

1959

Melvin Bradshaw v. Eugene N. Davie and Mrs. Eugene N. Davie : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

SEP 25 1959

MELVIN BRADSHAW,

Respondent,

Clerk, Supreme Court, Utah

—vs.—

EUGENE N. DAVIE and

MRS. EUGENE N. DAVIE,

Appellants.

Case

No. 9094

BRIEF OF APPELLANTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF APPELLANTS

STATEMENT OF FACTS

There are two appellants in this lawsuit, Dr. Eugene N. Davie and Mrs. Eugene N. Davie, his wife. Inasmuch as all transactions referred to in the lawsuit were made by Dr. Davie, the term "Appellant" used in the Statement of Facts refers to Dr. Davie.

In January of 1957 respondent telephoned appellant for the purpose of obtaining blasting powder to use on some punice claims he had (R. 225). During the conversation, it developed that appellant possessed similar claims and a discussion concerning the claims ensued (R.

226, 227, 228, 279). Sometime later, between the fifteenth and twenty-eighth days of March, 1957, respondent and appellant met several times to explore the possibility of forming a partnership for the purpose of operating their mining claims, securing additional pumice-perlite claims, and eventually getting themselves into a position where they could furnish materials from their properties to the Glen Canyon Dam project (R. 66, 228, 229). At the time their negotiations were being carried on, the United States Bureau of Reclamation was drilling holes in various claims in the area for the testing of the grade of material they contained, and said Bureau wanted respondent and appellant to build a road so they could test the materials in their claims (R. 66, 76, 78, 79, 229, 230, 231).

On March 28, 1957, said parties again met and appellant made a memorandum of their negotiations concerning the partnership (R. 228) (Plaintiff's Exhibit No. 2), which was taken home by respondent where his wife, at the dictation of respondent, wrote respondent's remarks in pencil on said memorandum (R. 330).

A partnership agreement was entered into on March 30, 1957, between respondent and appellant (Plaintiff's Exhibit No. 1).

After entering into the partnership agreement, the said parties determined that the nine claims put into the partnership by respondent were not legally located (R. 104, 105) and, in fact, part of one of them, the Pumice Hole Claim (Plaintiff's Exhibit No. 8), was located on a State School Section, whereupon, during the month of

April 1957 the said parties located and filed notices of location in the office of the County Recorder of Beaver County covering seventy-four mining claims (Plaintiff's Exhibit No. 16), said claims being located in the names of respondent and appellant and covering and embracing the ground previously claimed by respondent under the nine locations referred to in the agreement, except for the portion of the Pumice Hole Claim which was found to be embraced within a State School Section (R. 259, 260-266). Sometime after the execution of the partnership agreement, the appellant procured leases from the State of Utah, in his own name and for the use of the partnership, on lands adjacent to the partnership's seventy-four claims (R. 179).

Upon execution of the partnership agreement, respondent commenced work on the partnership claims and appellant advanced funds for the payment of operational (R. 133-158) expenses and the purchase of equipment, including a \$5000.00 down payment on a caterpillar tractor purchased from Wheeler Kershaw Company by the partnership for \$17,976.00, the balance to be paid in monthly instalments (R. 142), and a down payment of \$500.00 on an International Deisel tractor purchased by the partnership from the Utah Central Block Company for \$3,500.00, the balance to be paid out of shipments of pumice to the seller (R. 146, 147, 256).

Disagreements soon arose between the partners over the terms of their partnership agreement. Around the middle of May, 1957, respondent demanded that appellant

pay him \$400.00 per month for his labor, which appellant refused to do because it was not his personal obligation and the partnership had no money with which to pay it (R. 383, 389, 390). Respondent also demanded that appellant pay him \$5000.00 for his mining claims, insisting that said \$5000.00 was a down payment and was not to be returned to appellant from the proceeds of the partnership business. Appellant contended that the partnership agreement provided that it was to be returned to him. On or about May 17, 1959, appellant advanced the sum of \$150.00 to respondent, and on or about June 18, 1957, he advanced respondent the sum of \$1315.62 (R. 348, 349, 383, 384, 390, 391).

After June 18, 1957, appellant refused to pay any further moneys to respondent personally because they were in dispute over their agreement and until the disagreement was resolved he said he felt it was wrong to advance any further moneys to respondent (R. 392).

