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CASE NOTES

BUSINESS ORGANIZATIONS—Determining the Existence of a Partnership. P & M Cattle Co. v. Holler, 559 P.2d 1019 (Wyo. 1977).

In 1971, Rusty Holler was seeking someone to pasture cattle on his land at a rate of three dollars per head. In this regard Holler contacted Maxfield, a partner in the P & M Cattle Company. During negotiations, the rental plan was discarded, and instead the parties entered into the following agreement:¹

Rusty to furnish grass for estimated 1,000 yearling steers and/or heifers.

Maxfield and Poage to furnish money for cattle, plus trucking and salt, and maximum of \$300.00 per month for labor.

Rusty to take cattle around May 1, and cattle to be sold at a time this fall agreed upon by all parties involved.

Cost of cattle plus freight, salt and labor to be first cost.

Net money from sale of cattle less first cost to be split 50-50 between Rusty (½) and Maxfield and Poage (½), death loss to be part of first cost.

Although the agreement did not mention it, the parties together would decide the number of animals P & M should purchase.² Holler had a right to object to the time P & M chose to purchase the cattle. He also had a right to object to the price offered by P & M for the cattle, and exercised that right in March of 1974.³ Under the agreement, both parties would decide when the market was right to sell the cattle.⁴ Then, when offers were received for the animals, both parties would consider them.⁵

The agreement was orally renewed in 1972, 1973 and 1974. In 1974, the enterprise suffered its first losses, amounting to \$89,090.48. When P & M asked Holler to contribute his share of the loss, he refused. P & M brought suit alleging a partnership or a joint venture had existed between the parties and asked for one-half of the amount of the loss. Holler de-

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1. P & M Cattle Co. v. Holler, 559 P.2d 1019, 1021 (Wyo. 1977).

2. Brief for Appellant at 3, P & M Cattle Co. v. Holler, 559 P.2d 1019 (Wyo. 1977).

3. *Id.*

4. P & M Cattle Co. v. Holler, *supra* note 1, at 1021.

5. Brief for Appellant at 4, P & M Cattle Co. v. Holler, 559 P.2d 1019 (Wyo. 1977).

nied the existence of any partnership or joint venture and counterclaimed for one-half of the money he had expended for salt.

In deciding this issue, the lower court held that no joint venture or partnership existed between the parties; accordingly, Holler was not liable for half of the losses. It also held for Holler on his counterclaim and awarded him one-half of his expenditure for salt. On appeal, the Wyoming Supreme Court affirmed the lower court's decision that no partnership had been formed and that P & M was liable for one-half of the cost of the salt.

DETERMINING THE EXISTENCE OF A PARTNERSHIP

No formal means are necessary for two parties to create a partnership.⁶ Accordingly, this relationship is created when two persons associate to do business as co-owners but do not formally comply with the requirements of another form of organization.⁷

Because the relationship can arise so easily, disputes are common as to whether or not a partnership exists.⁸ This follows from the duties partners have toward each other and the liabilities of partners to third persons. Partners, for example, are jointly and severally liable for breaches of trust and torts, and they are jointly but not severally liable for other partnership debts and obligations.⁹ Also, they must contribute toward any losses that the partnership incurs.¹⁰

Because of the duties and liabilities partners have toward each other and third persons, the finding of such a relationship can be advantageous to both the parties to, and the creditors of a business venture. For example, if a creditor cannot collect from one person in a venture, proving the venture is a partnership will allow him to collect from any other solvent members of the partnership.¹¹ Similarly, when a person is in-

6. UNIFORM PARTNERSHIP ACT § 6(1).

7. CRANE & BROMBERG, LAW OF PARTNERSHIP 3-4 (1968).

8. *Id.* at 4.

