

1963

# Rulon R. West v. Terry R. West and Flora E. West : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *West v. West*, No. 9870 (Utah Supreme Court, 1963).

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## IN THE SUPREME COURT

of the  
STATE OF UTAHFILED  
JUN 13 1963

RULON R. WEST,

*Plaintiff and Appellant,*

vs.

TERRY R. WEST and FLORA E.  
WEST,*Defendants and Respondents.*

Clerk, Supreme Court, Utah

Case No.  
9870

## APPELLANT'S BRIEF

Appeal From a Judgment of the Third District Court  
For Salt Lake County  
Honorable A. H. Ellett, JudgeBryce E. Roe  
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Salt Lake City 1, Utah  
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IN THE SUPREME COURT  
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RULON R. WEST,

*Plaintiff and Appellant,*

vs.

TERRY R. WEST and FLORA E.  
WEST,

*Defendants and Respondents.*

} Case No.  
9870

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APPELLANT'S BRIEF

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STATEMENT OF KIND OF CASE

This was an action brought by a partner against his two co-partners for dissolution and winding up of partnership affairs, an accounting by the managing partner, and distribution of partnership property remaining after the payment of partnership liabilities.

DISPOSITION IN LOWER COURT

Neither of the respondent partners objected to dissolution of the partnership. The lower court, on

appellant's motion and over respondents' objections, appointed a receiver to take possession of partnership assets, manage them pending sale, sell them, and wind up partnership affairs. Partnership assets (primarily a motel, trailer park and trailer sales office) were sold, whereafter the court appointed a special master to take evidence with respect to the accounting to be rendered by respondent Terry R. West. The court made some adjustments as to amounts due from the partners to each other and entered a judgment (on the basis of an interlocutory summary judgment entered at an earlier stage of the case) that all funds of the partnership after payment of creditors other than partners, and deduction of the costs and fees of the receivership were to be paid "40% to Rulon West, 40% to Terry West and 20% to Flora E. West." In other words, the court ruled that appellant was not entitled to return of amounts he had contributed to partnership capital, nor to amounts he had loaned to the partnership during operation of the motels, regardless of the disparity between his payments and respondents' payments.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of that part of the judgment establishing amounts to be distributed to the partners, and entry of a decree that the receiver pay all liabilities to partners, including capital contributions and loans before making distribution to the parties in the proportions shown; also that the plaintiff Rulon

R. West be paid interest as provided in the partnership articles.

In event the court does not enter a decree as requested, then appellant seeks remand to the District Court for trial of fact issues bearing upon interpretation of the articles of partnership, and dissolution agreements, and whether amounts paid into the partnership by appellant were capital contributions, or loans, or gifts.

## STATEMENT OF FACTS

The primary dispute has been over the extent to which the partners are entitled to participate in distribution upon winding up of partnership affairs. Inasmuch as the lower court did not try the issue but granted a summary judgment with respect to the distribution, it must have concluded that there were no material facts in dispute. This statement of facts, therefore, will refer severally to the pleadings, to undisputed facts, and to facts lying within an area of dispute.

[References to pages of the official record will be prefaced by "R", and those to depositions by the name of the deponent. Because of the identity of family name, the appellant will sometimes be called "Rulon," the respondents "Terry," and "Flora."]

### *The Pleadings*

The complaint (R. 1-10) was in three counts. The first alleged a dispute as to the meaning of the partner-



ship articles with respect to distribution upon winding up of the partnership, and asked for a declaratory judgment; the second alleged dissolution of the partnership by appellant and a refusal by Terry West to wind up partnership affairs; the third alleged disagreement between appellant and Terry, a disregard by Terry of the appellant's requests, instances of Terry's improper management, and his failure to render an accounting, the prayer being for a decree of dissolution and court assistance in winding up partnership affairs.

In his answer (R. 11-13) Terry admitted the partnership agreement and that he claimed to be entitled to 40 per cent of all partnership assets, including contributions and advances made at any time by the appellant; he denied there had been a dissolution by appellant and alleged that on April 2, 1960, the parties had entered into a written dissolution agreement [apparently signed by appellant on March 31], annexed to his answer as Exhibit 2 (R. 19-22); he admitted that appellant had paid approximately \$148,000.00 into the partnership by way of either contributions or loans but alleged that all of the money paid in by the plaintiff was "capital contribution." As an affirmative defense Terry repleaded the dissolution agreement of April 2, 1960, as well as an agreement supplemental to it (R. 18) from which he concluded that the appellant by those "and other written instruments" had "transferred and reaffirmed transfer to defendant, and defendant accepted same, relied upon same, and mate-

rially altered and changed his entire plans and future plans, and changed his position, and accepted said transfer." Terry also alleged that on or about April 2, 1960, by the supplemental agreement, appellant had transferred 40 per cent of his interest to Terry, and that because of this Terry had entered into the dissolution agreement. By a counterclaim and amended counterclaim (R. 173-17, 23-27) Terry sought 40 per cent of appellant's capital investment and all advances made by the appellant, as well as relief in connection with a separate transaction.

In her answer (R. 28-30) Flora claimed 20 per cent of all appellant's contributions to the partnership "whether at its inception or thereafter and whether by the way of capital contributions or by way of advances to the partnership" and that appellant "is not entitled to any return of contributions or advances;" she also alleged execution of the dissolution agreement dated March 31, 1960 (R. 19-22) and that the agreement had been "ratified, approved and confirmed by" her; she admitted that Rulon contributed substantially all of the initial capital of the partnership. In her second defense Flora took the position that by the partnership agreement dated October 15, 1957, she received a 20 per cent interest in "all of the partnership property howsoever the same was received by the partnership, including capital contributions, whether made at the inception of said partnership or thereafter, and the undivided profits and income therefrom, and plaintiff by said contract of partnership is estopped to deny

or claim otherwise." In her third defense she stated that on October 15, 1957, the date of the original articles of partnership, appellant had made a gift to her of 20 per cent of all the contributions made to the partnership by him. She stated that in reliance on it she had materially altered her position, but she did not say how. In a fourth defense she stated that the instrument in writing dated on or about the 31st day of March, 1960, and the one dated the 2nd day of April, 1960 (R. 19-22, 18), served to confirm, ratify, and approve the 20 per cent interest given by the original partnership agreement. Respondent Flora did not contend that either the agreement of April 2, 1960, or the supplement to it, itself operated as a gift in her favor.

### *Undisputed Facts*

Prior to September, 1957, Rulon R. West, appellant here, occasionally had expressed interest in purchasing a motel. About that time his son, Terry, saw an advertisement for the sale of the El Rancho Motel in Murray and reported it to Rulon (Terry 3; Rulon 7). Thereafter, at Rulon's request, Terry made an offer to purchase the motel, which was accepted (Terry 4).

A contract was entered into which Rulon and Terry were purchasers, and a down payment of \$47,500.00 was made by Rulon (Terry 5-6). On about October 15, Rulon, Terry and Flora executed "Articles of Partnership" under which they began to operate the motel. The interest in the real estate was contributed

to the capital of the partnership. A copy of the partnership agreement is annexed to the complaint as Exhibit "A" (R. 6-10), and to this brief as Appendix "A".

The motel business was operated by the partnership as such until about March 21, 1960, when Rulon's attorneys sent a letter (R. 5) to Terry announcing his withdrawal and requesting Terry to wind up the partnership and distribute assets.

The partners negotiated toward a dissolution agreement. On March 31, 1960, Rulon executed the dissolution agreement and it was executed within a day or two thereafter by Terry (R. 12, par. 4). The agreement was not executed by Flora until sometime in January, 1961—after the present legal action had been initiated (Flora 20). The agreement is at R. 19-22, is an exhibit to Rulon R. West's deposition, and is Appendix "B" to this brief.

