

1992

Mark O. Walsh v. Judith Erickson, Jude Erickson, Peter Van Alstyne, Gerald Robinson : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

Mark O. Walsh,

Plaintiff and Appellant,

v.

**Judith Erickson, a.k.a. Jude Erickson;
Peter Van Alstyne; and Gerald Robinson,**

Defendants and Appellees.

)
) **Case No. 920222-CA**
)
)
) **Priority No. 15**
)
) **Consolidated Appeals from Two**
) **Judgments of the Third District**
) **Court, Salt Lake County, State of Utah**
)
) **HONORABLE RICHARD H. MOFFAT**

BRIEF OF THE APPELLEES

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The caption on the cover shows the names of all parties.

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- 14 Oneida v. Oneida, 236 U.A.R. 24, 25 (Utah App. 1994).
- 17 Resource Mgt. Company v. Weston Ranch and Livestock, 706 P.2d 1028 (Utah 1985).
- 13 Steele v. Board of Review of Indus. Comm'n, 204 Utah Adv. Rep. 33 at 34, 845 P.2d 960 (Utah Ct. App. 1993).

Page Rules

- 5 Rule 24 of the Utah Rules of Appellate Procedure.
- 22 Rule 33 of the Utah Rules of Appellate Procedure.
- 22 Rule 34 of the Utah Rules of Appellate Procedure.

Page Statutes

- 18 §§ 48-1-21 and 48-1-24, Utah Code
- 18, 23 § 48-1-6, Utah Code
- 5 48-1-15(1), Utah Code
- 4 § 78-2a-3(2)(j), Utah Code

STATEMENT SHOWING APPELLATE COURT JURISDICTION

This appeal is properly within the jurisdiction of the Utah Court of Appeals pursuant to Utah Code § 78-2a-3(2)(j).

STATEMENT OF THE ISSUES

1. SHOULD THE APPEAL BE DISMISSED FOR APPELLANT'S FAILURE TO COMPLY WITH RULE 24(a)(7) and 24(e) OF THE UTAH RULES OF APPELLATE PROCEDURE?

2. SHOULD THE APPEAL BE DISMISSED FOR APPELLANT'S FAILURE TO MARSHALL THE EVIDENCE?

3. HAS APPELLANT ESTABLISHED THAT THE TRIAL COURT'S FINDINGS ARE SO LACKING IN SUPPORT AS TO BE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE, THUS MAKING THEM ERRONEOUS?

4. GIVEN THE TRIAL COURT'S FINDINGS OF FACT, WAS IT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO MAKE THE FOLLOWING RULINGS:

4.1. In December, 1985, Appellant entered into an oral Partnership agreement with appellees Van Alstyne and Robinson, thus creating the Universal Video Partnership (hereinafter the "Partnership") for the purpose of retail video business.

4.2. The terms of the Partnership Agreement required that, in exchange for Robinson's loan of the \$30,000.00 start-up funds for the business, Walsh and Van Alstyne agreed: (a) to repay Robinson; (b) to be responsible for the partnership business debts; and (c) to share in equal thirds with Robinson the business profits, even though it finally turned out that there were no business profits.

4.3. As a manager of the Partnership's Universal Video business with responsibility to manage the business so as to pay its debts, is responsible to repay Robinson for one-half of Robinson's loans to the Partnership as set forth in the Facts above. The debt to Robinson, after deducting all payments to him to date, totals \$10,718.45 plus interest through May 21, 1989. Robinson should be granted judgment against Walsh effective May 21, 1989 against Walsh for one-half of that sum, \$5,359.23.

4.4. Pursuant to the terms of the Partnership agreement Walsh and Van Alstyne, and not Robinson, were equally responsible for the business debts to Chytraus, Jet Star, Oakwood, and other business creditors. Pursuant to his right of contribution per Section 48-1-15(1), Utah Code, as amended, Van Alstyne should be granted judgment against Walsh effective May 21, 1989, for \$24,346.82, which represents one-half of Van Alstyne's \$48,693.65 payments to creditors with his own money.

4.5. Walsh is liable for breach of fiduciary duty to Van Alstyne and Robinson. For Walsh's breach of fiduciary duty to Van Alstyne, Van Alstyne should be granted judgment against Walsh for \$24,346.82 actual damages. For Walsh's breach of fiduciary duty to Robinson, Robinson should be granted judgment against Walsh for \$5,359.23 actual damages.

4.6. The Sales Agreement entered into by Walsh and Erickson May 2, 1985 is void for lack of consideration and void for failure of consideration. Even if the Sales Agreement were not void for lack of consideration, it is void for failure of consideration.

4.7. Appellant's "Motion for Summary Enforcement of Settlement Agreement" should be denied and Defendants should be granted judgment against Plaintiff for \$3200.00 attorney's fees incurred in defending against the motion.

5. ARE THE ISSUES WHICH APPELLANT RAISES FOR THE FIRST TIME ON APPEAL PROPERLY BEFORE THIS COURT?

DETERMINATIVE STATUTES

The determinative statutes are §§48-1-1 through 48-1-40, copied and attached hereto in the addendum.

STATEMENT OF THE CASE

Nature of the case: This case arose from a number of disputes between the parties concerning their real or alleged partnership interests.

Course of the proceedings and disposition at trial court: Walsh filed an action against Appellees in the Third District Court, alleging breach of a purported sales agreement pursuant

to which he allegedly sold all of his partnership interest to Erickson. Appellees counterclaimed alleging causes of action including breach of partnership agreement, breach of fiduciary duty, and unjust enrichment. After a two-day trial, the trial court ruled for Appellees on all of their claims. Appellant filed and lost a motion objecting to appellee's proposed forms of Findings of Fact and Conclusions of law and Judgment. Appellant filed and lost a Motion for New Trial. Having lost at his attempts to prevent entry of the judgments against him from the first trial, appellant next filed a Motion for Summary Enforcement of Settlement Agreement, alleging that the parties had entered into a settlement agreement to liquidate the judgments from the trial. There was no such settlement agreement. Appellant's own arguments at trial supported appellees' firm position that there was no settlement agreement by any stretch of the imagination.

RELEVANT FACTS WITH CITATIONS TO THE RECORD

In December, 1984, appellant entered into an oral Partnership agreement with appellees Van Alstyne and Robinson, creating the Universal Video Partnership (hereinafter the "Partnership") for the purpose of retail video business. [T. pp. 4, 47.] Walsh had previous experience and success in that line of business. Van Alstyne and Robinson had no such experience. Van Alstyne and Robinson entered into the Partnership and thereby assumed substantial obligations: (1) in reliance on Walsh's experience and success in the video retail business [T. pp. 8, 48-49, 54-55]; (2) in reliance on Walsh's self-professed net worth of approximately \$243,500.00 [T. pp.59-63, 125-127; and Defendants' Exhibit 10 for Trial #1.]; (3) in reliance on Walsh's promises that the Partnership Business would be profitable with certainly

enough revenue to pay Jet Star Contract, the Oakwood lease, the Chytraus contract, and the \$30,000.00 plus interest to Robinson; (4) in reliance on Walsh's assurances that Walsh would mortgage his home if necessary to repay Robinson [T. pp. 56-63, 65]; and (5) in reliance on the fact that Walsh was an L.D.S. Bishop and returned missionary and lifelong friend of Van Alstyne. [T. pp. 5, 223, 296-297.]

The Partnership agreement included the following terms:

1. Robinson's obligations: Loan \$30,000.00 to Walsh and Van Alstyne [T. pp. 57-59, 186-187, 192.] for their \$25,000.00 payment on the Jet Star Contract and \$5,000.00 for operating expenses. Robinson was a "silent partner" with no obligation to manage the business or pay its debts. [T. pp. 297-299.]

2. Walsh's and Van Alstyne's obligations:

- 2.1. Assume joint liability to repay Robinson the full \$30,000.00 plus interest at 19.41% per annum (3% plus the 16.41% rate Robinson was paying to his bank for the second mortgage on his home to get the \$30,000.00) [T. pp. 56-59, 91-94, 292-293, 308-309, and p. 310 re Plaintiff's Exhibit 32 from Trial #1; Defendant's Exhibits 18, 27, and 31 from Trial #1.]

- 2.2. Contribute time and labor to manage and run the business [T. pp. 5, 134-135.] to pay expenses and make a profit.

- 2.3. Assume joint and several liability for the following Partnership Business obligations including the following contracts [T. pp. 4, 78-80.]: (a) Jet Star contract to purchase the business known as Universal Video (the "Partnership Business"). [T. p. 194, 198, 226; Plaintiff's Exhibit 1 from Trial #1.]; (b) the "Oakwood Lease" of the premises for Partnership Business operations, which obligated Walsh and Van Alstyne to eighteen monthly payments of \$1,420.00 to \$1,440.00. [T. p. 227; Defendant's Exhibit 17 from Trial #1.]; and (c) personally guarantee and assume joint and several liability to Oscar E. Chytraus Company ("Chytraus") the primary vendor of video tapes for the Partnership Business, by signing an Application for Credit and personal guarantee to Oscar E. Chytraus Company (hereinafter "Chytraus") [T. p. 82; Defendants' Exhibit 15 from Trial #1.]. Neither Walsh nor Van Alstyne intended nor asked Robinson to be responsible for Jet Star contract, the Oakwood lease, or any other Universal Video business debts. [T. pp. 69, 79, 82-83, 226-227.]

3. Rights to profits of the Universal Video Business: Walsh, Van Alstyne, and Robinson were to share net profits equally after debts to Robinson and third parties had been paid. [T. pp. 4, 224, 297-299.]

Unbeknownst to Van Alstyne or Robinson, before Walsh signed the Jet Star contract in December, 1984, and before Robinson provided the \$30,000.00 loan, Walsh had been concerned that the Partnership Business income would be insufficient to make the Jet Star and Robinson payments. [T. pp. 65-66., 193-194.] Walsh did not disclose those financial worries to Van Alstyne until after Robinson had already loaned the \$30,000.00, and after Walsh and Van Alstyne had cosigned on the Jet Star Contract, the Oakwood Lease, and the personal guarantee to Chytraus. [T. pp. 65-66, 81.] From the beginning of business operations until May, 1985 when Walsh abandoned the Partnership, the Business revenue was so low that Walsh became concerned "that the store wasn't going to make it in the spring or the summer without an infusion of some additional revenues[.]" [quotation from T. p. 199; also see T. pp. 65-71, 104, 198-199.] In March, 1985, Walsh shocked Van Alstyne by disclosing that he was facing personal bankruptcy and that, therefore, he had no assets to pay his obligations on the Partnership Business should the business revenue be insufficient. [T. pp. 71, 109.] Consequently, Walsh and Van Alstyne tried, without success, to sell the Partnership Business. [T. pp. 69-71, 199-200.] With the newfound information of Walsh's personal financial distress, Van Alstyne began to look for alternate sources to help pay \$35,000.00 on the Jet Star contract in June, 1985, and to contribute additional monies for the business. [T. pp. 74-75.] From May, 1985, until spring of 1986, Van Alstyne, Robinson, and Erickson considered various possibilities and made several proposals back and forth for Erickson to become an additional "partner" in the business. No agreement was ever reached. [T. pp. 25,

26, 29-30, 44, 74-77, 108-112, 147-149, 176-177; Plaintiff's Exhibit 6 from Trial #1.]

Negotiations with Erickson notwithstanding, neither Van Alstyne nor Robinson ever released or offered to release Walsh from his Partnership obligations for the Jet Star contract, the Oakwood lease, the Chytraus debts, the Robinson loan, or any other of his partnership obligations. [T. pp. 4 (stipulation), 75, 98-99, 119-120, 135, 150, 155, 384.] In April-May, 1985, without informing Van Alstyne or Robinson, Walsh negotiated with Erickson to sell her his Partnership interest for \$10,000.00, a sales price determined by Walsh and characterized by him as "a fairly arbitrary figure." [T. p. 240.] Walsh kept his sales agreement with Erickson secret from Van Alstyne and Robinson, although Erickson thought they were aware of it because Walsh told Erickson before she signed any of the sales documents that Van Alstyne had approved. Erickson was naive and inexperienced in business matters. [T. pp. 285-291.] She trusted and believed in Walsh and thus let him induce her into believing that she was purchasing all of his Partnership interest for \$10,000. Erickson relied on Walsh's experience in the video business and her belief that he was looking out for her best interests because he represented himself as "a good church man" whom she could trust him to help her. [T. pp. 149-150, 167.]

On May 2, 1985, Erickson and Walsh executed these four documents which were prepared by an attorney of Walsh's at Walsh's request [T. pp. 203, 219] for his purported sale of his Partnership interest to Erickson for \$10,000.00: (1) Sales Agreement [Plaintiff's Exhibit 2 of Trial #1]; (2) Promissory Note [Plaintiff's Exhibit 3 of Trial #1]; (3) Assignment and Assumption Agreement [Plaintiff's Exhibit 4 of Trial #1]; and (4) Consent to Assignment [Plaintiff's Exhibit 5 of Trial #1]. The Consent to Assignment, which was necessary for completion of Walsh's sale

to Erickson, was not signed by nor agreed to by three necessary parties: Oakwood Village Partnership (for the partnership lease), Jet Star Industries, Inc., and Van Alstyne. [T. pp. 147-149, 220, 256.]

Neither Walsh nor Erickson informed Van Alstyne or Robinson about the terms of their May 2, 1985, transaction or those four documents. The first time Van Alstyne or Robinson saw any of those documents was in autumn of 1986 when they saw a copy of the Promissory Note attached the Complaint in this action. [T. pp. 38, 96-99, 293.] Nevertheless, before Erickson signed the four documents, Walsh told Erickson that Van Alstyne had approved the documents. The purported Sales Agreement between Walsh and Erickson was an ambiguous combination of the above-referenced four documents and a number of other oral representations made on various occasions. [T. pp. 246-249, 285-290.] Though the Walsh-Erickson sales agreement in totality was ambiguous, the Sales Agreement document included these two provisions: (1) Walsh purportedly sold his Partnership rights and Partnership interest to Erickson; and (2) Erickson purportedly assumed Walsh's Partnership obligations including the following: Jet Star obligation; Chytraus obligation; Oakwood Lease; and utilities. [Plaintiff's Exhibit 2 from Trial #1.]

Walsh told Erickson not to worry about the Partnership debts because all Partnership bills "were being paid by the store" and that the "store revenues " would continue to pay the debts. [T. pp. 160-162, 230, 240-242.] Further, Walsh told Erickson it was not necessary to pay Robinson because there was no contract with Robinson [T. p. 163.] and that, therefore, Robinson "didn't have a claim to the store . . . [and that] Robinson couldn't prove that he had given the \$30,000." [T. p. 288.] From June through October, 1985, Erickson paid Walsh \$5,500.00 toward the

\$10,000.00 to purchase Walsh's partnership interest: \$3,000 paid to Walsh May 2, 1985 and \$500 per month for the next five months. [T. p. 5.] After paying the October, 1985 \$500.00 installment to Walsh, Erickson ceased paying Walsh.

