

1955

## Marinus Johnson and Arlin Davidson v. Joseph Koyle et al : Brief of Appellant, Duke Page

Utah Supreme Court

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

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ARLIN DAVIDSON,  
Plaintiffs and Respondents,

vs.

JOSEPH KOYLE, DUKE PAGE,  
and JOHN DOE SYRETT,  
Defendants,  
DUKE PAGE,  
Defendant and Appellant.

**CASE  
NO. 8404**

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**Brief of Appellant, Duke Page**

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vs.

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**CASE  
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## **Brief of Appellant, Duke Page**

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### **STATEMENT OF FACTS**

Prior, to the 21st day of May, 1940, the plaintiff Marinus Johnson, was the owner of Water Filing No. 9873, filed in the office of the State Engineer of Utah, which he had acquired from one William F. Pratt and one Owen (Tr. P. 22). At that time the plaintiff, together with one Joseph Koyle, who is joined in this action as a party defendant, had

a written agreement with one William F. Pratt for the acquisition of 440 acres of land, which is to be hereinafter described, located in Juab County, Utah. Pratt, prior to the time that this agreement was entered into, was homesteading the property, and had merely a right of homestead but did not have a marketable title, and would not have one until the homestead was perfected, which was contingent upon the homestead requirements of the law of the United States and upon Pratt surviving to perfect the homestead. With this in mind, on the 21st day of May, 1940, the plaintiff, Marinus Johnson, and the defendant, Duke Page, entered into a written agreement which contemplated the use of the land which was subject to the homestead to be made by and perfected by Pratt. This agreement set forth, among other things, that Marinus Johnson was the owner of Water Filing No. 9873, and that in order for the Water Filing to be of any value, it would be necessary for the parties to construct certain dikes, levies and ditches from the source of water in Juab County, known as Baker's Hot Springs, to the land then owned by Pratt, which was to be acquired under the contract between Johnson and Pratt, to Johnson and for which Page was to receive an interest when it was so perfected. The purpose of the contract was that the defendant, Page, was to furnish money and equipment necessary to build the dikes and levies and that the plaintiff would contribute services, and that the defendant, Page, would be paid for his advancement by receiving one half of the water right and improvements, together with one half of the property that was to be acquired by the contract. In other words, both parties were to share equally in the water, improvements and the property that was acquired and in the

contributions made, even though the defendant, Page, was to advance the money at that time.

Thereafter, during the summer of 1940, Page sent men and equipment to work upon the canals and levies and dikes mentioned in the contract and that the plaintiff, Johnson, furnished a truck, and the men worked for a period of approximately twenty-eight days and that during this period Page paid for all gasoline, oil and supplies for this project. There is a conflict of evidence as to whether the project was completed; however, it is the position of the defendant that it was (Tr. P. 54, Tr. P. 112). At the end of this period both parties withdrew their equipment and the men from the job and it never again was resumed. Shortly thereafter, William Pratt died without having acquired a patent or title to the land, which was part of his agreement with Johnson.

Approximately three years later the widow of Pratt received title to the land by perfecting the homestead, and she conveyed, on May 7, 1943, this land to the defendant, Duke Page, for \$440.00. On October 4, 1944, the defendant, Page, entered into a written agreement with one Oran Lewis by which he was to sell and convey 440 acres of land, together with his interest in the Water Filing, for a price of \$3,750.00. The said Lewis paid Page \$350.00 and received a deed to one forty-acre piece of property, to-wit:

Northeast  $\frac{1}{4}$  of the Southeast  $\frac{1}{4}$  of Section 10,  
Township 14 South, Range 8 West.

At this time the agreement between Page and Lewis was terminated by a mutual consent in respect to the remainder of the property.

