statement of sound law, at all. It is language of confusion, which purposely avoids the related element, “while acting in the ordinary course of the business of the partnership.” And, in view of the other allegations and admissions, it can mean, and must be intended to mean, only that, if a partnership exists and is “in course of operation” at the time one partner therein causes a loss, the innocent partner is liable. This, of course, is not so.

And, also, “the disposition of this liquor” by Lack in this package agency business was not a wrongful act, under the law relied upon, either. Appellant had bound him by an agreement to sell the liquor.

And, furthermore, we have shown that such operation, in the handling of the liquor, could not be "in the ordinary course of the business" of the partnership operating "the Brigham Street Pharmacy."

And appellant, having pleaded the facts from which it asks that its theory be deduced, is within the rule of decision in the Federal Court of *Robbins v. Zabarsky*, *supra*, wherein a motion to dismiss was granted, and the opinion said:

"I cannot agree with the plaintiff's further contention that his allegations are insufficient to justify the action here taken because the *proof* might show he was not within the jurisdiction of the Interstate Commerce Commission. The plaintiff's description of his job is sufficiently minute to give an ordinary person a clear impression of the nature of his duties."

We simply add that the detailed description of the liquor business here, and the allegation as to the business of the partnership, are certainly sufficient to give an ordinary person a clear picture of the nature of each of these separate businesses. There certainly cannot be any claim merely by reason of the physical proximity of these two different kinds of businesses.

And, finally, when a plaintiff alleges detailed facts, from which a theory of liability is claimed or asked to be deduced, whether the theory of liability is sound or unsound, the matter of proof must depend upon its relevancy to what has been pleaded. The rule, of course, requires that the facts must state a basis of claim. But

there is certainly no rule that plaintiff can prove the basic facts in support of its claim because it has *not* alleged such.

Further Reasons Why No Liability Is Alleged:

There are two matters of law to which reference has been made before, in addition to those cited under the foregoing points, and by reason of which this complaint fails to state a claim as against this defendant.

The sections of *Am. Jur.*, above referred to, as to different acts by a partner binding an innocent partner in tort, turn very frequently (as above pointed out by Mechem, also) on whether the acting partner is really engaged in furthering the business of the partnership, or whether he has stepped outside, because of some malice, or intent or purpose or "personal motive * * * to act upon his own account."

We need not go into the detail of this, but call attention to the general rule that, where a partner engages in the commission of a crime, except in those cases where the crime consists in the failure of the business to acquire the necessary licenses, or do other things of that character, the innocent partner is not generally liable for the criminal acts of his partner. This is on the theory, and we think that situation clearly prevails in this case, that, in committing a crime, a partner or agent steps into the field of his individual endeavor.

40 *Am. Jur.*, p. 266:

“Sec. 196. CRIMINAL AND PENAL LIABILITIES.—A partnership relation in a lawful enterprise will not render one partner liable for the intentional criminal act of another. The liability of the absent partner is based on the theory of agency, but an agent’s wanton criminal act will not bind his principal.”

Another matter to which attention has been previously directed, is the further reason why no conversion at all is alleged in that there can be no such thing as the conversion “of a value.”

We have pointed out that in the only mention of “converted” or “conversion” in the complaint, it is recited: “That said defendants wrongfully converted the value thereof, to-wit: * * *”.

A value is “that which is considered an equivalent in worth.” It is not, by any definition, tangible property or personal property. It is not, therefore, capable of conversion.

Money itself, and particularly if identified, may be the subject of conversion. But there is no allegation that any sum of money was ever received by the partnership here, or by this respondent. Value would be somewhat similar to a chose in action.

53 *Am. Jur.*, p. 809:

“Sec. 5. CHOSSES IN ACTION.—An action will not lie for the conversion of a mere debt or chose in action.”

"Sec. 4. *INTANGIBLE PROPERTY*.—It has been declared that an action for conversion lies for every species of *personal property* which is the subject of private ownership; that the conception that an action for conversion lies only for tangible property capable of being identified and taken into actual possession is based on a fiction on which the action of trover was founded, namely, that the defendant had found the property of another, which was lost; and that such conception has become, in the progress of law, an unmeaning thing which has been discarded by most courts. It is ordinarily held, however, that an action for conversion lies only for personal property which is tangible, or at least represented by or connected with something tangible, and not for such indefinite, intangible, and incorporeal species of property as the good will of a business or a laundry route, or a permit to conduct business, or a licensed market stall for transacting trade."