When Walsh negotiated his purported sale to Erickson, he did not disclose to Erickson that Van Alstyne had made demand on Walsh to help pay \$30,000.00 due Jet Star May 31, 1985. Before Van Alstyne made that Jet Star payment Van Alstyne made demand on Walsh to help satisfy the Partnership obligations. Walsh refused, telling Van Alstyne he was facing bankruptcy and that he hadn't the assets to spend on those obligations. [T. p. 109.] Over several months following, Van Alstyne made additional demands on Walsh to contribute to pay Partnership Business debts, and each time Walsh refused. [T. pp. 120, 130, 280, 283-284.] Van Alstyne mortgaged his family residence for \$30,000.00 in June, 1985, to pay on the Jet Star contract. [T. pp. 5, 113.] Having been abandoned by their partner Walsh, Van Alstyne and Robinson proceeded to wind up the Partnership Business.

After several unsuccessful attempts to sell the Universal Video business [T42 and 43], Van Alstyne and Robinson sold the inventory in June 1986 to Video USA for \$25,835.00. All of those sales proceeds were applied to pay Partnership Business debts. [T. p. 5.] Van Alstyne was damaged by paying these amounts, either as cash out of pocket or as lost interest, to satisfy the business debts:

\$30,000.00	plus interest at 10% per annum June 3, 1985 for discounted payment on Jet Star [Defendant's Exhibit 25 from Trial #1.]
\$ 5,200.00	plus interest at 13% per annum December 18, 1985 for one-half of \$6,038.00 final payment to Chytraus and one-half of \$4,362.00 final payment on jet

Star contract.

+ 13,493.65 Total interest at the above specified 10% and 13% rates

\$48,693.65 TOTAL VAN ALSTYNE PAYMENTS TO SATISFY PARTNERSHIP
BUSINESS DEBTS OWED JOINTLY BY HIM AND WALSH.

[T. pp. 271-274, 280, 305-309, and pp. 310-312 re Plaintiff's Exhibit 32 from Trial #1; Defendants' Exhibit 30 from Trial #1.]

Robinson paid these sums to satisfy the Partnership Business debts: In addition to the initial \$30,000.00 loan at 19.41% per annum, Robinson loaned the business \$5,200.00 at 13% per annum December 18, 1985 for one-half of the \$6,038.00 final payment to Chytraus and one-half of the \$4,632.00 final payment on the Jet Star Contract. The amount that Walsh and Van Alstyne jointly owed Robinson through May 21, 1989 was \$10,717.45. [T. pp. 91, 294-295, 300-305, and pp. 310-312 re Plaintiff's Exhibit 32 from Trial #1; Defendant's Exhibits 18 and 31 from Trial #1.]

No settlement or liquidation agreement was ever reached between the parties after the trial court entered the judgments for appellees. Appellant brought a "Motion for Summary Enforcement of Settlement Agreement" alleging such a settlement. That motion was non-meritorious and had no merit. See transcript of the trial on that motion.

SUMMARY OF THE ARGUMENT

The appeal should be dismissed because appellant made no attempt to marshal the evidence. There is no statement of relevant facts in appellant's brief. The trial court's rulings should be upheld and appellees should be awarded their costs and attorney's fees for defending this non-meritorious appeal.

1. THE APPEAL SHOULD BE DISMISSED FOR APPELLANT'S FAILURE TO COMPLY WITH RULE 24(a)(7) and 24(e) OF THE UTAH RULES OF APPELLATE PROCEDURE.

Rule 24(a)(7) states:

. . . A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

Rule 24(e) states:

References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence of proceedings References to exhibits shall include exhibit numbers.

There is no statement of facts in the "Statement of the Case" or anywhere else in appellant's brief.

Further, appellant bases his arguments on many facts which were not in evidence at trial, and he fails to cite the source of those purported facts. In Steele v. Board of Review of Indus. Comm'n,

204 Utah Adv. Rep. 33 at 34, 845 P.2d 960 (Utah Ct. App. 1993), this court ruled that

An appellant's brief must contain a "statement of the facts relevant to the issues presented for review," and "[a]ll statements of fact and references to the proceedings below shall be supported by citations to the record." Likewise, subsection (a)(9a) of Rule 24 requires the argument in a brief to contain "citations to the . . . parts of the record relied on" therein. Briefs that do not comply with Rule 24 "may be stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer." Utah R. App. Procedure 24(k).

If a party fails to provide a statement of the facts along with a citation to the record where those facts are supported, we will assume the correctness of the judgment. [Citations.]

If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below.

2. THE APPEAL SHOULD BE DISMISSED FOR APPELLANT'S FAILURE TO

MARSHAL THE EVIDENCE.

This court's ruling in Oneida v. Oneida, 236 U.A.R. 24, 25 (Utah App. 1994) places a heavy burden on the appellant who challenges the trial court's findings of fact:

Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual finding. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. '[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling] duty . . . , the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellants resist.' [Citations.] Once appellants have established every pillar supporting their adversary's position, they then must ferret out a fatal flaw in the evidence and show why those pillars fail to support the trial court's findings. [Citations.] They must show the trial court's findings are so lacking in support as to be "against the clear weight of the evidence," thus making them "clearly erroneous." [Citations.]

. . . Accordingly, "[w]hen the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid." [Citations.]

Not only did appellant make no effort to marshal evidence in his brief, he did not even acknowledge the concept of marshaling evidence in his brief. Because appellant has failed to marshal the evidence. The court should uphold all of the trial court's findings of fact.

3. APPELLANT HAS FAILED TO ESTABLISH, INDEED HE DID NOT EVEN SHOW AN ATTEMPT TO ESTABLISH, THAT THE TRIAL COURT'S FINDINGS ARE SO LACKING IN SUPPORT AS TO BE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE, THUS MAKING THEM ERRONEOUS.

Because appellant has failed to meet his burden in challenging the trial court's findings, the findings of fact must be upheld.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT APPLIED UTAH PARTNERSHIP LAW TO ITS FINDINGS OF FACT AND MADE THESE RULINGS

AND LEGAL CONCLUSIONS [R. at 000543-000566, in addendum attached hereto]:

4.1. In December, 1985, Appellant entered into an oral Partnership agreement with appellees Van Alstyne and Robinson, thus creating the Universal Video Partnership (hereinafter the "Partnership") for the purpose of retail video business.

4.2. The terms of the Partnership Agreement required that, in exchange for Robinson's loan of the \$30,000.00 start-up funds for the business, Walsh and Van Alstyne agreed: (a) to repay Robinson; (b) to be responsible for the partnership business debts; and (c) to share in equal thirds with Robinson the business profits, even though it finally turned out that there were no business profits.

4.3. As a manager of the Partnership's Universal Video business with responsibility to manage the business so as to pay its debts, is responsible to repay Robinson for one-half of Robinson's loans to the Partnership as set forth in the Facts above. The debt to Robinson, after deducting all payments to him to date, totals \$10,718.45 plus interest through May 21, 1989. Robinson is entitled to judgment against Walsh effective May 21, 1989 against Walsh for one-half of that sum, \$5,359.23.

4.4. Pursuant to the terms of the Partnership agreement Walsh and Van Alstyne, and not Robinson, were equally responsible for the business debts to Chytraus, Jet Star, Oakwood, and other business creditors. Pursuant to his right of contribution per Section 48-1-15(1), Utah Code, as amended, Van Alstyne is entitled to judgment against Walsh effective May 21, 1989, for \$24,346.82, which represents one-half of Van Alstyne's \$48,693.65 payments to creditors with his own money.

4.5. Walsh is liable for breach of fiduciary duty to Van Alstyne and Robinson. For Walsh's breach of fiduciary duty to Van Alstyne, Van Alstyne should be granted judgment against Walsh for \$24,346.82 actual damages. For Walsh's breach of fiduciary duty to Robinson, Robinson should be granted judgment against Walsh for \$5,359.23 actual damages.

The trial court found by clear and convincing evidence that Walsh breached his fiduciary duty to Van Alstyne and Robinson in many ways. First, before borrowing the \$30,000.00 from Robinson to purchase the Universal Video business under the Jet Star Contract, Walsh was wary of the debt service on the contract and was concerned that the business revenue would not cover the debt serve, let alone the loan payments to Robinson

and the other business debts, and yet he borrowed the \$30,000.00 from Robinson and had Van Alstyne cosign with Walsh on the underlying contracts and personal guarantee to Chytraus without warning Van Alstyne and Robinson of the risk involved.

Second, Walsh breached his fiduciary duties when he abandoned the Partnership May 2, 1985, leaving Van Alstyne to manage and pay the debts of a business in which he had virtually no experience, and leaving the debt to Robinson unpaid.

Further, Walsh breached his fiduciary duties when he attempted to sell his partnership interest to Erickson without fully disclosing to Van Alstyne and Robinson the terms of the sale and without informing them that he received \$5,500.00 from Erickson.

The trial Court found by clear and convincing evidence that the said breaches of fiduciary duty were done by Walsh in a manner that showed a knowing and reckless indifference to and disregard of the rights of Van Alstyne and Robinson, and that Walsh either knew or should have known that he said conduct would, in a high degree of probability, result in substantial harm to Van Alstyne and Robinson. Appellant has failed to rebut those judicial findings.

4.6. The Sales Agreement entered into by Walsh and Erickson May 2, 1985 is void for lack of consideration and void for failure of consideration.

Even if the Sales Agreement were not void for lack of consideration, it is void for failure of consideration. Section I of the Agreement purported to convey to Erickson all of Walsh's one-third partnership rights and interest in the Universal Video business. Walsh did not have the authority or right to convey his Partnership rights. Walsh's sale to

Erickson was tantamount to the proverbial "sale of the Brooklyn Bridge". Walsh's promise to convey all of his partnership rights to Erickson was illusory because it required approval (never obtained) by Van Alstyne and Robinson.

When there exists only the facade of a promise, i.e., a statement . . . such . . . that the person making it commits himself to nothing, the alleged "promise" is said to be "illusory". An illusory promise, neither binds the person making it, [Citation], nor functions as consideration for a return promise.

Resource Management Company v. Weston Ranch and Livestock Company Inc., 706 P.2d 1028, 1036 (Utah 1985). Thus the Sales Agreement is void for lack of consideration because Walsh's promise to convey his Partnership rights to Erickson was illusory because it committed Walsh to nothing because he had no legal right to make that commitment without consent from Van Alstyne and Robinson.

4.7. Even if the Sales Agreement were not void for lack of consideration, it would be void for failure of consideration.

When consideration is lacking, there is no contract. When consideration fails, there was a contract when the agreement was made, but the promised performance has failed. DeMentas v. Estate of Tallas, 95 Utah Adv. Rep. 28 (Utah App. 1988). Walsh failed to deliver the consideration (his Partnership rights) to Erickson because he was never authorized to do so by the other partners, Van Alstyne and Robinson.

4.8. All partners' consents are required for sale of partner's rights: Pursuant to Sections 48-1-21 and 48-1-24, Utah Code, as amended, both Van Alstyne's and Robinson's consent would be required to imbue Erickson with Walsh's Partnership rights (as opposed

to his mere Partnership interest, which is the partner's right to profits) to manage or administer Partnership business or affairs.

4.8.1. Neither Van Alstyne nor Robinson consented, either explicitly or implicitly, to the Walsh-Erickson Sales Agreement.

Van Alstyne and Robinson did not even see the document until this lawsuit was filed. After Erickson signed the documents and began paying Walsh the \$500.00 monthly installment, several months of arguments ensued between Erickson and Van Alstyne because Van Alstyne and Robinson did not ever accept Erickson as a full one-third partner to replace Walsh.

4.8.2. Neither Van Alstyne nor Robinson released Walsh from his Partnership obligations.

The fact that Van Alstyne and Robinson made significant Partnership business decisions after May 1, 1985 without consulting Walsh does not imply a release of Walsh or a consent to his sale to Erickson. Walsh abandoned the partnership May 2, 1985. Section 48-1-6, Utah Code, as amended, provides that a partner who abandons the Partnership business does not have to be included in other partners' decisions to sell or assign Partnership property. There was no novation to substitute Erickson for Walsh to pay Walsh's Partnership obligations. "For a novation to occur, there must be (1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one." Hormana v. Gordon, 740 P.2d 1346, 1352-1353 (Utah App. 1987).

4.9. Neither mistake of fact nor mistake of law by Erickson or Walsh would validate the Walsh-Erickson Sales Agreement.

Even if Walsh and Erickson both mistakenly believed when they entered in to the Sales Agreement that Van Alstyne and Robinson had consented to the Agreement, that mistake would not be grounds for validating the Sales Agreement. Mooney v. GR and Associates, 746 P.2d 1174 (Utah App. 1987). To allow such a mistake of fact to validate the Sales Agreement would be analogous to validating a contract for sale of the Brooklyn Bridge by a seller who believed he had legal rights to sell the bridge but who in fact did not. Rather than being validated because it was obtained by mistake, the Sales Agreement is voidable because obtained by mistake.

As to mistake of law, ignorance of the law is no excuse. Walsh's or Erickson's mistake in legal interpretation of the Sales Agreement (mistakenly believing the Agreement was legally valid because of mistaken belief that partner's consent is not legal requirement for other partner's sale of his Partnership rights) would not be grounds sufficient for validating the Agreement. Kiahtipes v. Mills, 649 P.2d 9 (Utah 1982).

4.10. The Walsh-Erickson Sales Agreement is not severable so as to make Erickson liable to Walsh for the \$10,000.00 contract price and award her only Walsh's Partnership interest (right to accounts receivable) instead of all of his Partnership rights.

Partners' management rights are not assignable without the other partners' consent. There is no severability clause in the Sales Agreement. Section I of the Sales Agreement purports to sell all of Walsh's Partnership rights and interest in one total package. The Sales Agreement does not break down the \$10,000.00 sales price into units separately

specifying a certain sum for Walsh's Partnership rights and another sum for Walsh's Partnership interest. Further, there was no indication by Walsh or Erickson at trial of any intent by either of them that the contract be severable. "A contract is severable or entire depending on the intent of the parties at the time they entered into the contract." Management Services Corp. v. Development Associates, 617 P.2e 406, 408 (Utah 1980).

4.11. Appellant's "Motion for Summary Enforcement of Settlement Agreement" should be denied and Defendants should be allowed to collect their judgments against Plaintiff for \$3200.00 attorney's fees incurred in defending against the motion.

As with the other issues, appellant made no attempt to marshal the evidence to attack the trial court's findings. There is no credible evidence of any settlement agreement. Indeed, appellant's own arguments at trial supported appellees' firm position that their judgments entered against appellant in the first trial had not been satisfied, settled, or otherwise liquidated.

