

1965

Werner Kiepe v. Eli D. Lecheminant : Appellant's Brief

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**In the Supreme Court
of the State of Utah** UNIVERSITY OF UTAH

WERNER KIEPE,

*Plaintiff-Appellant
and Cross Respondent,*

vs.

ELI D. LeCHEMINANT,

*Defendant-Respondent
and Cross Appellant*

OCT 15 1965

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Case No. 10310

APPELLANT'S BRIEF

FILED
APR 2 - 1965

Clerk, Supreme Court, Utah

Appeal from the judgment of the Third District
Court for Salt Lake County
Hon. Marcellus K. Snow, Judge

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In the Supreme Court of the State of Utah

WERNER KIEPE,

*Plaintiff-Appellant
and Cross Respondent,*

vs.

ELI D. LeCHEMINANT,

*Defendant-Respondent
and Cross Appellant*

Case No. 10310

APPELLANT'S BRIEF

Appeal from the judgment of the Third District
Court for Salt Lake County
Hon. Marcellus K. Snow, Judge

STATEMENT OF NATURE OF THE CASE

This is an action for an accounting upon the dissolution of a partnership, primarily for the period between the date of dissolution and the completion of winding up.

DISPOSITION OF CASE MADE IN LOWER COURT

The lower court entered a judgment dated November 9, 1964, which provided, among other things:

1. That the Respondent be awarded \$2,500.00 for "preserving the mortgage loan asset of the partnership."

2. That a bonus of \$535.00 be awarded to each of the parties.

3. Adjudging that the Respondent is entitled to total credits of \$20,101.93, less refunds of \$3,668.71.

4. Adjudging that the Respondent is entitled to net credits of \$16,443.22.

5. Adjudging that compensation paid to Ruth Barlow and R. L. Christensen should be allowed as partnership expense and be borne equally by the partners.

6. Adjudging that the fee charged by Lawrence S. Pinnock, Certified Public Accountant, should be a partnership expense and borne equally by the partners.

7. Awarding Respondent a net balance credit of \$16,433.22 out of cash on hand of \$28,723.90.

8. The Court denied Appellant's motion to amend the judgment of the Court dated March 12, 1964.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the following portions of the judgment dated November 9, 1964 and judgment in his favor as a matter of law therein, or, failing that, a new trial thereon:

1. The award of \$2,500.00 to Respondent for preserving the mortgage loan asset of the partnership.

2. The award of a bonus of \$535.00 to each party.

3. Adjudging that the Respondent is entitled to total credits of \$20,101.93, less refunds of \$3,668.71.

4. Adjudging that the Respondent is entitled to net credits of \$16,433.22.

5. Appellant seeks reversal of the order of the Court denying his motion to amend the judgment of the Court dated March 12, 1964, to provide that the Respondent pay into a special fund the sum of \$981.96 in addition to the sum of 75 per cent of \$9,819.65 ordered paid by the Court into said fund, out of which overcharges made by Respondent from patrons of the partnership should be repaid.

Respondent seeks reversal of the following portions of the judgment of the Court dated November 9, 1964, and judgment in his favor as a matter of law, or, failing that, a new trial thereon:

1. Awarding Respondent the sum of \$2,500.00 for "preserving the mortgage loan asset of the partnership," when Respondent had asked for \$5,000.00.

2. Adjudging that compensation paid to both Ruth Barlow and R. L. Christensen should be allowed as partnership expense and be borne equally by the partners.

3. Adjudging that the fee charged by Lawrence S. Pinnock, Certified Public Accountant, should be a partnership expense and borne equally by the partners.

4. Awarding Respondent a net balance credit of \$16,433.22 out of cash on hand of \$28,723.90, when Respondent is entitled to more.

STATEMENT OF FACTS

Appellant and Respondent commenced business as

of October 1, 1943, as real estate brokers. (R-3)

It was agreed that 50 per cent of all fees and commissions earned should be paid to the partner producing the same, (R-3) and the remaining 50 per cent should be put into the profit and loss account from which all expenses of operating the business should be paid, and the balance divided equally between the partners.

Later it was agreed that the division of fees and commissions should be changed to pay to the one producing the same 50 per cent of all such fees and commissions from \$1.00 to \$7,200; 52½ per cent of total commissions from \$7,200 to \$8,400; 55 per cent of total commissions from \$8,400 to \$9,600; 57½ per cent of total commissions from \$9,600 to \$12,000; and 60 per cent of total commissions in excess of \$12,000. (R. 292 and R-301) All sums so paid in excess of 50 per cent of commission earned have been considered as bonuses and paid at the end of each calendar year.