POINT II.

The Trial Court did not err in granting respondent's motion for a more definite statement, based on the ground that the complaint "is so vague and ambiguous" that respondent "could not reasonably be required to frame a responsive pleading," nor in dismissing plaintiff's complaint for refusal to furnish a more definite statement, when so ordered by the Court.

While the claim upon which appellant apparently relies here, has become more certain by reason of concessions and statements of theory in its brief, the situation on this point must be considered as it was presented to the Trial Court on the motion and complaint.

We were there met with the problem of determining, as to both causes of action, what theories of liability might be asserted as against this respondent, and of attempting to determine which of such theories might be legally sound.

We believe, the situation presented is this:

If appellant's basis of claim of liability is, as we have stated and briefed it under Point I-B, then it does not come within the principle of law solely relied upon, and the Trial Court was right in sustaining our first motion. A claim was not stated and if a claim was not stated, as claimed under Point I, then this Point II need not be further considered.

But, on the other hand, if appellant claims that its theory of liability is not confined to the one point of claim, or is not confined to the possible theories or claims which we have attempted to discover and to refute under Point I, then it should be conceded that its refusal to furnish a more definite statement justified the decision under this Point II. Rule 12(e) requires that its complaint must be disposed of, if it so refuses.

Furthermore, there is no sense or reason or law, and no law has been cited, for appellant's off-handed brushing aside of both Rule 12(b), as to stating a claim, and also Rule 12(e), as to a more definite statement, with the mere assertion that something might be uncovered or found out under other later Rules, appropriate and applicable only after the formation of the pleadings, and for other purposes.

Rule 12(b) is intended to save the time and expense of the courts and parties, by determining at the outset whether plaintiff has a valid legal claim.

Rule 12(e) seeks to serve the same purposes, by enabling the parties to get at something definite enough, so that they won't be litigating in all directions. This rule has particular application, as shown by the authorities herein cited, to pleadings of this character, where detailed facts are set forth and several possible claims suggested.

It is also very plain that our motion did not seek "evidentiary" matters, as claimed by appellant. On this, while we do not repeat our motion, we do ask the Court to note (R. 16) that it seeks only for the theories or bases of liability against respondent, who, as appellant states (p. 11), was a "non-contracting partner." We were trying to get at something we could plead to, without having to speculate as to all that might be claimed under the two causes of action then alleged. The motion pointed out "details" desired as the Rule required.

And, it seems to us that, if Rule 12(e) is ever to have the application intended, this was the place for it.

We agree that *if the complaint* sets forth "a short and plain statement of the claim showing that the pleader is entitled to relief" (URCP 8(a), each averment of which is "simple, concise, and direct" 8(e)(1)), a motion for a more definite statement, attempting merely to compel the plaintiff to set out the evidentiary details upon which that claim is based, may be denied.

We also agree with Professor Moore (2 Moore's Federal Practice, p. 1651, 2d Ed. 1947) that "the true test is whether the pleading gives fair notice and states the elements of the claim plainly and succinctly, and not whether as an abstract matter it states 'conclusions' or 'facts'."

In the instant case, however, it is clear that the complaint does not comply with the requirements of clarity, brevity, and conciseness set forth in URCP 8 and, therefore, a situation is presented which calls for the application of URCP 12(e) *to compel compliance* with URCP 8.

Appellant begs the whole question when it says, at p. 14 of its brief, that a complaint complying with Rule 8, URCP, is not subject to motion for a more definite statement. The *issue* is whether the complaint *does* comply with Rule 8, and the discussion following will be directed to pointing out that the complaint here considered *does not* in any sense comply with URCP 8.

In the first place, this complaint does not set forth plainly and concisely, or at all, any legal theory of liability of the defendant Athas. A complaint must, in the first instance, in order to comply with URCP 8, set forth a legal theory of liability in simple and concise language. As eminent an authority as Professor Moore has this to say about the necessity of setting forth a theory of liability (2 Moore's Federal Practice, p. 1656, et seq., 2d Ed. 1947):

“The Federal Rules have done away with the narrow ‘theory of the pleadings’ doctrine. This doctrine, applied in many code states, requires a pleader to state a definite theory of his case, on which theory he must win or fail. Under the Federal Rules, on the other hand, a party is not ‘required to pick and stick to one theory of law * * * only to find when he gets to trial that he has chosen the wrong one.’ Amendments may be made during and after trial under Rule 15, changing the theory on which the case is brought, and under Rule 54(c) the party is to be granted any relief to which he is entitled even though he has not demanded it * * *.”