During the years 1944 through 1954, Page paid the taxes upon the said property, which has been in his name, and has made all other and necessary expenditures to the maintenance and operation of the property and has held the title ostensibly as sole owner. That on October 1, 1949, Water Filing No. 9873 lapsed because Page failed to submit a proof of use or obtain a further extension of time to do so, and that after the application lapsed, the plaintiff, Davidson, filed upon the water and appropriated it to his own use. Arlin Davidson, one of the plaintiffs in this case, also acquired title to the forty acres sold by Page to Lewis and, in addition, claims title to the property in question as a result of an agreement entered into between himself and the plaintiff, Marinus Johnson, and his wife, Katy Johnson, on the 27th day of May, 1952, whereby the said Johnson did sell and assign and convey a one-half interest in the property described in the plaintiffs' complaint.

On the 26th day of September, 1952, suit was commenced by the plaintiffs in the District Court of Juab County, State of Utah, to determine the right, title and interest of each of the above named plaintiffs and defendants in the following described property located near Baker's Hot Spring, Juab County, State of Utah:

Northeast Quarter of the Southeast Quarter of Sec. 10; North Half of the Southwest Quarter, North Half and the Southeast Quarter of the Southeast Quarter, all in Sec. 11; East Half and the Southwest Quarter of the Northeast Quarter; Southeast Quarter of the Northwest Quarter; Northeast Quarter of the Southeast Quarter, all in Sec. 14.

All of said property being in Township, 14 South, Range 8 West, Salt Lake Base and Meridian.



**STATEMENT OF POINTS****POINT 1**

THAT THE COURT ERRED IN FINDING THAT THE PLAINTIFFS HAD ANY CONTRACTUAL RIGHTS, EITHER EXPRESS OR IMPLIED, THAT COULD BE ENFORCED.

**POINT 2**

THAT THE COURT ERRED IN FAILING TO DISMISS THE PLAINTIFF'S CAUSE OF ACTION OR FIND FOR THE DEFENDANT, PAGE, FOR REASON THAT THE SAME WAS BARRED BY LACHES AND THE STATUTE OF LIMITATION.

**POINT 3**

THAT THE COURT ERRED IN FINDING THAT THE TITLE TO PROPERTY ACQUIRED BY PAGE WAS HELD SUBJECT TO THE RIGHTS OF JOHNSON AS JOINT ADVENTURER UNDER AGREEMENT — AND IN IMPOSING A TRUST UPON ALL THE PROPERTY ACQUIRED BY PAGE FOR THE BENEFIT OF THE PLAINTIFFS.

**POINT 4**

THAT THE COURT ERRED IN ASSESSING ONE-HALF OF THE TAXES AGAINST PAGE.

**ARGUMENT****POINT 1**

THAT THE COURT ERRED IN FINDING THAT THE PLAINTIFFS HAD ANY CONTRACTUAL RIGHTS, EITHER EXPRESS OR IMPLIED, THAT COULD BE ENFORCED.

In order for the plaintiffs to recover anything under the contract, they must show that the same was in good standing, at least from their point of view, and that the defendant has no legal reason for non-performance or non-compliance. This is the basic premise to this entire suit.

The plaintiff by his pleading admits that the land in question was the land included in that agreement between himself, Joseph Koyle and one William F. Pratt (See paragraph 3 of plaintiffs' second Amended Complaint) and that the title to this land was to be perfected by Pratt, who was then homesteading the same. This contract was dated March 8, 1939, and was for the obvious purpose of uniting this land, as soon as the patent was obtained, with the water to be secured under the plaintiff's application No. 9873, which apparently had been filed by Pratt to be used on the land Pratt was homesteading. The plaintiff, at that time, had commenced the construction work on the dikes and levies that later became an essential part of the contract between Johnson and Page. This fact is rightfully concluded in the court's Findings of Fact Nos. 1 and 2.

"That on the 21st day of May, 1940, the plaintiff, Marinus Johnson, was the owner of water filing No. 9873 filed in the office of the State Engineer of Utah and the water rights represented thereby being an application filed by William F. Pratt to appropriate 19 c. f. s. of water from a spring known as Baker Hot Spring for irrigation of lands adjacent thereto."