5. THE ISSUES WHICH APPELLANT RAISES FOR THE FIRST TIME ON APPEAL ARE NOT PROPERLY BEFORE THIS COURT.

Appellant's arguments number THREE, FOUR, FIVE, SIX, SEVEN, EIGHT, NINE, and TEN should be stricken because they are all based on erroneous and unsubstantiated facts and conclusions contrary to the findings of fact in the court below.

Appellant's arguments number TWELVE and THIRTEEN should be stricken because they raise issues not raised at the trial court level. John Deere v. A&H Equipment, 241 U.A.R. 17.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The appeal should be dismissed forthwith so that appellees may proceed to collect their long overdue moneys for judgments awarded them by the trial court:

Judgments entered almost 4 years ago, October 30, 1990, for Defendants against Plaintiff, (not including interest since May 31, 1990 or post-judgment costs) **total \$51,563.54** as follows:

Judgment for Erickson:

\$5,500.00	Principal judgment for Erickson
+2,755.75	10% pre-judgment interest from 10/31/85
<hr/>	<u>through 10/31/90 (\$1.51 per diem)</u>
\$8,255.75	TOTAL JUDGMENT with pre-judgment interest through
10/31/90	
+ 1,566.38	12% post-judgment interest from 10/31/90
<hr/>	<u>through 5/31/92 (\$2.71 per diem)</u>
\$9,822.13	TOTAL JUDGMENT PLUS INTEREST FOR ERICKSON
	THROUGH MAY 31, 1992 (does not include post-judgment
	costs, and does not include interest accruing
	on judgment at 12% per annum after May 31, 1992)

Judgment for Robinson:


\$5,359.23	Principal judgment for Robinson
+ 1,849.26	10% pre-judgment interest from 5/21/87 through
<hr/>	<u>10/31/90 (\$1.47 per diem)</u>
\$7,208.49	TOTAL JUDGMENT with pre-judgment interest
	through 10/31/90
+ 1,396.86	12% post-judgment interest from 10/31/90
<hr/>	<u>through 5/31/92 (\$2.37 per diem)</u>
\$8,578.35	TOTAL JUDGMENT PLUS INTEREST FOR ROBINSON
	THROUGH MAY 31, 1992 (does not include post-judgment
	costs, and does not include interest accruing
	on judgment at 12% per annum after May 31, 1992)

Judgment for Van Alstyne:

\$24,346.82	Principal judgment for Van Alstyne
+ 3,521.76	10% pre-judgment interest from 5/21/89 to 10/31/90 (\$6.67 per diem)
<hr/>	
\$27,868.58	TOTAL JUDGMENT with pre-judgment interest through 10/31/90
+ \$ 5,294.48	12% post-judgment interest from 10/31/90 through 5/31/92 (\$9.16 per diem)
<hr/>	
\$33,163.06	TOTAL JUDGMENT PLUS INTEREST FOR VAN ALSTYNE THROUGH MAY 31, 1992 (does not include post- judgment costs, and does not include interest accruing on judgment at 12% per annum after May 31, 1992.)

The appeal is without merit and was filed solely to delay and avoid payment of the appellees' judgments. Pursuant to Rules 33 and 34 of the Utah Rules of Appellate Procedure, Appellees should be awarded judgment against appellant for their costs and attorney's fees in defense of the appeal.

DATED this 6th day of July, 1994.


JOYCE MAUGHAN
Attorney for Appellees

TITLE 48

PARTNERSHIP

Chapter

1. General Partnership.
2. Limited Partnership [Repealed].
- 2a. Utah Revised Uniform Limited Partnership Act.
- 2b. Utah Limited Liability Company Act.

CHAPTER 1

GENERAL PARTNERSHIP

Section		Section	
8-1-1.	Definition of terms.	48-1-22.	Nature of a partner's right in specific partnership property.
8-1-2.	Interpretation of knowledge and notice.	48-1-23.	Nature of partner's interest in the partnership.
8-1-3.	"Partnership" defined.	48-1-24.	Assignment of partner's interest.
8-1-3.1.	Joint venture defined — Application of chapter.	48-1-25.	Partner's interest subject to charging order.
8-1-4.	Rules for determining the existence of a partnership.	48-1-26.	"Dissolution" defined.
8-1-5.	Partnership property.	48-1-27.	Partnership not terminated by dissolution.
8-1-6.	Partner agent of partnership as to partnership business.	48-1-28.	Causes of dissolution.
8-1-7.	Conveyance of real property of partnership.	48-1-29.	Dissolution by decree of court.
8-1-8.	Partnership bound by admission of partner.	48-1-30.	General effect of dissolution on authority of partner.
8-1-9.	Partnership charged with knowledge of or notice to partner.	48-1-31.	Right of partner to contribution from copartners after dissolution.
8-1-10.	Partnership bound by partner's wrongful act.	48-1-32.	Power of partner to bind partnership to third persons after dissolution.
8-1-11.	Partnership bound by partner's breach of trust.	48-1-33.	Effect of dissolution on partner's existing liability.
8-1-12.	Nature of partner's liability.	48-1-34.	Right to wind up.
8-1-13.	Partner by estoppel.	48-1-35.	Rights of partners to application of partnership property.
8-1-14.	Liability of incoming partner.	48-1-36.	Rights where partnership is dissolved for fraud or misrepresentation.
8-1-15.	Rules determining rights and duties of partners.	48-1-37.	Rules for distribution.
8-1-16.	Partnership books.	48-1-38.	Liability of persons continuing the business in certain cases.
8-1-17.	Duty of partners to render information.	48-1-39.	Rights of retiring or estate of deceased partner when the business is continued.
8-1-18.	Partner accountable as a fiduciary.	48-1-40.	Accrual of actions.
8-1-19.	Right to an account.		
8-1-20.	Continuation of partnership beyond fixed term.		
8-1-21.	Extent of property rights of a partner.		

48-1-1. Definition of terms.

In this chapter:

"Court" includes every court and judge having jurisdiction in the case.
 "Business" includes every trade, occupation or profession.

"Person" includes individuals, partnerships, corporations and other associations.

"Bankrupt" includes bankrupt under the federal bankruptcy laws or insolvent under any state insolvency law.

"Conveyance" includes every assignment, lease, mortgage or encumbrance.

"Real property" includes land and any interest or estate in land.

History: L. 1921, ch. 89, § 2; R.S. 1933 & C. 1943, 69-1-1.

Uniform Laws. — Jurisdictions that have enacted the Uniform Partnership Act are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Mon-

tana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Cross-References. — Banks by partnership forbidden, § 7-3-2.

Insolvency defined, § 25-6-3.

NOTES TO DECISIONS

Cited in Gary Energy Corp. v. Metro Oil Prods., 114 F.R.D. 69 (D. Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 1 to 4.

C.J.S. — 68 C.J.S. Partnership §§ 1, 2.

A.L.R. — Joint venturers' comparative liability for losses, in absence of express agreement, 51 A.L.R.4th 371.

Determination of citizenship of partnership, for purposes of diversity jurisdiction under 28 USCS § 1332(a), 83 A.L.R. Fed. 136.

48-1-2. Interpretation of knowledge and notice.

(1) Within the meaning of this chapter, a person is deemed to have knowledge of a fact not only when he has actual knowledge thereof, but also when he has knowledge of such other facts that to act in disregard of them shows bad faith.

(2) A person has notice of a fact within the meaning of this chapter when the person who claims the benefit of the notice:

(a) states the fact to such person; or,

(b) delivers through the mail, or by other means of communication, a written statement of the fact to such person, or to a proper person at his place of business or residence.

History: L. 1921, ch. 89, § 3; R.S. 1933 & C. 1943, 69-1-2.

8-1-3. "Partnership" defined.

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

But any association formed under any other statute of this state, or any statute adopted by authority other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

History: L. 1921, ch. 89, § 6; R.S. 1933 & C. 943, 69-1-3.

NOTES TO DECISIONS

ANALYSIS

Evidence of partnership.
Joint stock company.
Mining partnership.
Requisites of partnership.

Evidence of partnership.

Evidence relating to joint operation of a cafe established that relationship of parties was that of partnership as defined in this section. *Eardley v. Sammons*, 8 Utah 2d 159, 330 P.2d 122 (1958).

Joint stock company.

A joint stock company is generally classified as a partnership possessing some of the characteristics of a corporation. *Rocky Mt. Stud Farm Co. v. Lunt*, 46 Utah 299, 151 P. 521 (1915).

Mining partnership.

For cases discussing common-law mining partnership, see *Bentley v. Brossard*, 33 Utah 396, 94 P. 736 (1908); *Mud Control Labs. v. Covey*, 2 Utah 2d 85, 269 P.2d 854 (1954).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 1 to 11.

C.J.S. — 68 C.J.S. Partnership §§ 1 to 21.

A.L.R. — Construction of agreement between real-estate agents to share commissions, 71 A.L.R.3d 586.

Requisites of partnership.

The requisites of partnership are that parties must have joined together to carry on trade or adventure for their common benefit, each contributing property or services, and having community of interest in profits. *Bentley v. Brossard*, 33 Utah 396, 94 P. 736 (1908).

An organization of workers, formed for the purpose of performing and undertaking contracts for bricklaying jobs, did not have the essential elements of either a general or limited partnership, where all the equipment used by workers belonged to one individual who had sole authority to make contracts for himself and the organization, and where workers were not entitled to share in profits equally or on any fixed percentage basis, were not chargeable for losses, nor permitted to determine the means or methods of operating. *Johanson Bros. Bldrs. v. Board of Review*, 118 Utah 384, 222 P.2d 563 (1950).

Propriety, under state statutes or bar association or court rules, of formation of multistate law partnership or professional service corporation, 6 A.L.R.4th 1251.

Key Numbers. — Partnership ⇐ 1 to 26.

48-1-3.1. Joint venture defined — Application of chapter.

(1) A joint venture is an association of two or more persons to carry on as co-owners of a single business enterprise.

(2) This chapter governs the property and transfer rights of joint ventures.

History: C. 1953, 48-1-3.1, enacted by L. 1985, ch. 14, § 1.

NOTES TO DECISIONS

ANALYSIS

Agreement to share profits required.
Continuation of venture presumed.
Joint venture not found.
Litigation.
Shared facilities.

Agreement to share profits required.

To establish a joint adventure there must be an agreement, express or implied, for the sharing of profits. *Bates v. Simpson*, 121 Utah 165, 239 P.2d 749 (1952).

Fact that the person who finances the sale of a used car thereby realizes profit does not make him a joint adventurer with the seller. *Bates v. Simpson*, 121 Utah 165, 239 P.2d 749 (1952).

Continuation of venture presumed.

Fact that one joint venturer reimbursed the other for the latter's contribution did not, in itself, indicate termination of the joint venture, thereby making first joint venturer responsible

for the venture's entire loss. *Producer's Livestock Mktg. Ass'n v. Christensen*, 588 P.2d 156 (Utah 1978).

Joint venture not found.

There was no joint adventure or partnership by estoppel where one of the two alleged joint adventurers had not given his consent to being held out as a joint adventurer with the person making the representation, and where the third person to whom the representation had been made had not relied upon it. *Bates v. Simpson*, 121 Utah 165, 239 P.2d 749 (1952).

Litigation.

Joint venturers may sue in the name of the joint venture. *Cottonwood Mall Co. v. Sine*, 767 P.2d 499 (Utah 1988).

Shared facilities.

Used car dealers who share a lot, building, and telephone do not become joint adventurers by reason of that working arrangement. *Bates v. Simpson*, 121 Utah 165, 239 P.2d 749 (1952).

COLLATERAL REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d Joint Ventures §§ 1 to 71.

C.J.S. — 48A C.J.S. Joint Ventures §§ 1 to 73.

A.L.R. — Construction of agreement be-

tween real-estate agents to share commissions, 71 A.L.R.3d 586.

Joint venture's capacity to sue, 56 A.L.R.4th 1234.

48-1-4. Rules for determining the existence of a partnership.

In determining whether a partnership exists these rules shall apply:

(1) Except as provided by Section 48-1-13, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

- (a) As a debt by installments or otherwise.
- (b) As wages of an employee or rent to a landlord.
- (c) As an annuity to a widow or representative of a deceased partner.
- (d) As interest on a loan, though the amounts of payment vary with the profits of the business.
- (e) As the consideration for the sale of the good will of a business or other property by installments or otherwise.

History: L. 1921, ch. 89, § 7; R.S. 1933 & C. 1943, 69-1-4.

NOTES TO DECISIONS

ANALYSIS

Evidence.

- Burden of proof.
- Presumptions.
- Existence of partnership.
- Cited.

Evidence.

—Burden of proof.

In action for accounting and dissolution of partnership, plaintiff had burden of proving existence of partnership. *Benson v. Rozzelle*, 85 Utah 582, 39 P.2d 1113 (1934).

—Presumptions.

The fact that two persons share profits of a business raises a presumption that they are partners. *Kimball v. McCornick*, 70 Utah 189, 259 P. 313 (1927).

Where payment of a portion of profits to defendant constituted partial reimbursement for defendant's expenditures in connection with the business premises, there was no presumption of partnership, and plaintiff was required to meet his burden of proof without the aid of the presumption. *Koesling v. Basamakias*, 539 P.2d 1043 (Utah 1975).

Existence of partnership.

Evidence held insufficient to show that a partnership was ever formed, but did show that a business arrangement was entered into that

constituted a preliminary to a partnership. *Millett v. Langston*, 8 Utah 2d 15, 327 P.2d 253 (1958).

Where defendant had turned over operation of tavern, equipment, furnishing, and inventory that he owned to plaintiff pursuant to an agreement to divide profits from the business equally, plaintiff had full authority to manage the business, including purchase of supplies, payment of bills, and keeping of books, and income from the business was reported on partnership income tax forms, trial court could properly find that a partnership existed, entitling plaintiff to half the compensation paid for disruption of business upon condemnation of the building where the tavern was located. *Cutler v. Bowen*, 543 P.2d 1349 (Utah 1975).

Evidence established the existence of a partnership where two parties entered into an agreement requiring them to work together to obtain a zoning change and to develop land, and providing for sharing the profits derived from their joint efforts; classification of the project as a single undertaking rather than a continuous business transaction did not render the trial court's finding of a partnership erroneous. *Nupetco Assocs. v. Jenkins*, 669 P.2d 877 (Utah 1983) (decided before enactment of § 48-1-3.1).

Cited in *Hoth v. White*, 799 P.2d 213 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 1 to 4.

C.J.S. — 68 C.J.S. Partnership § 1.
Key Numbers. — Partnership ⇨ 1 to 26.

48-1-5. Partnership property.

All property originally brought into the partnership stock, or subsequently acquired by purchase or otherwise on account of the partnership, is partnership property.

Unless the contrary intention appears, property acquired with partnership funds is partnership property.

Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor, unless a contrary intent appears.

History: L. 1921, ch. 89, § 8; R.S. 1933 & C. 1943, 69-1-5.

Cross-References. — Conveyances, Title 57, Chapter 1.

