

1958

## Paul P. Eardley v. Jimmie Sammons and Beulah G. Sammons : Brief of Plaintiff and Appellant

Utah Supreme Court

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McKay, Burton, McMillan & Richards; Salt Lake City, Utah;

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# In the Supreme Court of the State of Utah

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PAUL P. EARDLEY,

*Plaintiff and Appellant,*

vs.

JIMMIE SAMMONS and BEULAH G.  
SAMMONS, his wife,*Defendants and Respondents.*

Clerk, Supreme Court, Utah

Case No.  
8834

## Brief of Plaintiff and Appellant

McKAY, BURTON, McMILLAN & RICHARDS  
Salt Lake City, Utah

certify that on the 14th day of March, 1958 I mailed two (2) copies of the above brief to Pickett & Pickett attorneys for defendants addressed to them at the Pickett Building, Geor

*Richards*

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# In the Supreme Court of the State of Utah

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PAUL P. EARDLEY,

*Plaintiff and Appellant,*

vs.

JIMMIE SAMMONS and BEULAH G.  
SAMMONS, his wife,

*Defendants and Respondents.*

Case No.

8834

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## Brief of Plaintiff and Appellant

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### STATEMENT OF FACTS

This action was presented to the trial court on the part of both plaintiff and defendant, requesting an accounting, dissolution and winding up of a joint venture or partnership formed to acquire and operate a cafe property in St. George, Utah. The joint venture is based entirely on an oral arrangement between plaintiff and defendant. The joint venture functioned from the first part of August, 1955, to April, 1956, and as

to the operations of the cafe from April, 1956, to July 10, 1956, when defendant Sammons was "incarcerated" on a drunk charge and subsequently "floated" out of St. George on a sentence of six months suspended, conditioned on his leaving the city.

The oral agreement provided for defendant Jimmie Sammons to purchase in his name the real estate, improvements thereon, consisting of the cafe, the equipment, furnishings and supplies under a title retaining contract which plaintiff's attorney had prepared. Plaintiff furnished the \$1000 down payment required for the contract and the defendant Jimmie Sammons was to manage and operate the property, and, after payment of all expenses of operation, including the payments on the contract, was to receive a living wage and the residue of the income from the business was to be divided equally between plaintiff and defendant. In October, 1955, the living wage was fixed at \$300 a month.

The trial court in its Conclusions of Law stated that "it is necessary to determine and declare terms for dissolution and settlement, \* \* \* that the original agreement between the parties does not fix or define terms of settlement in case of *abandonment* or *termination* of the venture; that an equitable settlement of the rights and obligations of the parties will be as follows."

The Court then proceeds to set up a financial statement for the parties by determining that the assets of the partnership, consisting of the original purchased property, equipment, supplies and furnishings, together with equipment, utensils and supplies, purchased during the period of the



partnership, would be the amount of the total moneys paid in the purchase thereof by funds produced by the partnership, plus \$100 contributed by the defendant Beulah Sammons. (Findings and Conclusions).

The Court sets up the liability side of the statement without including any of the capital contributions of the plaintiff, which amounted to \$2556.94. The Court included in the liability side of the statement the amounts due the defendants Jimmie Sammons and Beulah Sammons for wages and for the \$100 loan of Beulah Sammons, totaling in all \$2356.48. As a result of this procedure, the Court achieves a net worth figure from a venture which had lost money from its inception, as shown by the books. The books actually show the partnership paid out \$9283.91 more than it received in the eleven month period (Tr. 106).

The Court credits Sammons with one-half of the net worth computed on these figures at \$631.02, and so gives defendants judgment for a total of \$2986.50 against the plaintiff, and leaves plaintiff with a cafe property (which had lost money for the eleven months it had been operated), with liabilities totaling approximately \$34,000.00, which the Court requires plaintiff to assume entirely and to save defendants harmless from any such liability. In addition to this judgment in favor of defendants, the defendants had taken out of the partnership their meals for eleven months and \$1961.02 in cash, according to the records, plus additional amounts deposited in savings accounts.

At no time has the defendant furnished to plaintiff an accounting or statement covering the operations of the cafe.

Sammons, with the assistance of his wife, Beulah G. Sammons, operated the cafe from August 9, 1955, until April 2, 1956, under the terms of the partnership. During this period the defendant Jimmie Sammons drank liquor excessively and at various times was incapacitated to look after the cafe business. On February 14, 1956, the defendant Jimmie Sammons was incarcerated in the County Jail of Washington County, Utah (Tr. 41-42; Plaintiff's Ex. 2). The defendant was incarcerated for drunkenness and fined \$100 and sentenced to serve 90 days, with 60 days suspended, and a trusteeship to be considered during the 30-day period. On March 17, 1956, defendant was again incarcerated in the County Jail of Washington County, having been committed to serve the balance of the sentence imposed, with the good behavior suspension revoked (Plaintiff's Ex. 3). The defendant was in jail from March 17, 1956, to April 7, 1956, (Tr. 43) and was returned to jail on the 11th day of April, 1956, being again released on April 17, 1956.