"That at that time said plaintiff together with the defendant, Joseph Koyle, had a written agreement with said William F. Pratt for the acquisition by said Johnson and Koyle of 440 acres of land described in plaintiffs' Second Amended Complaint, which land said Pratt

was then occupying or claiming under some preferential entry right.”

In other words, the same 440 acres of ground encompassed by the plaintiffs’ complaint and the Court’s findings 1 and 2 is the same 440 acres referred to in the Court’s Conclusion of Law No. 2:

“That by reason of this the title acquired by Page to the 440 acres of land involved herein should be considered to be held subject to the rights of Johnson as a joint adventurer under said agreement.”

The next premise to consider, then, is what the parties intended by their contract of May 21, 1950, which contract this suit was based upon. Obviously and admittedly, the parties intended that Johnson would initially put up his water application and Page would put up money and equipment to build the levy. Now, what were they going to put the water on and for what purpose were they going to build the dikes and levies? The answer to this question is obvious—the land which Johnson was to acquire from Pratt by contract, which acquisition was conditioned upon Pratt perfecting his title by homesteading it (See Transcript Page 55).

It was for this reason that the contract (Exhibit “A”) contained the following language:

“and the second party shall also be enttield to an equal one-half interest in any and all lands or interest therein, or contracts with respect to lands or interests therein, **owned or possessed by the First Party**, or to the acquired in any lands or property connected with or pertaining to the appropriation **within the project contemplated.**”

(Emphasis added)

Although the above cited passage is not clear in and of itself the Findings of Fact and Conclusions of the Court and the circumstances surrounding this contract show conclusively that the property intended by this agreement was the property to be obtained by Johnson under the contract. How else were they going to use the water?

“In the interpretation of an agreement the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning.”

Daly v. Old, 35 Utah 74, 99P. 460.

For the plaintiff to contend that there was no specific piece of land intended or contemplated (Tr. Page 15, 23, 25; Page 96) is contrary to both law in fact. In the first place he says (Tr. Page 15) “and we went down to Delta. He looked the property over”, which indicates that a particular piece of property was intended and an integral part of the contract. In the second place, the court is charged with judicial knowledge that a water filing without land to beneficially use it upon is of absolutely no value. The plaintiff admits he had no other land other than that contracted for, and, consequently, how can he say he merely owned a water application (Tr. Page 15). You can’t own that without the land to put it on, therefore, when Pratt died and it became obvious that Johnson could not perform his part of the agreement, the contract terminated for lack of a subject matter.

The whole contract was contingent upon Pratt perfecting title which in turn Johnson would get by contract; otherwise, what was Page to get for his efforts? Although the language of the contract is broad it is obvious that no one ever intended that the contract would have a continuing

effect to make Page a trustee of property acquired at a later date by Page, not through Johnson or Pratt, but from another party.

If the court's rational in respect to Conclusion No. 2 were sound then Page would become an unwilling trustee for Johnson if he acquired the property by any means and at any time afterward—even if he acquired it by inheritance, purchase or foreclosure.

This, surely, is attaching a meaning far different than the language and intent of the parties anticipated.

The true fact is, that when Pratt died the contract ceased to be enforceable, for a condition precedent to liability had become impossible to obtain—to-wit: Receiving title from Pratt. This situation is usually referred to as a destruction of means of performance contemplated but not contracted for. The contract could not be performed because of the impossibility of obtaining title from the source contemplated. It cannot be said that the contract was intended to forever bar the defendant, Page, from forever dealing with the property without becoming a trustee for Johnson of such interest that he might obtain.

The only correct conclusion that the court could come to was that the contract ceased upon Pratt's death because of a supervening impossibility of performance.

The Restatement sets forth the rule as follows:

“Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustra-

tion, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.”

Restatement Rule 288.

This is exactly the situation in the principal case. Both Johnson and Page assumed that the land in question was that to be obtained from Pratt. If the reverse were true we would have in effect a contract to build levies, dikes and canals to be used on certain lands, one-half of which lands were to belong to each of the parties to the contract if and when either of them acquired them. This is incongruous and inconsistent with the facts.