NOTES TO DECISIONS

ANALYSIS

- Assignment for benefit of creditors.
- Death of partner.
- Property purchased with partnership funds.
- Security for loan.

Assignment for benefit of creditors.

Assignment of property of partnership for benefit of its creditors is not rendered invalid by noninclusion therein of individual property of each partner. *Wilson v. Sullivan*, 17 Utah 341, 53 P. 994 (1898).

Death of partner.

In suit by surviving partner against widow of deceased partner to recover title to certain real property held in the name of defendant, evidence held sufficient to require such land to be held in trust for partnership. *Matson v. Matson*, 56 Utah 394, 190 P. 943 (1920).

Property purchased with partnership funds.

Property purchased with partnership funds

is prima facie the property of the firm, though the title is taken in the individual name of one or more of the partners. *Deming v. Moss*, 40 Utah 501, 121 P. 971 (1912); *Staats v. Staats*, 63 Utah 470, 226 P. 667 (1924).

Although two partners entered into a contract in their individual names to purchase lands, assignments of the contract referred to these buyers as individuals, the property was referred to as that of the individuals by name in the trial, and the parties submitted memorandums concerning the issue of cotenancy, nevertheless the partnership was the purchaser because of the use of partnership funds. *Fullmer v. Blood*, 546 P.2d 606 (Utah 1976).

Security for loan.

Where partnership money was loaned and note and mortgage securing the indebtedness were taken in name of partner, note and mortgage were property of partnership so that partner could not be charged with amount of loan upon dissolution of partnership. *Buzianis v. Buzianis*, 81 Utah 1, 16 P.2d 413 (1932).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 329 to 356.

C.J.S. — 68 C.J.S. Partnership § 69.

A.L.R. — Insurance on life of partner as partnership asset, 56 A.L.R.3d 892.

Key Numbers. — Partnership ⇨ 67.

48-1-6. Partner agent of partnership as to partnership business.

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

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

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all of the partners have no authority to:

- (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership.
- (b) Dispose of the good will of the business.
- (c) Do any other act which would make it impossible to carry on the ordinary business of the partnership.
- (d) Confess a judgment.
- (e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

History: L. 1921, ch. 89, § 9; R.S. 1933 & C. 1943, 69-1-6.

NOTES TO DECISIONS

ANALYSIS

Burden of proof.
Common-law mining partnership.
Duties of partners inter se.
Manner of entering into transaction.
Power of individual partner to bind partnership.
—Borrowing money.
—Conveyance of property.
—Nontrading partnership.

Burden of proof.

Plaintiff, whose action was based on transaction with individual partner that was not within ordinary or apparent scope of partnership business, had burden of showing either that partner had special authority in matter or that transaction was ratified by other partners whom plaintiff sought to hold liable. *Peterson v. Armstrong*, 24 Utah 96, 66 P. 767 (1901).

Common-law mining partnership.

An important distinction between ordinary trading partnership and mining partnership is that member of mining partnership has not the

power to bind his associates by engagements with third persons to extent that member of trading or commercial firm may do. *Bentley v. Brossard*, 33 Utah 396, 94 P. 736 (1908).

Duties of partners inter se.

Partners stand in fiduciary relation to each other, and it is duty of each partner to observe utmost good faith towards his copartners in all dealings and transactions that come within scope of partnership business. *Nelson v. Matsch*, 38 Utah 122, 110 P. 865, 1912D Ann. Cas. 1242 (1910).

Manner of entering into transaction.

Where transaction by one partner is for benefit of partnership and is within general or apparent scope of its business, it is immaterial that such partner's name alone is signed to writing that evidences transaction. *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199, 66 P. 1058 (1901).

Power of individual partner to bind partnership.

Partner, without special authority in matter,

has no power to bind partnership in transaction which is not within ordinary or apparent scope of partnership business, and person dealing with such partner is charged with notice of such fact. *Peterson v. Armstrong*, 24 Utah 96, 66 P. 767 (1901).

As between partnership and person dealing with one of its members in good faith, without notice, it is immaterial whether partner acts fairly with his copartners in transaction, so long as he acts within scope of partnership business and his authority. *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199, 66 P. 1058 (1901).

—Borrowing money.

When money is borrowed by partner on credit of partnership, according to usual course of its business and within general scope of its authority, partnership is liable for money thus borrowed. *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199, 66 P. 1058 (1901).

—Conveyance of property.

Where the title to real property is in the name of one or more or all of the partners, or of a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of Subsection (1). *Billings v. Cinnamon Ridge, Ltd.* (In re Granada, Inc.), 92 Bankr. 501 (Bankr. D. Utah 1988).

—Nontrading partnership.

Where partnership is engaged in stage business, or carrying of mails, passengers, and express, one of partners has, prima facie, no authority to bind firm or another partner by transaction relating to business of mining, and he who would seek to hold firm liable by virtue of such transaction has burden of showing authority in contracting partner to enter into it. *Cavanaugh v. Salisbury*, 22 Utah 465, 63 P. 39 (1900).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 249 to 251.
C.J.S. — 68 C.J.S. Partnership § 136.

A.L.R. — Vicarious liability of attorney for tort of partner in law firm, 70 A.L.R.3d 1298.
Key Numbers. — Partnership ¶ 125.

48-1-7. Conveyance of real property of partnership.

Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property, unless the partner's act binds the partnership under the provisions of Section 48-1-6(1), or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner in making the conveyance has exceeded his authority.

Where title to real property is in the name of the partnership a conveyance executed by a partner in his own name passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of Section 48-1-6(1).

Where title to real property is in the name of one or more but not all of the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property, if the partners' act does not bind the partnership under the provisions of Section 48-1-6(1), unless the purchaser or his assignee is a holder for value without knowledge.

Where the title to real property is in the name of one or more or all of the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of Section 48-1-6(1).

Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

History: L. 1921, ch. 89, § 10; R.S. 1933 & C. 1943, 69-1-7. **Cross-References.** — Conveyances, Title 57, Chapter 1

NOTES TO DECISIONS

ANALYSIS

Equitable interest
Cited

Equitable interest.

Where the title to real property is in the name of one or more or all of the partners, or of a third person in trust for the partnership, a conveyance executed by a partner in the part-

nership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of § 48-1-6(1) *Billings v Cinnamon Ridge, Ltd (In re Granada, Inc)*, 92 Bankr 501 (Bankr D Utah 1988)

Cited in *Gary Energy Corp v Metro Oil Prods*, 114 FRD 69 (D Utah 1987)

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am Jur 2d Partnership §§ 304 to 308

C.J.S. — 68 CJS Partnership § 154
Key Numbers. — Partnership ⇨ 138

48-1-8. Partnership bound by admission of partner.

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership.

History: L. 1921, ch. 89, § 11; R.S. 1933 & C. 1943, 69-1-8. **Cross-References.** — Party admission, Rules of Evidence, Rule 801(d)(2)

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am Jur 2d Partnership §§ 754 to 757, 939

C.J.S. — 68 CJS Partnership § 167
Key Numbers. — Partnership ⇨ 152

48-1-9. Partnership charged with knowledge of or notice to partner.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operates as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

History: L. 1921, ch. 89, § 12; R.S. 1933 & C. 1943, 69-1-9.

COLLATERAL REFERENCES

Am. Jur. 2d — 59A Am Jur 2d Partnership §§ 252 to 256

C.J.S. — 68 CJS Partnership § 175
Key Numbers. — Partnership ⇨ 159

48-1-10. Partnership bound by partner's wrongful act.

Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

History: L. 1921, ch. 89, § 13; R.S. 1933 & C. 1943, 69-1-10.

NOTES TO DECISIONS

Cited in *Rogers v. M O Bitner Co*, 738 P 2d 1029 (Utah 1987)

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am Jur 2d Partnership §§ 647 to 661, 667 to 672

C.J.S. — 68 CJS Partnership §§ 168 to 171

A.L.R. — Vicarious liability of attorney for tort of partner in law firm, 70 A L R 3d 1298

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 A L R 3d 822

Key Numbers. — Partnership ⇨ 153(1)

48-1-11. Partnership bound by partner's breach of trust.

The partnership is bound to make good the loss:

- (1) where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and,
- (2) 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 partner while it is in the custody of the partnership

History: L. 1921, ch. 89, § 14; R.S. 1933 & C. 1943, 69-1-11.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur 2d Partnership §§ 662 to 666

C.J.S. — 68 CJS Partnership § 169
Key Numbers. — Partnership ⇨ 153(2)

48-1-12. Nature of partner's liability.

All partners are liable:

- (1) Jointly and severally for everything chargeable to the partnership under Sections 48-1-10 and 48-1-11.
- (2) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

History: L. 1921, ch. 89, § 15; R.S. 1933 & C. 1943, 69-1-12.

NOTES TO DECISIONS

ANALYSIS

Joint and several liability.
Parties.
Satisfaction of debts.
Service on partners.
Cited.

Joint and several liability.

Where partners failed to comply with the former Utah Limited Partnership Act, they were liable as general partners and were jointly and severally liable for a partial failure of consideration paid by the partnership for stock. *Bergeson v. Life Ins. Corp. of Am.*, 265 F.2d 227 (10th Cir.), cert. denied, 360 U.S. 932, 79 S. Ct. 1452, 3 L. Ed. 2d 1545 (1959).

Where a right of recovery, in a stockholder's derivative action against a life insurance company, was based on the fraud of the directors in acting both as directors and as members of the partnership that organized the company, the liability of the directors was joint and several. *Bergeson v. Life Ins. Corp. of Am.*, 170 F. Supp. 150 (D. Utah 1958), aff'd in part and rev'd in part on other grounds, 265 F.2d 227 (10th Cir.), cert. denied, 360 U.S. 932, 79 S. Ct. 1452, 3 L. Ed. 2d 1545 (1959).

Parties.

An individual member may not be sued on

an alleged claim of only an individual obligation and recovery had against him on proof of a partnership obligation not qualifying under Subsection (1) of this section as a joint and several obligation, but coming under Subsection (2) as only a joint obligation, unless the partnership or all the members thereof are made parties. *Palle v. Industrial Comm'n*, 79 Utah 47, 7 P.2d 284, 81 A.L.R. 1222 (1932).

Satisfaction of debts.

Partnership debts and obligations coming within the scope of Subsection (2) must be satisfied by partnership assets to the extent any exist before a creditor can seek satisfaction from the individual assets of a partner. *McCune & McCune v. Mountain Bell Tel.*, 758 P.2d 914 (Utah 1988).

Service on partners.

If a partner's liability is joint rather than joint and several, each defendant must be individually served in order to be liable. *Barber v. Emporium Partnership*, 800 P.2d 795 (Utah 1990).

Cited in *First Sec. Bank v. Felger*, 658 F. Supp. 175 (D. Utah 1987); *Billings v. Key Bank (In re Granada, Inc.)*, 115 Bankr. 702 (Bankr. D. Utah 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 638 to 672.

C.J.S. — 68 C.J.S. Partnership § 180.

A.L.R. — Vicarious liability of attorney for tort of partner in law firm, 70 A.L.R.3d 1298.

Derivative liability of partner for punitive

damages for wrongful act of copartner, 14 A.L.R.4th 1335.

Partnership or joint venture exclusion in contractor's or other similar comprehensive general liability insurance policy, 57 A.L.R.4th 1155.

Key Numbers. — Partnership ⇨ 165.

48-1-13. Partner by estoppel.

(1) When a person by words spoken or written or by conduct represents himself, or consents to another's representing him, to anyone as a partner, in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made who has on the faith of such representation given credit to the actual or apparent partnership, and, if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by, or with the knowledge of, the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as if he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability; otherwise, separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of an existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

History: L. 1921, ch. 89, § 16; R.S. 1933 & C. 1943, 69-1-13.

NOTES TO DECISIONS

Requisites.

There was no partnership or joint adventure by estoppel where one of the two alleged joint adventures had not given his consent to being held out as a joint adventurer with the person making the representation, and where the third person to whom the representation had been made had not relied upon it. *Bates v. Simpson*, 121 Utah 165, 239 P.2d 749 (1952).

Partnership liability to mechanics' lienors was found where defendant had stated to others that he was or intended to become another's partner, and where he paid for a part of

the material used and was present during the delivery and use of construction materials on the premises. *Buehner Block Co. v. Glezos*, 6 Utah 2d 226, 310 P.2d 517 (1957).

Defendant was not liable as a partner in an enterprise by estoppel even though payment for goods was made by check on the account of defendant, defendant was sometimes listed as a purchaser on the sales invoices, and defendant filed applications for licenses to engage in business with the state tax commission. *Phillips Mfg. Co. v. Putnam*, 29 Utah 2d 69, 504 P.2d 1376 (1973).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 145 to 147, 673 to 697.

C.J.S. — 68 C.J.S. Partnership § 21.

Key Numbers. — Partnership ⇨ 24, 33 to 38.

48-1-14. Liability of incoming partner.

A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as if he had been a partner when such obligations were incurred, except that his liability shall be satisfied only out of partnership property.

History: L. 1921, ch. 89, § 17; R.S. 1933 & C. 1943, 69-1-14.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 914 to 919, 933.

C.J.S. — 68 C.J.S. Partnership § 256.
Key Numbers. — Partnership ⇨ 238.

48-1-15. Rules determining rights and duties of partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(3) A partner who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute shall be paid interest from the date of the payment or advance.

(4) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(5) All partners have equal rights in the management and conduct of the partnership business.

(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(7) No person can become a member of a partnership without the consent of all the partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

History: L. 1921, ch. 89, § 18; R.S. 1933 & C. 1943, 69-1-15.

NOTES TO DECISIONS**ANALYSIS**

Existence of partnership.
Gifts to members of family.
Remuneration to partner for services.
Repayment of contributions.
Sharing profits and losses.

Existence of partnership.

An organization of workers, formed for the purpose of performing and undertaking contracts for bricklaying jobs, did not have the essential elements of either a general or limited partnership, where all the equipment used by workers belonged to one individual who had sole authority to make contracts for himself and the organization, and where workers were not entitled to share in profits equally or on any fixed percentage basis, were not chargeable for losses, and were not permitted to de-

termine the means or methods of operating. *Johanson Bros. Bldrs. v. Board of Review*, 118 Utah 384, 222 P.2d 563 (1950).

Gifts to members of family.

Where father intended at the time of dissolution of family partnership to make a gift to his son and wife of certain amounts of the capital contributions he had made to the partnership, and intended that such gift be accomplished by each partner's sharing according to respective partnership interests in the total assets of the partnership including the contributions made by the father, and the other partners relied on such gift, the agreement between the parties superseded Subsection (1) of this section. *West v. West*, 16 Utah 2d 411, 403 P.2d 22 (1965).

Remuneration to partner for services.

Where partners had made no agreement as

to the partners' wages or compensation, it was not error for the trial court to exclude evidence that one partner did more work than the other, for partners receive no compensation for action in the partnership business (other than splitting the profits) unless there is an agreement or provision for such remuneration. *Keller v. Wixom*, 123 Utah 103, 255 P.2d 118 (1953).