“This does not mean, however, that a pleading should not indicate some legal theory on which the pleader hopes to recover. As a practical matter, a good lawyer will of necessity have one or more theories of law upon which he believes his client is entitled to recover; if he cannot work out any theory he is not likely to have much success with his suit. True, the courts will go very far in finding a basis on which to sustain a pleading as against a motion to dismiss for failure to state a claim, but good practice demands that the pleader state his claim with simplicity and clarity in the first instance, rather than set out a jumble of unrelated facts and hope that the court will work out his case for him. *Further, if the pleading is to give ‘fair notice’ of the claim it will normally have to be bottomed upon some theory supporting recovery.* Indeed, it has been argued that this is now the major function of the pleadings, since the facts can be better gotten at by discovery.

"The courts have recognized these considerations in a line of cases supporting the proposition that the pleadings should indicate the theory or theories on which the pleader relies. Judge Leibell has stated it in this manner: 'Although under the Federal Rules of Civil Procedure plaintiff's relief does not depend upon the theory of action or actions which she adopts in her complaint, * * * in the interest of clarity and good pleading, she should state the grounds upon which her various causes of action depend. Not only is such a statement necessary in order to present defendant *with a complaint to which he can readily prepare an answer, but also a proper definition of the issues will greatly facilitate future proceedings in the case, such as examinations before trial.*' In this case the complaint, in addition to violating other provisions of the Rules, stated elements of a number of different causes of action without any clear demarcation of the legal theories on which plaintiff predicated recovery. In another case the court was unable to determine whether a cause of action was intended to be stated as an action for fraud, for breach of contract or for conversion, and therefore dismissed the complaint with leave to amend. Similar rulings have been made in other cases."

"This requirement that the pleader indicate the legal theory of his claim does not, of course, require him to pick one particular theory and cling to it to the exclusion of all others. Under Rule 8(e)(2) he may state the claim alternatively or hypothetically in the same count or in separate counts, and he will not be required to make an election between inconsistent theories. And as indicated above he may, within fairly broad lim-

its, shift his position before or at the trial under Rule 15, and even without amendment is entitled to any relief justified by the evidence.”

Another eminent authority, Judge Charles E. Clark, who played an important part in the formulation of the Utah Rules of Civil Procedure (See 2 Utah Law Review 12, 19, note 19, 1950), has indicated in a unanimous opinion by the Third Circuit Court of Appeals (*Herman v. Mutual Life Insurance Co. of New York*, 108 F. (2) 678, 682, (C.A. 3rd 1939) that a complaint, subject to “varied interpretations,” such as the complaint in the instant case, may be rendered more certain pursuant to Rule 12(e) of the Federal Rules of Civil Procedure.

In addition to the cases cited in the previous quotations, see:

United States v. Crescent Amusement Co., Inc. et al., 31 F. (2) 730 (D.C. M.D. Tenn. 1940):

“Upon due consideration thereof, the Court is of the opinion that interrogatories as provided for under Rule 33 are not considered as a preliminary step in the formation of pleadings but may be utilized for the purpose of obtaining evidentiary matters, *after pleadings have been formulated*; * * *

“The Court is therefore of the opinion that the proper method of obtaining a more definite statement of facts not averred with sufficient definiteness or particularity, in the original complaint to enable defendant to properly prepare his responsive pleading, is by a motion for a more definite statement or for a bill of

particulars under Rule 12(e), and this view has apparently been adopted by a large number of courts throughout the country."

Also, *Hartman Electrical Mfg. Co. v. Prime Mfg. Co.*, 8 F.R.D. 510 (D.C. E.D. Wis. 1949): "The defendant, as well as the Court, is entitled to know with reasonable certainty the basis of the plaintiff's claim for relief."

Also, *Gulf Coast Western Oil Co. v. Trapp*, 165 F. (2d) 343, (C.A. 10th 1947), where the Court says, at p. 348:

"If the requisite allegations of a complaint under Rule 8(a)(2) are too general or indefinite to apprise the defendant of the nature of the charge leveled at him, or are insufficient to enable him to prepare his defense, he may require of plaintiff the additional information under Rule 12(e) by a motion for a more definite statement of fact."