Another analogy to the principal situation which is also in point is Restatement Rule 281, which is as follows:

“In promises for an agreed exchange, a promisor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject matter or means of performance, provided that the promisor has not himself wrongfully caused the impossibility or has not assumed the duty that the subject-matter or means of performance shall exist unimpaired.”

Illustration 2 under the above citation is a good analogy to appellant's argument that because the first contract failed because of the impossibility of obtaining the subject matter, the fact that it later becomes possible does not renew or restore the contract.



## POINT 2

THAT THE COURT ERRED IN FAILING TO DISMISS THE PLAINTIFF'S CAUSE OF ACTION OR FIND FOR THE DEFENDANT, PAGE, FOR REASON THAT THE SAME WAS BARRED BY LACHES AND THE STATUTE OF LIMITATION.

The law in Utah in respect to the Statute of Limitations upon an action based upon contract is as follows:

U. C. A. 78-12-23—Within six years:

1. An action for mesne profits of real estate.
2. An action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section.

In matters involving equitable problems the question of laches is usually resolved on the basis of the Statute of Limitations in respect to similar legal questions, and the defense of the Statute of Limitations includes the defense of laches.

The court, in effect, found that in the summer of 1940 the defendant, Page, recalled his employees from the work project of building the levies and canals and that thereafter the work was never resumed. There can be no other conclusion from this finding of the court other than that the court concluded that Page breached his contract during the summer of 1940 by withdrawing his men. If so, there was a breach of contract which the plaintiff could have sued upon and recovered such damage as he, at that time, had sustained. It is a primary principle of law that a party has the duty to minimize his damages and cannot sit back and idly wait for his damages to magnify and then expect to recover the increased amount. This is such an elementary

point of law, we do not believe it is necessary to give to the Court citations; consequently, if the plaintiff has a cause of action, it arose in the summer of 1940, and he should have commenced his litigation at that time. Subsequently to that, on the 7th day of May, 1943, the court found that Page obtained title to the property, which, if he did so contrary to the purposes of the contract entered into between he and the plaintiff, Johnson, constituted an additional breach, which at that time would have allowed Johnson to have brought his suit for an accounting and for a division of the property, if he claims such was the case and his damages then would have been the same as they are now and, in fact, there would not have been taxes that have accrued of which one-half have been assessed against the plaintiff.

Johnson admits that shortly after Page received the property from Mrs. Pratt that he demanded a half interest, but that Page refused him (Tr. P. 24, L. 10 to L. 26). That is when he should have brought his suit, for it was then that his cause of action, if any, accrued. In other words, as early as May 7, 1943, and, in fact, during the summer of 1940, this action could reasonably have been commenced and should have been commenced, and it is rather late and untimely for the plaintiff to come to court at this time and ask for relief and damages. There is no question that if the allegations of the plaintiff are true and if the Findings of the court are true, that on October 4, 1944, there was an additional breach, in that Page conveyed all of the property acquired to one Lewis for a price of \$3,750.00. At that time, there would have been no question but what the plaintiff had a cause of action, if the other allegations contained in his complaint are true, which the appellant does not, by this argument, admit. Nothing has accrued since October 4,



1944, that has changed his situation any or that has given the plaintiff any new cause of action, and, in fact, all the rights that had accrued, had accrued at this time without question. It is obvious from this, then, that he should have commenced his suit, in any event, not later than six years from the 4th day of October, 1944. The court doesn't even contend anything different than this, for the court failed to make a finding that the joint adventure, if that is what it was, continued after October 4, 1944, and, in fact, the court found by its Conclusion of Law No. 3 as follows:

"That by reason of Page's failure to furnish men and equipment for completing the levee and canal as agreed by him and his failure to pay necessary fees and costs to complete the appropriation of water referred to in said agreement and by reason of his failure to make any offer or tender herein to complete such work or to reinstate or recover such water filing he should be considered to have abandoned his right to continue as a joint adventurer in respect to the property and project herein involved."