Generally, a partner is not entitled to any remuneration for his services in the absence of an agreement by the partners to that effect. *Chambers v. Sims*, 13 Utah 2d 371, 374 P.2d 841 (1962).

Where the partnership agreement or a specific practice, acquiesced in by the partners, contemplates the payment of salary to one or more partners, but no amounts are specified, it is presumed that payment of reasonable salaries is intended. *Chambers v. Sims*, 13 Utah 2d 371, 374 P.2d 841 (1962).

While generally a partner is not entitled to any remuneration for his services while acting in the partnership business in the absence of a partnership agreement providing for such remuneration, such an agreement for remuneration may be either expressed or implied. *Knutson v. Lauer*, 627 P.2d 66 (Utah 1981).

In the absence of an agreement providing for remuneration, partner was not entitled to remuneration for services rendered while acting in the partnership business. *Nupetco Assocs. v. Jenkins*, 669 P.2d 877 (Utah 1983).

Repayment of contributions.

Upon dissolution and distribution of partnership assets, this section does not authorize the deduction of depreciation from advances made for capital improvements in repayment of the partners' contributions, and trial court erred when it ordered such deduction for depreciation because the partnership agreement did not authorize such deduction and to allow the deduction would produce an unjust result. *Knutson v. Lauer*, 627 P.2d 66 (Utah 1981).

Sharing profits and losses.

Although obligation to share losses is not directly expressed in partnership agreement, generally agreement to share profits, nothing being said about losses, amounts prima facie to agreement to share losses also. *Bentley v. Brossard*, 33 Utah 396, 94 P. 736 (1908).

In absence of agreement or proof of agreement to contrary, partners will divide profits and losses equally. *Kimball v. McCornick*, 70 Utah 189, 259 P. 313 (1927).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 409 to 418, 469 to 475.

C.J.S. — 68 C.J.S. Partnership § 76.

A.L.R. — Partner's breach of fiduciary duty

to copartner on sale of partnership interest to another partner, 4 A.L.R.4th 1122.

Key Numbers. — Partnership ⇨ 70.

48-1-16. Partnership books.

The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

History: L. 1921, ch. 89, § 19; R.S. 1933 & C. 1943, 69-1-16.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 962 to 967.

C.J.S. — 68 C.J.S. Partnership § 91.
Key Numbers. — Partnership ⇨ 80.

48-1-17. Duty of partners to render information.

Partners shall render on demand true and full information of all things affecting the partnership to any partner, or the legal representatives of any deceased partner, or partner under legal disability.

History: L. 1921, ch. 89, § 20; R.S. 1933 & C. 1943, 69-1-17.

NOTES TO DECISIONS

Partner acquiring other partner's interest.

Partner's failure to disclose voluntarily to the other partner the value of the other partner's limited partnership interest before acquiring such interest from him was not a breach of fiduciary duty where the other part-

ner managed and kept the financial records of the primary partnership asset and had ample access to information about the value of his interest. *Burke v. Farrell*, 656 P.2d 1015 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 409 to 410, 425.

C.J.S. — 68 C.J.S. Partnership § 76.

A.L.R. — Partner's breach of fiduciary duty

to copartner on sale of partnership interest to another partner, 4 A.L.R.4th 1122.

Key Numbers. — Partnership ⇨ 70.

48-1-18. Partner accountable as a fiduciary.

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

History: L. 1921, ch. 89, § 21; R.S. 1933 & C. 1943, 69-1-18.

NOTES TO DECISIONS

ANALYSIS

Employee's actions.
Partnership income.
Relations inter se.
Secret profits.
Cited.

Employee's actions.

Where employee of one member of a group of joint adventurers seeking to buy and sell certain contiguous lands having valuable clay deposits discovers clay on other adjoining land, obtains option thereon, and enters into a contract with the group for a share of the proceeds and upon consideration of his option being turned over to the group, his employer is not chargeable with breach of trust toward other

original adventurers for failing to inform them of employee's discovery until after he obtained option. *Lane v. Peterson*, 68 Utah 585, 251 P. 374 (1926).

Partnership income.

Where partnership was organized for purpose of furnishing supplies to laborers employed by power and light company, and one partner was to act as treasurer and furnish all foreign labor on construction work, for which he was to receive in full payment one-third of net profits of partnership, money received for furnishing labor was partnership income. *Paggi v. Skliris*, 54 Utah 88, 179 P. 739 (1919).

Relations inter se.

The relation of partners between themselves

is fiduciary, that of trustee and cestui que trust, and this fiduciary relationship exists between surviving partner and legal representative of deceased partner. *Sharp v. Sharp*, 54 Utah 262, 180 P. 580 (1919).

Secret profits.

Member of partnership will not be permitted

to take advantage of any secret agreement to receive private or personal gain for work or business carried on by partnership. *Paggi v. Skliris*, 54 Utah 88, 179 P. 739 (1919).

Cited in *Billings v. Cinnamon Ridge, Ltd.* (In re Granada, Inc.), 92 Bankr. 501 (Bankr. D. Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 420 to 426.

C.J.S. — 68 C.J.S. Partnership §§ 76, 378.

A.L.R. — Partner's breach of fiduciary duty to copartner on sale of partnership interest to another partner, 4 A.L.R.4th 1122.

Civil liability of one partner to another or to the partnership based on partner's personal purchase of partnership property during existence of partnership, 37 A.L.R.4th 494.

Key Numbers. — Partnership ⇨ 81.

48-1-19. Right to an account.

Any partner shall have the right to a formal account as to partnership affairs:

- (1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners.
- (2) If the right exists under the terms of any agreement.
- (3) As provided by Section 48-1-18.
- (4) Whenever other circumstances render it just and reasonable.

History: L. 1921, ch. 89, § 22; R.S. 1933 & C. 1943, 69-1-19.

NOTES TO DECISIONS

ANALYSIS

Action for accounting.
Estates of decedents.
Statute of limitations.

Action for accounting.

Before one partner can compel another partner to pay what is claimed to be indebtedness to partnership, it must be first ascertained that amount owed by debtor partner is greater amount than he would be entitled to receive upon striking balance and finding interest of each partner in assets of partnership; aggrieved parties must bring action for accounting rather than action on claimed debt. *Bankers' Trust Co. v. Riter*, 56 Utah 525, 190 P. 1113 (1920).

Estates of decedents.

Administrator of deceased partner held entitled to maintain an action against heirs of another partner for general accounting of partnership affairs, where it appeared that accounting was necessary, coupled with additional fact that estate of other partner had been closed and personal representative re-

leased from further duty in administration of estate. *Bankers' Trust Co. v. Riter*, 56 Utah 525, 190 P. 1113 (1920).

Where a deceased partner's daughter, who acted as one of the personal representatives of her father's estate, had held the partnership assets in trust for the surviving partner and had control of her father's accounts and the records of those accounts before she died, the estate had the burden of (1) proving which accounts were partnership accounts and which were not, (2) identifying the source of the funds contained in nonpartnership accounts if possible, and (3) proving that the funds which had been in partnership accounts and had been removed from those accounts by the personal representatives had been adequately accounted for. In re Estate of Harris, 728 P.2d 1003 (Utah 1986).

Statute of limitations.

In action against executors for accounting based on partnership between plaintiff and deceased, evidence was insufficient to show that cause of action was barred by statute of limitations so that court erred in nonsuiting plaintiff.

Kimball v. McCornick, 70 Utah 189, 259 P. 313 (1927).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 968 to 970.
C.J.S. — 68 C.J.S. Partnership §§ 378, 379.
A.L.R. — When statute of limitations com-

mences to run on right of partnership accounting, 44 A.L.R.4th 678.

Key Numbers. — Partnership ⇨ 81.

48-1-20. Continuation of partnership beyond fixed term.

When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination so far as is consistent with a partnership at will.

A continuation of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.

History: L. 1921, ch. 89, § 23; R.S. 1933 & C. 1943, 69-1-20.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 89 to 95.
C.J.S. — 68 C.J.S. Partnership §§ 64, 350.
Key Numbers. — Partnership ⇨ 60, 259.

48-1-21. Extent of property rights of a partner.

The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership and (3) his right to participate in the management.

History: L. 1921, ch. 89, § 24; R.S. 1933 & C. 1943, 69-1-21.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership § 383.
C.J.S. — 68 C.J.S. Partnership §§ 16, 85.
Key Numbers. — Partnership ⇨ 76, 79.

48-1-22. Nature of a partner's right in specific partnership property.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no

right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable, except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representative of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representatives. Such surviving partner or partners, or the legal representatives of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs or next of kin.

History: L. 1921, ch. 89, § 25; R.S. 1933 & C. 1943, 69-1-22.

NOTES TO DECISIONS

ANALYSIS

Divorce settlement.
Individual property.
New tenancy.
Right of marital distributive share.

Divorce settlement.

Neither a partner nor his ex-wife could force a sale of specific partnership property for purposes of a property settlement pursuant to a divorce. *Berry v. Berry*, 635 P.2d 68 (Utah 1981).

Individual property.

Evidence supported a finding that certain realty was not partnership property, which would have made it exempt from a judgment lien, where the parties treated the land as the individual property of the partners and not as partnership property. *Frandsen v. Holladay*, 739 P.2d 1111 (Utah Ct. App. 1987).

New tenancy.

This section sets forth with particularity the

incidents of a new tenancy, that of a "tenant in partnership." *In re Ostler's Estate*, 4 Utah 2d 47, 286 P.2d 796 (1955).

Right of marital distributive share.

Courts that have considered the changes brought about by the adoption of the Uniform Partnership Act have concluded that the legislative intention was to enact the English rule and have, with the exception of one state, held that marital rights in specific partnership property have been excluded by the act. *In re Ostler's Estate*, 4 Utah 2d 47, 286 P.2d 796 (1955).

Through the Uniform Partnership Act the Legislature intended to adopt the English rule of conversion of real property into personalty when it is partnership property. Hence, as to partnership real property, the wife of a partner would not have a marital interest. *In re Ostler's Estate*, 4 Utah 2d 47, 286 P.2d 796 (1955).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 384, 401 to 404.
C.J.S. — 68 C.J.S. Partnership §§ 72, 73.

A.L.R. — Embezzlement, larceny, false pre-

tenses, or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Key Numbers. — Partnership ⇨ 68.

48-1-23. Nature of partner's interest in the partnership.

A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

History: L. 1921, ch. 89, § 26; R.S. 1933 & C. 1943, 69-1-23.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 385 to 387.
C.J.S. — 68 C.J.S. Partnership § 85.
A.L.R. — Evaluation of interest in law firm or medical partnership for purposes of division of property in divorce proceedings, 74 A.L.R.3d 621.
Key Numbers. — Partnership ⇨ 76.

48-1-24. Assignment of partner's interest.

A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, or, as against the other partners in the absence of agreement, entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

In case of a dissolution of a partnership, the assignee is entitled to receive his assignor's interest, and may require an account from the date only of the last account agreed to by all the partners.

History: L. 1921, ch. 89, § 27; R.S. 1933 & C. 1943, 69-1-24.

NOTES TO DECISIONS

ANALYSIS

Common-law mining partnership.
 —Effect of assignment of interest.
 Contract to transfer partnership interests.

Common-law mining partnership.**—Effect of assignment of interest.**

A principal distinction between ordinary trading partnership and mining partnership is that member of mining partnership may assign his interest without consent of his copartners, and the assignment does not work dissolution of partnership. *Bentley v. Brossard*, 33 Utah 396, 94 P. 736 (1908).

Contract to transfer partnership interests.

A 1932 contract between general partners and their brothers and sisters for sale of lat-

ters' interests in partnership, written in terms of present purchase and present determination of value, but the purchase price of which was not payable until demanded by vendors, did not freeze the price of the interests sold at the time contract was made, where the purchase price was not demanded until 1960 and the business had grown in financial value with the benefit of vendors' continuing capital investment, and where, over the years, losses on sales and charitable deductions had been allocated pro rata to the owners, including vendors, vendors were named co-owners on tax returns, and \$27,000 in accumulated profits belonging to vendors had been retained by the partnership as working capital. *Bullough v. Sims*, 16 Utah 2d 304, 400 P.2d 20 (1965).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 833 to 837, 970.
C.J.S. — 68 C.J.S. Partnership §§ 102, 103, 244, 245.
A.L.R. — Partner's breach of fiduciary duty to copartner on sale of partnership interest to another partner, 4 A.L.R.4th 1122.
Key Numbers. — Partnership ⇨ 95, 226, 227.

48-1-25. Partner's interest subject to charging order.

(1) On due application to a competent court by any judgment creditor of a partner the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon and may then or later appoint a receiver of his share of the profits and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or, in case of a sale being directed by the court, may be purchased without thereby causing a dissolution:

- (a) with separate property, by any one or more of the partners; or,
- (b) with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption laws as regards his interest in the partnership.

History: L. 1921, ch. 89, § 28; R.S. 1933 & C. 1943, 69-1-25.

Cross-References. — Exemptions generally, Title 78, Chapter 23.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 790 to 795.

C.J.S. — 68 C.J.S. Partnership § 189.
Key Numbers. — Partnership ⇨ 181.

48-1-26. "Dissolution" defined.

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.

History: L. 1921, ch. 89, § 29; R.S. 1933 & C. 1943, 69-1-26.

NOTES TO DECISIONS

Effect of dissolution.

Dissolution does not, in itself, necessarily give either of the parties an immediate cause

of action or suit against the other. *Kimball v. McCornick*, 70 Utah 189, 259 P. 313 (1927).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 808 to 810.

C.J.S. — 68 C.J.S. Partnership § 331.
Key Numbers. — Partnership ⇐ 261.

48-1-27. Partnership not terminated by dissolution.

On dissolution a partnership is not terminated, but continues until the winding up of partnership affairs is completed.

History: L. 1921, ch. 89, § 30; R.S. 1933 & C. 1943, 69-1-27.

NOTES TO DECISIONS

ANALYSIS

In general.
Cited.

In general.

Where a partner's conduct constituted acts of dissolution, the partnership was not thus terminated and its affairs had to be wound up. The services of an accountant in preparing an account of the partnership's business should

have been paid for by the partnership. *Pantages v. Arge*, 1 Utah 2d 105, 262 P.2d 745 (1953).

A partnership at will was not terminated when one partner notified the other he was ending the partnership and expelled him from the business. *Ferrin v. Ferrin*, 7 Utah 2d 5, 315 P.2d 978 (1957).

Cited in *McCune & McCune v. Mountain Bell Tel.*, 758 P.2d 914 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership § 889.

C.J.S. — 68 C.J.S. Partnership § 351.
Key Numbers. — Partnership ⇐ 277.

48-1-28. Causes of dissolution.

Dissolution is caused:

(1) Without violation of the agreement between the partners:

(a) By the termination of the definite term or particular undertaking specified in the agreement.

