

11 U.S.C. § 362  
O.R.S. 68.020(3)  
ORS 68.620  
Partnerships  
Subordination  
Trusts

In re The Corey Partners,

Dist. Ct. No. CV-92-6073-H0  
Bankr. Case NO. 691-60081-H11

8/11/92                      Judge Redden Affirming PSH                      unpublished

District court affirmed Judge Higdon's letter opinion denying in part Bank's motion for relief from automatic stay to name managing partner, individually, of debtor in possession, a general partnership, as defendant in state court foreclosure proceeding. Debtor in possession held valid interests in 2 of 6 parcels of real property upon which Bank sought foreclosure. Debtor's managing partner had pledged the property to Bank as collateral for personal and partnership loans. Because Bank had signed the partnership agreement as trustee on behalf of two trusts for the benefit of the managing partner's grandchildren, which each held a one percent interest in the partnership, Bank is the general partner of debtor whose liability is not limited to the value of the trust assets. Moreover, its claim as a creditor must be subordinated under partnership law to those non-partner creditors. Therefore, Bank was not entitled to relief from stay regarding the properties in which debtor in possession had an interest.

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BY \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In re

The Corey Partners,

Debtor.

) CV-92-6073-HO  
) Bankruptcy Court  
) Case No. 691-60081-H11  
)  
) OPINION

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REDDEN, Judge:

Commercial Bank appeals from the bankruptcy court's  
partial denial of its motion for relief from the automatic  
stay. For the reasons explained below, I affirm the bankruptcy  
court's ruling.

/ / /

1 - OPINION

1 BACKGROUND

2 In 1957, Robert Corey and his wife Betty Corey formed a  
3 general partnership to operate a chain of Hamburger stands, the  
4 Bob's 19-cent Hamburgers partnership. In 1979 and again in  
5 1980, the Coreys each transferred a one-half percent interest  
6 in the partnership to separate trusts established for their two  
7 grandchildren. As a result, the trusts each held a one percent  
8 interest in the partnership and the Coreys each held 49 percent  
9 interests.

10 Appellant Commercial Bank (Bank) was appointed trustee of  
11 both trusts. While serving as trustee in the 1980s, Bank also  
12 made several personal loans to Robert Corey.

13 On December 31, 1986, the trusts and the Coreys executed  
14 a Liquidation of Partnership Agreement (dissolution agreement),  
15 which dissolved the Bob's 19-cent Hamburgers partnership.  
16 Under the dissolution agreement, direct ownership interests in  
17 the partnership's assets were distributed to the Coreys and to  
18 the trusts. Each received percentage shares in the assets  
19 equivalent to the percentage of the partnership they had owned.  
20 A trust officer of Bank signed the dissolution agreement as  
21 trustee for the trusts.

22 Also on December 31, 1986, the Coreys and the trusts  
23 executed a new partnership agreement, forming the Corey  
24 Partners partnership. Under it, certain interests in real  
25 property that had previously been owned by the Bob's 19 cent  
26 Hamburger partnership were declared to be property of the new

1 partnership. As with the dissolution agreement, a Bank trust  
2 officer signed the agreement for the trusts. On June 1, 1990,  
3 Robert Corey removed Bank as trustee of the trusts.

4 In January 1991, Corey Partners filed a Chapter 11  
5 bankruptcy petition. In the ensuing bankruptcy proceeding, the  
6 Debtor in Possession (Debtor) included, in listing the assets  
7 of the bankrupt estate, six properties which Robert Corey had  
8 pledged to Bank as collateral for personal loans that were in  
9 default.

10 Bank filed a motion in the bankruptcy court for relief  
11 from the automatic stay.<sup>1</sup> Specifically, Bank requested to be  
12 allowed to name Debtor as a defendant in a suit to foreclose on  
13 its security interests in the six properties Debtor had listed  
14 as assets of the bankrupt estate.

