

1962

J. T. Chambers v. R. W. Sims : Brief of Plaintiff and Cross-Appellant

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

J. T. CHAMBERS,
Plaintiff and Cross-Appellant,

vs.

R. W. SIMS,
Defendant and Appellant,

vs.

MARGARET S. CHAMBERS,
Cross-Defendant N Respondent.

Case No. _____
Court, Utah

Case No. 9554 UNIVERSITY UTAH

JUN 1 1962

Case No. 9556 LAW LIBRARY

**BRIEF OF PLAINTIFF AND CROSS APPELLANT IN 9554,
WHO IS APPELLANT IN 9556**

**APPEAL FROM JUDGMENT OF THE DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE MERRILL C. FAUX, DISTRICT COURT JUDGE**

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IV

IN THE SUPREME COURT
of the
STATE OF UTAH

J. T. CHAMBERS,
Plaintiff and Cross-Appellant,

vs.

Case No.
9554

R. W. SIMS,
Defendant and Appellant,

vs.

Case No.
9556

MARGARET S. CHAMBERS,
Cross-Defendant & Respondent.

**BRIEF OF PLAINTIFF AND CROSS APPELLANT IN 9554,
WHO IS APPELLANT IN 9556**

STATEMENT OF THE CASE

This is an appeal from the Third District Court of Salt Lake County, Honorable Merrill C. Faux presiding, wherein the Court entered judgment for the plaintiff and against the defendant and in favor of the cross defendant in an action for partnership accounting.

Plaintiff and defendant were general partners in the South East Ready Mixed Concret Company for

some 12 years. Cross-Defendant is the wife of the plaintiff and sister of defendant and was active in the business during the entire time. Her duties were multifarious and included handling orders, supervising records, collecting accounts, and running the office generally. Much of the trial was devoted to consideration of the duties, authority and functioning of Mrs. Chambers.

The partnership was formed May 8, 1948, as a limited partnership (Exhibit 11-D) and terminated when an Agreement of Dissolution was entered into (Exhibit 10-D). This action was instituted to recover from defendant the sum of money indicated on the capital accounts of the partners' records before division of net profits. Defendant filed a counterclaim and interpleaded Mrs. Chambers, alleging a different theory of compensation of partners and charging cross-defendant with faulty record keeping.

More specifically, the complaint alleged that the practice of the partners had been to recognize claims for salaries of the plaintiff and cross-defendant before division of the net profits equally between the plaintiff and defendant; that annual information tax returns have been filed on that basis; that the final balance sheet had been made up to the time of the dissolution and requesting determination of the partnership agreement; that the books and records are binding upon the partners and that they are bound by the annual statement of profits and division thereof and that in the dissolution,

capital accounts be paid off according to their balances as shown in the records and for a final accounting between the partners (R. 1 to 9).

The lengthy answer, counterclaim and cross-claim challenged the sufficiency of the books and records, set up a different theory of the agreement between the partners for compensation, charged the cross-defendant with improper record keeping and sought corrections in the books and records, payment of salaries to the defendant, reduction of salaries to the plaintiff and cross-defendant and for settlement of the accounting in accordance with the claims of defendant. (R. 19 to 30).

Interrogatories were submitted and answered after appeal to the Court for assistance, and depositions were taken and concluded in the same manner, all engendering bad feelings and mistrust.

The accountants of the parties worked together and reconciled all accounting differences except the issue of salaries. The pre-trial order noted the success of the accountants in reducing the issues, noted the claim of defendant for \$48,900.00 additional salaries and that there would be a contest on every salary and every partnership distribution entry in the books and as to entries which should have been made and were not made. Defense of the Statute of Limitations as to the claims of defendant was noted, and the Court gave a starting place for the settlement of accounts between the parties by giving balance sheet figures as agreed by the accountants and leaving the issue of salaries to be

determined. The pre-trial order also required the furnishing of certain information by each party to the others and denied the motion of cross-defendant for dismissal as to her (R. 86 to 88).