Subsequent to October 1, 1943, State Mutual Insurance Company of Worcester, Massachusetts, appointed the partnership an agent to make real estate loans for it and collections of the payments thereon, and agreed to pay one-half of one per cent of the total outstanding loans belonging to State Mutual Insurance Company each year for such collection service. For the making of such loans, loan fees were charged by the partnership, and usually collected from the borrowers. The making

of the loans and supervising the collections were largely the work of the Respondent. (R. 195) The fees for making the loans and commissions on insurance sold with the loans were credited to the partner making them, usually the Respondent, upon which he received 50 per cent, and the remainder was put into the profit and loss account.

The Respondent at all times supervised the keeping of the books of the partnership. Until after the Appellant gave notice of the termination of the partnership, (December 30, 1962) he was unfamiliar with the books. After he had checked the books, Appellant filed suit, alleging that the Respondent had used for his own individual use and benefit sums of money exceeding his share of the partnership income, and that he refused to account therefor to Appellant. (R. 1-2)

Trial was held on November 26, December 9, 10, 11, 12, 13, 19 and 20 in 1963. The Respondent was ordered to pay to the Appellant on account thereof \$4,697.70, which amount the Respondent paid. (R. 61) In addition, in the judgment rendered on March 12, 1964 on this matter, the Respondent was ordered to place in a special account 75 per cent of \$9,819.65, and Appellant was ordered to pay into said account 25 per cent of said \$9,819.65, from which overcharges to customers of the partnership made by the Respondent should be repaid, and the balance remaining after said payments should be divided 50 per cent to the Respondent and 50 per cent to Appellant.

From Exhibit P-10 placed in evidence, it appears that the Respondent had received 75 per cent of \$9,819.65, *plus a bonus of \$981.96 thereon*, and Appellant had received 25 per cent of \$9,819.65.

On the 26th day of December, 1963, pursuant to stipulation of the parties, the parties each bid for all interest of the other in and to the assets of the partnership. After several bids had been made by each of the parties, the Appellant made a bid of \$40,000.00, and the Respondent refused to bid higher. Pursuant thereto, judgment dated March 12, 1964, provided, among other things:

“3. Plaintiff having bid \$40,000.00 for the Defendant’s interest in and to said assets and the Defendant having refused to bid higher for Plaintiff’s interest therein, all of said assets are hereby awarded to the Plaintiff.” (R. 61)

The judgment goes on to state:

“The Plaintiff has paid to the Defendant said sum of \$40,000.00, less the sum of the following amounts which the Court has found are owing from the Defendant to the Plaintiff (sums totalling \$4,697.70)” (R. 61)

The Appellant served notice of dissolution of the partnership upon Respondent on December 30, 1962, to become effective February 1, 1963. Respondent agreed to the dissolution.

From January 1, 1963 to February 1, 1964, the part-

ners continued to operate the business in the same manner as they had done prior to notice of dissolution. On February 1, 1964, Respondent removed from the office space occupied by the partnership, and the Appellant took full control of the books, records and other assets of the partnership.

On February 13, 1964, a hearing was had upon Respondent's claim for "compensation for his preserving the mortgage loan account with State Mutual Insurance Company" during the period of January 1, 1963 to February 1, 1964, and his motion that wages paid to R. L. Christensen and Ruth Barlow be paid by the Appellant instead of by the partnership for the same period. At the conclusion of the evidence, the purport of the evidence was discussed by the Court with counsel, during which counsel for the Respondent made the following statement:

"I said if they would be willing to invoke the partnership agreement all the way down the line, we would be willing to do that."

The Court then stated:

"All right. The Court will adopt the suggestion of Mr. Backman that we go all the way down the line***. Neither partner will receive any special compensation for services during this interim period, and all of the expenses by which ever department incurred or by whom will be lumped together and deducted from the profit

and loss account***." (R. 244-245)

A judgment was signed by the Court on March 12, 1964, pursuant to the oral memorandum decision aforesaid, (R. 60-64) which provided, among other things, as follows:

"9. All income of each party hereto from January 1, 1963, to February 1, 1964, is hereby ordered to be received and distributed in the same manner as is provided by the partnership agreement and as has heretofore been received and distributed, which includes insurance renewal commissions upon which the producer thereof shall receive 50 per cent and the remaining 50 per cent shall be deposited in the profit and loss account, out of which all expenses of operation by whichever department incurred or by whichever party incurred shall be lumped together and deducted from the profit and loss account, and the balance shall be divided equally and distributed one-half thereof to each of the parties to this action.

"11. The judgment herein entered constitutes an accord and satisfaction of all claims each of the parties hereto has against the other***."

Of the transcript of testimony taken at said hearing, more than half thereof was devoted to evidence concerning the preservation of the mortgage loan asset by the Respondent. As above stated, at the conclusion of the testimony the Court stated that neither party would receive any special compensation for services during the

interim period. (R. 245) The provision of the judgment quoted, that the judgment constituted an accord and satisfaction of all claims each of the parties had against the other, referred particularly to Respondent's claim for special compensation for preserving the mortgage loan asset. This judgment became final thirty days thereafter.