At about the time the dissolution agreement was signed by Terry (just before, according to his answer, R. 12, par. 3) Terry's attorney presented to Rulon what purported to be a supplemental agreement, dated April 2, 1960, the main purport of which was that "with respect to the 40% interest" acquired by Terry West, and the interest acquired by Flora West (whatever those interests were) it was *agreed* that they had been acquired by gift and that Rulon would file a gift tax return and absorb any losses. A copy of the "supplemental agreement" is annexed to Terry's answer (R. 18) and is Appendix "C" to this brief.

Although the dissolution agreement and its supplement had been executed by Terry and Rulon by April 2, 1960, partnership affairs were not wound up and on January 6, 1961, the complaint was filed in this action.

### *Facts Which May be in Dispute*

After the action was initiated interrogatories and depositions were used by all parties. There are conflicting stories as to what the partners had in mind when certain funds were advanced to the partnership by Rulon, as well as to the circumstances under which the dissolution agreement and supplemental agreement were signed.

Some of the facts set out in this subdivision may not be "disputed" in the usual sense, the versions related by the respective parties being consistent in many respects. But the coloration is different and the possible impression upon a fact-finder (had the trial court permitted a fact-finder to hear the evidence) is important in connection with this appeal. The lower court's judgment nominally was based upon the prior discovery as well as the pleadings (R. 107, 110).

Terry, who had been through business management school and graduated in accounting, drew the agreement, according to Rulon, though Rulon suggested that it might be polished up by an attorney (Rulon 10). The division of profit and loss was changed from 50-50 to 40-40-20 to permit Flora to participate (Terry 7).

Flora didn't know she was going to be a partner until the parties met to sign the agreement (Flora 9), and neither did Rulon (Rulon 11). Terry says he understood the capital of the partnership was to be distributed 40-40-20 on distribution no matter who contributed or in what proportions (R. 7-8). But Flora at times says "gifts" of percentages made by Rulon were not made until Rulon signed the supplemental agreement in Murray on April 2, 1960 (R. 13).

There are a number of activities of Terry and Flora which, to a fact-finder, would have significant bearing on construction of the original articles of partnership. For example, notwithstanding Terry's claimed "understanding" that all of the capital from whatever source would be distributed 40-40-20, accountant Terry maintained separate capital accounts, and amounts contributed and loaned by Rulon were credited to Rulon's capital (Terry 8); they remained so credited until after Rulon gave notice of dissolution. On June 15, 1960, Terry made a charge against Rulon's capital account and transferred 60 per cent of his capital credit to Terry and Flora, the amounts being approximately \$30,000.00 to Flora and \$59,000.00 to Terry (R. 51, No. 5; R. 54, 58, No. 5). This was done, according to Terry, on the basis of the dissolution agreement (Appendix "B").

Neither Terry nor Flora contributed to the beginning capital (Terry 12, R. 6, par. 3) but after the partnership was in operation Terry "contributed" part of his salary (ex parte) by taking credits to his capital

account (Terry 12). After the partnership began Rulon "loaned" to the partnership (Rulon 12) approximately \$100,000.00, which Terry says was "invested" Terry 19). When money was needed Terry would ask Rulon for it; Terry and Flora gave Rulon an "opportunity of additional investment" by "not hollering when he put the money in" (Terry 20). When Rulon received this opportunity and took advantage of it he was given a credit to his capital account (Terry 20), but it was Terry's understanding that each time he obtained money from Rulon 40 per cent was to be his (Terry 21). The provision in the articles requiring the partners to consent to increased contributions to capital was for the "protection" of the three partners (Terry 22), but Rulon was to receive credit for his contributions or loans only as long as the business was operated (R. 23), and Terry at one time interpreted the agreement as requiring him to repay Rulon in event of loss (Terry 28). Terry also testified that he construed the partnership contract as an agreement by Rulon to make a gift; and that he would not have to repay Rulon for losses, but that he and Flora would join in bearing the loss of what Rulon had given them (Terry 28).

Accountant Terry kept all the partnership books (Terry 23) but no entry was ever made in any of them showing that Terry and Flora were to get part of Rulon's money until late spring of 1960, after notice of dissolution (Terry 33).

The letter of March 21, 1960, in which Rulon stated



that he was withdrawing was “the second time other than the—or the first time other than the original partnership he showed an indication of expecting only a 40 per cent return of capital” (Terry 38). Between the signing of the partnership articles and the date of the letter Rulon had done nothing to indicate that he expected to get back only 40 per cent (Terry 38). Moreover, Terry didn’t regard any “gift” as having been made in the original partnership agreement, but only as having been “promised” (Terry 40). After the partnership agreement had been entered into Terry had given financial statements relating to his own affairs but they did not show any interest in Rulon’s capital account (Terry 41).

Sometimes when Rulon advanced money he said he was “investing,” according to Terry, and sometimes he didn’t say anything, but just made the money available when requested. Terry had no letters from Rulon indicating that he was “investing” (Terry 50). Rulon did show the contributions or loans as his asset (R. 51). During the time he was operating the partnership and keeping its books Terry did not furnish any partnership returns and there was no division of profits (Terry 52).

Flora didn’t know much about the partnership, how it was operated, or how it came into existence. She took the view that her 20 per cent was given to her at Murray by the supplemental agreement of April 2, 1960, not by the partnership articles (Flora 13). More-



over, she understood that tied to the "gift" was the proposition that Terry was to buy the interest of Rulon in the partnership, and that all papers were signed except for the paper indicating how Terry would pay for Rulon's interest (Flora 13). The only thing Flora had ever been concerned about was profit and loss, because she didn't think the business would be sold. She might have to dig up some money to meet the losses (Flora 14-15). She also understood that she was to get part of the assets, but the understanding about her receiving 20 per cent of Rulon's capital came solely from the partnership agreement, since the parties hadn't discussed the matter (Flora 17). [The inconsistency is Flora's not ours]. There were no meetings at which the partners agreed that additional investments might be made by Rulon (Flora 17-18).

Flora did make "loans" to the partnership (Flora 21) for which Terry gave her notes. But the notes were destroyed by her or Terry after they were paid off. She was not requested to "invest" in the partnership (Flora 21). Rulon didn't examine the books, according to her, and he never told her that she and Terry were to have 60 per cent of his payments into the partnership. When Terry came to him for additional moneys, it was Rulon's understanding and Terry's too, that notes were to be delivered. He discussed this with Terry many times and kept copies of correspondence relating to notes; moreover, he has witnesses to prove it. The notes were to bear interest at 5 per cent, a matter which was talked about on numerous occasions (Rulon

12-13). But he never did receive any interest. Rulon had requested on numerous occasions that the notes be executed and delivered to him (Rulon 25-27).

Terry's receiving part of Rulon's investment (or loans) to the partnership as an advancement of his "inheritance" was first discussed in Murray with Mr. E. L. Schoenhals (Terry's lawyer) a few hours before Rulon was to leave for South America on a trip (Rulon 31). Rulon signed the dissolution agreement (Rulon 34). The supplemental agreement of April 2, 1960, was "sprung on" Rulon at Murray just at the time the dissolution agreement was signed (Rulon 34). Rulon was surprised by the supplemental agreement because it had never been discussed (Rulon 36). Terry's attorney at that time worked upon Rulon's passion and pressure for time, talking to him about inheritance and taxes when he was in a great hurry to leave (Rulon 37-38). Moreover, part of the understanding was that Rulon would get 6 per cent interest on all the money he left in the partnership. The luncheon meeting was the first time Rulon saw the supplemental agreement, and he neither received nor was promised anything for it (Rulon 62).