(b) By the express will of any partner when no definite term or particular undertaking is specified.

(c) By the express will of all the partners who have not assigned their interests, or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking.

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

(4) By the death of any partner.

(5) By the bankruptcy of any partner or the partnership.

(6) By decree of court under Section 48-1-29.

History: L. 1921, ch. 89, § 31; R.S. 1933 & C. 1943, 69-1-28.

NOTES TO DECISIONS

ANALYSIS

Common-law mining partnership.

—Death of partner.

Remedy for expulsion of one partner by another.

Common-law mining partnership.

—Death of partner.

An important distinction between an ordinary trading partnership and a mining partnership is that the death of a member of a mining partnership does not work dissolution of the partnership. *Bentley v. Brossard*, 33 Utah 396, 94 P. 736 (1908).

Remedy for expulsion of one partner by another.

Where, under a partnership at will, one partner fraudulently expelled another partner from the partnership, the remedy was an accounting of the partnership profits, based upon an assumption of a continued partnership with full participation in profits according to the partnership agreement, at least for the period from the wrongful expulsion to actual dissolution by circumstances or decree of court. *Graham v. Street*, 2 Utah 2d 144, 270 P.2d 456 (1954).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 815 to 871.

C.J.S. — 68 C.J.S. Partnership §§ 330 to 349.

Key Numbers. — Partnership ⇐ 259½ to 276.

48-1-29. Dissolution by decree of court.

(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.

(b) A partner becomes in any other way incapable of performing his part of the partnership contract.

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.

(d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

(e) The business of the partnership can only be carried on at a loss.

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under Section 48-1-24 or 48-1-25:

(a) After the termination of the specified term or particular undertaking.

(b) At any time, if the partnership was a partnership at will, when the interest was assigned or when the charging order was issued.

History: L. 1921, ch. 89, § 32; R.S. 1933 & C. 1943, 69-1-29.

NOTES TO DECISIONS

ANALYSIS

Accounting.
Judgment, order or decree.
Jurisdiction.
Not reasonably practicable.

Accounting.

In a suit for the dissolution of a partnership the trial court has discretion to order an accounting Huber v. Newman, 106 Utah 363, 145 P.2d 780 (1944).

Judgment, order or decree.

Although judgment ordering dissolution of a partnership was void because there was no evidence of a partnership as alleged by plaintiff, such judgment was final judgment from which appeal could be taken Benson v. Rozzelle, 85 Utah 582, 39 P.2d 1113 (1934).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 847 to 871.

C.J.S. — 68 C.J.S. Partnership §§ 338, 339, 349

A.L.R. — Inability of partnership to operate

Jurisdiction.

Where there was no evidence of a three-party partnership as alleged by plaintiff in action for dissolution of partnership, court was without jurisdiction to order dissolution, since no partnership existed. Benson v. Rozzelle, 85 Utah 582, 39 P.2d 1113 (1934).

Not reasonably practicable.

Partner's conduct, in keeping the books and records contrary to agreement and using partnership funds for private purposes, regardless of his intent, provided more than ample support for the conclusion that it was no longer reasonably practicable or equitable for parties to continue their partnership business, rendering dissolution appropriate. Crowther v. Carter, 767 P.2d 129 (Utah Ct. App. 1989).

at profit as justification for court-ordered dissolution, 20 A.L.R.4th 122.

Key Numbers. — Partnership ⇨ 267, 273, 274.

48-1-30. General effect of dissolution on authority of partner.

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

(1) With respect to the partners:

(a) when the dissolution is not by the act, bankruptcy or death of a partner; or,

(b) when the dissolution is by such act, bankruptcy or death of a partner in cases where Section 48-1-31 so requires.

(2) With respect to persons not partners as declared in Section 48-1-32.

History: L. 1921, ch. 89, § 33; R.S. 1933 & C. 1943, 69-1-30.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 934 to 944.

C.J.S. — 68 C.J.S. Partnership §§ 354 to 362.

Key Numbers. — Partnership ⇨ 278.

48-1-31. Right of partner to contribution from copartners after dissolution.

Where the dissolution is caused by the act, death or bankruptcy of a partner each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless:

(1) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or,

(2) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

History: L. 1921, ch. 89, § 34; R.S. 1933 & C. 1943, 69-1-31.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership § 935.

C.J.S. — 68 C.J.S. Partnership § 359
Key Numbers. — Partnership ⇨ 283

48-1-32. Power of partner to bind partnership to third persons after dissolution.

(1) After dissolution a partner can bind the partnership, except as provided in paragraph (3):

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution.

(b) By any transaction which would bind the partnership, if dissolution had not taken place, provided the other party to the transaction:

1st Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or,

2nd Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place, if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1)(b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution:

(a) unknown as a partner to the person with whom the contract is made; and,

(b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution:

(a) where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or,

(b) where the partner has become bankrupt; or,

(c) where the partner has no authority to wind up partnership affairs; except by a transaction with one who:

1st Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or,

2nd Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1)(b) 2nd.

(4) Nothing in this section shall affect the liability under Section 48-1-13 of any person who after dissolution represents himself or consents to another's representing him as a partner in a partnership engaged in carrying on business.

History: L. 1921, ch. 89, § 35; R.S. 1933 & C. 1943, 69-1-32.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 936 to 961.

C.J.S. — 68 C.J.S. Partnership §§ 354 to 362.

Key Numbers. — Partnership ⇨ 278, 279.

48-1-33. Effect of dissolution on partner's existing liability.

(1) The dissolution of a partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged for any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner, but subject to the prior payment of his separate debts.

History: L. 1921, ch. 89, § 36; R.S. 1933 & C. 1943, 69-1-33.

NOTES TO DECISIONS

Agreement by third person to assume obligations required.

Under this statute there must be an assumption of liability by a third person of the partnership obligation if the partners are to be discharged of their liabilities. Thus where a creditor of a dissolving partnership consented to an arrangement whereby the purchaser of the

partnership was to pay him the money owing to the dissolving partnership, but the purchaser had never assumed the liabilities of the partnership, the creditor could obtain judgment against the dissolving partnership when the purchaser failed to pay him. Davis v. Kemp, 3 Utah 2d 16, 277 P.2d 816 (1954).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 906 to 913.

C.J.S. — 68 C.J.S. Partnership § 352.

A.L.R. — Liability of transferor of business

operated under tradename for supplies furnished to successor by one without notice of transfer, 70 A.L.R.3d 1250.

Key Numbers. — Partnership ⇨ 277, 279.

48-1-34. Right to wind up.

Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representatives of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representatives or his assignee upon cause shown may obtain a winding up by the court.

History: L. 1921, ch. 89, § 37; R.S. 1933 & C. 1943, 69-1-34.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 1100, 1180.

C.J.S. — 68 C.J.S. Partnership §§ 273, 355

Key Numbers. — Partnership ⇨ 244

48-1-35. Rights of partners to application of partnership property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities either by payment or agreement under Section 48-1-33(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have:
1st All the rights specified in paragraph (1) of this section; and,
2nd The right as against each partner who has caused the dissolution wrongfully to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by

themselves or jointly with others, may do so during the agreed term for the partnership, and for that purpose may possess the partnership property; provided, they pay to any partner who has caused the dissolution wrongfully the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2)(a) 2nd of this section or secure the payment by bond approved by the court, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

1st If the business is not continued under the provisions of paragraph (2)(b), all the rights of a partner under paragraph (1), subject to clause (2)(a) 2nd of this section.

2nd If the business is continued under paragraph (2)(b) of this section, the right as against his copartners, and all claiming through them, in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered.

History: L. 1921, ch. 89, § 38; R.S. 1933 & C. 1943, 69-1-35.

NOTES TO DECISIONS

Continuation of business.

Where one partner was forced to take over the operation of a cafe to save it from further losses due to the other partner's neglect, evidence did not support a finding that the part-

ner took over the business permanently and he could not be charged with all the business obligations. *Eardley v. Sammons*, 8 Utah 2d 159, 330 P.2d 122 (1958).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 1211 to 1219.

C.J.S. — 68 C.J.S. Partnership §§ 354, 386. Key Numbers. — Partnership ⇨ 277, 297.

48-1-36. Rights where partnership is dissolved for fraud or misrepresentation.

Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled:

- (1) to a lien on, or right of retention of, the surplus of the partnership property, after satisfying the partnership liabilities to third persons, for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and,
- (2) to stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and,
- (3) to be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

History: L. 1921, ch. 89, § 39; R.S. 1933 & C. 1943, 69-1-36.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 871, 903 to 905.

C.J.S. — 68 C.J.S. Partnership § 13. Key Numbers. — Partnership ⇨ 25.

48-1-37. Rules for distribution.

In settling accounts between the partners after dissolution the following rules shall be observed, subject to any agreement to the contrary:

- (1) The assets of the partnership are:
 - (a) The partnership property.
 - (b) The contributions of the partners necessary for the payment of all the liabilities specified in Subdivision (2) of this section.
- (2) The liabilities of the partnership shall rank in order of payment, as follows:
 - (a) Those owing to creditors other than partners.
 - (b) Those owing to partners other than for capital and profits.
 - (c) Those owing to partners in respect of capital.
 - (d) Those owing to partners in respect of profits.
- (3) The assets shall be applied in the order of their declaration in Subsection (1) of this section to the satisfaction of the liabilities.
- (4) The partners shall contribute as provided by Section 48-1-15(1) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and in the relative proportions in which they share the profits the additional amount necessary to pay the liabilities.
- (5) An assignee for the benefit of creditors, or any person appointed by the court, shall have the right to enforce the contributions specified in Subsection (4) of this section.
- (6) Any partner or his legal representative shall have the right to enforce the contributions specified in Subsection (4) of this section to the extent of the amount which he has paid in excess of his share of the liability.
- (7) The individual property of a deceased partner shall be liable for the contributions specified in Subsection (4) of this section.
- (8) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.
- (9) Where a partner has become bankrupt or his estate is insolvent, the claims against his separate property shall rank in the following order:
 - (a) Those owing to separate creditors.
 - (b) Those owing to partnership creditors.
 - (c) Those owing to partners by way of contribution.

History: L. 1921, ch. 89, § 40; R.S. 1933 & C. 1943, 69-1-37.

NOTES TO DECISIONS

ANALYSIS

Collection on partnership judgment.
Credits.
Goodwill.
Money in bank.
Money invested.
Partnership receipts.
Repayment of contributions.

Collection on partnership judgment.

Where partners conducted business without books and took money from partnership for living expenses, partner could not be charged with money collected on a partnership judgment on dissolution of partnership, in absence of evidence that it was appropriated to his own use for other than living expenses. *Buzianis v. Buzianis*, 81 Utah 1, 16 P.2d 413 (1932).

Credits.

Where contribution of one partner exceeded that of other partner and he borrowed money from his wife for purpose of purchasing property for partnership, on dissolution he was entitled to credit for such excess and for money borrowed, together with interest until date of termination of partnership. *Buzianis v. Buzianis*, 81 Utah 1, 16 P.2d 413 (1932).

Goodwill.

A partnership of certified public accountants is of the same nature as a partnership of attorneys or physicians and has no goodwill to be accounted for as an asset upon dissolution in absence of provision in partnership agreement relating to goodwill. *Jackson v. Caldwell*, 18 Utah 2d 81, 415 P.2d 667 (1966).

Where goodwill was not carried as an asset on partnership books and partnership agreement did not contemplate that goodwill be included in book value of partnership, it was

proper to exclude goodwill as an item requiring an accounting by one partner to another upon dissolution. *Jackson v. Caldwell*, 18 Utah 2d 81, 415 P.2d 667 (1966).

Money in bank.

In determining rights of partners upon dissolution of partnership, it was held that money in the bank, which receiver had taken charge of, was improperly included in the computation of total receipts. *Wardrop v. Harrison*, 63 Utah 132, 222 P. 1069 (1924).

Money invested.

Where evidence supported finding that partner used partnership funds to purchase Greek currency, he was properly charged with such money on dissolution, together with interest to date of termination of partnership. *Buzianis v. Buzianis*, 81 Utah 1, 16 P.2d 413 (1932).

Partnership receipts.

Under contract dissolving partnership engaged in obtaining refunds of excessive freight rates paid to railroads, partner leaving partnership held entitled to percentage of fee in case that was pending at time of dissolution, although refund obtained was on freight bills paid after partnership was dissolved. *Gallacher v. Foubert*, 85 Utah 13, 38 P.2d 297 (1934).

Repayment of contributions.

Upon dissolution and distribution of the partnership assets, this section does not authorize the deduction of depreciation from advances made for capital improvements in repayment of the partner's contributions, and trial court erred when it ordered such deduction for depreciation because the partnership agreement did not authorize such deduction and to allow the deduction would produce an unjust result. *Knutson v. Lauer*, 627 P.2d 66 (Utah 1981).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 1200 to 1222.

C.J.S. — 68 C.J.S. Partnership § 385.
Key Numbers. — Partnership — 300.

48-1-38. Liability of persons continuing the business in certain cases.

(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representatives of a deceased partner assign) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first, or dissolved, partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representatives of a deceased partner assign) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued, as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partner or the representatives of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of Section 48-1-35(2)(b), either alone or with others and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business, either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section, the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representatives of the deceased partner, have a prior right to any claim of the retired partner or the representatives of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership, or on account of any consideration promised for such interest, or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not

of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

History: L. 1921, ch. 89, § 41; R.S. 1933 & C. 1943, 69-1-38.

COLLATERAL REFERENCES

Brigham Young Law Review. — Utah's Business Name Statutes: "An Open Invitation to Litigation," 1983 B.Y.U. L. Rev. 795.

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 913 to 919, 1131 to 1133.
C.J.S. — 68 C.J.S. Partnership § 255.
Key Numbers. — Partnership ⇨ 237.

48-1-39. Rights of retiring or estate of deceased partner when the business is continued.

When any partner retires or dies and the business is continued under any of the conditions set forth in Section 48-1-38(1), (2), (3), (5), (6), or Section 48-1-35(2)(b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representatives as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representatives, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided, that the creditors of the dissolved partnership as against the separate creditors or the representative of the retired or deceased partner shall have priority on any claim arising under this section, as provided by Section 48-1-38(8).

History: L. 1921, ch. 89, § 42; R.S. 1933 & C. 1943, 69-1-39.

NOTES TO DECISIONS

ANALYSIS

Applicability.
Right of wife's distributive share.

Applicability.

Application of this section was required for settling dissolved partnership accounts between widow of partner and successors of other partner. *Wanlass v. D Land Title*, 790 P.2d 568 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 907, 908, 1133.

C.J.S. — 68 C.J.S. Partnership §§ 251, 297.
Key Numbers. — Partnership ⇨ 232.

48-1-40. Accrual of actions.

The right to an account of his interest shall accrue to any partner or his legal representative as against the winding-up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution in the absence of any agreement to the contrary.

History: L. 1921, ch. 89, § 43; R.S. 1933 & C. 1943, 69-1-40.