9. UNIFORM PARTNERSHIP ACT § 15.

10. UNIFORM PARTNERSHIP ACT § 18.

11. *Cf. Minute Maid Corp. v. United Foods, Inc.* 291 F.2d 577 (5th Cir. 1961), *cert. denied*, 368 U.S. 928 (1961).

volved in a venture with another and a loss has been suffered, if a partnership is found, half of the loss must be borne by his partner.¹²

Thus, frustrated creditors and members of a business relationship that have been forced to bear a loss are the usual plaintiffs in suits where the existence of a partnership is in question.¹³ The question then becomes, "When is a partnership imposed on one who denies it?"¹⁴ A partnership found in this situation has been characterized as an "inadvertent" one by one commentator.¹⁵ When the facts are uncontroverted, this is a question of law for the judge.¹⁶ When the facts are controverted, this is usually a question for the jury.¹⁷

The Uniform Partnership Act defines a partnership as (1) an association of two or more persons (2) to carry on as co-owners (3) a business for a profit.¹⁸ It has been stated that there is no general rule which can be applied to determine the existence of a partnership. Instead, the courts usually examine the facts of each case in the light of several criteria in making this determination.¹⁹ Different jurisdictions do vary, however, in deciding precisely which criteria are to be used. Most have mentioned the following factors in various combinations, or individually, as being essential: loss sharing, profit sharing, intention to form a partnership, right of control and various types of community of interest.²⁰ Profit sharing seems to be the only element, however, that is absolutely essential.²¹

The association element in the definition of partnership is largely one of intent.²² As it is a consensual relationship, intent is a necessary element of a partnership.²³ This intent can be present in an express or implied agreement between the parties.²⁴ There need be no written contract evidencing

12. *Cf. Penrod v. Smith*, 9 Ill.App.2d 257, 132 N.E. 2d 675 (1956).

13. ROWLEY, 1 PARTNERSHIP 40 (2d ed. 1960).

14. CRANE & BROMBERG, *supra* note 7, at 33.

15. AMERICAN LAW INSTITUTE ON CONTINUING EDUCATION, RESOURCE MATERIALS: PARTNERSHIPS 10 (1977).

16. *Pruitt v. Fetty*, 148 W.Va. 275, 134 S.E.2d 713, 716 (1964).

17. *Robinson Transp. Co. v. Hawkeye-Security Ins. Co.*, 385 P.2d 203, 205 (Wyo. 1963).

18. UNIFORM PARTNERSHIP ACT § 6(1).

19. *Pruitt v. Fetty*, *supra* note 16, at 716.

20. ROWLEY, *supra* note 13, at 163.

21. *Id.* at 163.

22. *Id.* at 43.

23. *Fenwick v. Unemployment Compensation Comm'n*, 133 N.J.L. 295, 44 A.2d 172, 174 (Ct. App. 1945).

24. *Bramson v. Bramson*, 4 Ill.App.2d 249, 124 N.E.2d 33, 38 (1955).

the agreement.²⁵ When the intent is implied, it is not necessary that the parties have realized that they have entered into a partnership; if the legal requirements for the formation of a partnership are met the law fixes their rights.²⁶ A court will do this even when the parties have expressed an intent not to form a partnership by specifically limiting their liability in an agreement.²⁷

The co-ownership element of the partnership definition includes components of profit sharing, property rights and joint control.²⁸ Section 7 of the Uniform Partnership Act sets out standards for a court to apply in determining the existence of a partnership.²⁹ Under this Section, division of profits is prima facie evidence of a partnership unless the money is received as payment of a debt, wage, interest or purchase price. Because the dominant theme underlying a partnership is that each partner contributes to the business in anticipation of its making a profit in which he may share, the profit sharing element of partnership is given high evidentiary status.³⁰ Although an important factor, profit sharing alone has been held not to be conclusive in determining the existence of a partnership. It may be overcome by other evidence showing that the parties intended no partnership.³¹

25. 6 UNIFORM LAWS ANNOTATED, UNIFORM PARTNERSHIP ACT § 6, Official Comment, pp. 23-24 (Master ed. 1966) [hereinafter cited as Official Comment].

26. Jenkins v. Harris, 19 Tenn. App. 113, 83 S.W.2d 562, 567 (1935).

27. Gardiner v. Gaither, 162 Cal. 2d 607, 329 P.2d 22, 28 (1958).

28. AMERICAN LAW INSTITUTE, *supra* note 17, at 10.

29. 7. RULES FOR DETERMINING THE EXISTENCE OF A PARTNERSHIP

In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

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

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

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

(a) As a debt by installments or otherwise,

(b) As wages of an employee or rent to a landlord,

(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of a good-will of a business or other property by installments or otherwise.