15 Debtor opposed the motion, arguing that Bank is a general  
16 partner and creditor of Debtor. Because Bank is its general  
17 partner, Debtor argued, Debtor has a right to offset -- against  
18 any liability it has to bank -- its right to contribution from  
19 Bank, as a partner, for partnership liabilities. Debtor also  
20 argued that as a general partner, Bank's claims against it  
21 should be subordinated under partnership law to those of non-  
22 partner creditors.

23 In response, Bank argued that the trust estates, not  
24

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25 <sup>1</sup> Under section 362 of the Bankruptcy Code, all suits against  
26 a debtor are automatically stayed upon the debtor's filing of a  
Chapter 11 petition. 11 U.S.C. § 362.

1 Bank, are general partners in Debtor. Alternatively, if it is  
2 general partner, Bank argued, its liability is limited to the  
3 value of the trust assets.

4 The Bankruptcy court agreed with Debtor that Bank is a  
5 general partner in Debtor, and that its liability as such is  
6 not limited to the value of the trust assets. See August 26,  
7 1991 Opinion, pp. 7-10. The court further found that, as to  
8 properties in which the debtor has a valid interest, Bank was  
9 also a creditor of debtor. Id. at 10-13. The court found that  
10 Debtor held valid interests in two of the six properties at  
11 issue: the Bernheim Contract and the Ranch, and therefore  
12 denied Bank's motion for relief from the automatic stay as to  
13 those properties.

14 Bank now appeals, challenging the court's finding that it  
15 is a general partner of debtor, that its liability is not  
16 limited to the value of the trust property it administered, and  
17 the findings respecting the Bernheim contract and the Ranch.

#### 18 STANDARD OF REVIEW

19 "The district court acts as an appellate court, reviewing  
20 the bankruptcy court's findings of fact under the clearly  
21 erroneous standard and its conclusions of law de novo." In re  
22 Daniels-Head & Associates, 819 F.2d 914, 918 (9th Cir. 1987).

#### 23 DISCUSSION

##### 24 1. Is Bank a General Partner in Debtor?

##### 25 a. The Bankruptcy Court's Analysis

26 In holding that Bank is a general partner in debtor, the

1 bankruptcy court noted that Bank signed the partnership  
2 agreement as a partner. The agreement's first section lists as  
3 parties Robert E. Corey, Betty L. Corey, Bank as trustee for  
4 Justin R. Corey Trust, and Bank as trustee for Julia Laraine  
5 Corey Trust. Ex. 2, Appellant's Excerpt of Record. These  
6 parties are thereafter referred to throughout the agreement as  
7 "Partners." Section 1.1 states their agreement to form a  
8 general partnership under Oregon law.

9 The court rejected Bank's contention that the trusts, and  
10 not Bank, were partners. The court reasoned that because trust  
11 estates cannot themselves make promises, they cannot enter into  
12 contracts, and therefore cannot be parties to a general  
13 partnership agreement. Nor is a trustee an agent of the trust  
14 under the law of agency, because a trust, being simply a  
15 collection of property (or, in another sense, a description of  
16 a relationship regarding property), cannot be a principal. The  
17 court found the Oregon Uniform Partnership Act consistent with  
18 its analysis in failing to specifically name "trusts" in its  
19 nonexclusive listing of those "persons" who can enter into  
20 partnership contracts. O.R.S. § 68.020(3). The court  
21 concluded that:

22 when a trustee enters into a contract, even if  
23 signing only in his representative capacity, it is  
24 the trustee, not the trust, which is legally bound  
25 by the promises it has made in the contract.