On June 13 and June 24, 1964, a hearing was had upon petitions filed by each of the parties against the other for an order to show cause directed to the other, to show cause why he should not be punished for contempt of court for failure to comply with the judgment of March 14, 1964. No evidence was adduced on the matter of payment of any special compensation to the Respondent for his efforts in preserving the mortgage loan asset of the partnership. At the conclusion of that hearing the Court indicated that he would accept briefs only on the following matters:

1. Contempt.
2. Bonus to be paid over and above the 50 per cent producer's basic compensation.
3. The salaries paid to Mrs. Barlow.
4. The salaries paid to Mr. Christensen.

The Court stated:

"These four items are the only items concerning the Court." (R. 397)

On September 14, 1964, the Court gave a written

memorandum decision on the hearings of June 13 and June 24, which included the following:

“1. That the Respondent should receive the sum of \$2,500.00 for his efforts during the period January 1, 1963 to February 1, 1964 in preserving the mortgage loan asset of the partnership.

2. The graduated bonus plan of the partnership may be employed in determining the commissions to be allocated to each partner.

3. The compensation as heretofore paid to both Ruth Barlow and R. L. Christensen shall remain and be allowed as a partnership expense to be borne equally by the partners.

4. The fee as charged by Lawrence S. Pinnock, Certified Public Accountant, shall be a partnership expense and paid from partnership funds and borne equally by the partners.” (R. 107-108)

Counsel for Respondent then prepared a judgment designated “Order” which was signed by the Court on November 9, 1964, which provided, among other things:

“1. That the Respondent should be paid \$2,500.00 for his efforts in preserving the mortgage loan asset of the partnership.

2. Compensation heretofore paid to Ruth Barlow and R. L. Christensen shall be allowed as a partnership expense, to be borne equally by the partners.

3. The fee charged by Lawrence S. Pinnock, C.P.A. shall be borne equally by the partners.

4. That each partner shall be paid \$535.00

as a bonus.

5. That refunds of \$3,668.71 should be paid to the Appellant, and the Respondent is entitled to receive \$16,433.22 out of cash on hand in the partnership of \$28,723.98." (R. 109-110)

Appellant filed a motion to amend the judgment of the Court dated March 12, 1964, to provide that the Respondent pay into the special fund for refunds of overcharges an additional sum of \$981.96. The Court denied the motion.

Following is the evidence pertinent to the matters at issue in this appeal and cross-appeal.

Before the Court commenced taking testimony at the hearing of February 13, 1964, he stated that it was his understanding that the only thing to be considered at the hearing "is the respective service rendered to this operation since the dissolution," to which counsel for the Respondent answered, "Yes." (R. 164)

Mr. LeCheminant was the first witness called. He testified in effect that the mortgage loan business consisted of making collections from some 600 accounts on a monthly basis. As the payments were received at the office, they were entered on a cash book by a clerk. The work of seeing that the accounts are kept current is more than a clerical operation. That was the function he performed. During the year they had had 81 of the 600 accounts which required more or less collection effort

every month. Telephone calls were made to those people and in addition some letters were written, if they were unable to get the delinquent accounts on the telephone. In addition, State Mutual Insurance Company required a delinquency statement and a statement of the reasons for the delinquencies each month. (R. 165) A statement was sent to the accounting department by a clerk, and one to the mortgage loan department which the Respondent did. State Mutual Insurance Company exerted a great deal of pressure concerning delinquencies. In addition to making collections, there was a maze of detail necessary to maintain the mortgage loan connection.

That when Mr. Kiepe terminated the partnership, State Mutual Life could have cancelled its contract with the partnership at any time, and it was necessary to put forth additional effort to make sure that the accounts were properly handled.

It was necessary to call personally upon some of the delinquent mortgagors. Respondent went to Draper on two or three occasions and to Magna on one. He went to Bountiful and to Centerville. During the year he made 20 to 25 personal visitations and had personal conversations with mortgagors. Some calls were made after office hours, some during the day. During the year he spot-checked 70 to 100 homes. When Mr. Saunders of State Mutual Insurance Company was in Salt Lake City he inspected with him probably 20 houses. (R. 167)

The insurance company wanted loans on commercial properties instead of homes as they had previously wanted. It was necessary that considerable work be done in submitting some commercial loans in order to keep the insurance company informed that we were at least attempting to satisfy their requirements. During the year he submitted about 8 or 9 residential loans and in addition about 11 commercial loans on which he had done considerable work. They were all turned down. (R. 168)