Early in August 1957, appellant learned that respondent was contemplating suing him (R. 358, 392), and in September 1957 the caterpillar tractor was repossessed by the Wheeler-Kershaw Company (R. 392) and the semi-trailer truck was repossessed by the Utah Central Block Company (R. 147). After this, the partners no longer worked together on the partnership business, but respondent, without knowledge of appellant, sold material from the partnership properties for which he received the sum of \$3,223.76 (R. 193, 194, 352, 354).

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE PLAINTIFF'S ACTION AS THE COMPLAINT AND EVIDENCE FAILED TO SHOW ANY GROUNDS UPON WHICH A JUDGMENT AGAINST DEFENDANT, AS AN INDIVIDUAL, COULD BE GRANTED.

POINT II.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST DEFENDANT ON THE GROUND THAT WHILE THE PARTNERSHIP AGREEMENT WAS EXECUTORY, PLAINTIFF RENOUNCED THE AGREEMENT AND DEMANDED OTHER AND DIFFERENT TERMS. SUCH CONDUCT CONSTITUTED A RENUNCIATION OR ANTICIPATORY BREACH AND RELIEVED DEFENDANT FROM FURTHER PERFORMANCE AS A MATTER OF LAW.

POINT III.

AS A MATTER OF LAW THE TRIAL COURT ERRED IN AWARDING PLAINTIFF THE JUDGMENT AGAINST DEFENDANT FOR \$11,562.08 BASED UPON A PARTNERSHIP TRANSACTION.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER IN ITS PURPORTED ACCOUNTING SECRET FUNDS RECEIVED BY PLAINTIFF FROM PARTNERSHIP TRANSACTIONS.

POINT V.

THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF JUDGMENT AGAINST THE DEFENDANT AS THERE

WAS NO EVIDENCE TO SUPPORT WHAT INJURY OR LOSS PLAINTIFF SUFFERED AND THE JUDGMENT WAS THE RESULT OF CONJECTURE AND SPECULATION ON THE PART OF THE TRIAL COURT.

POINT VI.

THE PURPORTED ACCOUNTING ADOPTED BY THE TRIAL COURT WAS IN CONTRAVENTION AND VIOLATIVE OF THE RULES OF DISTRIBUTION AND ACCOUNTING OF PARTNERSHIPS.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE PLAINTIFF'S ACTION AS THE COMPLAINT AND EVIDENCE FAILED TO SHOW ANY GROUNDS UPON WHICH A JUDGMENT AGAINST DEFENDANT, AS AN INDIVIDUAL, COULD BE GRANTED.

An accounting and settlement between co-partners is a condition precedent to an action by one partner against the other based upon partnership claims and transactions. An examination of the pleadings and evidence reveal an entire absence of the performance of such requirement.

The judgment in favor of the plaintiff (R. 43-46), and its finding and conclusions (R. 33-41) show without doubt that the judgment was based upon claims and transactions of the partnership.

The Utah Supreme Court in the case of *Bankers Trust Co. v. Riter*, 56 Utah 525, 190 Pac. 1113, adopted the universal rule above set forth, as follows:

“The great weight of authority seems to be, in this country at least, that, before one partner can compel another partner to pay what is claimed to be an indebtedness to the partnership, it must be first ascertained that the amount is necessary in settling the partnership affairs, or that the amount owing by such partner is a greater amount than he would be entitled to receive upon striking a balance and finding the interest of each partner in the assets of the partnership. *Silver v. Eakins*, supra; *Baughman v. Hebard* (Okl.) 166 Pac. 88; *McGorray v. O'Connor* (C. C.) 79 Fed. 861; *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086 *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824; *Kirby, Ex'r. v. Lake Shore & M. S. R. Co.* (C. C.) 14 Fed. 261; *Adams v. Church*, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. Rep. 740; *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 302, 61 Am. St. Rep. 637.”

Also, as early as 1899, this court made the same announcement in *Jennings v. Pratt*, 19 Utah 129, 56 Pac. 951 :

“* * * The rule is doubtless well settled that, in the absence of a settlement of accounts, one partner cannot sue another at law upon a demand which has grown out of a partnership transaction, but, where the claim of one partner against copartners arises out of a transaction which is not properly a partnership matter, the rule does not apply.”

The foregoing point of law is thoroughly discussed in an exhaustive annotation found in 51 *A. L. R.* 34, 58 *A. L. R.* 623, and 168 *A. L. R.* 1091.