Accountant Terry's keeping of partnership books was slipshod with respect to things other than Rulon's capital. He purchased a car in the company name which was a "contribution" to capital (Terry 12, 18), but it was his car because he made the down payment (Terry 18), and was the company's car for income tax pur-

poses (Terry 18), and if the partners decided to go strictly by the partnership articles, probably the car would be a company car (Terry 32).

Although Terry treated Rulon's advances to the partnership as contributions to capital in which he and Flora were to share, he "borrowed" money from Flora on at least four different occasions (R. 47), and then paid the money back to her out of partnership funds with 8 per cent interest.

On about June 15, 1960, Terry gave to Flora, out of Rulon's capital account, a credit of \$30,000.00, which is shown in his answer to interrogatories as "recording transaction between R. R. West and Terry R. West made in April, 1960" (R. 54). At the same time Terry took credit on his own capital account in the amount of \$59,000.00.

Rulon has shown the El Rancho as one of his assets in financial statements furnished by him (R. 61, 66, No. 1(b)). He didn't know Terry was borrowing money from Flora (R. 72, No. 31).

All of the above matters were in record at the time the appellant moved for summary judgment on May 23, 1961). The trial court not only denied the plaintiff's motion for summary judgment but took the position that there were no material facts that could lead to the construction contended for by appellant. It held the defendants entitled to judgment as a matter of law that they receive 60 per cent of all amounts

that had been paid into the partnership, whether by way of contribution or loan, by appellant. It is not clear whether the court was relying upon the partnership itself (Appendix "A") or upon the dissolution agreement and supplement to it signed by two of the partners on about April 2, 1960 (Appendixes "B" and "C"). At the hearing on the motion for summary judgment (R. 96) appellant objected to the introduction of evidence and resisted an attempt by the trial judge to have appellant proceed forthwith to trial for the purpose of determining the disputed questions of fact (R. 99). Appellant pointed out to the court the material issues of fact which needed to be tried (R. 89-102). When the defendants purported to rely on the agreement of April 2, 1960, the appellant offered to show Terry's undue influence in obtaining it (R. 97). It was pointed out to the court (R. 98-100) that the appellant's position would be that the "additional amounts that were paid by Rulon R. West to Terry R. West were not and never intended to be contributions to capital, that they were loans to the partnership, and that the evidence in the case of a trial of this thing would so show." It was also pointed out that one of the agreements of Terry West in consideration of the supplemental agreement was that Terry would buy out Rulon's interest in the partnership, which he never did do.

When the appellant refused to enter into a court-suggested settlement with respondents, the court entered an order that the assets of the partnership would

be divided 40 per cent to Rulon, 40 per cent to Terry “by way of a gift” and 20 per cent to Flora “by way of a gift” after payment of liabilities to outsiders. This applied to all advancements to the partnership by Rulon whether contributions to capital or loans (R. 105-106).

On June 29, 1962, the court appointed a special master to hear evidence concerning partnership accounts. At that time the court withheld from consideration by the master the amounts that had been standing in the capital accounts of the partners and the interest thereon. Thereafter, on January 7, 1963, the special master filed his report and, consistent with the court’s discretion, did not make any allowance for interest to the partners on the amounts standing in their capital accounts despite an express provision in paragraph 4 of the articles. An objection was raised to the master’s report on this ground, among others (R. 165-166), but the objections were overruled and a final judgment was entered by the court on February 27, 1963, directing that all assets of the partnership — non-partner creditors having been paid—would be paid 40% to Rulon, 40% to Terry, and 20% to Flora.

## ARGUMENT

### I

*The court erred in directing that the assets of the partnership be distributed 40 per cent to appellant and 60 per cent to respondents without prior repayment of loans and capital contributions of the partners.*

The decision can find justification only in some agreement between the parties; and the only agreements upon which any reliance has been placed by respondents were the partnership articles, the April 2, 1960, dissolution agreement, and the agreement supplementing it. There is no help for respondents in the statutes.

*(a) Under the Utah Partnership Act liabilities to partners are to be paid prior to distribution, in the absence of an agreement to the contrary.*

The Utah Partnership Act in at least two sections recognizes the right of obligee-partners to be paid prior to distribution. The first, 48-1-15 Utah Code Annotated 1953, provides:

“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, 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. \* \* \*

(3) A partner who in the 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. \* \* \*"

Related provisions in 48-1-37 Utah Code Annotated 1953, govern distribution of assets upon dissolution:

"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) 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 profit.

(c) Those owing to partners in respect of capital.

(3) The assets shall be applied in the order of their declaration in subsection (1) of this section to the satisfaction of the liabilities."

Under the statute itself appellant is clearly entitled to the return of his capital and, indeed, to recoupment of his losses. The taking away of his rights, therefore, must be found in one of the three agreements appended to this brief; and the agreements do not lend themselves reasonably to the trial court's interpretation.

(b) *The partnership articles do not contain any agreement that liabilities to partners are not to be paid prior to distribution.*

It is impossible to determine whether the summary judgment was based upon the articles or the subsequent agreements. None of them contains an agreement showing an intention to wind up differently than provided in the statute.

The partnership articles contain two provisions which, read together, refer to distribution of assets after winding-up:

"6. The net profits of the business shall be divided between the partners in the following proportions: Rulon R. West, forty per cent (40%); Terry R. West forty per cent (40%) and Flora E. West twenty per cent (20%); and the partners shall in like proportion bear all losses including loss of capital.

12. \* \* \* If the partnership shall be determined or expire during the joint lives of the partners, then *the partnership shall be wound up*, and the assets distributed in the proportions set forth in paragraph 6 above hereof." (Emphasis added.)



The word "assets" is not defined in the articles of partnership. Moreover, it could not have been used in the same sense as in the Partnership Act, which defines assets to include (1) partnership property, and (2) contributions of the partners necessary for the payment of all partnership liabilities (including liabilities to partners). If this definition were applicable to the term as used in the articles, distribution would be contemplated even before non-partner creditors were paid.

The trial court, in effect, construed "assets" to mean capital remaining after payment of non-partner liabilities, as if "assets" and "capital" were synonymous. But the agreement itself did not treat the terms as equivalents. Paragraph 3, referring to capital, calls it "capital," not "assets." Paragraph 11 refers to the share of a deceased partner "in the capital *and* assets"—two different things. The above usages are consistent with the construction that assets means *net assets*, i.e., the surplus remaining after payment of partnership liabilities.

Supporting the conclusions based upon choice of words are contract provisions completely inconsistent with the trial court's interpretation:

Paragraph 3(b) in defining the capital excludes sums paid in by partners for "non-capital purposes." Capital is to consist of beginning capital and sums any partners "shall with the consent of the others from time to time contribute for capital purposes," which are to be "credited to his capital accounts." Maintenance of

capital accounts would seem to indicate that they are to serve a purpose with respect to the "ownership" interests of the partners. Why maintain capital accounts if the partners are to share 40-40-20 regardless of credits to those capital accounts?

Paragraph 4 provides that interest shall be paid on amounts in the capital account of each partner, that it shall accumulate, and that if it is not paid in one year it shall be made up out of gross profits of succeeding years. As construed by the trial court the interest is cumulative only if the obligee-partner manages to get his hands on it before dissolution—because the partners are entitled to assets 40-40-20, and anything that happens to be remaining in the partnership at dissolution is an "asset."

Under paragraph 6 the partners are to "bear all losses, including loss of capital," in the proportions in which they share profits. But as interpreted by the trial court, losses of capital are to be borne by the partner who contributed the capital, in this case appellant.

Accounting provisions in paragraph 8 were ignored by the trial court. That paragraph requires an account to be taken annually, at which time there is to be a "recouping of any loss of capital," and after adjustments for depreciation and recouping, the net profits may be divided. A contributing partner is entitled to an adjustment, and if there has been a loss of capital the profits are to be used to pay that partner. But the trial court would require this adjustment only if made

before dissolution, and any partner could prevent the payment by dissolving the partnership at a propitious moment, the partnership "assets" then being bundled up and distributed in the proportions set out in paragraph 6 without regard to any recoupment of loss of capital.