26 August 26, 1991 Op., p. 9.

/ / /

1     b.     Intent As a Requisite of Partnership Formation

2             Bank argues that it could not have become a partner in  
3 Debtor under the Corey Partners agreement because the parties  
4 to the agreement did not intend that result. It cites numerous  
5 Oregon partnership cases for the proposition that partnerships  
6 are creatures of voluntary contract, created only where the  
7 parties intend it. The cited cases, however, demonstrate that  
8 parties need not expressly intend to form a partnership (or to  
9 become partners) to do so in the eyes of the law. Rather, in  
10 determining whether a partnership exists in a given instance --  
11 and thus whether the legal rules governing partnerships apply --  
12 - Oregon courts look to the nature of the parties' intended  
13 arrangements. Where those arrangements have the attributes of  
14 a partnership, the law treats them as such.

15             Thus, to form a partnership, parties need merely have  
16 intended to form an association having the attributes of a  
17 partnership: an entity separate from themselves as individuals  
18 which they co-own and carry on as a business for profit. See  
19 ORS 68.110(1).

20             [W]here the parties to a contract, by their acts,  
21 conduct, or agreement, show that they intended to  
22 combine their property, labor, skill, and  
23 experience, or some of these elements on one side  
24 and some on the other, to carry on, as principals  
25 or co-owners, a common business, trade or venture  
26 as a commercial enterprise, and to share, either  
expressly or by implication, the profits and losses  
or expenses that may be incurred, such parties are  
partners.

Eldridge, et al. v. Johnson, 195 Or. 379, 395, 245 P.2d 239,

1 246-47 (1952).

2 The Eldridge case is illustrative. There, a key  
3 employee's contract to purchase an interest his employer's  
4 business, under which the employee received a correlating share  
5 of its profits, was held to create a partnership. By contrast,  
6 the court in H.H. Worden Co. v. Beals, 120 Or. 66, 250 P.375  
7 (1926) held that a contract providing for logging, milling and  
8 sale of one party's timber by the other did not create a  
9 partnership, because the parties dealt with each other as  
10 individuals, without creating a separate business association  
11 in which they shared a community of interest. In neither  
12 Eldridge or Worden did the contracts make express references to  
13 partnerships.

14 Bank argues there is no evidence in this case that it and  
15 the Coreys intended to combine their property, labor, and/or  
16 skill to carry on as co-owners of Debtor, and to share the  
17 profits and losses as partners. Rather, Bank contends, it  
18 acted only as the trustee of the two trusts, and was not  
19 considered a partner by anyone.

20 This argument obscures and distorts the legal effect of  
21 Bank's having acted as a trustee in executing the dissolution  
22 and Corey Partners agreements. When considered in light of  
23 relevant trust law, these agreements demonstrate that Bank and  
24 the Coreys established a relationship having all the attributes  
25 of a partnership, and is therefore appropriately treated as one  
26 under the law.

1 Under the law of trusts, a trustee holds legal title to  
2 property transferred into trust subject to the fiduciary duty  
3 to deal with it for the benefit of the trust beneficiaries.  
4 Restatement (Second) of Trusts, §§ 2, 88. Thus, when Bank  
5 accepted its appointment as trustee of the two grandchildren's  
6 trusts, it became the legal owner of separate one-percent  
7 interests in the original Bob's 19-cent Hamburgers partnership.  
8 Bank subsequently executed, as trustee, the agreement  
9 dissolving Bob's 19-cent Hamburgers. Under that agreement,  
10 Bank received, in exchange for the trust partnership interests,  
11 direct interests in the property the partnership had owned.

12 In executing the Corey Partners Agreement, the Coreys and  
13 Bank formed a new partnership. Each contributed the real  
14 property interests that had been distributed to them under the  
15 dissolution agreement. Consequently, the real property  
16 formerly owned by Bob's 19-cent Hamburgers came to be owned by  
17 the Corey Partners partnership. The new agreement expressly  
18 provided that the parties would share the partnership's profits  
19 and losses in proportion to their stated ownership shares, and  
20 designated Robert Corey as the managing partner. Thus, on its  
21 face, the Corey Partners Agreement evidences the parties'  
22 intent to combine their property and to carry on, as co-owners,  
23 a common business, sharing its profits and losses. Because the  
24 agreement incorporates all the critical elements of a  
25 partnership, the relationship it establishes would be treated  
26 as a partnership under Oregon law even if it were not expressly

1 referred to as one.