On March 19, 1956, notice was given Sammons by the sellers of the property by registered letter (plaintiff's Ex. 9) that he was in default and that he had until April 3rd to bring the contract to date.

The purchase agreement (plaintiff's Ex. 5) provided a purchase price of \$30,000, with a down payment of \$1000, with \$1000 monthly payments in the months of October, November and December, 1955, and January, 1956, and thereafter monthly payments of \$200, plus accrued interest. Interest was to be paid at the rate of five per cent from September 19, 1955.

On April 2nd, the plaintiff visited the defendant Sammons in the County Jail of Washington County (Tr. 53) and discussed with Sammons the "foreclosure" notice above referred to.

Pursuant to this conversation, the sum of \$2900 was gathered from cafe funds which defendant had placed in various savings and bank accounts in his name only, and plaintiff advanced an additional \$1100, pursuant to which plaintiff's Exhibit 6, an assignment, was executed with Jimmie Sammons and his wife assigning to Paul Eardley all of their right, title and interest in the contract, improvements, fixtures, equipment, supplies and personal property, and which assignment was notarized by defendant's attorney, Charles M. Pickett, and delivered to plaintiff. This assignment contains the following paragraph:

"This bill of sale and assignment is an absolute transfer of title to all our right, title and interest in, to and under said agreement and the property described therein, and is not intended as a mortgage, pledge or trust conveyance of any kind or nature."

The total sum of \$4000 was paid to the sellers of the property on April 10, 1956.

Jimmie Sammons returned to operate the cafe on the 17th day of April, 1956, and continued such operation until on or about July 10, 1956, at which time he was incarcerated in the County Jail of Washington County on a charge of drunkenness, as stated above.

On July 11th plaintiff had filed and commenced this action and service had been made on the defendant Sammons. After the service of the papers on Sammons, he contacted

plaintiff on July 11, 1956, at the cafe office and asked plaintiff if he wanted the keys, and was directed to turn the keys over to Mrs. Edwards at the cafe. Mrs. Edwards is a cafe employee. At the time of plaintiff's arrest, and incarceration on July 10, 1956, and sometime thereafter, the defendant Beulah Sammons was in Salt Lake City.

John Smith, a bookkeeper for plaintiff, made an examination of the records of the cafe, all of which records were in the custody of the Court (Tr. 102). "The last entry was sometime in July but the books had not been very well kept prior to April, 1956. \* \* \* It appeared to me that some of them must have advised Mr. Sammons to improve the bookkeeping system because there was a definite change in the way the entries were made commencing in April."

The first entry on the books showed receipts of August 9, 1955 (Tr. 102a). The first deposit in the bank was August 10, 1955. During the period from August 9, 1955, to December 31, 1955, the books showed total receipts of \$30,178.60, but the total of the disbursements made by cash plus the deposits to the cafe account at the bank totaled \$35,696.89, showing amounts paid out over and above receipts of \$4,818.29 (Tr. 102-103).

During the period January 1, 1956, to and including March 31, 1956, the total receipts was \$18,324.35, and the total bank deposits, plus cash payments, were \$22,097.08, showing amounts paid out exceeded income by \$4182.68 (Tr. 104). From April 1, 1956, to July 10, 1956, the total cash receipts were shown as \$24,033.26, and the total cash disbursements and deposits at the bank were \$24,366.20, so that the dis-

bursements were \$332.94 in excess of receipts for that period (Tr. 105).

The financial records show there was disbursed \$9283.91 in excess of the receipts of the business.

At Page 113 of the transcript are shown items of equipment that were purchased between August 9, 1955, and July 10, 1956. These consisted of items such as refrigerators, mixers, cash registers, toasters, adding machine, cigarette machine, slicing machine, chopper, tenderizer, freezer, with the records showing that a total of \$1654.31 has been paid on these items, and that there was owing \$2234.63. At Page 115 of the transcript it appears that, including the amounts heretofore stated as owing on contracts for the purchase of equipment, there was a total of \$6837.73 in accounts outstanding as of July 10, 1956. In addition, there were amounts owing for wages, taxes, sales tax and state insurance fund premiums, all of which, as appears on Page 117 of the transcript, including the \$6837.73, make a total of \$8784.65.

As appears at Pages 117-120 of the transcript, Smith found the following sums in the office of the cafe on July 15, 1956: \$51.25 in the cigarette box; \$450.89 in the cash register; \$47.20 in a punch board box and checks of \$53.64, making a total of \$650.68. These included all receipts from the operations of the cafe at the time Sammons delivered the keys on July 11, 1956, to the time of the accounting of July 15 (Tr. 118).