Paragraph 11 prescribes a method for surviving partners to purchase the interest of a deceased partner. A formula is set out under which the purchase price is the amount "at which such share [of the deceased partner] shall stand in the *last balance sheet* which shall have been prepared prior to the death of said partner plus ten per cent (10%) thereof." (Emphasis added). The "balance sheet" is described in paragraph 8, and is supposed to make allowance for depreciation and the recouping of lost capital. Paragraph 11 then requires the surviving partners to pay as the base price for the deceased partner's interest an amount generally equivalent to the credit to his capital account. Interest and 10% is to be added to the base price.

If Rulon had died, and Flora and Terry had elected to purchase his interest, there would have been an obligation to pay the amount that should be standing to the credit of Rulon's capital account, plus ten per cent, plus interest on the above. Under paragraph 12, however, if the deceased partner's interest is not purchased by the surviving partners pursuant to paragraph 11, "then the partnership shall be wound up, and the assets distributed in the proportions set forth in paragraph

6 above hereof.” Under the interpretation adopted by the trial court, Flora and Terry as surviving partners could either: (1) purchase Rulon’s interest; or (2) get 60% of it for nothing. For under the trial court’s “everything is asset” theory, all property in the partnership at the date of death would be distributed to the partners 40-40-20 regardless of the state of capital accounts, loans, or contributions. The virtue of simplicity cannot overcome the sin of incongruity, and application of the trial court’s theory would render paragraph 11 silly and meaningless.

Admittedly, none of the partners had died, as anticipated in paragraph 11, but under the provisions of paragraph 12, the partnership is to be wound up and distributed *in exactly the same way* whether (1) a partner dies and the option to purchase is not exercised, or (2) the partnership “shall be determined or expire during the joint lives of the partners.”

Paragraph 12 contains a provision that the partnership shall be “wound up” and the assets distributed. Use of the term “wound up” implies an intention that things will be done that are inherent in the winding up process. These include payment of obligations, not only to non-partner creditors but to partners. *Duncan v. Bartle et al.*, 188 Ore. 451, 216 P.2d 1005 (1950), was an action for dissolution of partnership and adjudication of accounts. The main issues of the case revolved about questions of date of dissolution and proper book-keeping, but the court had this to say about termination, dissolution and winding up:

“A dissolution of a partnership must precede its termination. The order of events is (1) dissolution, (2) winding up, and (3) termination. A dissolution may be brought about by a partner for any of the causes recited in [the Oregon Partnership Act], or by a decree of the court \* \* \*. Dissolution does not terminate the partnership \* \* \* and does not end completely the authority of the partners. Termination extinguishes their authority. It is the ultimate of the winding up and occurs at the conclusion of the wind up. Dissolution according to [Oregon Partnership Act] leaves the partners with authority ‘so far as may be necessary to wind up partnership affairs or to complete transactions begun but not finished \* \* \*’

“Winding up, of course, means the termination of the assets for the purpose of terminating the business and *discharging the obligations of the partnership to its creditors and members.*” (Emphasis added.)

Paragraph 15 deals generally with winding up. Upon termination of the partnership there is to be a final accounting of all things relating to the business and an *adjustment of accounts*, whereafter “all stock, as well as the gains and increases thereof, including all real and personal property, *which shall appear to be remaining*, either in money, goods, wares, fixtures, debts or otherwise shall be divided between them in the proportions set forth” in paragraph 6. Paragraph 15 had no meaning for the trial court; it looked at “assets” as those things which happen to be in the partnership at the time of dissolution, without regard to adjustments,

loans, undistributed income, interest, losses, or credits or debits to any capital accounts. (It did permit some of the assets to be used to pay non-partner creditors before making the 40-40-20 split; otherwise “winding-up” meant “distributing”.)

The basic question involved in construction of the articles of partnership is whether a provision that “assets” will be distributed 40-40-20 after winding up means that liabilities to partners need not be paid; for 48-1-37 Utah Code Annotated 1953 provides that such liabilities will be paid, subject to “any agreement to the contrary.” We submit that the trial court—in attempting to achieve what it may have deemed a “just” result—has overreached the sinews of reason, leaving construction of statute and articles strained and sore.

Other courts, in construing partnership agreements, have been reluctant to give one partner’s property to the others in the absence of some clear expression by the partners; and the only expression found in the present agreement is a reference in one paragraph to distribution of “assets”—a term easily construed to mean net assets after the payment of liabilities, including liabilities to partners.

It has long been recognized that partners’ contributions to the partnership should be repaid; *a fortiori*, loans by partners to the partnership should be repaid. Two text-book cases dealing with partnerships and the nature of the partners’ interests are *Whitcomb v. Con-*

*verse*, 119 Mass. 38, 20 Atl. 311 (1875) and *Leserman v. Bernheimer*, 113 N.Y. 39, 20 N.E. 869 (1889).

*Whitcomb v. Converse* was an action to compel contribution to make good the losses of a partnership which had been organized in 1871 to continue one year. The articles provided that Converse was to contribute \$25,000.00, receive 7 per cent on it, give such time to the business as he was able, and receive  $\frac{1}{4}$  of the net profits; Whitcomb was to contribute \$50,000.00, receive 7 per cent interest, give all his time, and take  $\frac{1}{4}$  of the net profits; Blagdon and Stanton were both to contribute all their time and receive  $\frac{1}{4}$  of the net profits each. Whitcomb put in \$25,000.00 of the agreed \$50,000.00. The partnership was dissolved by mutual consent and Whitcomb authorized to close up the business. He did so and claimed contribution because of a loss to the firm of \$25,000.00. The court said:

“\* \* \* where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest, but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the



same proportion as other debts of the partnership. \* \* \*

“The partners were by agreement to receive each  $\frac{1}{4}$  of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse respectively for the amount of capital paid in by them.”

*Leserman v. Bernheimer* was an action for settlement of partnership accounts. In discussing the nature of the interests of the partners in the partnership property the court said:

“The interest of each partner in the partnership property is his share in the surplus after the partnership accounts are settled and all just claims satisfied. In this case, by the terms of the partnership, the partners were to contribute equally, from the beginning of the partnership to its dissolution. There is no evidence which requires or would permit any finding that this arrangement had been changed, nor are we referred to such finding. It would seem to follow that the division of profits and charge of losses should be in the proportion of one-third of each to each partner. To carry out that mode of adjustment as the one provided by the agreement of the parties, *the advances made by either partner beyond the capital called for by that agreement should be treated as a debt due from the firm, paid out of the surplus before any division is made upon the partnership capital.* If that advance was not in strictness to be regarded as a debt during the existence of the firm, nor until



the debts of the firm to third persons were satisfied, it came into that relation the moment those debts were paid, and the concern, as regards its business and its outside obligations wound up.” (Emphasis added.)

In *Kaufer v. Rothman*, 4 N.J. Misc. 1029, 135 Atl. 266 (1926), a bill for construction of a partnership agreement, the court rejected a contention that a provision for certain shares precluded prior repayment of capital. The agreement contained the following provision:

“At the expiration of one year period of the co-partnership, and in the event that it is mutually decided to discontinue the partnership, the said Abraham A. Kaufer is to retain the aforesaid business, and said Abraham A. Kaufer is to pay to the said Jacob Rothman  $\frac{1}{2}$  of the physical assets of the firm at the termination of the co-partnership.”