2 c. Facts Showing Lack of Intent to Form a Partnership

3 Bank asserts the following facts as evidence that the  
4 parties did not intend it to be a partner in Debtor. First,  
5 Bank contends that it did not consider itself a partner, nor  
6 intend to be held personally liable. Both Wendy Weaver, the  
7 trust department's trust officer who signed the agreement, and  
8 Marvin Abeene, Trust Department Manager, testified that they  
9 believed that by executing documents "as trustee," the trust  
10 department, as a matter of law, could not be held personally  
11 liable. Bank contends it would not have executed the  
12 agreements if it were aware that in doing so it risked personal  
13 liability.

14 Second, when the partnership agreement was signed, Bank  
15 contends, the Coreys knew that the trust department did not  
16 consider itself personally liable. Mr. Corey had served as a  
17 director of Bank for twenty years, and for much of that time --  
18 possibly ten years -- had been a member of its trust committee.  
19 Abeene testified that, as a member of that committee, Mr. Corey  
20 would have been well aware that the trust department had a  
21 policy against exposing itself to personal liability in  
22 entering into contracts on behalf of trusts. Mr. Corey himself  
23 testified that he considered the trust department the  
24 "custodian" of the trusts. The Coreys did not hold the trust  
25 department out as a partner in debtor, and its financial  
26 statements did not include the bank's assets. The Coreys'

1 accountant filed yearly partnership income tax returns on  
2 behalf of the trusts as partners.

3 Finally, Bank points out that after it was removed as  
4 trustee on June 1, 1990, the partnership was not dissolved.  
5 Under O.R.S. 68.510 and 68.530(1)(d), Bank argues, a  
6 partnership dissolves when any partner ceases to be associated  
7 with the carrying on of the business or is removed. Yet,  
8 following Bank's removal, Corey Partners undertook no steps to  
9 wind up its affairs, but rather, as Mr. Corey testified,  
10 continued business as usual. No new partnership was formed.

11 None of these contentions undermines the evidence that  
12 Bank and the Coreys arranged a contractual relationship that  
13 includes all of the critical elements of a partnership, and  
14 which the law will therefore regard as a partnership. Rather,  
15 they are probative of the parties' subjective understandings of  
16 the legal effect of their contract. As discussed above,  
17 however, Oregon partnership law does not require that to form a  
18 partnership, parties have expressly intended to do so -- or  
19 even have understood that they have done so. For this reason,  
20 these contentions are not helpful to Bank's argument that it  
21 could not have become a partner for lack of partnership intent.  
22 A partnership was clearly established under the Corey Partners  
23 agreement. If Bank is personally liable on that contract, it  
24 is a general partner in debtor. That it may not have  
25 understood the legal effect of the contract it executed is not  
26 grounds for relieving it from its resulting obligations. Shell

1 Oil Co. v. Boyer, 234 Or. 270, 277-78, 381 P.2d 494 (1963).

2 d. The Trusts as Partners

3 Bank maintains, however, that the trust estates, and not  
4 Bank, are liable under the agreement. It contends that the  
5 bankruptcy court erred in concluding that trusts cannot enter  
6 into contracts, and thus cannot be general partners, citing  
7 Ogden Railway Co. v. Wright, 31 Or. 150, 49 P. 975 (1897) and  
8 Richmond v. Ogden Street Ry Co., 44 Or. 48, 74 P. 333 (1903).  
9 Neither case, however, supports a contrary conclusion.