NOTES TO DECISIONS

ANALYSIS

Existence of partnership.
Laches.

Existence of partnership.

In action for accounting against executors of estate of deceased, there was substantial evidence of existence of partnership between plaintiff and deceased so that court erred in nonsuitoring plaintiff. *Kimball v. McCornick*, 70 Utah 189, 259 P. 313 (1927).

Laches.

In action by administrator of wife for partnership accounting with respect to personal property, wherein it appeared that for period of 37 years after personal property came into

hands of husband on death of wife, no claim or demand whatever was made by interested parties for its recovery or for an accounting with respect thereto. Held that wife's administrator was barred by laches from maintaining this suit. *Walton v. Broadhead*, 54 Utah 320, 180 P. 433 (1919).

Delay of several years between partner's death and action for an accounting did not require application of laches because relationship between surviving partner and deceased partner's son, who was carrying on business, was a confidential one, surviving partner did not know about disputed payments, and delay did not prejudice defendants. *Bankers' Trust Co. v. Riter*, 60 Utah 1, 206 P. 276 (1922).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d Partnership §§ 968 to 970, 1175, 1176, 1045 to 1060.
C.J.S. — 68 C.J.S. Partnership § 378.
A.L.R. — When statute of limitations com-

mences to run on right of partnership accounting, 44 A.L.R.4th 678.

Key Numbers. — Partnership ⇨ 298.

CHAPTER 2 LIMITED PARTNERSHIP

(Repealed by Laws 1990, ch. 233, § 71.)

48-2-1 to 48-2-27. Repealed.

Repeals. — Laws 1990, ch. 233, § 71 repeals §§ 48-2-1 to 48-2-12, Utah Code Annotated 1953; § 48-2-13, as amended by Laws 1975, ch. 139, § 1; and §§ 48-2-14 to 48-2-27, Utah Code Annotated 1953; all relating to limited part-

nerships, effective April 23, 1990. For present comparable provisions, see Chapter 2a of this title. See also § 48-2a-1104 as to applicability of former law, and § 48-2a-1106 (savings clause).

FILED DISTRICT COURT
Third Judicial District

OCT 31 1990

By Kate Lake Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

MARK O. WALSH,)	
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.)	
)	Civil No. C 86-7199
JUDITH ERICKSON a/k/a JUDE)	
ERICKSON; PETER VAN ALSTYNE,)	Judge Moffat
and GERALD ROBINSON,)	
)	
Defendants.)	
)	

THIS MATTER came on for trial before the Honorable Judge Richard H. Moffat on April 24 and 25, 1989. Plaintiff was present and represented by his attorney Steven D. Crawley and John Walsh. Defendants Judith Erickson a/k/a Jude Erickson, Peter Van Alstyne, and Gerald Robinson were present and represented by their attorney Joyce Maughan. The Court having heard testimony of the witnesses and having reviewed the exhibits entered on file herein, now therefore, the Court enters its

FINDINGS OF FACT

1. In December, 1984, plaintiff Mark Walsh (hereinafter "Walsh") entered

ADDELLERS' ADDENDUM EXHIBIT 2 000543

into an oral Partnership agreement with Van Alstyne and Robinson, creating the Universal Video Partnership (hereinafter the "Partnership").

2. Terms of the Partnership agreement included the following:

a. Robinson's obligations: Robinson agreed to and did loan \$30,000.00 to the Partnership for the purpose of paying a \$25,000.00 payment on the Jet Star Contract and \$5,000.00 for operating expenses. Robinson obtained the \$30,000.00 by taking out a second mortgage on his home, at the bank's interest rate of 16.41% per annum.

b. Walsh's and Van Alstyne's obligations:

(1) Walsh and Van Alstyne agreed to repay Robinson the full \$30,000.00 plus interest at 19.41% per annum (3% plus the 16.41% rate Robinson was paying to his bank for the mortgage he took out to loan the \$30,000.00 to start up the Universal Video Partnership. If the Universal Video business profits were not sufficient to repay Robinson, Walsh and Van Alstyne would personally repay Robinson.

(2) Walsh and Van Alstyne agreed to contribute time and labor to manage and run the business so as to satisfy the Partnership obligations and make a profit for the three partners. Robinson was a "silent partner" with no obligation to manage the business or pay its debts.

(3) Walsh and Van Alstyne cosigned with each other to be obligated on the following contractual obligations:

(a) Jet Star contract dated December 8, 1984 (hereinafter "Jet Star Contract"), pursuant to which Walsh and Van Alstyne agreed to be liable for purchasing from Jet Star Industries the business known as Universal Video

located at 5444 South 900 East, Murray, Utah.

(b) Consent to Assignment of lease of the premises. executed by Walsh and Van Alstyne December 21, 1984, pursuant to which Walsh and Van Alstyne agreed to be jointly and severally liable for the tenants' obligations under the Oakwood Village Partnership lease (hereinafter "Oakwood Lease") dated March 11, 1982. This obligated Van Alstyne and Walsh to an eighteen-month lease term, from December, 1984 through June, 1985, at monthly lease payments of \$1,420.00 to \$1,440.00.

(c) Application for Credit and personal guarantee to Oscar E. Chytraus Company (hereinafter, "Chytraus"), vendor of video tapes for the Universal Video Business, dated January 29, 1985, pursuant to which Walsh and Van Alstyne agreed to personally guarantee and be jointly and severally liable for Universal Video debts to Chytraus.

(4) When they signed as obligors on the Jet Star Contract, the Oakwood lease, neither Walsh nor Van Alstyne asked Robinson to be responsible for satisfaction of the obligations on those contracts or any other of the Universal Video business debts.

c. Rights to profits of the Universal Video Business: Walsh, Van Alstyne, and Robinson all agreed to share net profits equally after debts to Robinson and third parties had been paid. However, the debts exceeded the profits so there were no profits to distribute.

3. Walsh had induced Van Alstyne to enter into the Partnership business by Walsh's representations of his previous experience and self-professed success in the video retail business.

4. When Van Alstyne entered into the Jet Star contract, the Oakwood Lease, and the Chytraus obligations with Walsh, Van Alstyne did so in reliance on Walsh' financial statement in December, 1984, which financial statement showed Walsh's net worth to be approximately \$243,500.00

5. Robinson is related to Van Alstyne by marriage. Van Alstyne negotiated with Robinson for the \$30,000.00 loan to start up the Universal Video business. Van Alstyne told Walsh he did not want to have Robinson loan the \$30,000.00 without assurance that Robinson would be completely repaid. Walsh assured Van Alstyne that the Universal Video business revenue would repay Robinson, but that even if it did not, Walsh would mortgage his home if necessary to repay Robinson. In reliance on those assertions by Walsh, Van Alstyne assured Robinson that the \$30,000.00 loan would be a safe investment and the debt to Robinson would be completely repaid.

6. In reliance on those representations and on the fact that Walsh was a Bishop in the Church of Jesus Christ of Latter-Day Saints, Robinson loaned Walsh and Van Alstyne the \$30,000.00 to start up the Universal Video business.

7. During the first three months of operation under Walsh and Van Alstyne, the Universal Video business generated barely enough income to pay its monthly obligations.

8. During those first three months of operation, Walsh was concerned that the business revenue would not be sufficient to cover payments on the Oakwood lease (approximately \$1,500.00 per month), the debt service on the Jet Star Contract, and the other business debts.

9. Walsh had been concerned about that debt service since before entering

into the Jet Star Contract in December, 1984, and before getting the \$30,000.00 from Robinson.

10. Walsh did not tell Van Alstyne of this concern until January, 1985, after Robinson had already loaned the \$30,000.000, and after Walsh and Van Alstyne had cosigned on the Jet Star Contract, the Oakwood Lease, and the personal guarantee to Chytraus.

11. Van Alstyne's decision to cosign on those three contracts (Jet Star, Oakwood, and Chytraus) with Walsh, and his decision to let Robinson loan \$30,000.00 to the business, were decisions he made in reliance on Walsh's representations to Van Alstyne of Walsh's financial success in his previous video store and Walsh's assertions to Van Alstyne that the Universal Vide (Jet Star Contract) business would be a profitable venture, and that the Universal Vide Business revenue would certainly cover the obligations on the Jet Star Contract, the Oakwood lease, the Chytraus contract, and the repayment of \$30,000.00 plus interest to Robinson.

12. From January 1985 on, Walsh remained concerned that the business revenue couldn't cover the obligations to Jetstar, Oakwood, Chytraus, and Robinson.

13. Walsh knew that the nature of video retail business is a seasonal business such that the most lucrative months are the winter months, and that income drops in the summer.

14. In March, 1985, Walsh suggested to Van Alstyne that they put the business up for sale.

15. Walsh had to leave town for a few days, so Van Alstyne agreed to place

a newspaper ad to sell the business.

16. Van Alstyne placed the ad for a few days in a Salt Lake City local newspaper. The responses to the ad were discouraging.

17. Van Alstyne discontinued the ad because of the expense of the ad and the poor responses to the ad.

18. In March, 1985, Walsh told Van Alstyne that Walsh's personal financial situation was very poor and that he was facing bankruptcy and that, therefore, he had no assets to pay his obligations on the Universal Video obligations should the Universal Video business revenue be insufficient to pay those debts.

19. Van Alstyne was shocked and deeply concerned by this confession of Walsh's purported financial troubles.

20. In April, 1985, Walsh and Van Alstyne had an altercation because Van Alstyne had signed Walsh's name to several business checks to pay business debts.

21. Walsh had told Van Alstyne not to pay those certain business debts because of the Universal Video cash flow dearth. Van Alstyne disagreed, and signed Walsh's name to the checks because Walsh had refused to do so.

22. Shortly after the altercation described in the previous paragraph, Walsh acquiesced and approved of Van Alstyne's having paid the debts with Universal Video revenues.

23. In the Jet Star Contract negotiations, Van Alstyne had negotiated for a discount provision pursuant to which Van Alstyne and Walsh would receive a discount if they could pay the contract balance to the sellers by June, 1985.

24. With the newfound information of Walsh's personal financial distress, Van Alstyne hoped to find a new investor to help pay the approximately

\$35,000.00 payoff in June, 1985 to Jet Star and to Contribute additional monies for the business.

25. Defendant Judith Erickson (hereinafter "Erickson") was a clerk in the Universal Video store who had expressed interest in "buying into the store".

26. Van Alstyne and Erickson discussed the possibility of her becoming an additional "partner" in the business if she could contribute at least \$20,000.00 to the business.

27. Van Alstyne told her she had to provide the \$20,000.00 no later than May 31, 1985. She failed to do so by May 31, 1985 or thereafter."

28. Separate from Van Alstyne's negotiations with Erickson, Walsh negotiated with Erickson to sell her his Partnership interest for \$10,000.00.

29. Erickson telephoned Van Alstyne to inform him she intended to purchase Walsh's interest for \$10,000.00

30. Van Alstyne and others, including Erickson's legal counsel at the time, told Erickson that \$10,000.00 was far too much to pay Walsh.

31. When Erickson told Walsh that Van Alstyne had told Erickson that \$10,000 was too high a price, Walsh reassured Erickson that \$10,000.00 was a fair price and told her that if she didn't agree to pay him the \$10,000.00, Van Alstyne would pay Walsh more than \$10,000.00 to purchase Walsh's Partnership interest.

32. Because of Walsh's experience in the video business and because Walsh treated her such that she trusted him and believed he was looking out for her best interest, Erickson believed Walsh over Van Alstyne and the lawyer who was representing her at the time.

33. On or about May 2, 1985, Erickson and Walsh signed the Sales

Agreement and Promissory Note and the Assignment and Assumption Agreement, Consent to Assignment those being the documents purporting to sell Erickson all of Walsh's Partnership rights and obligations.

34. The Sales documents in which Walsh purportedly sold his interest in the business to Erickson were prepared by the attorney who was representing Walsh at the time.

35. Neither Walsh nor Erickson showed Van Alstyne or Robinson the Sales Agreement, Promissory Note, Assignment and Assumption Agreement, or Consent to Assignment. The first time Van Alstyne or Robinson saw those documents was in the fall of 1986 when served with Summons and Complaint in this action. However, Walsh had indicated to Erickson that Van Alstyne had approved of the documents (Sales Agreement, Promissory Note, Assignment and Assumption Agreement, and Consent to Assignment) before May 2, 1985, the date she signed the documents.

36. Walsh received \$5,500.00 from defendant Erickson toward the \$10,000.00 sum, paid as follows: \$3,000.00 paid by Erickson May 2, 1985 and \$500.00 for each of the five following months (June through October, 1985).

37. After paying the October, 1985 \$500.00 installment to Walsh, Erickson ceased paying Walsh.

38. The reason Erickson ceased paying Walsh in October, 1985 is that the attorney who was representing her at the time told her to stop paying on the Walsh contract because she was not getting anything for her payments.

39. The Walsh-Erickson Sales Agreement speaks for itself but includes the following terms:

a. Walsh purportedly sold his Partnership rights and Partnership interest to Erickson;

b. Erickson purportedly assumed Walsh's Partnership obligations including the following: Jet Star obligation; Chytraus obligation; Oakwood Lease; and utilities.

40. On or about May 2, 1985 when Erickson and Walsh signed the Sales Agreement, Promissory Note, Assignment and Assumption Agreement, and Consent to Assignment, Erickson told Walsh that, contrary to the Sales Contract language, the Jet Star sellers would not let her assume Walsh's obligations on the Jet Star contract, and that she was concerned about assuming Walsh's obligations on the Jet Star contract and the other debts. In response, Walsh assured Erickson that there would be enough business revenue from the Universal Video business to pay the debts.

41. Further, regarding the debt to Robinson, Walsh told Erickson not to worry about the debt of \$30,000.00 owed to him.

42. At the time of the May 2, 1985 purported sale by Walsh to Erickson, or any time thereafter, Walsh did not inform Erickson that Van Alstyne had made demand on Walsh to help pay the Jet Star payoff May 31, 1985.

43. Even though Van Alstyne and Robinson were unaware of the terms of the written documents pursuant to which Walsh purportedly sold his Partnership interest to Erickson, they were aware that Erickson, commencing May, 1985 believed that she was entitled to be a partner in the Partnership.

44. After May 2, 1985 disputes and negotiations ensued between Erickson and Van Alstyne. The principal dispute was Erickson's claim that she was a full

one-third partner having totally replaced Walsh, and Van Alstyne's claim that she was not, primarily because she had not contributed the \$20,000.00 by June, 1985 to help satisfy Partnership obligations.

45. Between June, 1985 and spring, 1986, various settlement negotiations ensued between Erickson, Van Alstyne and Robinson regarding Erickson's Partnership status.

46. Erickson hired a lawyer to represent her against Van Alstyne in her claim of full one-third partner status.

47. Though several proposals were made back and forth, no agreement was ever reached between Van Alstyne, Robinson and Erickson regarding her status as a partner in the Universal Video Partnership.