During the period of August, 1955, to July 10, 1956, Sammons is shown by the books to have withdrawn \$1805.50 and Beulah Sammons \$183.20 (Tr. 129).

No meals were shown as charged either to Beulah or Jimmie Sammons (Tr. 129).

At Page 131 of the transcript are shown the payments on the purchase contract as \$1,000, July 28, 1955; \$500, September 23, 1955; \$200, December 12, 1955; \$300, January 19, 1956; \$303.13, April 17, 1956. Exhibit 11 shows \$4000 paid April 10, 1956; \$302.29, May, 1956, and \$301.25, July 19, 1956.

In the Court's Finding of Fact No. 29 the Court has attempted to set up a balance sheet for the cafe, typifying the same, however, as a "reasonable valuation of assets and liabilities of the cafe business at the time plaintiff took control on July 11, 1956." As indicated, however, it is nothing more or less than an attempt to set a balance sheet for the partnership as of that date. There is no testimony as to value of any of the items indicated in this balance sheet, Finding No. 29, as assets. On the inventory plaintiff made an accurate report of what the inventory was and prices were fixed by plaintiff in accordance with the invoices.

The Court permitted Sammons, the defendant, to furnish an inventory which represented his recollection, and fixed prices which represented an amount approximately double that provided by plaintiff. Without any testimony from any competent individual, the Court has fixed a value on supplies and inventories at approximately the figure submitted by defendant in his estimate. The Court then proceeds to set as the value of the utensils and equipment at the cafe purchased since operations were commenced a total of \$2111.36, which represented the full cost paid for these items, without deductions

for time financing or interest or depreciation of restaurant equipment, which is known to be of a highly depreciable character.

In setting up the liabilities for this statement, the Court did not set up as a partnership liability the amounts owing to plaintiff for capital advance of \$2556.94. The Court did not set up the amount of interest owing plaintiff on the money advanced.

## POINTS RELIED UPON

### POINT NO. I.

THE TRIAL COURT ERRED IN THE APPLICATION AND DETERMINATION OF THE PROCEDURE, REMEDIES AND RIGHTS OF THE PARTNERS IN THE DISSOLUTION, WINDING UP AND SETTLEMENT OF THE PARTNERSHIP.

### POINT NO. II.

THAT CONCLUSION OF LAW NO. 2 OF THE COURT THAT PLAINTIFF HAD ELECTED TO TAKE OVER THE OPERATION OF THE CAFE BUSINESS IS CONTRARY TO THE EVIDENCE AND CONTRARY TO LAW.

### POINT NO. III.

THE COURT ERRED IN ITS CONCLUSION OF LAW NO. 4 AND THE WHOLE THEREOF FOR THE REASON THAT THE SAME IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE, FINDINGS OR PLEADINGS, AND IS CONTRARY TO LAW.



POINT NO. IV.

THE COURT ERRED IN ITS CONCLUSION OF LAW NO. 5 AS THE SAME IS CONTRARY TO THE EVIDENCE AND THE FINDINGS AND IS CONTRARY TO LAW.

POINT NO. V.

THE COURT ERRED IN ITS CONCLUSION OF LAW NO. 6 FOR THE REASON THAT THE SAME IS CONTRARY TO LAW.

POINT NO. VI.

THE COURT ERRED IN ENTERING ITS JUDGMENT IN FAVOR OF DEFENDANTS FOR WAGES AND NET WORTH AGAINST PLAINTIFF, DISCHARGING DEFENDANTS FROM ALL PARTNERSHIP ACCOUNTS, INCLUDING THE REAL ESTATE PURCHASE CONTRACT, AND REQUIRING PLAINTIFF TO SAVE THEM HARMLESS FROM ALL PARTNERSHIP OBLIGATIONS, AS THE SAME IS CONTRARY TO LAW AND CONTRARY TO THE AGREEMENT OF THE PARTIES.

POINT NO. VII.

THE COURT ERRED IN ITS CONCLUSION OF LAW NO. 1 AND IN ITS JUDGMENT, PARAGRAPH 1, THAT THE ASSIGNMENT, PLAINTIFF'S EXHIBIT 6, WAS GIVEN AS SECURITY AND NOT AS A TRANSFER OF OWNERSHIP, AND AS A COROLLARY THEREOF, IF THE ASSIGNMENT WAS SECURITY, THE FAILURE OF

THE COURT TO GIVE APPROPRIATE RELIEF OR PROTECTION TO PLAINTIFF ON THAT SECURITY BY WAY OF FORECLOSURE OR OTHERWISE. THE COURT ERRED IN PERMITTING EVIDENCE TO VARY THE WRITTEN INSTRUMENT OF ASSIGNMENT CONTRARY TO THE TERMS THEREOF.

POINT NO. VIII.