The court concluded that the agreement was predicated upon the terms of the agreement that the partners were to make equal contributions to capital, holding that there should be an adjustment in the capital accounts resulting from the fact that Kaufer had contributed some \$13,000.00 as against Rothman's \$1,600.00. The court rejected, as being manifestly unjust, a contention by Rothman that the agreement should be literally interpreted and that he should be able to take over the business by payment to Kaufer of  $\frac{1}{2}$  of the assets without regard to adjustments to the capital accounts.

In *Vollet v. Pechenik*, 380 Pa. 342, 110 A.2d 221 (1955), one partner brought an action against the other partners for an accounting on dissolution. The Pennsylvania Supreme Court held that a provision of the partnership agreement that one of the partners should receive, in addition to his salary of \$15,000.00 per year, 20 per cent of the annual net profits of the partnership, calculated annually after deduction of his base salary and the base salary of another partner, did not apply to profits made by the partnership on liquidation of partnership assets when the partnership was dissolved. The court held that he was to share in those "profits" according to his capital account.

Another case refusing to torture a partnership agreement into one requiring a contributing partner to give up his contribution is *Glenn v. Weill et al.*, 319 Pa. 380, 179 Atl. 563 (1935). The accounting credited each partner with a  $\frac{1}{3}$  interest, but the trial court found this feature of the accounting to be improper and ordered distribution according to amounts contributed. The partnership agreement contained nothing as to contributions to capital but the initial capital was carried on the books in certain amounts for each partner. The partner who had contributed nothing on the books averred that these were not contributions, but payments for an interest in the business. Both courts found this contention without merit. The Pennsylvania Supreme Court said:

"Under these circumstances, the  $\frac{1}{3}$  interest in the business mentioned in the agreement was

undoubtedly a 1/3 interest in the profits and losses, and in any surplus after paying off all the debts."

After quoting the provisions of the Uniform Partnership Act with respect to dissolution and distribution, the court went on:

"\* \* \* It necessarily follows that where, as here, the books of a partnership show an unequal contribution of capital and there is nothing in the partnership agreement to show the capital should not be returned in proportion to the amounts contributed, that return will be governed by the ordinary rule of law, which is, that the distribution of capital upon dissolution of a partnership is in the same proportion in which such capital was furnished."

*Adam v. Obarr*, 123 Cal. App. 36, 11 P.2d 11 (1932), was an appeal from a judgment dissolving a meat-and-grocery partnership, ordering an accounting, and directing the payment of debts, sale of assets, and distribution among the co-partners. The trial court determined that although the original agreement was for respondent's purchase from appellant of a 1/2 interest in the business, this had been changed by a later oral agreement to the effect that respondent should contribute to the partnership capital an amount equivalent to the original investment of appellant. They found that he did so contribute in equal amounts. The appellate court held that the trial court had correctly ordered that after payment of the partnership debts and before distribution of the remaining assets the withdrawals

of the partner should be equalized by the payment to respondent of an amount equivalent to the excess withdrawn by appellant.

The court was wrong, too, insofar as it determined that the amounts paid into the partnership by Rulon were "capital contributions" as distinguished from "loans" and that there was no obligation to repay them. The presumption is that amounts contributed by Rulon not required by the partnership articles were loans. See *M & C Creditors Corporation v. Pratt*, 281 N.Y. 804, 24 N.E. 2d 482 (1939), a suit brought by an assignee of partnership assets and liabilities to recover part of the amount paid earlier to a deceased partner. The administrator of the deceased partner contended that the partner's interest represented a debt of the firm which, being fixed in amount, could not be affected by depreciation of the partnership assets. It was argued that upon the deceased partner's death the firm owed his estate more than \$224,000.00 and that neither appraisal nor liquidation was necessary to ascertain the amount of the claim. The court through Lehman, J., defined capital to consist of "money, required of the partners by partnership agreement," taking the view that sums voluntarily contributed for the use of the partnership over and above that amount represented an advance to the firm. The court said:

"To the extent that the partnership agreement fails to impose an obligation on the partners to furnish capital requisite for the conduct of the business, the parties to the contract must intend

that money will be borrowed to carry on the business and that interest will be paid on money borrowed. Therefore, where a partner pays money to the partnership beyond his partnership obligation, it is a reasonable inference that the parties intended that such payment should be a loan and should bear interest. \* \* \*

“The items credited to Pratt’s account [between partnership beginning and the death of the partner] may not arbitrarily be characterized as contributions to capital. They were not designated as such. It suggests itself that the other partners would have been required to make proportionate contributions if they had regarded Pratt’s advances as capital. It is conceded that no such payments were made.”

The court held that the money due to Pratt was a fixed debt and an obligation of the firm, and that Pratt’s personal representatives were clearly entitled to the payments made to them.

It would appear that all of the sums contributed by Rulon to the partnership after the date of the partnership, in the absence of some clear subsequent agreement that sums would be added to capital, were loans to the partnership and were to be repaid before there could be a distribution of assets. This would be true regardless of the treatment to be given to beginning capital.

The above cases, the partnership act, and the provisions of the partnership agreement all militate against the construction of the trial court. Moreover, the parties themselves, prior to initiation of the present action,

construed the agreement as providing for a return of capital to Rulon. A contemporaneous construction is found in the manner in which accountant Terry showed the capital accounts on partnership books until after dissolution. It is also found in the provisions of the dissolution agreement (hereinafter discussed), and in the scurrying of Terry's counsel to obtain an agreement on April 2, 1960, that Terry and Flora would not be charged with any losses. This certainly would not have been necessary if the trial court's construction was correct, for the losses were to be borne by whom-ever contributed the most capital.

*(c) Respondents are bound by the dissolution agreement of April 2, 1960, which required payment of liabilities to partners on winding up of partnership affairs.*

The respondents in their answers to the complaint, in the counterclaim of Terry, and in the answers to oral interrogatories, have relied upon the dissolution agreement and supplemental agreement of April 2, 1960, as creating some interest in them. Their contentions are inconsistent in some respects: Flora says both that she received the interest at the time of the articles of partnership and on April 2, 1960, while Terry has generally taken the position that he received 40 per cent of Rulon by virtue of the dissolution agreement. This contention is reflected in the book entry referred to in the statement of facts, charging about \$90,000.00 against Rulon's capital account on the basis of the agreement of April

2, 1960. Regardless of Rulon's original contention as to the binding effect of the agreements of April 2, 1960, the agreements ought to be binding upon the defendants, either as an aid to construction of the partnership or as operative agreements themselves. Terry has pleaded the agreements and Flora, in her answer, has stated that she fully ratified, accepted, and confirmed them.

Paragraph 1 of the dissolution agreement provides:

*"The winding up of the partnership affairs shall consist of selling all real and personal property of the partnership, paying all partnership liabilities (including liabilities to partners), and distributing the net assets of the partnership in cash to the parties hereto in the following proportion:*

Rulon R. West	40%
Terry R. West	40%
Flora E. West	20%

*"When all the net assets of the partnership have been distributed in cash in accordance with the preceding sentence, the winding up of the partnership affairs shall be completed."* (Emphasis added.)

"Liabilities to partners" is clear enough. In subparagraph (2) of 48-1-37 Utah Code Annotated 1953 there is a reference to three classes of liabilities to partners: those owing other than for capital and profits, those owing in respect of capital, and those owing in respect of profits. There is no reason to suppose that



the parties meant to adopt a different meaning for "liabilities to partners," and under the terms of the dissolution agreement it was incumbent upon the court to order payment of liabilities to partners prior to distribution of the remaining assets.