Respondent spent at least a part of each working day at the office on the business of maintaining the loans, (R. 170), and he had numerous telephone calls concerning refinancing loans which they were processing, and he thought he had convinced at least 20 people to leave the loans and do any additional financing some other way. (R. 170)

In the insurance business they had a cashier who was also a bookkeeper, and the Respondent had a secretary who took care of general correspondence and preparation of mortgage loan papers, and handled the insurance account. (R. 170-171)

At the beginning of 1963, the total amount of mortgage loan business which they were servicing was close to \$7,000,000. (R. 174) During 1963 the submission of loans was minor, the clerical help so far as the secretary was concerned was minor, and the insurance renewals until September, 1963 were negligible. From May to

September, 1963, they had about 60 policies of insurance that had to be registered and sent out to customers, and that after that time there were some 400. They were all renewed at practically the same time. (R. 171)

Ruth Barlow did nothing except a small amount of work from May to September on insurance accounts. The Respondent testified that he informed Mr. Kiepe that he would refuse to pay any part of Ruth Barlow's salary, that she was not needed in the office, and that she came there to do Mr. Kiepe's personal work (R. 174).

The Respondent was asked by his counsel what in his opinion would be reasonable for the Court to allow to him by way of special compensation to be chargeable against Appellant. The Court interjected, "You mean for extra services rendered during the interim period." (R. 174-175) Respondent further testified that the partnership income approximated \$33,000 on the mortgage loan account and the insurance account, with an expense of \$10,700, so that Respondent's share of the income from the mortgage loan department would net \$11,150, and Appellant's would be the same. In addition, during 1963 Respondent's income from appraisal work was approximately \$1,000 and approximately \$110 from real estate sales and listings; his commissions on one commercial loan was \$5,600 and on two residential loans about \$350, and on personal insurance commissions \$800 or \$900. (R. 182)

Respondent testified that his activities in 1963 were no different from any other year so far as his mortgage loan business was concerned. He worked just as hard in 1960, 1961 and 1962 on that phase of the business as he did in 1963. There was nothing new after the dissolution of the partnership in the amount of effort that he put into the mortgage loan business. (R. 195-196)

The partnership had 600 or 700 accounts. Each customer made a monthly payment, either at the counter or through the mail. Respondent had nothing to do with the receiving of payments at the counter or through the mail. They were listed and posted in the books of the partnership by a clerk. He had nothing to do with that. He was then asked the following question and gave the following answer:

“Question: Then the only thing that remains to be done is to take care of the delinquent payments after that and make reports to the insurance company, isn't that correct?

“Answer: That's substantially correct.”
(R. 196)

On making reports to the company on collections of the delinquencies a clerk made the reports to the accounting department and the Respondent reported to the mortgage loan department. (R. 197) The Respondent wrote five to seven letters a month to State Mutual Insurance Company on collections. It would take maybe 15 minutes to write a letter. (R. 198)

Appellant introduced into evidence and read into the record a letter dated December 19, 1963 from State Mutual Insurance Company to the Respondent which is most uncomplimentary of Respondent's handling of the mortgage loan account. (R. 203-204)

Respondent was asked if Appellant ever asked him to take care of the mortgage loan account, to which he answered no. He answered yes to the statement, "You were just as much interested in preserving that account for yourself as you were for anybody else." (R. 205)

Mrs. Ruth Barlow was then called and testified in substance as follows: During 1963 from February 17 to August 31, the period of time during which she was employed by the partnership, the Respondent arrived at the office on the average about 9:30 — between 9:00 and 10:00 in the morning. His leaving time was at 3:00 or 3:30 each day. On at least two or three days a week, he would leave about 11:00 and come back at 1:00. He usually spent the time between 11:00 and 1:00 at the Deseret Gym. When he left the office in the afternoon, he usually went home or to the Desert Gym. He had a standing appointment two days a week at 3:00 with Brother Jonathan at the Deseret Gym. (R. 210-211)

Respondent spent part of a morning twice a month dictating on delinquent accounts. (R. 212) When she was working with Respondent, he dictated reports to State Mutual and she typed them, usually a two-page

letter. It didn't take long. She was his secretary in 1960, 1961 and 1962. His coming and going during those years was the same as in 1963. (R. 212-213)

Respondent's own mortgage loans which he had in the office in 1963 amounted to \$108,565.24 as of April 16, 1963. (R. 216)

Mr. Kiepe testified in substance as follows: That I employed Mr. R. L. Christensen as an understudy to help me in making appraisals. He did a great deal of work in bringing up to date the accounting system in the loan account and in bringing to date the insurance policies. I employed people to carry on the mortgage loan business because I found there was a very bad accumulation of insurance policies which needed to be sent out. I employed Ruth Barlow for that purpose. Later on others helped in the same process. (R. 220-221).