30. ROWLEY, *supra* note 13, at 88.

31. Troy Grain & Fuel Co. v. Rolston, 227 S.W.2d 66 (Mo. App. 1950).

The sharing of losses is often used with the profit element to aid a court in determining if a partnership does exist.³² Together, these elements present a strong case for the existence of a partnership, but courts differ as to whether having both elements present in a case conclusively establishes one.³³ Partnerships have been found even in cases where the parties have expressly agreed not to share losses.³⁴ One commentator has pointed out that when factors point to a partnership, in the absence of an agreement to share losses, courts will infer one; however, when factors point against the existence of a partnership, courts will emphasize the lack of an agreement to share losses.³⁵

Contribution toward losses is one of the duties of a partner under the Uniform Partnership Act and, therefore, when parties make such an agreement it evidences their intent to form a partnership.³⁶ However, the Uniform Partnership Act sets this out only as a duty. It is not included among the tests for determining the existence of a partnership.³⁷

The power of ultimate control is implicit in the co-ownership or community of interest element of partnership and distinguishes a partnership from an agency.³⁸ One commentator has called the power of mutual management the most important attribute of partnership status.³⁹ Some courts have classified the element of control as "one of the primary elements of partnership."⁴⁰

Thus, the presence of control over part of the enterprise by a person may be given great weight by a court when deciding if a partnership exists.⁴¹ Usually in cases of "inadvertent" partnership, if elements of profit sharing and joint control are found, they are sufficient, though the court may weigh other factors depending upon the context in which the transaction

32. ROWLEY, *supra* note 13, at 175.

33. *Id.* at 176.

34. Clemens v. Crane, 234 Ill. 215, 84 N.E. 884 (1908).

35. Comment, *Formation and Nature of Partnership*, 45 TULANE L. REV. 336, 342 (1971).

36. UNIFORM PARTNERSHIP ACT § 18(a).

37. *Id.*

38. Official Comment, *supra* note 25.

39. AMERICAN LAW INSTITUTE, *supra* note 15, at 14.

40. Green v. Brooks, 235 Cal.2d 161, 45 Cal. Rptr. 99, 102 (1965).

41. Tafoya v. Trisler, 8 Ariz. App. 250, 445 P.2d 452 (1968).

occurred.⁴² It may even be sufficient that a party has the right to joint control in the management of the business, although he does not exercise it.⁴³

The Uniform Partnership Act gives each party a mutual right of management, but this right may be circumscribed by agreement.⁴⁴ One area, however, where more control may be exercised without a partnership being created is in the creditor - debtor relationship. In *Martin v. Peyton*, a creditor's right to inspect firm books and to veto business which he thought to be too speculative was held to be merely a precautionary measure to safeguard a loan, and not evidence of a partnership. The court pointed out that the lender had no right to initiate business or bind the firm by his action as a partner can do.⁴⁵

THE COURT'S REASONING IN *HOLLER*

The Wyoming Supreme Court employed the Uniform Partnership Act to help it determine if a joint venture or partnership existed. In deciding the issue, the court relied on its interpretation of intent of the parties as was evidenced by their written agreement and subsequent conduct. The court noted that although the joint venture usually relates to a single transaction, there is no legal difference between the two types of associations.⁴⁶

In examining the agreement's provision allowing equal division of the profits between the parties, the court followed the Uniform Partnership Act in calling this prima facie evidence of a partnership.⁴⁷ The court then followed the view of many jurisdictions by stating that an agreement to share profits is not conclusive, and that other factors must be examined to determine if the parties intended a partnership.⁴⁸

One factor the court turned its attention to was the failure of the parties to provide for the handling of losses either in their written agreement or in their subsequent discussions.

42. AMERICAN LAW INSTITUTE, *supra* note 15, at 11.

43. *Bengsten v. Shain*, 42 Wash.2d 404, 255 P.2d 892, 896 (1953).

44. UNIFORM PARTNERSHIP ACT § 18(e) and (h).

45. *Martin v. Peyton*, 246 N.Y. 213, 158 N.E. 77, 79 (1927).