(d) *Neither the articles of partnership nor the supplemental agreement of April 2, 1960, operates as a gift to the respondents of appellant's property.*

The trial court must have asked itself this question: What kind of businessman of ordinary acumen would enter into a contract by the terms of which 60% of all his contributions to a partnership would, ipso facto, vest in his co-partners (neither of whom had any substantial funds to contribute themselves)? And given itself this answer: King Lear or Santa Claus. For the court seemed reluctant to interpret the partnership contract, *qua* contract, as accomplishing what the summary judgment accomplished. Prior to entering the judgment the court said (R. 106):

"All right, then, gentlemen, my order will be that the contract be construed that as of the second day of April, 1960, both of the Messrs. West have a 40 per cent interest, Terry by way of a gift, and that Flora has a 20 per cent interest by way of a gift, and that the distribution of the assets after the payment of debts to outsiders be on this basis."

The court did not make it clear what it relied upon as constituting the "gift" of the 40 per cent interest to



Terry and the 20 per cent interest to Flora, but it must have been either the partnership agreement or the supplemental agreement of April 2, 1960. We submit that neither satisfies the requirements of a valid inter vivos gift.

The courts have consistently affirmed that a valid gift requires an "unmistakable intention" of the donor to make a gift, coupled with such delivery as the nature of the property permits. 24 Am. Jur., Gifts, §§ 21-27. There are no enforceable promises to make gifts. *Id.*, § 23.

In *Holman v. Deseret Savings Bank et al.*, 41 Utah 340, 124 Pac. 765 (1912), the court had the following to say about the requisites of an inter vivos gift:

"Gifts inter vivos have no reference to the future, and go into the immediate and absolute effect. To constitute such a gift, the donor must be divested of, and the donee invested with, the right of property in the subject of the gift. It must be absolute, irrevocable, without any reference to its taking place at some future period. The donor must deliver the property in part with all present and future dominion over it."

And in *Christensen v. Ogden State Bank*, 75 Utah 478, 286 Pac. 638 (1930), this court again recognized that there can be no "executory gift."

At the time of execution of the articles the capital of the partnership consisted of an equity in a real estate contract and \$1,000 cash, both contributed by Rulon. Assuming that the articles could be taken (without

regard to surrounding disputed facts) to show an “unmistakable intention” to make a gift, what was or could have been given? An interest in beginning capital? An interest in any amounts thereafter contributed or loaned by Rulon? Or would the rights of respondents in subsequent payments depend upon the intent existing at the time property or money was delivered? And if a later intent were important, could it have been determined as a matter of law?

The articles of partnership *should not* have been interpreted as making any gift, and *could not* be interpreted as making a gift of amounts to be paid in by Rulon in the future — which amounts weren’t even promised.

Moreover, the evidence is shadowy as to whether there was any gift when the articles were signed. Flora says both that there was and wasn’t. Terry claimed a gift only in the dissolution agreement and supplement, a fact borne out by his accounting treatment of capital, and his post-dissolution “adjustment” of Rulon’s capital account by transfer of approximately \$90,000.00 to himself and Flora.

But the transactions of April 2, 1960, cannot be held to constitute a gift, for there was neither “unmistakable intention” nor delivery. Indeed, the supplemental agreement doesn’t even identify the property that has been or is being given, and is phrased in terms of a bargain for consideration.

The supplemental agreement that Terry's attorney prevailed upon Rulon to sign is entitled "Agreement," and describes itself as being a "supplemental" to the Dissolution Agreement then being negotiated. It states that the parties have "mutually agreed" as to certain matters. In paragraph 1, without showing what "40 per cent" is being talked about, the agreement provides that Rulon "agrees" that the contribution with respect to "the " 40 per cent interest acquired by Terry West was and is a gift, and that Rulon will (prospectively) file a gift tax return. In paragraph 2, he agrees to absorb all losses suffered by the partnership. And in paragraph 3, Rulon "certifies" that "the" interest acquired by Flora was also by virtue of a gift. We submit that the supplemental agreement does not qualify as a binding agreement upon Rulon because not given for consideration. It is not capable of construction contended for by respondents because such a construction is repugnant to plain language of the agreement supplemented, and the language of the agreement can be construed so as not to create such inconsistency. The supplemental agreement appears to be an attempt on the part of Terry to obtain an unjustifiable tax benefit in event there were a surplus.

(If the trial court was relying on the supplemental agreement, it did give Rulon one advantage. To be consistent with its application of 40-40-20, it should have required Rulon to pay into the partnership an amount necessary to increase the capital—if there had been a loss—to the greatest amount he had contributed.

Otherwise, respondents might not receive their full 60%.)

The supplemental agreement does not purport to be a deed of gift and contains no word of assignment or transfer, failing to identify the property “transferred.” At most, it is an agreement as to the method of treatment to be given to a transaction concluded in the past (or contemporaneously with the supplemental agreement). It is inconceivable how the trial court could have construed the supplemental agreement as a gift of 60 per cent of Rulon’s interest in the partnership—not only 60 per cent of the original contribution made in 1957, but 60 per cent of all contributions made thereafter, and 60 per cent of all loans made to the partnership, as well as 60 per cent of all of the interest to which he was entitled, and 60 per cent of all undistributed profits.

In *Jones et al v. Cook*, 118 Utah 562, 223 P.2d 423 (1950), this court adopted the view that there must be a “clear and unmistakable intention” on the part of the donor to make a gift, and that the gift must be proved by clear and convincing evidence. The donee has the burden of proving the gift. *Blonde v. Jenkins’ Estate*, 130 Cal. App.2d 682, 281 P.2d 14 (1955).

We submit that on the basis of evidence found in the depositions and answers to interrogatories, and the statements in the pleadings, a finding of a gift by Rulon to Flora and Terry of 60 per cent of his interest in the partnership “would lack the support of clear and con-

vincing evidence.” Moreover, in this case the court never arrived at fact-finding stage. It determined *as a matter of law* that there are no facts in dispute which could have a bearing upon whether a gift had been, or upon the extent of that gift.

We recognize that the kind of property involved in a partnership may not admit of actual delivery. But it does admit of a less equivocal delivery than had found sufficient by the trial court. The kinds of delivery necessary to constitute a valid gift of a debt to the debtor (essentially our situation) are discussed at length in the annotation, “Gift of Debt to Debtor,” beginning at 63 A.L.R.2d 259. Most enlightening are the cases on page 472 dealing with gifts of partnership interests, where the courts have looked for delivery in some unambiguous action with respect to the partnership books.

In the present case there has been no assignment, and no direction on the part of the claimed donor to make book entries to reflect the “gift.” The book entry made by Terry was his own idea, made two or more months after the April 2 agreement, without Rulon’s knowledge.

## II

*The court erred in withholding from the special master determination of the capital accounts of the partners and the interest due on capital invested in and loans made to the partnership.*

At the time of appointment of the special master an order was prepared and submitted to the court which would have required the master to determine the state of the capital accounts and arrive at a determination of the interest due to Rulon R. West on the amounts that were standing in his capital account. The provision for this determination was stricken by the trial court (R. 146), after which the plaintiff moved that the order be amended to provide for a determination of capital contributions and interest (R. 148), but the motion was denied.

Insofar as the order related to a determination of capital contributions for the purpose of distribution on a 40-40-20 basis, the action of the court was consistent with its interlocutory summary judgment. But the summary judgment did not purport to make a determination of the interest on contributions to which any of the parties was entitled under the plain terms of the partnership agreement.

It does not require extensive discussion to show the error of the court in this respect. The partnership articles were clear on interest. We need refer only to paragraph 4:

“Interest at the rate of five per cent (5%) per annum shall be paid to each partner on the capital for the time being standing to his credit out of the gross profits of the business, and such interest shall be cumulative, so that any deficiency in one year shall be made up out of the gross profits of any succeeding year or years.”

## CONCLUSION

The plaintiff should have had judgment as a matter of law that he was entitled to a return of his contributions, interest on them, and loans to the partnership prior to a distribution of the remaining partnership assets. The partnership articles, if read in their entirety, lead inescapably to the conclusion that the contributions of partners were to be treated as contributions are treated in other partnerships—that is, they were to be repaid.