You will note that by the above conclusion, the defendant, Page, is said to have abandoned his right to continue the joint adventure by his failures, as stated therein. When did those failures take place? In the summer of 1940. If that were the situation, then that is when the breach took place. How, then, can there be any defense under any circumstances to the statutes of limitations having barred the plaintiffs' case? It was pleaded, it was proved, and the court failed and neglected, and, in fact, refused to make a finding upon it.

The Utah Supreme Court has considered this matter on many occasions. Perhaps the most clear enunciation of

the rule was made in the case of *State Tax Commission vs. Spanish Fork*, found in 99 Utah 177, 100 Pacific Second 575, for the court said:

“The general rule is that an action accrues at the time it becomes remedial in the Courts, that is, when recourse to the courts will render full remedy.”

The question is then, when did the cause of action accrue? The rule is that it accrues at the time when it becomes remedial in the Courts, that is when the claim is in such condition that the court can proceed and give judgment if the claim is established. In *Sweetser vs. Fox*, 43 Utah 40, 134 Pacific 599, we find: “It is a rule of universal application that a cause or right of action arises at the moment an action may be maintained to enforce it and that the Statute of Limitations is then set in motion. The test, therefore, is: Can an action be maintained upon the particular cause of action in question? If it can, the statutes begins to run.”

Nothing can be said contrary to these rules, and it is obvious that these rules apply to this particular case. There may be some question as to whether there was an accrual of a cause of action. The ordinary interpretation of the accrual is as follows:

“A cause of action upon a covenant accrues as in other cases at the moment of the default on the part of the covenantor. That is, upon its failure to do the thing agreed to which constitutes the breach. Not until then can an action be brought for breach of covenant. The question of the accrual of the cause of action on a covenant is important. Not only in determining the prematurity of the commencement of the action, but also the question whether it is brought within the time limited for bringing such action. Action for breach of covenant are, of course, subject to the

defense of the statutes of limitations, if not brought within the time limited by the statutes for bringing such action."

14 Am. Jur. 513, Sec. 37.

In the case of *Hunter v. Hunter*, 361 Mo. 799, 237 SWnd 100, 24 ALR 2nd 611, the court said:

"Statutes of Limitations are favored in the law, and cannot be avoided unless the party seeking to so brings himself strictly within some exception." (Citations) "Such exceptions are strictly construed and are not enlarged upon by the Courts upon consideration of apparent hardship."

### POINT 3

THAT THE COURT ERRED IN FINDING THAT THE TITLE TO PROPERTY ACQUIRED BY PAGE WAS HELD SUBJECT TO THE RIGHTS OF JOHNSON AS JOINT ADVENTURER UNDER AGREEMENT — AND IN IMPOSING A TRUST UPON ALL THE PROPERTY ACQUIRED BY PAGE FOR THE BENEFIT OF THE PLAINTIFFS.

The court erred in finding that the title acquired by Page was held subject to the rights of Johnson as joint adventurer under the said agreement. In imposing a trust upon Page for all of the property acquired by him and making it for the benefit of Johnson, it is obvious that this finding is grossly unfair. Even assuming the worst, that Page's acquisition of the property was a breach of a fiduciary relationship, and even assuming that it was done by fraud, with an intent to appropriate something that belonged to another, can it be said that Johnson can sit back for a pe-

riod of fifteen years and do nothing about it and contribute nothing to the acquisition of the property or the expenses of maintaining the property, or to the taxes or to anything else and yet, when he sees that there is something to be gained by it, to come in and claim that he is a joint adventurer and that a trust is imposed? In other words, it gives Johnson the opportunity of becoming a joint adventurer or a title holder or the beneficiary of a trust, without risking any of his own time or capital.

In the event that the acquisition by Page had been a failure and an unprofitable venture, and, in fact, a losing proposition, it is quite obvious that Johnson would have claimed that there was no joint venture; that the same had been abandoned in 1940, and that he had no interest whatever in the property. In other words, the contention of Johnson in this case is obviously a one-way street. Of course, it is rather universally held that the plaintiff in such instances cannot recover for the reasons stated.