46. *P & M Cattle Co. v. Holler*, *supra* note 1, at 1020.

47. UNIFORM PARTNERSHIP ACT § 7(4). *See* note 29, *supra*.

48. *P & M Cattle Co. v. Holler*, *supra* note 1, at 1022.

The court appeared to consider this factor as one of the most important in the case, and stated that this created an inference against partnership. This is a position few jurisdictions maintain.⁴⁹ Although an agreement to share losses would point to the existence of a partnership, most jurisdictions, in the absence of such a provision, imply a loss sharing agreement if other factors are there pointing to the existence of a partnership.⁵⁰

Two other factors the court looked at involved the parties' failure to take positive steps to treat their relationship as a partnership. These were: 1) the failure of the parties to put the label "partnership" on the agreement, and 2) the failure of the parties to file a partnership income tax return. The court considered these factors to be an indication the parties had no intent of forming a partnership when they began their cattle venture.

An Illinois court has approached this problem in another way. In *In Re Drennan's Estate*,⁵¹ the court looked first to see if the parties were carrying on a venture for their mutual benefit, and found that they were. The court then looked at the lack of a partnership income tax return and found that in light of other facts in the case, this evidence was inconclusive. This approach would seem to be more sound, as it focuses the court's attention not on whether the parties thought the relationship was a partnership, but on the real issue of whether the relationship legally qualified as one. As one court has said, "[i]t is the substance and not the form of the arrangement which determines the legal relationship . . . of the parties to each other."⁵²

The Wyoming Court indicated that another reason it did not find a partnership was that the agreement between the parties was signed "in an atmosphere created by defendant's desire to sell grass."⁵³ It would seem this factor should not bear much weight in disproving the existence of a partnership as the outcome of the negotiations, an agreement to split profits, is prima facie evidence that a partnership did exist.

49. CRANE & BROMBERG, *supra* note 7, at 72.

50. Clemens v. Crane, *supra* note 34.

51. *In re Drennan's Estate*, 9 Ill.App.2d 324, 132 N.E.2d 599 (1956).

52. Nelson v. Seaboard Sur. Co. 269 F.2d 882, 887 (8th Cir. 1959).

53. P & M Cattle Co. v. Holler, *supra* note 1, at 1023.

ANALYSIS

The Uniform Partnership Act was completed in 1914 and has since been adopted by forty-eight states.⁵⁴ The purpose of the Act was to provide uniformity in the law and give the courts some precedents to follow in confusing areas of partnership theory.⁵⁵ The Act has accomplished its purpose in providing uniform precedents, as a substantial body of case law has developed as to whether certain business relationships constitute partnerships. In the *Holler* decision, the Wyoming Supreme Court did not follow these precedents and, therefore, its decision that no joint venture or partnership was formed is inconsistent with the conclusion that would have been reached in other jurisdictions.

The Court's Weighing Process

The Wyoming Court's analysis of the issue as to whether a partnership was formed differed from the analysis utilized in other jurisdictions in two respects: first, in the weight it gave to minor factors in the case, and second, in its lack of attention to the control element of partnership. This section will discuss the court's weighing process.

As was previously mentioned, the court's decision focused on the following factors: 1) the failure of the parties to label their agreement a partnership agreement, 2) failure of the parties to file a partnership income tax return, 3) failure of the parties to provide for sharing of losses, and 4) the atmosphere in which the agreement was signed. The court reasoned that these factors outweighed the presumption of partnership that arose from the sharing of profits, and failed to take the joint control exercised by the parties into account at all.

Were the court to continue this reasoning, it is unlikely that there will be many instances of "inadvertent" partnership liability in this state. Basically, all the factors the court considered determinative in reaching its decision will never be present in a case where the issue is whether a partnership exists. As a practical matter, these suits only arise when someone wants to impose partnership liability on a person who denies the existence of a partnership. A person in this situa-

54. *Robinson Transp. Co. v. Hawkeye Security Co.*, *supra* note 17, at 6.

55. *Official Comment*, *supra* note 25, at 7.

tion is not likely to take steps to label an agreement he signs "partnership" or refer to himself as a partner. It is just as unlikely that a partnership income tax return will be filed by parties who never have considered themselves partners.