A construction that the partnership articles contemplated a return of capital is buttressed by the contemporaneous construction of the parties. It is undisputed that Terry West, the accountant, kept the partnership books in such a manner as to show a capital account for Rulon, and that he placed into the capital account various amounts contributed or lent to the partnership by Rulon. On about April 2, 1960, when the parties negotiated and signed a dissolution agreement (later ratified by Flora) it was expressly provided that the liabilities to partners would be paid before the net assets were distributed in the proportions of 40-40-20. As an adjunct to this dissolution agreement there was a supplemental agreement which, possibly, was interpreted by the trial court as a “gift” of something or other. But the supplemental agreement deals only with the method of treating something which it is assumed the other parties already had received. Patently, it is directed at a tax savings for Terry. It

refers only to "the" 40 per cent interest without setting out what it is 40 per cent of. The parties must have assumed that the extent of those interests were determinable by reference to other documents. The only other documents are the articles of partnership and the dissolution agreement, both of which must be construed as providing for a return of capital, for a payment by the partnership of liabilities to partners prior to distribution of assets.

But not only did the trial court refuse to enter a summary judgment in the plaintiff's behalf (which judgment was plainly dictated by the terms of the instruments before the trial court and by the testimony and admissions of the respondents) it violated rules of reason and right to trial by holding, as a matter of law, that appellant had lost 60 per cent of his property. Whether he contributed it as capital, or loaned it, or whether Terry had (as contended by Rulon) promised to execute notes in behalf of the partnership as evidence of the loans made by Rulon, made no difference to the trial court. The trial court not only took away from Rulon and gave to respondents the money he contributed as capital and loaned to the partnership, but excised from the partnership agreement the provision as to payment of interest, and held, in effect, that Rulon would be entitled to profits from operations of the partnership only if he succeeded in getting them away from Terry prior to dissolution.

It is submitted that if the plaintiff is not entitled to judgment as a matter of law at least there are fact



issues concerning the purposes for which money was advanced to the partnership after the date of the articles of partnership, the meaning and effect of the agreements of April 2, 1960, and the question of whether the supplemental agreement was to be conditional upon the respondent Terry West making a satisfactory arrangement with Rulon West to pay for his remaining interest in the partnership. The case, to that extent, has issues of fact which should be tried. The court committed plain error in ruling in the summary judgment that the plaintiff was not entitled to return of his contributions, loans, interest, and undistributed profit, and in construing a completely ambiguous and equivocal "supplemental agreement" to constitute a gift—a construction repugnant to the dissolution agreement to which it was supplemental, and to the articles of partnership theretofore executed by the parties.

The judgment of the trial court should be reversed and a decree entered directing that the receiver repay to Rulon R. West his capital contributions, loans, interest, and undistributed profits before making any distribution of the net assets of the partnership.

Respectfully submitted,

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Appellant

## APPENDIX "A"

### ARTICLES OF PARTNERSHIP

This AGREEMENT, made and entered into as of the 15th day of October, A.D. 1957, by RULON R. WEST, TERRY R. WEST and FLORA E. WEST,—WITNESSETH:

That the above named parties have associated themselves as partners under the firm name of EL RANCHO ENTERPRISES for the purposes and on the conditions herein recited:

1. The partnership business shall be that of operating motels, auto camps, trailer camps, tourist camps and allied businesses and shall be carried on at 5203 South State Street, in Murray City, Salt Lake County, State of Utah, or at such other place or places as the partners may from time to time agree upon.

2. Said partnership shall continue until dissolved by the mutual consent of the partners or terminated by operation of law.

3. The capital of the partnership shall consist of the following property:

(a) A real estate contract covering the purchase by the partnership and the sale by Reed P. Mortensen and Ann S. Mortensen, his wife, of the Murray El Rancho Motel, including approximately four (4) acres of real property situated at 5203 South State Street, in Murray City, Salt Lake County, State of Utah, including the personal property located in the sixteen motel units situated upon said real property upon which contract the said Rulon R. West has paid the sum of \$47,500.00 and the sum of \$1,000.00 cash in bank account also furnished by the said Rulon R. West.

(b) Any further sums which any partner shall with the consent of the other from time to time contribute for capital purposes which shall be credited to his capital account.

4. Interest at the rate of five per cent (5%) per annum shall be paid to each partner on the capital for the time being standing to his credit out of the gross profits of the business, and such interest shall be cumulative, so that any deficiency in one year shall be made up out of the gross profits of any succeeding year or years.

5. The said Terry R. West shall be the Manager of the partnership business and shall be entitled to draw up to but not exceeding the sum of \$500.00 per month for his services, all amounts so drawn to be charged as a partnership expense and deducted before any division of net profits is made.

6. The net profits of the business shall be divided between the partners in the following proportions: Rulon R. West, forty per cent (40%); Terry R. West, forty per cent (40%) and Flora E. West twenty per cent (20%); and the partners shall in like proportion bear all losses, including loss of capital.

7. The usual books of account shall be kept properly posted up, and shall not be removed from the place of business without the consent of all partners. Each partner shall have free access to them at all times, and shall be at liberty to make such extracts therefrom as he may think fit.

8. On the 15th day of October, A.D. 1958 and on the 15th day of October in each succeeding year during the continuation of the partnership, an account shall be taken of all the capital, assets and liabilities for the time being of the partnership, and a balance sheet and profit and loss account making due allowance for depreciation and for recouping any lost capital shall be prepared and a copy thereof furnished to each partner. At any time agreed upon by all of the partners, after the preparation of the said balance sheet and profit and loss account, the net profits, if any, shown by such account may be divided in the proportions set forth in paragraph 6 above hereof.

9. The partners agree: (a) That Terry R. West shall diligently attend to the business and devote such portion of his time thereto as is necessary to properly and economically operate said business. (b) each partner shall punctually pay his separate debts and indemnify the other partners and the assets of the partnership against the same and all expenses on account thereof; (c) each partner shall forthwith pay all moneys, checks, and negotiable instruments received by him on account of the firm into the bank or banks selected by the partners to the firm account; (d) each partner shall be just and faithful to the other partners, and at all times give to such other partners full information and truthful explanations of all matters relating to the affairs of the partnership, and afford every assistance in his power in carrying on the business for their mutual advantage.

10. No partner shall without the consent of the others (a) Lend any of the moneys or deliver upon credit any of the goods of the firm to any person or persons whom the other partners shall have previously in writing forbidden him to trust; (b) Give any security or promise for the payment of money on account of the firm unless in the ordinary course of business; (c) enter into any bond, or become bail, indorser, or surety for any person, or knowingly cause or suffer to be done anything whereby the partnership property may be seized, attached, or taken on execution or endangered; (d) assign, mortgage, or charge his share in the assets or profits of the partnership, or any part of such

share; (e) draw, accept, or indorse any bill of exchange or promissory note on account of the firm; (f) sign any check on behalf of the firm for a sum exceeding \$500.00; (g) buy, order, or contract for any goods or property exceeding the value of \$500.00 on behalf of the partnership; (h) compromise, or compound, or, except upon payment in full, release or discharge any debt due to the partnership.

11. If any partner shall die during the continuance of the said partnership, the survivors or survivor may purchase the share of the deceased partner in the capital and assets of the business on the following terms: (a) The purchase price shall be the amount at which such share shall stand in the last balance sheet which shall have been prepared prior to the death of said partner plus ten per cent (10%) thereof; (b) such purchase of any deceased partner's interest, if made by the surviving partners or partner, shall be effected within one year from the date of death, and in addition to the purchase money, the surviving partners or partner shall pay a sum equal to interest on the amount of said purchase price computed from the date of the then last preceding annual account up to the date of death of the deceased at the rate of 5% per annum in lieu both of interest on capital, including any arrears of such interest for preceding years, and profits during such period, credit being given for any sums drawn out by the deceased partner during the then current year.