THE COURT ERRED IN AWARDING TO DEFENDANT BEULAH G. SAMMONS AN AMOUNT FOR SERVICES IN THE SUM OF \$1319.70, OR OTHERWISE, AND IN AWARDING HER JUDGMENT AGAINST THE PLAINTIFF.

POINT NO. IX.

THE COURT ERRED IN AWARDING JUDGMENT TO DEFENDANT JIMMIE SAMMONS A SALARY IN THE AMOUNT OF \$300.00 PER MONTH, AS CONTRARY TO LAW AND NOT SUPPORTED BY EVIDENCE, FINDINGS OR CONCLUSIONS.

POINT NO. X.

THE COURT ERRED IN COMPUTATION OF THE LIABILITIES OF THE PARTNERSHIP IN NOT INCLUDING THEREIN AS A LIABILITY THE ADVANCES OF CAPITAL MADE BY PLAINTIFF, TO-WIT: \$2556.94.

POINT NO. XI.

THERE WAS NO EVIDENCE OF THE VALUE OF THE EQUITY IN THE REAL AND PERSONAL PROP.

ERTY OF THE PARTNERSHIP, AND THE DETERMINATION OF THE COURT AS TO THE VALUE OF SUCH EQUITY IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE OR BY LAW.

POINT NO. XII.

THE COURT ERRED IN FAILING TO AWARD TO PLAINTIFF HIS ADVANCEMENTS OF CAPITAL OVER AND ABOVE HIS ORIGINAL COMMITMENT, WITH INTEREST THEREON FROM THE DATE OF SUCH ADVANCEMENTS.

POINT NO. XIII.

THE COURT ERRED IN FAILING TO MAKE AN ACCOUNTING ON THE EARNINGS OF THE PARTNERSHIP, AND IN FAILING TO MAKE ANY FINDINGS OR DETERMINATION AS TO WHETHER THERE HAD BEEN ANY PROFIT OR LOSS OF THE PARTNERSHIP, AND IN FAILING TO DETERMINE WHETHER THERE WERE OR WERE NOT PROFITS IN WHICH PLAINTIFF WAS ENTITLED TO SHARE, AND MAKING AN APPROPRIATE AWARD THEREOF.

POINT NO. XIV.

THE COURT ERRED IN ITS DETERMINATION OF VALUE OF THE VARIOUS PARTNERSHIP PROPERTIES IN ITS FAILURE TO ALLOW DEPRECIATION AND ITS ASSUMPTION THAT THE EQUITY (OR VALUE) EQUALED THE PAYMENTS MADE ON THE PROP-

ERTIES FROM CAFE FUNDS; FURTHER, WITHOUT CONSIDERING INTEREST WHICH WAS A PART OF SUCH PAYMENTS AND CONTRACT OBLIGATION, AND WITHOUT CONSIDERING ITEMS SOLD, REMOVED OR LOST FROM ORIGINAL PROPERTIES PURCHASED; AND ITS ATTEMPTING TO SET A VALUE OTHER THAN BY HAVING A SALE OF THE ASSETS, ALL AS BEING CONTRARY TO LAW.

POINT NO. XV.

THE COURT ERRED IN ITS FAILURE TO AWARD TO PLAINTIFF DAMAGES RESULTING FROM THE BREACH OF THE PARTNERSHIP AGREEMENT BY DEFENDANT.

POINT NO. XVI.

THE COURT ERRED IN ITS FAILURE TO ALLOW AS A COST THE EXPENSES INCURRED IN PROVIDING INVENTORIES AND FINANCIAL STATEMENTS OF THE PARTNERSHIP PREPARED FOR THE PURPOSES OF THIS ACTION AND DISSOLUTION.

POINT NO. XVII.

THE COURT ERRED IN ITS FINDING OF FACT NO. 7 IN THAT THE FINDING IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE, WHEREIN THE COURT FINDS THAT THE PROFITS FROM THE OPERATION OF THE CAFE, AFTER PAYMENT OF A LIVING WAGE TO DEENDANT, WERE APPLIED UPON THE

ACCRUING INSTALLMENTS OF THE PURCHASE CONTRACT, AND RESIDUE AND PROFITS WERE TO BE EQUALLY DIVIDED BETWEEN PLAINTIFF AND DEFENDANT, AS THE ANSWER OF DEFENDANT AND THE EVIDENCE SHOWS THE AGREEMENT TO BE THAT THE INCOME OF THE CAFE, AFTER PAYING ALL OBLIGATIONS AND EXPENSES AND THE INSTALLMENTS ON THE CONTRACT, WERE THEN TO BE USED TO PAY A LIVING WAGE TO DEFENDANT JIMMIE SAMMONS AND THE RESIDUE DIVIDED EQUALLY BETWEEN PLAINTIFF AND DEFENDANT.

POINT NO. XVIII.

THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 27, 28 AND 29 AS THE SAME ARE CONTRARY TO OR ARE NOT SUPPORTED BY THE EVIDENCE.