POINT II.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST DEFENDANT ON THE GROUND

THAT WHILE THE PARTNERSHIP AGREEMENT WAS EXECUTORY, PLAINTIFF RENOUNCED THE AGREEMENT AND DEMANDED OTHER AND DIFFERENT TERMS. SUCH CONDUCT CONSTITUTED A RENUNCIATION OR ANTICIPATORY BREACH AND RELIEVED DEFENDANT FROM FURTHER PERFORMANCE AS A MATTER OF LAW.

The attention of the court is invited to the following testimony of the defendant:

(R. 389-392)

“Q. Now, Mr. Davie, after the date of March 30th 1957, did the plaintiff ever make any demands upon you personally to pay him \$400 a month wages?

A. Yes.

Q. To the best of your collection would you tell me about when that would be?

A. Some time around the middle of May.

Q. And also to the best of your recollection would you tell me where it occurred?

A. Yes.

Q. And who was present?

A. In my office at Milford, and Melvin Bradshaw and I were present.

Q. When he made a demand that you personally pay him his wages of \$400 a month, what did you tell him?

A. I refused.

Q. Did you tell him why you were refusing?

A. Yes.

- Q. And what did you tell him as to your reason for refusing?
- A. That I had never agreed to do that.
- Q. Now, you have testified, Dr. Davie, that on or about May 17, 1957, you advanced \$150 to the plaintiff in this case, is that correct?
- A. Yes, that is.
- Q. And where did that occur?
- A. In my office at Milford, Utah.
- Q. Who was present?
- A. Melvin Bradshaw and myself.
- Q. Now, will you tell the court in substance and effect the conversation the two of you had on that occasion?
- A. Melvin told me that he had to have some money. And I told him the partnership hadn't received any money and that there was no money, therefore, to pay him for his wages. And finally I agreed to advance him the \$150 to cover currently some things that he needed at that time.
- Q. At that time was there any discussion with Mr. Bhadshaw as to your right of having the money returned to you from the partnership in the event it earned anything?
- A. Yes, he said that I wasn't to receive any return of the \$5,000 that he insisted was some sort of a down payment.
- Q. Now, calling your attention to June 18, 1957, I believe you have testified that at that time you paid to him the sum of \$1315.62. Is that correct?
- A. Yes, that is right.

Q. And where did that occur?

A. That was in my office, at Milford, Utah.

Q. Who was present?

A. Melvin Bradshaw and myself.

Q. On that occasion was there a discussion regarding the subject of whether or not you were entitled to the return of any moneys from the partnership in the event of its earning any?

A. Yes, there was a discussion.

Q. And what position did Mr. Bradshaw take?

A. He insisted that this was merely a down payment and that I wasn't to receive any return for that money.

Q. And what was your position?

A. That all of that money should be returned to me, and that was our agreement.

Q. In the event the partnership earned it?

A. Yes.

Q. Now, after that time, Dr. Davie, did you intend to advance any moneys directly to the plaintiff?

MR. FENTON: I object to this, your Honor, this is an attempt to inject parole evidence state what his intent was at a prior time, entirely self-serving, and I object. What this man intended is set forth in the agreement.

(Argument)

THE COURT: The objection is sustained.

Q. After that date, did you pay any additional moneys to Melvin Bradshaw personally?

A. No.

Q. Will you tell the court why you didn't?

A. We were in dispute on this agreement as to what we had set down on paper on March 30th, 1957, and until that disagreement was resolved or until it was placed into a corporation, I felt it was absolutely wrong to advance any further moneys."

On the identical subject the plaintiff testifies:

(R. 329)

"Q. But you did sign the executed agreement of course on March 30th, 1957, did you not?

A. Yes.

Q. And at that time you agreed that the equipment costs and costs of operation was to be paid from the proceeds, didn't you?

A. No.

Q. You did not? Didn't you read that sentence when Mr. Fenton was examining you. Start there, read the next three or four lines.

A. This line wasn't in there.

Q. Start from that word there.

A. 'For fifty per cent interest in these claims Eugene N. Davie agrees to advance what moneys are needed to purchase equipment to operate these claims. The equipment cost and other cost of operating said claims are to be paid for' and I signed that.