Appellant finished \$28,825 of appraisal work in 1963 and produced \$3,295.00 in real estate commissions. (R. 242)

Thus Appellant produced \$32,120.00 income during 1963 which was turned into the partnership.

The bonuses each earned during 1959 to and including 1962 (R. 294) and during the period in question, 1963, (R. 120-122) were as follows:

<u>Year</u>	<u>LeCheminant</u>	<u>Kiepe</u>
1959	\$4,046.34	\$2,368.14
1960	1,676.39	2,001.00
1961	1,862.62	2,139.20
1962	1,848.58	1,731.37
1963	908.19	2,365.96

The earnings of the Respondent and the Appellant during the period in question, January 1, 1963 to February 1, 1964, were (R. 120 and 122) :

	<u>LeCheminant</u>	<u>Kiepe</u>
Commissions	\$9,190.95	\$16,479.79
Bonus	908.19	2,365.96
Share of Profits	15,556.44	15,556.44
Total	\$25,655.58	\$34,402.19

ARGUMENT

POINT I

THE AWARD OF \$2,500.00 TO RESPONDENT BY THE JUDGMENT OF NOVEMBER 9, 1964 IS NOT SUPPORTED BY PLEADINGS OR FINDINGS OF FACT.

The judgment designated "Order" filed on November 9, 1964, provides as follows :

"(a) Defendant LeCheminant will receive the sum of \$2,500.00 for his efforts and services during the last thirteen months in preserving the mortgage loan asset of the partnership."

There were no pleadings or Findings of Fact to support this part of the judgment. Said judgment of November 9, 1964, was entered pursuant to a hearing had on the 13th day of June, 1963, which was continued to and concluded on the 24th of June, 1964. The only pleadings in that matter were petitions for orders to show cause directed to each of the parties by the other, ordering each to show cause why he should not be found guilty of contempt for failure to abide by the judgment of the Court entered on March 12, 1964. There was not a word of evidence or other proof adduced at the hearing held on said days relative to Respondent's efforts in preserving the mortgage loan asset of the partnership.

If there had been evidence on this matter, it would have been necessary to file findings in support of this part of the judgment.

As stated in *Gaddis Investment Company vs Charles H. Morrison*, 3 Utah 2d 43, 278 P.2d 284:

"It has been frequently held that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Hall vs Sabey*, 58 Utah 343, 198 P. 1110; *Baker vs Hatch*, 70 Utah 1, 257 P. 673; *Prows vs Holley*, 72 Utah 444, 271 P. 31; *Simper vs Brown*, 75 Utah 178, 278 P. 529; *West vs Standard Fuel Company*, 81 Utah 300, 17 P.2d 292; *Pike vs Clark*, 95 Utah 235, 79 P.2d 1010."

Appellant filed a motion for a new trial (R. 118)

and for amendments of judgment on November 9, 1964 (R. 119) in which the Court's attention was called to the fact that there had been no Findings of Fact or Conclusions of Law entered in support of the above portion of said judgment. (R. 118-119) The Court overruled the motion for a new trial and filed an order denying Appellant's motion to amend. Nothing was done about making Findings of Fact.

POINT II

THE ISSUE UPON WHICH THE AWARD OF \$2,500.00 TO THE RESPONDENT WAS MADE BY THE JUDGMENT OF NOVEMBER 9, 1964 WAS TRIED ON FEBRUARY 13, 1964, AND WAS ADJUDGED AGAINST THE RESPONDENT BY THE JUDGMENT OF MARCH 12, 1964, WHICH JUDGMENT HAD BECOME FINAL AND WAS RES ADJUDICATA OF SAID ISSUE AT THE TIME OF THE ENTRY OF THE JUDGMENT OF NOVEMBER 9, 1964.

The issue upon which the award of \$2,500.00 to Respondent was made by the judgment of November 9, 1964, was tried on February 13, 1964. At the conclusion of the evidence, the Court ruled:

"Neither partner will receive any compensation for services during this interim period."
(R. 244-245)

A judgment was signed and filed by the Court pursuant to said ruling (R. 60-64) which provided, among other things, as follows:

"9. All income of each party hereto from

January 1, 1963 to February 1, 1964 is hereby ordered to be received and distributed in the same manner as is provided by the partnership agreement and as has heretofore been received and distributed.***

"11. The judgment herein constitutes an accord and satisfaction of all claims each of the parties hereto has against the other."

The judgment of March 12, 1964 became final and was res adjudicata of the issue of whether Respondent was entitled to any compensation for perserving the mortgage loan asset for the partnership.