ARGUMENT

POINT NO. I.

THE TRIAL COURT ERRED IN THE APPLICATION AND DETERMINATION OF THE PROCEDURE, REMEDIES AND RIGHTS OF THE PARTNERS IN THE DISSOLUTION, WINDING UP AND SETTLEMENT OF THE PARTNERSHIP.

Included in the Argument of Point No. I are those matters concerned with the improper and inequitable method the Court used in winding up the partnership affairs, in award-

ing a personal money judgment to defendants, and awarding plaintiff the obligations, plus a failing business. Therefore, under this POINT I will also be a discussion of the matters raised in POINTS I, II, IV, VII, IX and XV.

Plaintiff entered into an undertaking with defendant to advance and risk \$1000 in an enterprise, and within a period of eleven months, by virtue of the trial court's judgment, found himself required to entirely assume an indebtedness in excess of \$32,000, and, in addition, is required to pay to the other joint enterpriser and his wife an additional \$2601.47, and save defendants harmless from all debts. His joint enterpriser had agreed that if plaintiff would advance \$1000 he would provide management and operate the business and divide the profits with plaintiff. Instead, he was continually absent from the cafe because of drunkenness, was repeatedly arrested and was finally "floated" out of St. George under a suspended sentence for drunkenness. Not only this, but plaintiff was required to advance an additional \$1556.94 and is now saddled with the necessity of managing what has proved to be a losing business in an attempt to minimize the loss which the \$34,000 indebtedness will cause him.

The Court in effect struck a debtor and creditor account between the partners and awarded a money judgment against plaintiff in favor of defendants, and required plaintiff to save defendants harmless from all of the obligations of the partnership, and forced the plaintiff to assume all of the risks of a business which for the previous year had proved most unprofitable.

- (1) The Court should have ordered the partnership prop-

erty reduced to cash and the cash applied to liquidate the obligations of the partnership, and any amounts remaining distributed in accordance with the statute. The principle is clearly established in *Bagg v. Osborn*, 210 N. W. 862, in which case the Minnesota Supreme Court states:

“The trial court really stated a mere debtor and creditor account between the two parties. We believe that was an error. One partner cannot compel the other to buy according to a valuation fixed by the court, nor should one have to submit to a sale on such basis. Property cannot be treated as money and charged to either partner (Citing 210 S. W. 521). There is a mortgage to be paid. This fact, in the absence of agreement of parties, compels a sale. The fact that a sale cannot now be favorably made does not modify the rule.”

(2) The Court could not enter a personal judgment against the other partner until all of the assets have been collected and all the property sold and converted into cash.

In the case of *Hooper v. Barranti*, (Cal.), 184 Pac. (2d) 688, the California District Court of Appeals said:

“The general rule is that a personal judgment cannot be entered against a partner in a suit for accounting and settlement until all the partnership assets have been converted into money, the debts paid and a final balance ascertained.”

To the same effect see *Steinberg v. Goldstein* (Cal.), 278 Pac. (2d) 22, and *Owen v. Cohen* (Cal.), 119 Pac. (2d) 713, in which case the Court stated it was proper to allow either party to buy and use the credit of the portion he was to receive back.



*Clark v. Hewitt* (Cal.), 68 Pac. 303. No personal judgment can be rendered against a partner until all of the partnership debts are paid.

These principles of law are all supported by the case of *Olmo v. Olmo* (Cal.), 133 Pac. (2d) 866. See also *Nakamura v. Kondo* (Cal.), 223 Pac. 425.

Under the provisions of Section 48-1-35, Utah Code Annotated, 1953, plaintiff had the right "to have the partnership property applied to discharge its liability, and the surplus applied to pay in cash the net amount owing to the respective partners." Plaintiff also had, by virtue of the provisions of this section, "the right \* \* \* against \* \* \* a partner who has caused the dissolution wrongfully to damages for breach of the agreement."

By reason of defendant Jimmie Sammons' breach of the partnership agreement, plaintiff was entitled to damages for that breach, at least to nominal damages if the Court found no actual damage. The record is clear that it became necessary to replace Sammons as manager for a good part of the time, and there was ample evidence on which loss and damage resulted because of Sammons' incapacity for drunkenness, and the Court at least should have made a finding on this issue or some determination, and its failure so to do is definitely error.

Under the provisions of Section 48-1-37, U.C.A., 1953, the assets of the partnership were to consist of the partnership property, the contributions of the parties necessary to pay the liabilities of the partnership, and the liabilities of the

partnership were to be paid as follows: (a) creditors of the partnership; (b) the amounts contributed by partners over and above agreed capital requirements; (c) amounts owing to partners for capital; (d) amounts owing partners for profits.