10 In Ogden Railway Co., the Oregon Supreme Court reversed  
11 the dismissal of a complaint brought against two trustees in  
12 their personal capacities. Plaintiff sued on promissory notes  
13 the defendants had signed "as trustees." The Court rejected  
14 the defendants' contentions that they had signed the notes only  
15 as representatives of the trusts. Its analysis echoes that of  
16 the bankruptcy court here: a "trust estate cannot promise," and  
17 thus cannot be a principal, and a contract entered into by a  
18 trustee is therefore the personal undertaking of the trustee.  
19 31 Or. at 153, 49 P. at 976 (quoting Taylor v. Davis, 110 U.S.  
20 330 (1883)). The court acknowledged, however, that the  
21 trustees' liability could be limited by express agreement  
22 between the contracting parties. Id.

23 In Richmond, the Court affirmed a decree reforming the  
24 notes that had been at issue in Ogden Railway, based on  
25 unequivocal testimony by the parties that in executing the  
26 notes they had agreed the trustees' liability was limited to

1 the amount of the trust property they held, and they were not  
2 to incur personal liability. 44 Or. at 51-52, 74 P. at 334.  
3 Bank also cites Rothschild Bros. v. Kennedy, 86 Or. 566, 169 P.  
4 102 (1917), which goes no further, noting specifically that  
5 "even though [the trustee] purchased the goods for the benefit  
6 of the trust estate, he would be personally liable in the  
7 absence of an agreement exempting him from liability." 169  
8 P.2d at 104.

9 Bank also cites Terminal Trading v. Babbitt, 109 P.2d 564  
10 (Wa. 1941). There, the Washington Supreme Court reasoned that  
11 the rule that a trust estate cannot contract is one of  
12 necessity. It therefore refused to apply the rule where the  
13 trust estate was a corporation, a legal entity that is capable  
14 of contracting. 109 P.2d at 568. Terminal Trading is  
15 distinguishable from this case, as the trust estates at issue  
16 here are not legal entities capable of contracting.

17 e. Restatement of Trusts § 265

18 Bank also argues that because it merely held title in the  
19 partnership for the benefit of the trusts, its liability is  
20 limited under Restatement (Second) of Trusts § 265, to the  
21 extent the trust can indemnify it. This argument speaks to  
22 both Bank's status -- whether it is a general partner -- and  
23 that the scope of its resulting liability. Its thrust is that  
24 bank was merely a passive trustee. In support, Bank emphasizes  
25 that it did not participate in the hamburger business after the  
26 initial trust transfers; it was not consulted regarding

1 partnership business decisions; it was not notified of  
2 partnership meetings; and it was not consulted regarding the  
3 plan to dissolve the old partnership and create a new one.  
4 Rather, Bank merely executed the documents relating to  
5 formation of the new partnership, as requested by Robert E.  
6 Corey, so that the trusts could maintain their one percent  
7 ownership interests in the Coreys' business. After formation  
8 of the new partnership, the Bank's role continued to be  
9 passive.

10 Restatement of Trusts (Second), § 265, on which Bank  
11 relies, provides that:

12 Where a liability to third person is imposed upon a  
13 person, not as a result of a contract made by him  
14 or a tort committed by him but because he is the  
15 holder of the title to property, a trustee as  
16 holder of the title to the trust property is  
subject to personal liability, but only to the  
extent to which the trust estate is sufficient to  
indemnify him.

17 (emphasis added).

18 Bank incurs liability here not merely because it held  
19 title to property for the trusts, but as a consequence of the  
20 contract it made as trustee to form the new partnership.

21 Although it may not have intended to do more than hold title  
22 for the trusts, it does not follow from that subjective intent  
23 that it is entitled to the benefit of the Restatement § 265  
rule.

24 f. Conclusion: Bank is a General Partner in Debtor

25 As discussed above, that the parties did not expressly  
26

1 intend that Bank become a partner in Debtor did not preclude it  
2 from doing so under partnership law. The Corey Partners  
3 agreement contains all the elements of partnership, and  
4 therefore established one as a matter of law. Under  
5 controlling Oregon precedent in the Ogden Railway cases, Bank  
6 as trustee is personally liable on that contract, as trusts are  
7 incapable of entering into contracts. For these reasons, I  
8 affirm the bankruptcy court's holding that Bank is a general  
9 partner in Debtor.