48. At no time did Robinson or Van Alstyne ever agree or consent to having Erickson replace Walsh as a partner, even though there were times when Robinson or Van Alstyne contemplated accepting Erickson as an additional, not a replacement, partner, and they made various offers to Erickson regarding this.

49. At no time did Robinson or Van Alstyne ever release Walsh from his obligations to pay the Universal Video business debts.

50. Van Alstyne mortgaged his family residence to obtain funds to loan the Partnership \$30,000.00 in June, 1985, to pay on the Jet Star contract.

51. In the spring of 1985, Van Alstyne had told Walsh he might buy Walsh's Partnership rights and obligations for \$2,000.00, but that Van Alstyne would do so only if Walsh would first pay enough to contribute with Van Alstyne to satisfy the Partnership obligations.

52. In the spring of 1985, before completing the \$30,000.00 payoff to Jet

Star, Van Alstyne made demand on Walsh to help satisfy the Partnership obligations. Walsh refused, telling Van Alstyne he was facing bankruptcy and that he hadn't the assets to spend on those obligations. Van Alstyne made subsequent demands on Walsh and again was refused by Walsh.

53. The Oakwood Lease obligation, approximately \$1,500.00 monthly rent from January, 1985 through June, 1986, was satisfied from the Universal Video Partnership business revenue.

54. All but \$6,038.18 of the Chytraus contract obligations were satisfied from the Universal Video Partnership business revenue.

55. After several unsuccessful attempts to sell the Universal Video business, Van Alstyne and Robinson on or about June 23, 1986 sold its inventory to Video USA for the sum of \$25,835.00 payable with \$5,835.00 down and monthly payments of \$682.00 for 36 months, the last payment due May, 1989.

56. Van Alstyne's personal financial loss from his loans to the Partnership business for satisfying the business debts is as follows:

\$30,000.00	at 10% per annum June 3, 1985 for discounted payment on Jet Star [Defendants' Exhibit 25]
\$ 5,200.00	at 13% per annum December 18, 1985 for one-half of \$6,038.00 final payment to Chytraus and one-half of \$4,362.00 final payment on Jet Star contract
\$13,493.65	Total interest at the above specified 10% and 13% rates
<hr/>	
\$48,693.65	TOTAL VAN ALSTYNE PERSONAL FINANCIAL LOSS FROM HIS LOANS TO THE PARTNERSHIP BUSINESS FOR SATISFYING THE BUSINESS DEBTS

57. In addition to the initial \$30,000.00 loan at 19.41% per annum, Robinson loaned the business \$5,200.00 at 13% per annum December 18, 1985 for one-half of

the \$6,038.00 final payment to Chytraus and one-half of the \$4,632.00 final payment on the Jet Star Contract.

58. Robinson's loss from the loans set forth in the previous paragraph, after applying all of the Video USA sale proceeds to offset Robinson's loss, is \$10,718.45 through May 21, 1989.

From the foregoing Findings of Fact, the Court now makes and enters its

CONCLUSIONS OF LAW

1. The Terms of the Partnership Agreement between Walsh, Van Alstyne, and Robinson were as set forth in paragraph 2 of the Facts above. In summary, in exchange for Robinson's loan of the \$30,000.00 start-up funds for the business, Walsh and Van Alstyne agreed: (a) to repay Robinson; (b) to be responsible for the partnership business debts; and (c) to share in equal thirds with Robinson the business profits, even though it finally turned out that there were no business profits.

a. Debts to Robinson: Walsh as a manager of the Partnership's Universal Video business with responsibility to manage the business so as to pay its debts, is responsible to repay Robinson for one-half of Robinson's loans to the Partnership as set forth in the Facts above. The debt to Robinson, after credition to Robinson all of the proceeds of the June, 1986 sale of the Universals Video inventory to Video USA, totals \$10,718.45 with interest through May 21, 1989 for one-half that sum (paragraph 57, Facts above). Robinson should be granted judgment against Walsh effective May 21, 1989 against walsh for one-half of that sum, \$5,359.23

b. Other partnership Business debts for which Walsh owes Van Alstyne:

Pursuant to the terms of the Partnership agreement (paragraph 2, Facts above), Walsh and Van Alstyne, and not Robinson, were equally responsible for the business debts to Chytraus, Jet Star, Oakwood, and other business creditors. Pursuant to his right of contribution per Section 48-1-15(1), Utah Code Annotated 1953, as amended, Van Alstyne should be granted judgment against Walsh effective May 21, 1989 against Walsh for \$24,346.82, which represents one-half of Van Alstyne's \$48,693.65 loss from paying those creditors from his personal funds (paragraph 59, Facts above).

2. Walsh is liable for breach of fiduciary duty to Van Alstyne and Robinson: "Partners . . . occupy a fiduciary relationship and must deal with each other in the utmost good faith." Burke v. Farrell, 656 P.2d 1015, 1017 (Utah 1982) citing section 48-1-18, Utah Code Annotated 1953, as amended. The Court finds by clear and convincing evidence that Walsh breached his fiduciary duty to Van Alstyne and Robinson in several regards, including the following:

a. Before borrowing the \$30,000.00 from Robinson to purchase the Universal Video business under the Jet Star Contract, Walsh was wary of the debt service on the contract and was concerned that the business revenue would not cover the debt service, let alone the loan payments to Robinson and the other business debts, and yet he borrowed the \$30,000.00 from Robinson and had Van Alstyne cosign with Walsh on the underlying contracts and personal guarantee to Chytraus without warning Van Alstyne and Robinson of the risk involved.

b. Walsh abandoned the Partnership May 2, 1985, leaving Van Alstyne to manage and pay the debts of a business in which he had virtually no experience, and leaving the debt to Robinson unpaid.

c. Walsh attempted to sell his partnership interest to Erickson without fully disclosing to Van Alstyne and Robinson the terms of the sale and without informing them that he received \$5,500.00 from Erickson.

The Court finds by clear and convincing evidence that the said breaches of fiduciary duty were done by Walsh in a manner that showed a knowing and reckless indifference to and disregard of the rights of Van Alstyne and Robinson, and that Walsh either knew or should have known that he said conduct would, in a high degree of probability, result in substantial harm to Van Alstyne and Robinson.

For Walsh's breach of fiduciary duty to Van Alstyne, Van Alstyne should be granted judgment against Walsh for \$24,346.82 actual damages.

For Walsh's breach of fiduciary duty to Robinson, Robinson should be granted judgment against Walsh for \$5,359.23 actual damages.

3. Validity of Walsh-Erickson Sales Agreement: The Sales Agreement entered into by Walsh and Erickson May 2, 1985 [Defendants' Exhibit 12] is void for lack of consideration and void for failure of consideration. Section I of the Agreement purported to convey to Erickson all of Walsh's one-third partnership rights and interest in the Universal Video business. Walsh did not have the authority or right to convey his Partnership rights. Walsh's sale to Erickson was tantamount to the proverbial "sale of the Brooklyn Ridge". Walsh's promise to convey all of his partnership rights to Erickson was illusory because it required approval (never obtained) by Van Alstyne and Robinson.

When there exists only the facade of a promise, i.e., a statement . . . such . . . that the person making it commits himself to nothing, the alleged "promise" is said to be "illusory". An illusory promise, neither binds the person

making it, 1 Corbin on Contracts Section 145 (1963), nor functions as consideration for a return promise. Id. at 628.

Resource Management Company v. Weston Ranch and Livestock Company Inc., 706 P.2d 1028, 1036 (Utah 1985). Thus the Sales Agreement is void for lack of consideration because Walsh's promise to convey his Partnership rights to Erickson was illusory because it committed Walsh to nothing because he had no legal right to make that commitment without consent from Van Alstyne and Robinson.

Even if the Sales Agreement were not void for lack of consideration, it is void for failure of consideration. When consideration is lacking, there is no contract. When consideration fails, there was a contract when the agreement was made, but the promised performance has failed. DeMentas v. Estate of Tallas, 95 Utah Adv. Rep. 28 (Utah App. 1988). Walsh failed to deliver the consideration (his Partnership rights) to Erickson because he was never authorized to do so by the other partners, Van Alstyne and Robinson.

a. All partners' consents are required for sale of partner's rights: Pursuant to Sections 48-1-21 and 48-1-24, Utah Code Annotated 1953, as amended, both Van Alstyne's and Robinson's consent would be required to imbue Erickson with Walsh's Partnership rights (as apposed to his mere Partnership interest, which is the partner's right to profits) to manage or administer Partnership business or affairs.

b. Neither Van Alstyne nor Robinson consented, either explicitly or implicitly, to the Walsh-Erickson Sales Agreement. Van Alstyne and Robinson did not even see the document until this lawsuit was filed. After Erickson signed the documents and began paying Walsh the \$500.00 monthly installments, several

months of arguments ensued between Erickson and Van Alstyne because Van Alstyne and Robinson did not ever accept Erickson as a full one-third partner to replace Walsh.

c. Neither Van Alstyne nor Robinson released Walsh from his Partnership obligations. The fact that Van Alstyne and Robinson made significant Partnership business decisions after May 1, 1985 without consulting Walsh does not imply a release of Walsh or a consent to his sale to Erickson. Walsh abandoned the partnership May 2, 1985. Section 48-1-6, Utah Code Annotated 1953, as amended, provides that a partner who abandons the Partnership business does not have to be included in other partners' decisions to sell or assign Partnership property. There was no novation to substitute Erickson for Walsh to pay Walsh's Partnership obligations. "For a novation to occur, there must be (1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one." Hormana v. Gordon, 740 P.2d 1346, 1352-1353 (Utah App. 1987). See also First American Commerce Company v. Washington Mutual Savings Bank, 743 P.2d 1193 (Utah 1987); and D.A. Taylor Company v. Paulson, 552 P.2d 1274 (Utah 1976).

d. Neither mistake of fact nor mistake of law by Erickson or Walsh would validate the Walsh-Erickson Sales Agreement. Even if Walsh and Erickson both mistakenly believed when they entered into the Sales Agreement that Van Alstyne and Robinson had consented to the Agreement, that mistake would not be grounds for validating the Sales Agreement. Langston v. McQuarrie, 741 P.2d 544 (Utah App. 1987); Mooney v. GR and Associates, 746 P.2d 1174 (Utah

App. 1987). To allow such a mistake of fact to validate the Sales Agreement would be analogous to validating a contract for sale of the Brooklyn Bridge by a seller who believed he had legal rights to sell the bridge but who in fact did not. Rather than being validated because it was obtained by mistake, the Sales Agreement is voidable because obtained by mistake. "An agreement obtained by misrepresentation, fraud, or mistake is generally voidable." Tanner v. District Judges of the Third Judicial District Court, 649 P.2d 5,6 (Utah 1982) citing 17 Am. Jr. 2nd Contracts Section 143, et seq.

Next, regarding mistake of law, ignorance of the law is no excuse. Walsh's or Erickson's mistake in legal interpretation of the Sales Agreement (mistakenly believing the Agreement was legally valid because of mistaken belief that partner's consent is not legal requirement for other partner's sale of his Partnership rights) would not be grounds sufficient for validating the Agreement. Kiahtipes v. Mills, 649 P.2d 9 (Utah 1982).

e. The Walsh-Erickson Sales Agreement is not severable so as to make Erickson liable to Walsh for the \$10,000.00 contract price and award her only Walsh's Partnership interest (right to accounts receivable) instead of all of his Partnership rights (e.g., management rights not assignable without other partners' consent). There is no severability clause in the Sales Agreement. Section I of the Sales Agreement purports to sell all of Walsh's Partnership rights and interest in one total package. The Sales Agreement does not break down the \$10,000.00 sales price into units separately specifying a certain sum for Walsh' Partnership rights and another sum for Walsh's Partnership interest. Further, there was no indication by Walsh or Erickson at trial of any intent by either of

them that the contract be severable. "A contract is severable or entire depending on the intent of the parties at the time they entered into the contract."

Management Services Corp. v. Development Associates, 617 P.2d 406, 408 (Utah 1980).

4. Walsh was unjustly enriched at Erickson's expense by his receiving and keeping the \$5,500.00 which Erickson paid him from May 2, 1985 through October, 1985 as installments on the Walsh-Erickson Sales Agreement. The Sales Agreement is void. Erickson received nothing of value from Walsh for the \$5,500.00 she paid him. Erickson is entitled to judgment against Walsh for the \$5,500.00 plus pre-judgment interest at 10% per annum from and after October 31, 1985.

Even if the Walsh-Erickson Sales Agreement were valid, Utah partnership law would require Walsh to hold as trustee for the Partnership the \$5,500.00 and any other funds he received from Erickson under the Sales Agreement.

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

Section 48-1-18, Utah Code Annotated 1953, as amended. The \$5,500.00 was derived by Walsh from Erickson without the consent of Van Alstyne or Robinson and was connected with the conduct of the Partnership. Even if the Walsh-Erickson Sales Agreement were Valid, Utah Law would require Walsh to disgorge the \$5,500.00 to help Van Alstyne pay the Partnership debts.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Erickson should be granted judgment against Walsh as follows:

Actual damages of \$5,500.00 (five thousand five hundred and no/100 dollars) plus 10% pre-judgment interest from October 31, 1985 for restitution of Walsh's unjust enrichment.

Robinson should be granted judgment against Walsh as follows:

Total actual damages of \$5,359.23 (five thousand three hundred and fifty-nine and 23/100 dollars) plus 10% pre-judgment interest from and after May 21, 1987 for Walsh's one-half share of the unpaid portion of the \$30,000.00 loan and for repayment to Robinson of Walsh's one-half share of the unpaid portion of Robinson's \$5,200.00 loan to the Partnership business December 18, 1985 to pay Chytraus and Jet Star.

Van Alstyne should be granted judgment against Walsh as follows:

Actual damages of \$24,326.82 (twenty four thousand three hundred twenty six and 82/100 dollars) plus 10% pre-judgment interest from and after May 21, 1989 pursuant to Van Alstyne's right of contribution, representing one-half of the partnership debts paid personally by Van Alstyne.

DATED this 31st day of October, 1990.


JUDGE RICHARD H. MOFFAT

MAILING CERTIFICATE

I, the undersigned, certify that on the 4th day of October, 1990, I mailed a true and correct copy of the foregoing document by first-class mail to the following:

Steven D. Crawley, Esq.
WALSTAD & BABCOCK
254 West 400 South
Second Floor
Salt Lake City, Ut. 84101

John Walsh, Esq.
3865 South Wasatch Blvd.
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Suite 202
Salt Lake City, Ut. 84109

Michelle Moll

MAILING CERTIFICATE

I certify that on the 6th day of July, 1994, I served a copy of the attached Brief of Appellee upon John Walsh, counsel for the appellant in this matter, by ~~mailing~~ it to him by first class mail with sufficient postage prepaid to the following address: *causing it to be mailed*

John Walsh, Esq.
2319 Foothill Drive, Suite 270
Salt Lake City, UT 84109