Q. Read it on out, go on.

A. 'From the proceeds of the company plus six per cent interest on all moneys advanced.'

Q. Thank you.

A. Advanced."

(R. 383 - 384)

"Q. Now, if I understood you correctly, Mr. Bradshaw, your position that you took under this agreement was that Dr. Davie obligated himself to pay your wages of \$400 a month, is that correct?

A. Yes, sir.

Q. Did you ever make a demand upon Dr. Davie that he personally pay those wages?

A. Yes, sir.

Q. On many occasions?

A. Yes, sir.

Q. During the summer of 1957?

A. Yes, sir.

Q. Now, Mr. Bradshaw, also, if I understand your position you have testified that he was obligated to pay you \$5,000 as a down payment on the property?

A. Yes, sir.

Q. Now, Mr. Bradshaw, also, if I understand your position you have testified that he was obligated to pay you \$5,000 as a down payment on the property?

A. Yes, sir.

Q. Did you ever make a demand for that down payment as such?

A. Yes, sir.

Q. On many occasions?

A. Yes, sir.

Q. During the summer of 1957?

A. Yes, sir."

There now remains no dispute that plaintiff refused to acknowledge the partnership agreement (Ex. 1) from the first instance and this state of affairs continued up to and through this litigation. Such amounts to an anticipatory breach and discharges this defendant of any obligation to perform. The proposition receives support in this court in the case of *Jordan v. Madsen*, 69 Utah 112, 252 Pac. 570:

"It, of course, is well settled that a renunciation or repudiation of a contract by one party before the time fixed for performance constitutes a breach and gives an immediate right of action to the adverse party. 5 Page on Contracts, §2885; 13 C. J. 651. It also is well settled that if one of the parties to a contract notifies the other that he will not perform unless such other assents to a material modification of the contract, or by the addition of new terms, such conduct amounts to a renunciation of the contract. 5 Page on Contracts, §2904. The breach here as alleged operated as a discharge of the contract, which gave the plaintiff, who was not in default, the right to ignore the contract as a basis of his rights and to sue as he did in quasi contract to recover reasonable compensation for what he furnished in partial performance of the contract (5 Page on Contracts §3023) — here the value of his old car, alleged to be \$900. The renunciation discharged the plaintiff from further performance. 5 Page, §28882; 13 C. J. 653."

Restatement of Contracts, Vol. 1, §318 (a):

“(a) a positive statement to the promisee or other person having a right under the contract, indicating that the promiser will not or cannot substantially perform his contractual duties”;

The continued attempts of Davie to hold the activity together does not alter the result as set out in the same *Restatement* at §320:

“EFFECT OF URGING PERFORMANCE IN SPITE OF REPUDIATION.

“Manifestation by the injured party of a purpose to allow or to require performance by the promisor in spite of repudiation by him, does not nullify its effect as a breach, or prevent it from excusing performance of conditions and from discharging the duty to render a return performance.”

Dr. Davie continued his efforts at great expense until it obviously was futile (R. 392).

POINT III.

AS A MATTER OF LAW THE TRIAL COURT ERRED IN AWARDING PLAINTIFF THE JUDGMENT AGAINST DEFENDANT FOR \$11,562.08 BASED UPON A PARTNERSHIP TRANSACTION.

This point involves the most interesting maneuver of the trial court in the entire trial.

Dr. Davie agreed to advance funds *to the partnership* for equipment (R. 8). The *partnership* purchased a Caterpillar Tractor with funds advanced by Davie (R. 142).

The tractor later was repossessed (R. 392). It must now be kept in mind that pursuant to the terms of the agreement (Exhibit 1) the partnership was to reimburse Davie from proceeds. The trial court then, without any evidence, proceeds to the conclusion that the assets of the partnership were \$14,889.49 less in value (R. 40-41), and *separate and apart* from the partnership accounting awards one-half of said sum to plaintiff as a personal judgment against defendant (R. 45). Such action on the part of the trial court violated all provisions of law relating to rules of distribution. *Sec. 48-1-37, Utah Code Annotated 1953*. Dr. Davie was a partner and as such had equal authority with plaintiff to buy or return equipment without such being regarded as wrongful conduct and this is particularly strange in view of the fact the trial court, in paragraph 7 of its Findings of Fact (R. 34) found the partnership operation was unprofitable.

It is even more astounding when one considers that an unprofitable operation is a basis, in and of itself, for dissolution. *Sec. 48-1-29 (e), Utah Code Annotated 1953*.