In the case of *Shulkin vs. Shulkin*, 16 NE 2d 634, quoted in 118 ALR 632, it is said:

“that the contention that the wrong doer should be excluded from participating in the profits was rejected and a partner who wrongfully appropriated firm property and made secret profits for which he was required to account to the partnership, was held entitled to a share in such profits with his co-partner.”

The court took the view that the correct principle was that the innocent partner should be put as nearly as possible in the same position he would have occupied if there had been no wrong doing, and that this result would be accomplished by giving him that portion of the misappropriated

property and secret profits to which he would have been entitled if the misappropriated property had been allowed to remain with the partnership and the secret profits had been earned by the partnership in the usual course of the business. In other words, by giving the innocent partner or joint adventurer all of the profits gained or all of the property acquired is an undue penalty, and is in a sense an unjust enrichment. No one would argue that the wrong doing joint adventurer should not be responsible for any damages he has caused the innocent party, but to take everything that has been acquired by him and gained by him and give it to the innocent party does not make a right, but just commits another wrong, and, as the saying goes, "Two wrongs never make a right."

In 80 ALR, Page 88, it is said:

"Where one who has abandoned a joint adventure is permitted to share in the subsequently earned profits, damages for abandonment of the enterprise should be deducted from his share."

The above rule applies even in cases where the abandoning partner or joint adventurer did nothing to acquire subsequently earned profits, but there is no question that he is entitled to join in them if he, through his efforts, earned them. Can it be said that Page has in any way breached the contract more than Johnson? Wherein has Johnson come in and devoted any time or money or effort as required in the contract for the construction and building of canals and ditches? Wherein has Johnson done anything to successfully conclude the contract as required in its written form? Nothing; he has done exactly as stated above. He

has sat back and expected to reap the profits if there were a profit, but to take no part if it were a loss.

The court, in the case of Kinlock vs. Hamlin, cited in 80 ALR, Page 51, says:

“He comes into equity with an ill grace, to claim compensation on a contract which he utterly renounced and repudiated, to claim an account of the profits of the concern which he forthwith abandoned when he supposed it would be a losing business.”

The defendant respectfully suggests that this is the position the plaintiff is in, in this case. It is he who has abandoned and repudiated the contract, if anyone has, for he has done nothing that is required of him, but complains only of the defendant.

The court erred in failing to find that the contract had been abandoned as early as the summer of 1940. All the evidence (Transcript Page 32, 55), points out that the contract was abandoned at that time by both parties. There can be no question, however, that it was abandoned by October of 1944, when Page conveyed the property to Lewis. Under the circumstances the court should have found that the conduct of the parties constituted an abandonment termination of the original agreement (May 21, 1940, agreement).

The plaintiff admits that he signed a deed, a quit claim deed, to Lewis in October, 1944 (Tr. P. 25) and yet he says that he didn't find out about the conveyance until 4 or 5 years after Page had acquired the property. Yet, on Page 24, Johnson says when he found Page owned the property he made demand for his half interest (which couldn't, therefore, have been later than 1944) and that Page refused to



give it to him (Tr. P. 24, L. 10 to 26), and yet he waits for over 10 years before prosecuting this action. What better evidence could there be of abandonment?

This case is almost identical in nature to the case of Richards, et al. vs. Plumbe, et al, 253 P. 2nd 126. In that case, the plaintiff and defendant had on March 17, 1947, entered into a written agreement similar to the one in the instant case, whereby the parties were to secure certain land within the Rio Vista Gas Filed Area for the purpose of oil exploration. Through the failure of the parties to get a license from the state and for other reasons, all the licenses expired in the latter part of May, 1947. (In the instant case, the parties abandoned the contract in the summer of 1940, and the source of the property, Pratt, died shortly afterward, which are analogous facts). The appellant, Richards, went about other business (as did Johnson in the instant case), and the appellant, Richards went to Wyoming. Plumbe continued on and secured the property and commenced to drill a well upon it. Plaintiffs, appellants herein, brought suit to have their interest declared and for their share of the rentals which they yield. The court said:

“Nowhere in the record does it appear that either appellant made the slightest contribution toward securing either the first or second community lease. The facts as disclosed by Smith’s testimony show no relation whatever between the original undertaking of appellants and Plumbe, and the activities of Plumbe and his associates in securing the exploiting the first and second community leases. The conduct of appellants, and of Plumbe, is wholly inconsistent with the existence of either a partnership or joint venture. As is said in Beck v. Cagle, 46 Cal. App. 2nd 152, 162, 115 P.2d 613, 619, “The abandonment or dissolution of a partnership

or joint adventure may take place by conduct inconsistent with its continuance.” See also, *Middleton v. Newport*, 6 Cal. 2d 57, 62, 56 P.2d 508; and *Fooshe v. Sunshine*, 96 Ca. App. 2d 336, 343, 215 P.2d 66, 16 A.L.R. 2d 1142. Such was the determination of the trial court here, and this finding is, in our opinion abundantly supported by substantial evidence.”

It is respectfully submitted that the above case is in point in all particulars.

In 80 A.L.R. 27 we find an annotation that is in point, which is as follows:

“Where there has been a complete termination of the deal for the consumation of which the partnership or joint tenancy was formed, the joint interest of the parties having been completely severed by abandonment or otherwise, it has been held, contrary to the general rule governing the rights of the parties after dissolution, that thereafter each party may proceed for his own individual benefit, without being accountable to his former partner or co-adventurer for subsequently earned profits.”

**“This rule is more frequently applied in the case of joint adventures, particularly joint adventures for the purchase and sale of real estate.”**

(Emphasis added)

“Thus, where a joint adventure for the purchase and sale of land, whereby one was to supply the capital and purchase the land, and the other was to act as agent in finding a purchaser, was never carried out, no purchaser being found for the land, and the party supplying the capital took the land in his own name, and the adventure was terminated, it was held that the selling agent could not come in, years after, when the



value of the land had increased, and claim a share of the profits arising out of the transactions at this time.”

McCarney vs. Lighner (1920) 188 Iowa 1271,  
175 N.W. 751, 80 A.L.R. 28.

This is the rule of the principal case, and is universally applied in cases of this kind where the actions of the parties indicate termination and abandonment. The court in Bringgold vs. Sticky (1925) 167 Minn. 343, 202 N.W. 739, 80 A. L.R. 28, held:

“And where the parties enter into a contract for the purchase of land for the purpose of selling it at a profit, which contract is abandoned because of inability to pay for the land, and where one of such parties subsequently secures the land in an independent transaction and sells the same at a profit, it is held that the other parties have no right to share in such profits.”

This ruling is to facts almost identical to those in the principal case, except here the contract was mutually abandoned because neither party desired to go ahead with the construction of the canals and dikes, and also because the land was unobtainable from the source (Pratt) originally planned.

#### POINT 4

THAT THE COURT ERRED IN ASSESSING ONE-HALF OF THE TAXES AGAINST PAGE.

What explanation can the court make for such a holding? There was no finding that a sum equivalent to one-half the taxes constituted the plaintiffs' damages. If there was no finding of damages in this amount there is no legal principle upon which this assessment can stand.

The law is clear that in a case where there is fraudulent or wrongful acquisition by one of the joint venturers he is nevertheless entitled to share in the proceeds of that acquisition to the extent he was to share in the joint adventure in the first place, less whatever damage he has caused the other joint adventurer or adventurers.

In this case the defendant, Page, has acquired nothing, but has been penalized for one-half of the taxes paid during the years 1944 through 1954, and the court has made no finding or explanation whatever as to why, how or on what legal principle such finding was based upon. The inconsistent part about this finding is that the court held he was entitled to the entire amount of his other expenditures in respect to the property returned. Why one-half in one instance and the full amount in the other?

### CONCLUSION

There is no justification in law or in fact for the finding and decree of the court, and the same should be reversed, or remanded for a new trial.

Respectfully submitted,

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