10 2. Is Bank Liable Beyond the Extent of the Trust Property It  
11 Administered?

12 a. The Bankruptcy Court's Analysis

13 In holding that Bank's liability as a general partner is  
14 not limited to the trust assets, the bankruptcy court noted  
15 that at common law, a trustee's personal liability to third  
16 parties arising in the administration of the trust was  
17 unlimited. It recognized, however, that in Ogden Railway,  
18 Richmond, and Rothschild Bros., supra, trustees were relieved  
19 of personal liability on contracts to provide goods or services  
20 based on factual showings that the contracting parties had  
21 agreed the trustees' liability was limited to the amount of  
22 trust assets.

23 The bankruptcy court found the Ogden Railway line of  
24 cases inapplicable here, due to a key difference in the nature  
25 of general partnership agreements from that of contracts for  
26 the sale of goods or services. By executing a general

1 partnership agreement -- unlike other contracts -- the parties  
2 create a new legal entity capable of suing and being sued in  
3 its own name. A defining characteristic of that entity is that  
4 the partners are personally liable for its debts; the creditors  
5 of the partnership may reach the partner's personal assets to  
6 satisfy partnership debts. Thus, the court reasoned,

7 [I]f the document signed is agreed to be a general  
8 partnership agreement, as here, then absent  
9 language in the document allowing it one cannot say  
10 that the liability of the general partner signators  
11 may be limited. Such a statement would be  
12 oxymoronic.

13 [Bank's] status as . . . a partner includes by  
14 definition personal liability for the debts of the  
15 partnership. It cannot now be heard to argue that  
16 the law of trusts should be applied to limit its  
17 liability.

18 August 26, 1991 Op., p. 10.

19 The court further held that even if Ogden Railway line of  
20 cases were applicable, it could not find that Bank had shown  
21 that the parties to the partnership agreement had intended its  
22 liability to be limited.

23 b. Bank's Argument

24 Bank contends that partnership agreements are no  
25 different from other contracts for the purposes of Ogden  
26 Railway. It then emphasizes language in the Ogden Railway  
decision which suggests that a trustee's liability is limited  
where the facts and circumstances surrounding a contract's  
execution indicate this was the parties' intent.

/ / /

1 Finally, emphasizing the same facts it asserted as  
2 evidence the parties never intended it to be a partner (see  
3 ante, pp. 9-10), Bank argues that the facts and circumstances  
4 surrounding the execution of the Corey Partners agreement  
5 indicates the parties did not intend Bank to be liable beyond  
6 the extent of the trust assets.

7 c. Analysis

8 The bankruptcy court's conclusion that the Ogden Railway  
9 liability limiting rule is inapplicable to general partnership  
10 agreements is well reasoned. By the contracts involved in  
11 Richmond and Rothschild Bros., the parties limited their  
12 liability to one another. By contrast, for the parties here to  
13 have limited Bank's liability as a partner, they would have  
14 limited its liability to others, in a manner inconsistent with  
15 the defining characteristic of the very form of association  
16 they expressly purported to adopt. Bank conclusorily dismisses  
17 this distinction without addressing its merits.

18 Even if the bankruptcy court erred in finding Ogden  
19 Railway inapplicable, Bank has not shown that it is entitled to  
20 relief under that rule. Bank's reliance on "facts and  
21 circumstances" surrounding execution of the Corey Partners  
22 agreement is misplaced. Under Ogden Railway, Richmond, and  
23 Rothschild Bros., an express understanding is required to limit  
24 a trustee's liability under a contract. Bank has submitted no  
25 evidence that the parties agreed its liability as trustee was  
26 limited. I affirm the Bankruptcy's court's ruling that Bank's

1 liability as a partner in debtor is not limited.