Further, no finding or conclusion is found or made that defendant at any time was guilty of a breach of duty to the partnership nor that defendant wrongfully caused the dissolution. Such a purported judgment, not part of the accounting and settlement, must be a nullity. It is further an improper attempt on the part of the trial court to award damages for breach of an agreement in absence of any evidence of breach or of damage.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER IN ITS PURPORTED ACCOUNTING SECRET FUNDS RECEIVED BY PLAINTIFF FROM PARTNERSHIP TRANSACTIONS.

Section 48-1-18, Utah Code Annotated 1953, reads as follows :

“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.”

After September 14, 1957, the plaintiff secretly and without the knowledge of defendant sold material from the partnership properties and received \$3223.76 (R. 318, 352). In spite of such a deliberate and flagrant violation of trust, the trial court chose to ignore the mandatory language of the foregoing statute. The trial court brushed the entire fraud aside by finding “that no profit was realized from sale of such materials after allowance for expense of labor and transportation to market” (R. 38). The partnership is entitled to the reasonable market value of 1066 tons of the pumice material and Bradshaw is required by law to account for it. It is not enough nor

does it satisfy justice for the plaintiff to glibly state "I spent it * * * * because it was mine" (R. 352).

POINT V.

THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF JUDGMENT AGAINST THE DEFENDANT AS THERE WAS NO EVIDENCE TO SUPPORT WHAT INJURY OR LOSS PLAINTIFF SUFFERED AND THE JUDGMENT WAS THE RESULT OF CONJECTURE AND SPECULATION ON THE PART OF THE TRIAL COURT.

Assuming for purposes of argument (which defendant emphatically denies) that defendant breached the partnership agreement, ordinarily the measure of damages to be considered is the probable profits plaintiff would have made had not the breach occurred. *Section 483 of 40 American Juris. 462, Section 132 of 68 C. J. S. 569.* No evidence was presented on the subject of loss of profits and as found by the trial court, the undertaking was not profitable (R. 34).

When a party commences an action and seeks to recover compensatory damages and then offers no evidence of the nature or extent of his loss, it is difficult to argue at any length for the reason that record in the case is void of any evidence or support of the claim of damages.

The money judgment in favor of plaintiff is erroneous as it is not supported by any finding of any fact or evidence to show how or in what manner plaintiff was damaged. The award was a mere speculative effort of the trial court. This court in the case of *B. T. Moran, Inc.*

v. First Security Corporation, 82 Utah 316, 24 Pac. 2d 384, stated:

“The last assignment of error to which we need pay attention is that the trial court’s finding that, ‘because of the breach of said agreement on the part of the plaintiff and its failure to put over said campaign, defendant suffered damages in the sum of \$2,000.00,’ is erroneous as not stating a finding of any fact as to how or in what manner defendant was damaged and is in the nature of a legal conclusion. This objection must be sustained. There is no finding of any fact on which damages in any specific amount can rest. The mere fact that defendant did not obtain as many new savings accounts as contemplated cannot afford a basis for damages where there is no guaranty that certain results would and could be obtained. The evidence shows that 1,200 new accounts were obtained, but it is silent as to the amount involved in these accounts or the value of them to the bank. It is possible that no evidence could be obtained which would show the probable value of such accounts to the defendant. The element of damages is so speculative, and the cause of damages so uncertain on the record before us, as to afford no basis for a judgment in favor of the defendant. 17 C. J. 756; 8 R. C. L. 438; *Bredemeier v. Pacific Supply Co.*, 64 Or. 576, 131 P. 312.”

POINT VI.

THE PURPORTED ACCOUNTING ADOPTED BY THE TRIAL COURT WAS IN CONTRAVENTION AND VIOLATIVE OF THE RULES OF DISTRIBUTION AND ACCOUNTING OF PARTNERSHIPS.

The purported accounting adopted by the trial court was in contravention and violative of the rules of distribution and accounting of partnerships.