Since February 13, 1964, no evidence has ever been introduced thereon. To date, now more than a year since the judgment was entered, no motion for a new trial of the matters tried on February 13, 1964 and on which the judgment of March 12, 1964 was entered has ever been filed. No motion to amend the judgment or for any relief therefrom has ever been filed. The judgment could not be amended without filing a motion to amend within a reasonable time, which in this case would not be more than ninety days. (Rule 60(b), Utah Rules of Civil Procedure).

As the Court stated in *Kettner vs Snow*, 13 Utah 382, 375 P.2d 28:

"We are in accord with the proposition urged by the Defendant that the trial court has broad discretion in granting new trials and in allowing

claims under Rule 60(b) (relief from judgment or order). But this power is not without limitation and cannot be exercised capriciously or arbitrarily. It is elementary that under the circumstances the general rules of procedure are binding and that a party who has allowed the time to move for a new trial to expire is thereafter precluded from doing so. This can be avoided only where it is made to appear that for one or more of the reasons specified in Rule 60(b), justice has been so thwarted that equity and good conscience demand that this extraordinary relief be granted and the burden of showing facts to justify doing so is upon him who seeks such relief."

Said Rule 60(b) relative to judgment provides:

"The motion shall be made within reasonable time and for reasons (1), (2), (3) and (4) not more than three months after the judgment, order or proceeding was ordered or taken."

Apparently the Court took the position that he could change any judgment entered by him at any time. In the case of *Frost vs District Court of Box Elder County*, 83 P.2d 737, 96 Utah 106, this Court quoted with approval from *Freeman on Judgments*, Volume 1 of the 5th Edition, Section 141, as follows:

"As a general rule, unless control over it has been retained in some proper manner, or a statute otherwise provides, no final judgment can be amended after the term in which it was rendered or after it otherwise becomes a final judgment. The power of courts to correct clerical errors

and misprisons and to make the record speak the truth by nunc pro tunc amendments after the term does not enable them to change their judgments in substance and in any material respect, and this is true even though the judgment has not been formally entered of record by the clerk where such entry is not essential to its validity. Consequently, it is well settled that in the absence of a statute permitting it, the law does not authorize the correction of judicial errors, however flagrant and glaring they may be, under the pretense of correcting clerical errors."

In *Kettner vs Snow*, 13 Utah 2d 382, 375 P.2d 28, above cited, Headnote 4 reads:

"A trial court has broad discretion in granting new trials and in allowing claims under the rule authorizing courts to grant a party relief from judgment within a reasonable time, not to exceed three months after a judgment has been rendered, but this power cannot be exercised arbitrarily. Rules of Civil Procedure, Rule 60(b)."

On June 13, 1964, more than three months had expired after the entry of the judgment of March 12, 1963 when the hearing was had which did not include any issue of special compensation to Respondent nor a word of evidence thereon, but upon which the Court finally entered a judgment on November 9, 1964 in favor of Respondent for \$2,500.00.

POINT III

THE AWARD OF \$2,500.00 TO RESPONDENT BY THE JUDGMENT OF NOVEMBER 9, 1964, IS NOT ONLY NOT

SUPPORTED BY PLEADINGS OR FINDINGS OF FACT, BUT IS NOT SUPPORTED BY THE EVIDENCE GIVEN AT THE HEARING OF FEBRUARY 13, 1964, AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

If for sake of argument it is assumed that the judgment of March 12, 1964 had not become res adjudicata before the Court reversed any part of the judgment of March 12, 1964 denying Respondent any compensation for extra services rendered in preserving the mortgage loan account, no such award should have been made to the Respondent for the reason that the evidence adduced at the hearing of February 13, 1964 would not support such an award. During the course of the trial held February 13, 1964, counsel for the Respondent asked Respondent what in his opinion would be fair compensation to be awarded to him by the Court for his services in preserving the mortgage loan asset. The Court interjected:

“You mean for extra services rendered during the interim period?”

to which Mr. Backman replied, “Yes.” (R. 174-175)

The Respondent by his evidence attempted to prove that he had rendered great service to the partnership in preserving the mortgage loan asset, but in fact by his own testimony he established that he had performed no extra services in that particular during the period January 1, 1963, to February 1, 1964, and as heretofore

stated, at the conclusion of the testimony, the Court stated:

“Neither party will receive any special compensation for services during this interim period.”
(R. 245)

Pursuant to said ruling, a judgment was entered on March 12, 1964, which provided, among other things:

“11. The judgment herein entered constitutes an accord and satisfaction of all claims each of the parties hereto has against the other.”

which referred particularly to Respondent's claim for special compensation for preserving the mortgage loan asset.