(3) There has been no election of rights or remedies. Plaintiff had filed this action for dissolution and winding up, and service was made on the defendant prior to the time the defendant delivered the keys to plaintiff and prior to the time the defendant was required to leave St. George by virtue of his sentence on the drunkenness charge. Plaintiff found himself in a position where neither the defendant nor his wife was available to operate the business. The partnership agreement had been breached and he must attempt to protect himself from the entire loss of his investment as well as the very large accumulated debt of the partnership.

In 40 Am. Jur. 318, Par. 273, the law is stated as:

“While the dissolution of the partnership terminates the general agency of one partner for his co-partners, it leaves one of the partners with an equal duty and an equal power to do whatever is necessary to collect the debts due the partnership and to adjust, settle and pay its debts, *including authority as before to represent his firm in all acts necessary to complete partnership contracts.*” (Italics ours.)

In *Kimball v. McCormick*, 70 Utah 189, 259 Pac. 313, the Court states:

“The mere fact that a partnership is dissolved does not necessarily immediately give either of the parties a cause of action or suit against the other. The statutes of limitation do not begin to run until a suit or cause of action exists.”

In the case now before the Court, the plaintiff Eardley did nothing more than to continue the business and perform the partnership contract after the defendant and his wife abandoned the project awaiting the Court's decree. In his action filed with the Court the plaintiff is asking that the Court terminate and dissolve this partnership. Not at any time during the trial did the Court ever mention the remedies available to plaintiff or defendant. No election was announced, claimed or demanded by plaintiff to buy out the defendant. The Court has proceeded without any support in fact or law to determine what the plaintiff must do. Nothing occurred in this proceeding to alter the right of plaintiff to have the Court marshal all of the assets of this partnership, convert them into cash, apply the cash to paying the debts and making a disposition as provided by the statutes.

In *Morgan v. Hidden Splendor Mining Co.*, 155 Fed. Sup. 257, the Court states:

"A fruitless attempt to recover on an unavailing remedy does not constitute an election which will deprive one of rights properly recoverable by a different and appropriate remedy. To constitute an election the remedy, at least to some extent, must be efficacious. An act to be effective as an election of remedies must be decisive and unequivocal."

In pointing out that the doctrine of election is disfavored in equity, the Court cites from *Friedericksen v. Renard*, 62 L. Ed. 1075, wherein the Court determined that by disaffirmance of a contract in a suit in equity for fraud, the petitioner did not make such an election as to preclude him by amendment from seeking to affirm the contract and to recover damages.

It is submitted that there was nothing resulting from the continued operation of the cafe pending this litigation which constitutes an election by plaintiff to satisfy his rights by buying out the interest of defendant Sammons.

It is further submitted that the findings and judgment are very ambiguous, but it is clear that Judge Hoyt attempted to work out figures and direct rights and results which to him would have appeared equitable, but disregarding the statutory and legal rights of plaintiff.

The Court leaves very indefinite the status of the assignment executed in April, 1956. He decreed that it was given as security. He does not state what it secured. He infers that it secured some indebtedness due from defendant Sammons to plaintiff, but no such indebtedness is determined upon. Apparently Judge Hoyt determined to make the assignment a nullity. He certainly proceeded without any reason to make it a null and void instrument. If it was security, there would have to be a debt. This principle needs no citation of authority to support it.

If, therefore, plaintiff had determined that his assignment made him the owner of the cafe property, the Court could not determine that an attempt to enforce the assignment constituted an election where the Court found the assignment in effect to be void and of no effect.

This Court in *Welsh, Driscoll and Buck v. Buck*, 232 Pac. 911, considered the sufficiency of an election arising out of the fact that in a prior action the plaintiff sought to establish and foreclose a mortgage and failed in that ac-

tion, whereupon the action was dismissed. The plaintiffs had erroneously taken the view that they held a mortgage, and the Court stated:

“There is ample authority to the effect that where a mistake has been made in pursuance of a remedy, such mistake is not a bar to the bringing of another proper action.”

In other words, if the plaintiff had misconstrued his right in this case and sought to establish the assignment and failed, that did not constitute an election requiring plaintiff to buy out the defendant. If it is therefore submitted that the Court should proceed to reduce the assets in this partnership to cash and apply the same to the debts, and divide any surplus as provided by statute.

### POINT NO. III.

THE COURT ERRED IN ITS CONCLUSION OF LAW NO. 4 AND THE WHOLE THEREOF FOR THE REASON THAT THE SAME IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE, FINDINGS OR PLEADINGS, AND IS CONTRARY TO LAW.

This statement revolves around the conclusions of the Court that plaintiff had to assume the outstanding liability, including the real estate contract, and save the defendants harmless from all liability; concludes that there was a net worth, with Sammons entitled to one-half of that, plus his salary; concludes that Beulah Sammons was entitled to a judgment against the plaintiff for \$1284.40, and concludes that plaintiff had to secure releases of all liability and pro-

duce those releases, and made plaintiff's possession of the cafe contingent upon producing such.