2 3. Should Bank Be Granted Relief From the Automatic Stay To  
3 Foreclose on the Bernheim Contract and The Ranch?

4 Bank challenges the bankruptcy court's findings that the  
5 Bernheim Contract and the Ranch are assets of the debtor  
6 partnership. Both of these properties were declared by the  
7 Corey Partners agreement to be partnership property, taken  
8 subject to existing encumbrances.

9 a. The Bernheim Contract

10 The Bernheim contract is a land sale contract in which  
11 Robert E. Corey held a vendor's interest. In 1985, Corey  
12 assigned his interest to Bank as collateral for personal loans.  
13 That assignment contained a future advances clause. The  
14 contract was transferred to the Corey Partners on December 31,  
15 1986, under the partnership agreement, subject to existing  
16 encumbrances. In 1987 and 1989, Corey again assigned the  
17 contract to Bank as security for further personal loans.

18 The bankruptcy court found that Bank had held a perfected  
19 security interest in the Bernheim contract at the time the  
20 contract was transferred to the partnership. September 27,  
21 1991 Op., p. 2-3. The court also found that the future  
22 advances clause in the 1985 assignment secured Bank's 1987 and  
23 1989 loans. August 26, 1991 Op., p. 17. Thus, Bank's security  
24 interest extended to the amounts owed on those loans although  
25 they were made after title to the contract had passed to the  
26 partnership. Bank argues that because the debt secured by

1 its security interest exceeds the value of the contract, debtor  
2 has no equity in the contract. Further, Bank's interest in the  
3 contract is not a partnership obligation, because it predated  
4 formation of the partnership.

5 Bank's arguments undermine the logic of subordinating its  
6 claim to those of nonpartner creditors under ORS 68.620(2). To  
7 grant Bank relief from the stay would nonetheless be  
8 inappropriate in light of Debtor's right to offset any  
9 contributions it may need from Bank as its partnership to pay  
10 partnership liabilities. See ORS 68.620(1)(b) and (4). For  
11 that reason, I affirm the bankruptcy court's ruling denying  
12 relief as to the Bernheim contract.

13 b. The Ranch

14 The Ranch is a piece of real property previously owned by  
15 Robert Corey. In 1982, Corey and U.S. Housing and Development  
16 Corporation mortgaged the Ranch to Bank. U.S. Housing was a  
17 Corey-controlled corporation that went out of business in the  
18 early 1980s. The 1982 mortgage contained a future advances  
19 clause. Corey transferred the Ranch to the partnership by  
20 quitclaim deed on December 31, 1986. On September 30, 1987,  
21 Bank released the 1982 mortgage.

22 Robert Corey individually mortgaged Ranch to Bank on  
23 September 30, 1987 and May 19, 1989. On the same dates, Corey  
24 signed "Consent to Pledge" forms granting liens to Bank. Corey  
25 signed the consents twice, once individually and once on behalf  
26 of Corey Partners.

1           The Bankruptcy court found the 1987 and 1989 mortgages  
2 ineffective to grant liens on Ranch to Bank. Bank could not  
3 rely on the 1982 mortgage's future advances clause because it  
4 had released that mortgage. Further, the partnership, which  
5 owned Ranch after December 31, 1986, had not authorized use of  
6 its interest as collateral for personal loans to Robert Corey.  
7 August 26, 1991 Op., p. 18. The court therefore denied Bank  
8 relief from the automatic stay.

9           Bank argues the court erred in failing to find that the  
10 1987 mortgage was merely a continuation of the existing 1982  
11 (personal) mortgage. It cites Schwartzler v. Lemas, 82 P.2d  
12 419 (Cal. 1938) for the proposition that the 1987 and 1989  
13 mortgages are not mortgages on partnership property. In  
14 Schwartzler, Lemas mortgaged business equipment to secure two  
15 promissory notes. Lemas later sold a 50 percent interest in  
16 the business to Vierra. Vierra knew of the notes and mortgage  
17 and took his interest subject to the mortgage. Subsequently,  
18 Lemas executed a new mortgage on the same equipment to renew  
19 and extend one of the original notes. When the note was not  
20 paid, the lender foreclosed. Vierra intervened, objecting that  
21 the second mortgage, executed after he had purchased his  
22 interest in the business, was not binding on him.