Respondent testified that his activities in 1963 (the interim period) were no different from any other year so far as the mortgage loan business was concerned. He worked just as hard in 1960, 1961 and 1962 on that phase of the business as he did in 1963. There was nothing new after the dissolution of the partnership in the amount of effort that he put into the mortgage loan business. (R. 195-196)

After testifying to the work which he did on delinquent accounts and in writing letters to keep State Mutual Insurance Company satisfied, and the personal calls that he made to 20 or 25 homes (R. 167) concerning the matter of taking care of the account, he testified that

all collections came into the office at the counter or through the mail and were posted to the books, all of which was done by clerks. He was then asked the following question and made the following answer :

“Question: Then the only thing that remains to be done is to take care of the delinquent payments after that and make reports to the insurance company, isn't that correct?

“Answer: That's substantially correct.”
(R. 196)

On making reports to the insurance company, he testified that he wrote 5 to 7 letters a month, which took maybe 15 minutes per letter to write. (R. 198)

He was asked if the Appellant had ever asked him to take care of the mortgage loan asset, to which he answered no. He answered yes to the statement, “You were just as much interested in preserving that account for yourself as you were for anybody else.” (R. 205)

The Respondent was paid \$40,000.00 by Appellant for his interest in the partnership assets (R. 61), which was almost entirely for the mortgage loan asset. As above quoted, he testified that he was as much interested in preserving that asset for himself as he was for anyone else. He received more for his half interest in that asset from the Appellant than he was willing to pay to the Appellant for his half interest therein.

The Court ordered the income from January 1, 1963 to February 1, 1964 to be distributed in the same manner as provided in the partnership agreement. (R. 63) This is in accordance with the provisions of Section 48-1-27, Utah Code Annotated, 1953, relative to winding up of a partnership after dissolution.

Respondent took care of the mortgage loan asset for many years before 1963, but received no special compensation therefor in addition to his fees for making loans and commissions on insurance written with the loans.

The amount Respondent received for his work in 1963 was grossly excessive considering the time and effort he put into the business and the very limited amount of new commissions he brought into the partnership. He received \$25,655.58 (R. 120, 122) for approximately half-days' work (R. 210, 211). He brought in \$8,550.00 of new income (R. 182) while Mr. Kiepe brought in \$32,120.00 of new income, consisting of appraisal fees and real estate sales commissions, (R. 242) and received \$34,402.19 (R. 120, 122). It was chiefly the income from the asset for which Appellant paid \$40,000.00 for Respondent's half interest which resulted in the payment to Respondent of \$25,655.58.

Respondent's manner of "preserving the mortgage loan asset" brought a severe reprimand from State Mutual Insurance Company. See letter of December 19,

1963, to Respondent. (R. 203-204)

The payment of any extra compensation to Respondent finds no support in the evidence.

POINT IV

THE AWARD OF A BONUS OF \$535.00 TO EACH OF THE PARTIES IN THE JUDGMENT OF NOVEMBER 9, 1964 IS NOT SUPPORTED BY PLEADINGS OR FINDINGS OF FACT, NOR BY ANY EVIDENCE, AND IS CONTRARY TO THE EVIDENCE.

There are no pleadings or Findings of Fact supporting the award of a bonus of \$535.00 to each of the parties. On the contrary, there appears in the records the statement prepared by Lawrence S. Pinnock, Certified Public Accountant, (R. 122) for the period in question: That statement shows that the Appellant earned a bonus of \$2,365.96 and Respondent a bonus of \$908.19. (R. 122) The award of an additional bonus of \$535.00 to each of the parties would benefit neither party. As shown in the statement rendered by Mr. Pinnock, there were certain moneys remaining in the partnership account out of which payment was to be made to the parties.

If an additional \$535.00 is awarded to each of the partners, it must come out of the moneys on hand equally and would thus reduce the profits allowed to each of the parties, to wit, \$15,556.44, by \$535.00 each. Thus, neither party would receive any additional money.

No mention was made in the Court's memorandum

decision of a bonus of \$535.00 or any amount. (R. 107-108)

POINT V

THAT PORTION OF THE JUDGMENT OF NOVEMBER 9, 1964 WHICH READS: "THIS BRINGS TOTAL CREDITS TO WHICH DEFENDANT IS ENTITLED THE SUM OF \$20,101.93, LESS REFUNDS OF \$3,668.71 * * * RESULTS IN A NET BALANCE CREDIT TO WHICH DEFENDANT IS ENTITLED TO \$16,433.23 OUT OF THE CASH ON HAND OF \$28,723.98, IS NOT SUPPORTED BY FINDINGS OF FACT OR BY ANY EVIDENCE.

No mention was made in the Court's memorandum decision of the "Total credits to which Defendant is entitled" or "the amount of the refunds to which Plaintiff is entitled" or "the net balance credit to which Defendant is entitled." There is not a word of evidence or Findings of Fact on any one of these items in the record.

The total credits to which Defendant is entitled, the amount of refunds due Plaintiff, and the net credit balance to which Defendant is entitled can only be determined after this Court has ruled on the various items of this appeal and cross-appeal.