The discussion of this point will also cover and dispose of the items involved in POINTS IV, VI, IX and XVII.

The Court acted contrary to law and without any support in the evidence in awarding to defendant Jimmie Sammons a salary of \$300 a month and giving him a judgment against plaintiff for that amount.

The partnership agreement was oral, as set out by plaintiff in Paragraph 3 of his complaint, was one in which the defendant would operate the business and property aforesaid and would make all future payments on the purchase price thereof, and the residue of the profits realized from the operation of said business would be jointly shared and divided between plaintiff and defendant Jimmie Sammons. In Paragraph 3 of his answer, the defendant Sammons admits that to be the arrangement, but states he was "to draw a living wage from the said business before division of the profits to be jointly shared between plaintiff and defendant Jimmie Sammons."

In Paragraph 7 of his answer, the defendant further states and characterizes the agreement as one "that after the payment of the installments upon the contract for the sellers of the property and the operating expenses thereof, the defendants were to take a living wage from the said property, and the residue, if any, of the profits from said business would then be divided equally between plaintiff and defendants."

At Page 157 of the transcript, Sammons characterizes

the oral discussion with Eardley on the matter of wages: "He told me to take a wage from the cafe at that time."

In addition to the fact that the partnership income had not been sufficient to pay the costs of operation of the cafe, and meet the payments on the purchase contract of the cafe by some \$4000 defendant Sammons, at Page 164 of the record, explaining why Beulah Sammons, the defendant, was not paid a wage, says: "Well, as a rule on payday, maybe I would be a little short in the bank and I would say, 'I will pay you later on.' She was about the only one to charge it to."

The books of the partnership showed the receipts were over \$9,000 less than the items that had been paid. No evidence was introduced by defendant that there had ever been any profit resulting from the operation; no operating statement had ever been prepared, and, as indicated by the evidence and contended by plaintiff, the defendant Sammons did not at any time prepare or offer a profit and loss statement on the operations of this cafe.

In view of the evidence, it is conclusive that there were not at any time profits in the operation of this venture which would have permitted Sammons to be entitled to the \$300 a month, or any part thereof. If there were no profits above operation costs and payments on the purchase price, there could not be a liability to Sammons on his drawing account from either the partnership or Eardley.

The Court in its Finding No. 7 definitely committed error when it interpreted the agreement to be "that plaintiff and defendant Jimmie Sammons did agree, however, that the



profits from operations of the cafe, after payment of a living wage to defendant Jimmie Sammons, were to be applied upon the accruing installments of the purchase contract, and residue of profits were to be divided equally between plaintiff and defendant." This finding is obviously contrary to the agreement as stated by the parties in their pleadings and in their testimony, as the payments on the purchase contract were to be paid as a part of the operations of the cafe and were to be an item of cost of operation to be determined before a profit could arise from which Sammons' right to wages or other profits to be divided could be determined upon.

The Court has made the Sammons right to wages a personal obligation of Eardley, in effect to be paid out of more capital to be contributed by Eardley.

In 40 Am. Jur. at Page 373, Par. 348, the rule is announced:

"A partner who furnishes no capital but contributes merely time, skill and services to the partnership business, is not entitled on dissolution to any part of the original firm capital, but must look for compensation for such time and services to his share of the profits of the firm business."

#### POINT NO. XVIII.

THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 27, 28 AND 29 AS THE SAME ARE CONTRARY TO OR ARE NOT SUPPORTED BY THE EVIDENCE.

The discussion under this point concerns the purported financial statement which the Court created in Finding No. 29 and the various items which became involved in creating

such a financial statements, and therefore the argument on POINTS III, IV, VIII, X, XI, XII, XIII, XIV and XVIII are covered by the argument under this Point.

We desire at this time to discuss with the Court the errors contained in Findings 26, 27, 28 and 29 of the Court, pursuant to which the Court arrived at the balance sheet he set up for the partnership. In Finding No. 26 the Court determines that the fixtures and equipment were in the cafe when the plaintiff took over. At Page 113 of the transcript Smith, the bookkeeper, points out that a cash register on which \$90 was paid had not been found. In Finding No. 27 the Court finds that there was due Sammons \$300 a month for each month from August 8, 1955, to July 10, 1956, except for six weeks. In Finding No. 28 the Court finds that the services of Beulah Sammons was reasonably worth \$1319.70.

As heretofore pointed out, Sammons was not entitled to a salary as there was not a showing that there were profits, and, in fact, the evidence is that the partnership operated at a loss.

It is submitted that Beulah Sammons was there helping her husband in the partnership venture but was not entitled to be paid. She could not sue her husband for her services. It is submitted that no issue or pleading supports a personal judgment for Beulah Sammons against plaintiff in this case—the whole proceeding being one solely for the partnership dissolution and accounting, and Beulah Sammons having been joined only as a signer on a purchase contract with her husband, she could not, under the issue raised by the answer,

secure in this action a personal judgment against the plaintiff Eardley.