12. If the surviving partners or partner shall not exercise the option of purchasing the share and interest of the deceased partner, or if the partnership shall be determined or expire during the joint lives of the partners, then the partnership shall be wound up, and the assets distributed in the proportions set forth in paragraph 6 above hereof.

13. All rents, taxes, costs of repairs, alterations, or improvements, insurance and all other costs, charges and expenses which shall be incurred in or about the business or in any wise relating thereto, and all losses which shall happen in respect to the business, shall be paid out of the income or capital of the partnership, and in case of any deficiency thereof by the partners in the proportions set forth in paragraph 6 above hereof.

14. Notwithstanding the death of any partner, the partnership between the surviving partners shall continue under these articles of partnership.

15. At the end or sooner determination of the partnership the partners, each to the other, shall make a true, just and final account of all things relating to their said business, and in all things adjust the same; and all stock, as well as the gains and increases thereof,

including all real and personal property, which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided between them in the proportions set forth in paragraph 6 above hereof.

16. Any decisions and major arrangements required or necessary in the operation of said business which are not in the ordinary course of operations shall only be made and effected by and with the unanimous agreement and consent of all the partners.

IN WITNESS WHEREOF, the partners above named have hereunto set their hands and seals the day and year first above written.

/s /Rulon R. West

/s/ Terry R. West

/s/ Flora West

COUNTY OF SALT LAKE )  
STATE OF UTAH ) ss

On the 1st day of October, A.D. 1957 personally appeared before me the said Rulon R. West, Terry R. West and Flora E. West, signers of the above instrument, who duly severally acknowledged to me that they executed the same.

Paul S. Roberts

(Seal)

Notary Public

My Commission Expires:  
Sept. 10, 1959

Residing at Murray City, Utah

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## APPENDIX "B"

### AGREEMENT

AGREEMENT made this .... day of ....., 1960, by and between RULON R. WEST, FLORA E. WEST, and TERRY R. WEST.

WHEREAS, the parties hereto are partners under those certain Articles of Partnership dated the 15th day of October, 1957, and

WHEREAS, said partnership has been and is hereby declared to be dissolved, and

WHEREAS, the parties hereto desire to make an agreement with respect to certain matters pertaining to the winding up of the partnership affairs,

NOW, THEREFORE, the parties hereto agree that Rulon R. West and Terry R. West shall have authority to wind up the partner-

ship affairs, shall concur in all matters pertaining to the winding up of the partnership affairs, and shall proceed to wind up the partnership affairs in accordance with the following provisions:

1. Elements and Completion of Winding Up. The winding up of the partnership affairs shall consist of selling all real and personal property of the partnership, paying all partnership liabilities (including liabilities to partners), and distributing the net assets of the partnership in cash to the parties hereto in the following proportions:

Rulon R. West	40%
Terry R. West	40%
Flora E. West	20%

When all the net assets of the partnership have been distributed in cash in accordance with the preceding sentence, the winding up of the partnership affairs shall be completed.

2. Operation of Partnership Business Pending Sale. Each business of the partnership shall be operated until such time as such business is sold. Rulon R. West and Terry R. West and Flora West shall concur in all management decisions pertaining to the operation of said businesses. Terry R. West shall diligently attend to the business in the daily operation of the businesses, which operation shall include the renting of accommodations, the maintenance of all partnership property, including the interior and exterior of all buildings, rental units, signs, fences, sidewalks, driveways and other real and personal property of the partnership, in good repair, working order and appearance, and the maintenance of the motel and trailer camp premises, including the lawn, shrubbery and trees, in a state of good, neat and attractive appearance, having such assistance as is reasonably necessary to accomplish same. Terry R. West shall receive reasonable and periodic compensation for his services pertaining to the daily operation of the businesses, which compensation shall be on the same basis as heretofore taken and no additional compensation unless said compensation is agreed upon from [time] to time by all of the parties hereto.

3. Receipts and Disbursements. All receipts obtained from operations of the motel, trailer sales, and trailer park shall be deposited in the usual account and checked out only for payment of employees salaries, utilities, and ordinary expenses, including expenses to Terry R. West as above specified. All receipts involving sales of capital assets or realization from trailer sales where equities aside from the obligation and any other capital assets sales shall be placed in a special bank account, from which no proceeds can be taken except over the signatures of Terry R. West and Rulon R. West, or instead of Rulon R. West, Leroy E. Holmes.

4. Sale of Partnership Property. All partnership property, including the good will, shall be sold as soon and for a price as near to the fair market value thereof as is reasonably possible under the circumstances. Any offer for the purchase of any part or all of the partnership property which is made by a reasonably dependable and solvent offeror, on reasonable terms and for a reasonable amount shall be accepted. No property shall be accepted in trade as either part or full payment for the purchase of part or all of the partnership property unless such property can be expected to be sold with reasonable promptness at a price equal or in excess of the value for which it was accepted in trade. The sale of the partnership property shall be advertised in a reasonable manner, consistent with the desires to make a sale with reasonable promptness and to attract the attention of as many as possible of those persons who would and could qualify as purchasers.

5. Distribution of Partnership Assets. The parties hereto shall determine from time to time during the period of the winding up of the partnership affairs the amount of the partnership assets which may be distributed to the parties hereto in cash in the proportions specified in Paragraph 1 hereof, taking into consideration the absolute and contingent liabilities of the partnership.

6. Statements. On or before the 3rd day of April, 1960, and each six (6) months thereafter until the winding up of the partnership affairs is completed, Terry R. West shall prepare and shall distribute to each of the parties hereto an accurate, detailed and complete statement of all partnership assets, liabilities, receipts and disbursements. The partnership books shall be kept current by Terry R. West. Each of the parties hereto shall have access to the partnership books at any reasonable time.

7. Authority of Leroy E. Holmes. At all times during which Rulon R. West is away from Salt Lake City, Utah, during the period of the winding up of the partnership affairs, Leroy E. Holmes, of 1381 Brookshire Drive, Salt Lake City, Utah, shall, so long as he is in possession of a written and effective power of attorney from Rulon R. West, have the right to act for and in behalf of Rulon R. West in all matters pertaining to the winding up of the partnership affairs, and shall have all the rights, powers and privileges which Rulon R. West has under this agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names the day and year first above written.

/s /Rulon R. West

/s/ Flora West

/s/ Terry R. West

x



COUNTY OF SALT LAKE) ss  
STATE OF UTAH )

On the 31st day of March, 1960, personally appeared before me  
RULON R. WEST, one of the signers of the within and foregoing  
instrument, who duly acknowledged to me that he executed the same.

Jane Roberts

Notary Public

Residing at Salt Lake County, Utah

My commission expires:  
April 9, 1961

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## APPENDIX "C"

### AGREEMENT

This supplemental agreement to the dissolution agreement made  
and entered into the 2nd day of April, 1960, wherein it is mutually  
agreed as follows:

1. The contribution made by Rulon R. West with respect to the  
40 per cent interest acquired by Terry R. West was and is a gift from  
Rulon R. West to Terry R. West, and Rulon R. West does agree to  
file a gift tax return in connection therewith so stating.

2. Should the motel or the businesses be sold at a loss wherein  
the net recoveries are less than the sums due thereon, all loss will be  
absorbed and paid by Rulon R. West.

3. The undersigned, Rulon R. West, further certifies that the  
interest in the El Rancho Enterprises was not only a gift to Terry  
R. West, but also to Flora West and their interests were acquired by  
virtue of the gift.

Dated at Salt Lake City, Utah, this 2nd day of April, 1960.

/s /Rulon R. West

/s/ Terry R. West