Agreements to divide losses are also rare. In discussing whether courts should require this element to be present, one writer has stated, "[i]f this means there must be an express agreement to share losses, it is rather naive. Persons casually entering business relations (where most disputed partnership cases arise) are seldom thinking of losses, if they were they wouldn't be launching the venture."⁵⁶

The court could have focused not on what positive steps the parties failed to take that indicated their recognition of a partnership, but on what the actual conduct of the parties was under the agreement. The issue in these cases is not what the parties thought they had, but what their legal relationship was. As one court stated:

It is important to note that it is not of the essence of a partnership that the parties to it should have known their contract in law created a partnership. If the parties intend to and do enter into such a contract as in the eye of the law constitutes a partnership, they thereby become partners.⁵⁷

This is the rule in most jurisdictions. The rule in Wyoming after this case would seem to be that no partnership exists unless the parties originally intended one.

The Control Issue

Other courts faced with the issue of whether or not a business relationship is a partnership have approached the problem by focusing on the right of control of the parties.⁵⁸ The court did not consider this element of partnership in its opinion.

As was stated previously, this is an important consideration in determining the existence of a partnership, as it is an essential component of the co-ownership element. The evi-

56. CRANE & BROMBERG, *supra* note 7, at 72.

57. Raymond S. Roberts, Inc. v. White, 97 A.2d 245, 248 (Vt. 1953).

58. Tafoya v. Trisler, *supra* note 40.

dence presented in *Holler* demonstrated that in the cattle buying venture, both parties exercised control in the timing of the purchase of the cattle, the price paid when the cattle were bought, the time of marketing the cattle, and the acceptance or rejection of purchase offers. In addition, there was evidence showing that Holler had on various occasions sold cattle at auctions without consulting P & M. He had also signed a sales agreement on his own on at least one occasion.

These particular areas in which the parties had joint control are most important in a cattle buying venture. The prices paid and the time of marketing in order to receive the best purchase price for the animals are critical to the making of a profit in a cattle venture. This control is weighty evidence of co-ownership. Thus, the court should have taken it into account. The control factor plus the sharing of profits is usually enough to establish a partnership,⁵⁹ and in this case, would probably outweigh the other factors the court examined.

The importance given to the control factor has been illustrated by other jurisdictions. These jurisdictions, given essentially the same type of evidence, have decided the issue differently than the Wyoming court did.

In *Minute Maid Corporation v. United Foods, Inc.*,⁶⁰ a creditor, Minute Maid, brought suit against United Foods, a direct purchaser, alleging that United was engaged in a partnership relation with Cold Storage Corporation, thus making Cold Storage equally liable to Minute Maid for the unpaid purchase price of goods. United and Cold Storage had entered into a relationship whereby Cold Storage provided financing and warehouse facilities in order for United to purchase in such quantities from Minute Maid as would turn a profit for both of them on quantity discounts. The conduct of the parties was much the same as in *Holler*, as there was no partnership label on the agreement between the parties, no provision for losses and no partnership accounting done. There was a mutual right of control in the volume of purchases made, and Cold Storage had a right to see the accounts receivable and customer invoices.

59. AMERICAN LAW INSTITUTE, *supra* note 15, at 11.

60. *Minute Maid Corp. v. United Foods, Inc.*, *supra* note 11.

The court concluded from this evidence that Cold Storage was exercising joint control over the business and was liable as a partner. It placed little emphasis on the fact that there was no provision for the distribution of losses and recognized that loss division was "the very question that this Court has to decide, for if the relationship between the parties constituted them partners then, the law imposes upon them the obligation to pay the losses."⁶¹

A California decision, *Gardiner v. Gaither*,⁶² further illustrates the importance of the control element in determining the existence of a partnership. In this case, a realtor had entered into a contract with a builder whereby the realtor was to acquire land and the contractor was to construct homes on the property. The contract provided a formula for the division of profits. The elements of control included the necessity of mutual consent of the parties as to resale prices, selection of property and all other policy matters. In the event other jobs were offered to the contractor, they were to be submitted to the realtor for approval as to time, price and location, and were subject to all the terms of the original contract. The contract also contained a provision restricting each party's liability to his own debts, contracts or torts. Looking at the contract, the court found a partnership, "[t]he provisions for sharing profits, and giving each party an equal voice on all major policy matters can have no other meaning."⁶³

COULD THE COURT HAVE REACHED ITS RESULT IN ANOTHER WAY?