The trial court found in its Findings of Fact at paragraph 26 (R. 39) that plaintiff's accounting with the partnership resulted in the sum of \$1906.99 owing to plaintiff. In paragraph 25 of the same Findings of Fact the trial court found that the advances and contributions to the partnership by Davie amounted to \$14,473.91. Based upon such Findings the trial court made the amazing conclusion of law at paragraph 8 (R. 41) as follows:

“8. That since, by the agreement of the parties, the plaintiff was entitled to receive a royalty of 25 cents per ton to be paid monthly for materials sold from the mining claims until \$20,000 was paid to him, and since the defendant was entitled to receive from profits of operation of the mining claims repayment for advances which he agreed to make for purchases of equipment, and since the parties have now abandoned the partnership operation and no further royalties or profits will be received, it appears to be equitable to offset the plaintiff's right to royalties against the defendant's right to repayment for advances made and agreed to be made by him for equipment.”

In any event, under the provisions of the Uniform Partnership Act, *Sec. 48-1-37, Utah Code Annotated 1953*, each partner is entitled to payment of debts owing to him and to return of his contributions. A case in point, *Tiffany v. Short*, 22 Cal. 2d 531, 139 Pac. 2d 939, reads, in part, as follows:

“The trial court found that the agreement was a joint venture. The general rule applicable to dissolution in such cases is that in the absence of an express agreement to the contrary, the person advancing capital is entitled to its return before

there is a division of income or profits. The rule is stated in 47 Corpus Juris 1172, section 861, as follows: 'Upon dissolution of a firm the capital remaining after payment of the debts should be divided in accordance with the respective interests of the partners. While it has been said that, in the absence of any evidence showing a contrary intent, capital will be divided equally the general rule is that each partner is entitled to the amount of capital that he contributed, this being regarded as a debt of the firm to be repaid in whole if the firm assets are sufficient, and pro rata if firm assets are insufficient.' It is further stated (page 1173) that a partner contributing only service is ordinarily not entitled to a share of capital on dissolution. See also 47 C. J. 1163-1164, secs. 848, 849; 30 Am. Jur. 690, 704, secs. 27, 51, and cases cited. The decision in *Gulstrand v. Johnson, Carvell & Murphy* (a corporation), 37 Cal. App. 2d 610, 99 P. 2d 1065, is in accord with this general rule. That was an action for an accounting in a joint venture. The trial court found that the defendant by the terms of the agreement was to furnish the capital necessary to make all purchases of stock and materials and that it was not entitled to a refund of the money spent for that purpose. On appeal the judgment was reversed. The reviewing court concluded from the terms of the agreement and the statements rendered in the previous four and one-half years' business that the funds were to be considered as an advance, and that therefore the defendant was to receive credit and be reimbursed for such expenditures. Since the amount remaining was insufficient to reimburse the defendant, plaintiff recovered nothing. In the present case there was no specific agreement as to division of assets upon dissolution. Therefore, a division and distribution into equal parts before the return of capital, all of which had been advanced by one

partner, would be improper. None of the manufactured devices had been distributed by the partnership. There had been no sales. It is clear from the terms of the agreement that the funds furnished by defendant Short were in the nature of advances, since they were to be furnished by him 'until such time as the revenues and net income from the above-mentioned enterprises shall suffice to make further investment unnecessary.' On dissolution the profits could be measured only after Short had been reimbursed. There was no agreement to the contrary and his advancements were therefore a debt of the firm."

Appellants are unable, in any manner, to reconcile either the theory or mechanics used by the trial court in the purported accounting in this matter. It is obvious and apparent that the contributions by the partners to the partnership were so manifestly disproportionate that a conclusion of law (R. 41) that the partners should be declared equal owners in the remaining assets cannot possibly be justified as a matter of law or equity. The result amounted to gross injustice. A casual study of the accounts reveals immediately that, because of limited assets, this plaintiff made the most nominal contribution and that the defendant will be "holding the bag" after making large and substantial money contributions.

CONCLUSION

The judgment of the trial court resulted in an absurd result and a miscarriage of justice, whether law or equity. In spite of Bradshaw's denial of his executed written agreement, Davis poured large sums into the arrange-

ment until the threat of litigation was made by Bradshaw. It is evident that Davie will suffer this great monetary loss besides his own personal time and efforts. Bradshaw loses substantially nothing. The trial court would, without support of evidence, law or a proper sense of equity impose upon Dr. Davie the obligation of an additional large sum of money to be paid not to the partnership operation but to Bradshaw. It is appellants' strong feeling that no appellate court will condone such an abortion of justice.

Appellant submits that the trial court erred in the various rulings and acts set forth under the points herein presented and argued.

Respectfully submitted,

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