In the second place, if it is attempted to assert a vicarious liability on the part of the defendant, as is presumably so in the instant case (p. 7 of appellant's brief), the defendant is entitled to know the basis of such liability. That is, the defendant is entitled to know, before he can "reasonably be" expected to file a responsive pleading, to what extent he allegedly participated in or instigated the alleged acts resulting in liability, or, if he did not so instigate or participate in the acts alleged, whether, and to what extent, he ratified or adopted those acts, or is otherwise liable for the same.

A case in point, in addition to the cases previously cited under Point II, is *Picking v. Pennsylvania Ry. Co.*, 5 F.R.D. 76 (D.C. Pa. 1946), wherein a railroad company was being sued for damages for allegedly participating in a conspiracy to deprive plaintiffs of rights guaranteed by USCA Const. Amend. 14, and subject such plaintiffs to false arrest and imprisonment. It was held that the defendant was entitled to a more specific statement as to the manner in which the company adopted or instigated the alleged unlawful acts, and as to the capacity or position of its agents taking such action.

In the third place, it would seem that the defendant is entitled to know, if it is attempted to assert a conversion on his part, plainly and precisely, what property was allegedly converted. A direct and concise allegation to that effect is essential, not only in order that the defendant may file a responsive pleading, but, also, in order to enable the defendant to intelligently avail himself of the discovery procedures provided by the Utah Rules of Civil Procedure.

Having above set forth the law applicable to the issue raised by the motion for a more definite statement, we next consider the application of that law to the facts of the instant case.

The lack of any alleged theory of liability, we believe, is conclusively demonstrated by Para. 7 of the complaint (R. 3) wherein it is alleged that the *defendants* (meaning presumably defendant Lack and defendant Athas) "failed, neglected and refused to account to this

plaintiff, and that, *therefore*, the said defendants wrongfully converted the value” of what is contended to be a subject of conversion. Note that there is not only completely lacking any allegation of the origin of *any duty* to “account to this plaintiff,” but also in the previous para. 6 (R. 3) the complaint specifically negatives the existence of any such duty in that the liquor is alleged to have been “received” by the defendant (i.e. defendant Lack) “pursuant to the terms and conditions of said agreement, Exhibit A.” And with respect to the agreement referred to, it is further alleged (Para. 4 R. 2) “that in all instances the term ‘vendor’ as used in said agreement *referred to the defendant, C. V. Lack.*”

In short, it is alleged that the liquor was received and possessed by defendant Lack pursuant to an agreement solely between plaintiff and defendant Lack, and that, “therefore,” the defendant Athas is liable in conversion because he failed to account for liquor which he never received and for which he was never obligated to account under the terms of the agreement referred to.

We certainly think that the complaint was, therefore, so “vague and ambiguous” with respect to the theory of this appellant that respondent could not reasonably be expected to intelligently respond to it by any pleading whatsoever, and, moreover, that the complaint did not give to this respondent “fair notice” of the basis of any legal claim for relief. So, also, this respondent could not be compelled to resort to the discovery

provisions (U.R.C.P. 26 to 37) of the Rules since those provisions are appropriate only for ascertaining facts, not theories.

Next, we consider the existence of any basis of vicarious liability in the allegations of this complaint.

In paragraph 2 (R. 1) it is alleged that "the defendants * * * were partners, doing business under the firm name and style 'Brigham Street Pharmacy.'" In paragraph 5 (R. 2) it is further alleged that "said defendants owned and operated said Brigham Street Pharmacy as partners and shared in the profits and losses thereof." It has been pointed out that there is nowhere any allegation whatsoever that the defendants were engaged as partners in a liquor package agency. Then it is alleged (Para. 6 R. 3) that from 1945 to 1948, a quantity of liquor was "delivered to the defendants *at* the Brigham Street Pharmacy," but that only the "defendant (defendant Lack) received and took possession of the same" pursuant to the agreement previously referred to.

We think the sum of these allegations, intelligibly construed, is to the effect that the defendants were partners in the retail drug business and the liquor was delivered *at those premises* to be used in the liquor package agency pursuant to an agreement solely between defendant Lack and the plaintiff.

We fail to see how these allegations can be taken as asserting any basis for a vicarious liability on the part of defendant Athas whether in the operation or

ordinary course of business of *any partnership*, whether under the theory of defendant Lack as the agent of defendant Athas, or whether on any theory of ratification or adoption by defendant Athas of the acts of defendant Lack. Certainly, then, this respondent, is fairly entitled to enlightenment in this respect.