The court in *Holler* evidently sympathized with the predicament of a person who has not realized that the relationship he has entered into could be a partnership, thus making him liable for losses that he did not anticipate sharing in. As there are many prospective "inadvertent" partners in Wyoming due to the number of cattle ventures in this state, the finding of no partnership must have seemed a just result.

The California Supreme Court has found a way to deal with the problem of the unexpected liability a party is faced

61. *Id.* at 583.

62. *Gardiner v. Gaither*, *supra* note 27.

63. *Id.* at 27.

with when the law imposes a partnership. In *Kovacik v. Reed*,⁶⁴ one party provided capital to support a venture and the other gave his services. Nothing was said in the agreement concerning losses. The venture became unprofitable and Kovacik demanded contribution from Reed. The court found a partnership existed on the basis of the profit sharing agreement; however, it determined that Reed had already contributed his share of the loss. The court reasoned that when one party contributes capital and the other his labor and skill, "the parties have by their agreement to share equally in profits, agreed that the value of their contributions . . . were likewise equal; it would follow that upon the loss, as here, of both money and labor, the parties have shared equally in the losses."⁶⁵

It is possible the Wyoming Court could have followed this same reasoning and found that there *was* a partnership, but that Holler had already contributed towards the loss through the depletion of his pasture without any compensation for it. The court could have held that the parties, by dividing the profits equally, had impliedly set an equal value on each of their contributions. Accordingly, when losses were suffered, Holler had already contributed his grass, and owed P & M nothing.

In following the *Kovacik* rationale, the court would look to the substance of the business relationship at hand rather than its form in deciding whether it was a partnership. Even though the result in *Holler* must have seemed just according to the parties' original intent, the finding of a partnership in cases such as this would enable the court to reach a fair result in all instances. As it now stands, the court's stringent tests for a partnership could result in damage to innocent third parties.

The facts of *Finger v. Northwest Properties, Inc.*⁶⁶ illustrate this point. In that case, Northwest and Barthold entered into an agreement whereby Barthold was to provide pasture for Northwest's sheep. Barthold was placed in charge of the sheep and the business. The landowner and the sheepowner

64. *Kovacik v. Reed*, 49 Cal.2d 166, 315 P.2d 314 (1957).

65. *Id.* at 316.

66. *Finger v. Northwest Properties, Inc.* 63 S.D. 176, 257 N.W. 121 (1934).

were to split profits on a percentage basis. An employee of Barthold was badly injured due to the negligence of another of Barthold's servants. The employee sought to hold North-west liable with Barthold alleging that they were partners.⁶⁷ The South Dakota Supreme Court found a partnership and allowed the employee to recover.

If a situation such as this were to arise in Wyoming, the precedent of the *Holler* decision could prevent a third party such as the employee in *Finger* from recovering anything if the party involved in the business venture who had caused the third party's injury was judgment proof. Under *Holler*, this could be the result even though the substance of the relationship involved would satisfy the requirements of a partnership in most jurisdictions.

CONCLUSION

The Wyoming Court's emphasis on the factors that would normally not be present in an "inadvertent" partnership would seem to imply that in this jurisdiction, there is an almost impossible burden on a party seeking to prove the existence of a partnership so that he may receive contribution toward his losses, payment of a debt, or satisfaction of a judgment for a tort. It is evident that two important factors in partnership, mutual control and profit sharing, were not given the weight in Wyoming that they are in other jurisdictions. It is possible that the Wyoming Court could have used the precedent under the Uniform Partnership Act to find a partnership and by following the *Kovacik* rationale, still have reached the conclusion that *Holler* was not required to contribute toward the losses that P & M suffered.

PEGGY A. TAYLOR

67. It is reasonable to assume here that the plaintiff was searching for a defendant who was able to pay a judgment.