With reference to Finding No. 29 on the financial statement that the Court creates, we submit that the Court has created this statement entirely contrary to law. We have heretofore pointed out the impropriety of the Court's action. However, in addition to those points we call attention to the fact that the Court has failed to make any allowance for depreciation.

In the case of *Kennedy v. Yost*, 882 Atl. (2d) 297 (Del.), it was held that in an action for accounting involving a restaurant a depreciation of partnership property was an allowable item.

It is unknown by what manner of computation the Court arrived at the value of the cafe property or the equipment in setting up the assets in the statement in Finding No. 29. To define the value of this item as being an "equity," it may be assumed that by the use of the word "equity," Judge Hoyt has considered the cash that may remain had the property been disposed of to satisfy the obligations against the property. In order to arrive at such a figure, however, Judge Hoyt would have had to have evidence as to the value of the property as of the time he seeks to set up the balance sheet, and to subtract therefrom the obligations against the property. We might assume, therefore, that Judge Hoyt has by some method only known to him arrived at a net worth value of the property as of July 11, 1956. There is no evidence in this record to support a determination of the value of the property on that date.

To indicate the fallacy of Judge Hoyt's determination of value, we would like to point out the following figures relative to the original purchase contract. There was paid on the \$30,000 purchase the sum of \$6906.72. Of this, \$1034.48 was interest and \$5872 was principal. Considering that \$2100 of this amount was paid by the plaintiff for which he is entitled to be first paid before arriving at a value, this would leave a value in the purchase contract of \$3772.24 before depreciation. This would also assume that the equipment originally purchased was still available, but the evidence shows that much of the equipment has been destroyed, lost or otherwise disposed of.

As the equity figure of \$4806.66 for the real estate and personal property under the contract of purchase used in the financial statement is the total of the sums paid on the contract from cafe receipts, plus the \$100 Beulah Sammons provided from her funds, all as appears in Finding No. 16, one might assume that Judge Hoyt computed the equity as being equal to that figure. If so, it becomes equally ridiculous, because \$1034.48 represents interest and could not be applied to principal to produce an equity. In any event, either system is entirely contrary to law, is unfair and prejudicial to plaintiff.

The liability side of the financial statement is obviously contrary to the statutes of this state and to law, particularly inasmuch as the Court has failed and refused to include as a liability the \$2556.94 advanced by plaintiff. This clearly appears by the provisions of Sections 48-1-15 and 48-1-37, U.C.A., 1953. The Court failed to include as a liability the interest that would be due plaintiff on his contributions to capital in excess of that required by the partnership agreement.

A further deficiency in the liability side of the statement is the fact that the Court failed to set up the interest to which the plaintiff would have been entitled on the capital that he was required to advance over and above the original \$1000 he agreed to put in. This would have entitled Eardley to interest on the total sum of \$1556.94. This consists of the \$1100 plaintiff was called upon to advance to make up delinquent payments on the purchase contract, plus the sum of \$456.94 he had to advance to pay to the coffee supplier of the cafe. The right to this interest clearly appears in the provisions of Section 48-1-15 U.C.A., 1953.

There was no finding that either a profit or a loss had been sustained by the partnership. A profit would greatly affect the rights of the parties and a finding on this should have been made.

#### POINT NO. XVI.

THE COURT ERRED IN ITS FAILURE TO ALLOW AS A COST THE EXPENSES INCURRED IN PROVIDING INVENTORIES AND FINANCIAL STATEMENTS OF THE PARTNERSHIP PREPARED FOR THE PURPOSES OF THIS ACTION AND DISSOLUTION.

POINTS V and XVI are covered by the argument under this point and involve the right of plaintiff to have recovered the costs expended in securing the statement prepared by plaintiff's bookkeeper, Smith, in taking the inventories by the various employees, the plaintiff's right to compensation for his services in operating and managing the property pend-

ing litigation, and awaiting the determination of the Courts. The right of plaintiff hereunder is clearly covered by the uniform partnership act of this state, which section has heretofore been quoted. The Court erred, therefore, in not including in any accounting a provision to satisfy the plaintiff for these costs which he had expended in behalf of the partnership.

### CONCLUSION

In conclusion, the plaintiff requests the Court to remand this case to Judge Hoyt, with directions to cause the property of the partnership to be sold and the proceeds applied on all debts; to require an accounting to be made reflecting the operations of the partnership; to have the Court award to plaintiff his damages for breach of the contract by Sammons; to dismiss the judgment in behalf of Beulah Sammons; to award to plaintiff a liability of the partnership all of the plaintiff's advances, including interest thereon, and to award to plaintiff his costs as heretofore indicated.

Respectfully submitted,

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