Next, we consider the allegations pertaining to the subject matter of the conversion. The allegation relating to this is set forth in Para. 7 (R. 3) to the effect that the “defendants wrongfully converted the value thereof, to wit: the sum of \$37,805.17.” As heretofore pointed out in this brief, since it is impossible to convert the “value” of any thing, clarification is imperatively required with respect to this allegation. Moreover, apart from any theory of vicarious liability, there can be no conversion unless it is alleged that the defendant Athas was in the possession or control of something capable of being converted. Any allegation to that effect is wholly lacking in this complaint.

In conclusion, then, on this point, it is futile for this appellant to attempt to place the burden on this respondent of defining all the issues that could be involved in this case by any responsive pleading of his, in view of the “vague and ambiguous” character of this complaint. Moreover, it is equally futile for this appellant (p. 14 of appellant’s brief) to attempt to relegate this respondent to the discovery procedures afforded by the Utah Rules of Civil Procedure when such procedures are rendered useless to this respondent because, by util-

izing them, he can only be probing in the dark for the basis of the claim for relief attempted to be asserted in this case. In short, recourse to either pleading or discovery by this respondent will be futile at any time before the position of appellant in this case is considerably clarified.

CONCLUSION

This is not the ordinary case, dismissed on motion. Neither is it one where there need be concern as to whether injustice may result by appellant not having had its day in court. It wants, only, the disposition of an issue of law.

Appellant itself chose to present a limited theory of liability, based on alleged agency only, and resting upon misconduct of its own agent, which conduct has become publicly well known. It pleaded facts which it does not desire to change, and from which it claims a technical liability may be deduced. It intentionally avoided raising any facts reflecting any theory of liability based on respondent's individual knowledge or conduct.

It not only elected to present this limited theory, but it also voluntarily elected to stand upon its complaint, as to both motions of respondent, sustained by the Trial Court, and appellant refused to amend, thus definitely indicating, then and now, that it does not want to claim liability upon any other basis nor furnish a more definite statement, after being ordered to do so by the Court.

Furthermore, it appears that justice, instead of being prevented, is, in reality, served by the ruling of the Court, independently of any more technical merit of the claim presented.

The allegations as to the liquor business show that appellant's own neglect in discharging its statutory duties as to strict control and supervision of many details of the conduct of its package agency allowed its loss to occur. And, that its failure to require an adequate surety bond for its protection, in the event of the failure of its agent to account as he had agreed, also contributed to such loss. True, this is all hind-sight now, but it indicates the injustice of this attempt to charge respondent for the loss.

The complaint affirmatively also shows that this agency operation was not a losing one, but was highly profitable to appellant, in that \$1,057,000.00 retail value of liquor was delivered here, and that all, except \$37,000.00 worth, was paid for. So that Lack paid to appellant \$1,020,000.00 for liquor he sold.

The failure to account for \$37,000.00 retail value, of course, did not result in a loss of that amount, as approximately one-third of that would, under the statute and practice, have been profit. Of the approximately \$25,000.00, therefore, lost, \$4,000.00 was collected from the Surety Company, as alleged (R. 3), reducing such loss to a total of about \$21,000.00, or less.

We think it is common knowledge, also, that on \$1,020,000.00 retail worth of liquor accounted for, appellant

made a profit of somewhere between \$200,000.00 and \$300,000.00. Or, in other words, that its profit on this venture was at least ten times the loss it is here complaining about.

In view of all the foregoing, it would appear to be a gross injustice to attempt to take all this profit, and then impose upon this respondent a total penalty and loss of this amount, or any portion of it, since the loss was plainly incident to the liquor business, which produced the profit.

It is not anywhere intimated that he, or any business that he was connected with, received one dime out of this liquor business operation. The opposite is indicated by the statement of appellant that its theory is that respondent is liable, even though there was no participation, or even any knowledge, on his part of any misconduct on the part of Lack.

On the merits, it would serve no purpose to repeat our contention here, that the theory of liability is not sustained and is not sound, and that the Trial Judge did not err in granting both motions of the respondent. There is no reasonable basis for contending that the Court could have done otherwise.

We respectfully submit that the orders of the Trial Court here should be affirmed.

MULLINER, PRINCE & MULLINER

Attorneys for Respondent.

C. E. Athas