23           The California court held that the second mortgage had  
24 "created no new obligation." 82 P.2d at 421.

25           Under the circumstances of this case the lien  
26 created by the first mortgage was never  
extinguished. The second mortgage therefore did

1 not abridge the rights acquired by Vierra. There  
2 is substantial proof that the [second] mortgage was  
3 executed to renew the original \$3,317 note which  
was secured by the first mortgage and that the  
original lien was therefore not extinguished.

4 Id. The court found that Lemas had not mortgaged partnership  
5 property by executing the second mortgage, but had merely  
6 extended the original mortgage, subject to which Vierra had  
7 taken his interest. Vierra was therefore bound by it.

8 Bank contends the 1987 loan in this case was a  
9 consolidation of several outstanding loans Corey owed Bank,  
10 including that secured by the 1982 mortgage on Ranch, and  
11 therefore that, under Schwartzler, it should be considered to  
12 have been a mere extension of the original 1982 mortgage. For  
13 this reason, Bank continues, the 1987 lien should not be viewed  
14 as having been a transfer of partnership property. Therefore,  
15 whether Corey had been authorized to use such property as  
16 collateral for his personal loans is irrelevant.

17 Bank's analogy to Schwartzler is unpersuasive. There,  
18 the partnership property was re-mortgaged to secure the same  
19 note, in the same amount, that it had originally been mortgaged  
20 for when the new partner, Vierra, bought his interest. The  
21 record here is not clear as to the amount of indebtedness the  
22 Ranch secured at the time the partnership took title. Several  
23 different loans are involved. The 1987 and 1989 mortgages  
24 purported to secure new loans in an amount that consolidated  
25 several prior loans that were outstanding. Thus, the Ranch was  
26 mortgaged to secure new and different obligations.

1 Bank also argues that even if the bankruptcy court was  
2 correct in concluding that the 1987 loan was not a renewal of  
3 the 1982 loan, it erred in finding Corey had not been  
4 authorized to grant the liens on Ranch. Bank argues that in  
5 mortgaging Ranch in 1987 and 1989, Corey had apparent authority  
6 to act on the partnership's behalf, because he appeared to be  
7 "carrying on in the usual way" the business of the partnership.  
8 ORS 68.210. Bank also argues Corey also had actual authority,  
9 citing the partnership agreement's provision giving him, as  
10 managing partner, responsibility for all investment and  
11 business decisions. Finally, bank argues that the partnership  
12 should be deemed to have ratified Corey's actions by virtue of  
13 the partners' acceptance of the benefits of those actions.  
14 Bank contends the partners benefitted because if Corey had not  
15 restructured his debts, the Bank and another mortgage holder,  
16 U.S. National Bank, would have foreclosed on their interests,  
17 to the detriment of the partners.

18 These arguments are also unpersuasive. Pledging  
19 partnership property as security for personal debt cannot  
20 reasonably be seen as carrying on the partnership's business in  
21 the usual way. Nor can the partnership agreement's language  
22 granting the managing partner authority to conduct business  
23 reasonably be construed to actually authorize such action.  
24 Finally, as the debtor argued in response, there is no evidence  
25 that the other partners, Bank's trust department or Betty  
26 Corey, knowingly accepted any benefit from Robert Corey's

1 actions.

2 CONCLUSION

3 I affirm the bankruptcy court's partial denial of the  
4 motion for relief from the automatic stay.

5 DATED this 7 day of August, 1992.

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7   
8 JAMES A. REDDEN  
United States District Judge