POINT VI

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE JUDGMENT OF MARCH 12, 1964.

One provision of the judgment of March 12, 1964 reads:

"As to Item 6 of Plaintiff's schedule received in evidence as Exhibit P-10, reflecting items totaling \$9,819.65, it is ordered and adjudged that this amount shall be placed in a special account, 75 per cent thereof to be paid by the Defendant and 25 per cent thereof to be paid by the Plaintiff. That all overcharges to customers of the partnership collected by the partnership for anything shall be paid from the aforesaid special account. ***Costs of making such refunds shall be paid out of said special account. When all refunds have been made and all costs, deducted, the balance remaining in said special account shall be paid one-half thereof to each of the parties." (R. 61-62)

Appellant's motion was to amend the above provision of the judgment of the Court of March 12, 1964 by substituting therefor:

"As to Item 6 of Plaintiff's schedule received in evidence as Exhibit P-10 reflecting items totaling \$10,801.61, it is ordered and adjudged that this amount shall be placed in a special account, 75 per cent of \$9,819.65 plus \$981.96 thereof to be paid by the Defendant and 25 per cent of \$9,819.65 to be paid by the Plaintiff."

Exhibit P-10 showed items totalling \$9,819.65 plus a bonus of \$918.65 taken by Respondent. It was an obvious mistake or clerical error that the amount of \$9,819.65 was written into the judgment and not \$9,819.65 plus the bonus of \$981.96, a total of \$10,801.61, of which amount Respondent should return 75 per cent of \$9,819.65 plus \$981.96 into the special account, since it was the

intent of the Court that all moneys received by the parties in this matter should be returned into the Court.

Appellant's motion to amend was argued on July 12, 1965. Before counsel for Appellant made the argument, the Court stated:

"If there is a typographical mistake, naturally it can be conformed by stipulation of the parties, but other than that I have heard the case and I am not going to make any new — receive any new evidence or make any different determination." (Supp. R. 3-4)

Counsel for Appellant then stated:

"It wouldn't make a different determination and it would not require any evidence***Looking from the exhibits it can be seen from the exhibit that that amount is wrong." (Supp. R. 4)

The Court then stated:

"Well, Mr. Backman can see it as well as the Court can, can't he?" (Supp. R. 4)

Upon the conclusion of Appellant's argument, counsel for Respondent stated:

"I can't understand Mr. Iverson. This is the first time we will admit and we have discussed it a number of times, and I have followed his contention and I believe we can work it out. And if there is an apparent error, we drew the judgment.

“Mr. Iverson: Yes, you drew the judgment.”
(Supp. R. 6)

At the conclusion of the hearing the Court stated:

“Unless Mr. Backman consents to this amendment, motion to amend this paragraph and so on, then I will deny it.” (Supp. R. 7)

Thereafter Mr. Backman would neither agree nor refuse to agree to the order amending the judgment, and to make the matter appealable, Appellant was obliged to prepare and have the Court sign the order denying the motion.

This is a unique decision. Counsel for Respondent admitted Appellant was right. (Supp. R. 6) Yet the Court denied the petition to amend. The Court at no time indicated that Appellant was not right. He took the position that he would grant the amendment if Respondent's counsel would consent thereto, but not otherwise.

The rule against giving relief from judgments unless motions are filed in time does not apply to relief from clerical errors. As heretofore stated in this brief, the law on this matter is stated in the case of Frost vs District Court of Box Elder County, 83 P.2d 737, 96 Utah 106. This court quoted with approval from Freeman on Judgments in Volume 1, Fifth Edition, Section 141, as follows:

“As a general rule, unless control over it has been retained in some proper manner or a statute otherwise provides, no final judgment can be amended after the term at which it was rendered or after it otherwise becomes a final judgment. *The power of courts to correct clerical errors and misprisons and to make the record speak the truth by nunc pro tunc amendments after the term* does not enable them to change their judgments in substance and in material respects.”

Can a motion be denied in advance of hearing it unless the other side stipulates to the Court's granting the same, and then after the other side admits that counsel making the motion is right, may the Court deny the motion unless opposing counsel will stipulate to the amendment.

CONCLUSION

The Appellant submits that the law and the evidence require that:

1. The award of \$2,500.00 to Respondent for pre-serving the mortgage loan asset of the partnership be set aside.
2. That the bonus of \$535.00 to each partner be set aside.
3. That the portion of the judgment which finds the amount of credits to which Respondent is entitled, which fixes the amount of refunds due Appellant, and the balance credit due Respondent be set aside, and this matter returned to the trial court for a new trial.

4. Appellant's motion to amend the judgment of March 12, 1964 nunc pro tunc be granted.

Respectfully submitted.

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