When the case came on for trial, extensive opening statements were made by both sides (R. 255 to 292). During the course of the opening statements, defendant suggested that reasonableness of salaries could be eliminated as an issue (R. 265, 283, 287, 288). Plaintiff suggested that reasonableness was an issue but thought it could be eliminated and would save much time (R. 289 to 290). This was because the plaintiff thought salaries were established in specific amounts by the books and records, and the defendant thought salaries were specifically established by an oral agreement allegedly made in 1948.

In any event, a very lengthy trial was held and theoretically reasonableness of salary claims was eliminated from the trial, followed by a memorandum decision (R. 148 to 150).

The memorandum decision found partially in favor of the plaintiff but held that the salaries shown on the records had not been sufficiently communicated to the defendant, although there had been acquiescence and approval by the parties of allowance of salaries to the plaintiff and cross-defendant with no salary to the defendant subsequent to 1948 and with equal division of profits after salaries. The decision held that the defendant failed on his counterclaim (R. 150). This

meant further trial to determine the amount of salary allowable to the plaintiff under all the circumstances.

Following the second trial, the Court made a decision allowing plaintiff less by \$22,000.00 than the books had shown and giving judgment for the plaintiff against the defendant of \$29,314.66 and requiring defendant to account for \$1,196.58 additional (R. 190).

The defendant appealed from this judgment, and the plaintiff filed a Notice of Cross-Appeal and on appeal raising restricted issues (R. 227 and 226).

STATEMENT OF FACTS

The Statement of Facts made by appellant at pages 2 to 10 is rejected in its entirety. This statement ignores the decisions, findings, conclusions and judgment of the District Court, ignores the evidence of plaintiff and assumes that this Court is compelled to find in accordance with the desires of the defendant if any evidence can be found which will support the defendant's theory.

Because of the confusion arising from referring to the parties as appellant or cross-appellant or respondent in one capacity or the other, parties will be referred to as they were in the District Court.

The facts before this Court are primarily those stated by the Court in its memorandum decisions and found by the Court in its findings of fact. These must be accepted by this Court as the facts if they are sup-

ported by any substantial evidence. (Jewell v. Horner, (U. 2d 1962) 366 P. 2d 594; Lowe v. Rosenlof, (U. 2d, 1962) 364 P. 2d 418; Valcarce v. Bitters,) U. 2d 1961) 362 P. 2d 427.)

In its first memorandum decision (R. 148-150), the Court found:

1. The May 8, 1949, (1948) articles defined the obligations of the parties;

2. Salaries as contended by the defendant were discussed, but never became operative;

3. The interest of the limited partner descended to his three children, and the plaintiff and defendant were thereafter treated as equal general partners with an outstanding interest in a third child not a party to this action, recognizing that they might compensate themselves for services.

4. Cross-defendant's salary was combined with plaintiff's as part of plaintiff's earnings.

5. The practice was established after 1951 to allow plaintiff on the books compensation for his full time services, also his wife's, and of allowing defendant nothing after 1951 until he claimed \$2500.00 salary in 1959.

6. It was not a sufficiently consistent relationship between labor and profits to be binding upon defendant or to enable the Court to finally determine the capital standings of the partners;

7. The relationship of confidence between defend-

ant and cross-defendant required a more complete disclosure of salary allowances than the evidence shows;

8. The capital accounts in the books and records were not adopted by the parties;

9. Paragraph 4 of the pre-trial order requires determination of all issues, necessitating further evidence as to reasonable compensation in order to determine final capital standings, which must be done by stipulation, by appointment of master in chancery or otherwise;

10. Statutes of Limitations are not a defense to either party;

11. Plaintiff's motion for dismissal of the counterclaim is granted.

After further motions, notices, hearings and orders (R. 51 to R. 174), a further trial was held, and a supplemental memorandum decision was entered (R. 181-183).

This memorandum decision adjusted all of the factors and equities and allowed plaintiff compensation that would be reasonable under the circumstances, the amount allowed to the top man for 48 hours per week, without any additional allowances or overtime or extraordinary services and not exceeding in any year the amount claimed for plaintiff's services on the partnership books.

The Findings of Fact, Conclusions of Law and Judgment were prepared in accordance with these two

decisions resulting in judgment as indicated (R. 184 to 191).

A 25 page Motion of Objections to the Findings of Fact and Motion to Amend the Findings was filed by the defendant, (R. 192 to 216) and a motion to amend was also filed by the plaintiff (R. 218-220). The Court denied both motions in toto, holding that they may be considered Motions for New Trial upon stipulation of the parties, which Motions for New Trial were denied (R. 222).

Notice of appeal was given by the defendant (R. 232-232A) and Notice of Appeal was given by the plaintiff (R. 231). The Plaintiff filed a Statement of Points on Appeal limited to the following points:

1. The books and records are binding on the parties.
2. The allowable salaries and withdrawals of the partners are those shown on the books and records.
3. Judgment in favor of plaintiff should be increased by \$22,018.00 (R. 226).

Plaintiff's Cross Appeal raised the following points:

1. Defendant abandoned the salary agreement contended for by defendant and it was modified or waived.
2. The claim is barred by Section 78-12-25, U.C.A. 1953.

3. Any claim of defendant based on fraud, concealment or deceit is barred by Section 78-12-26, subsection (3), U.C.A. 1953.

4. By their practices the salaries on the partnership books and records have been established.

Because of the length of the record and the numerous subpoints raised by the brief of defendant, and the several subpoints under which the argument of this brief will be made, and in order to avoid repetition of references to the evidence, specific references to the evidence will be made in the argument of each point. It is believed that this method will be most useful to the Court. Plaintiff does not follow the points of the argument as contained in defendant's brief as not seeming logical or the actual issues before this Court.

POINTS OF ARGUMENT

POINT I

PARTNERSHIP AGREEMENTS MAY BE MODIFIED BY IMPLIED AGREEMENT OR ACQUIESCENCE.

- A. *The Partnership Agreement of May 8, 1948, provides for compensation before division of profits.*
- B. *The allowance of compensation for the partners became a matter of agreement by practice.*

POINT II

THE PARTIES ADOPTED THE BOOKS AND RECORDS AS THEY WERE KEPT.

- A. *No salary for Sims was claimed or recognized after 1948 until the \$2500.00 in 1959.*
- B. *Defendant was amply notified of the salaries practices and acquiesced therein.*

POINT III

WAS REASONABLENESS A PROPER ISSUE?

- A. *It was within the pleadings and Pre-Trial Order.*
- B. *Defendant suggested at the opening of the trial that it be eliminated.*
- C. *The possibility that both might fail in their claims of specific compensation was recognized.*
- D. *The Court had the right to hear the further issue and complete the case.*
- E. *If reasonableness was a proper issue, the Court's decision was supported by evidence and is sound.*

POINT IV

DEFENDANT IS BARRED ON HIS COUNTERCLAIM BY THE STATUTES OF LIMITATIONS.

A. *Claim for salaries is barred by Section 78-12-25, UCA 1953.*

B. *Action for salary based on fraud, concealment or deceit is barred by Section 78-12-26 (3) UCA 1953.*

ARGUMENT

POINT I

PARTNERSHIP AGREEMENTS MAY BE MODIFIED BY IMPLIED AGREEMENT OR ACQUIESCENCE.

A. *The Partnership Agreement of May 8, 1948, provides for compensation before division of profits.*

Plaintiff recognizes that Section 48-1-15 (6) must be satisfied. In his brief, defendant cites the statute as saying:

“No partner is entitled to remuneration for acting in the partnership business.” (Brief P. 10 and 19).

There is no dispute that this is the rule “in the absence of other agreement,” which is the preamble to that subsection of the statute.

The cases relied on by defendant plainly state the

correct rule to be that the statute applies only "in the absence of an express or implied agreement" or "unless there was an express agreement or provision for such remuneration." (Vangel vs. Vangel, 254 P. 2d 919, at page 17 of Brief and Keller vs. Wixom, 123 U. 102, 255 P. 2d 119, at page 19 of Brief).

At the threshold, the written Certificate of Limited Partnership (Exhibit 11-D), Paragraph XII, provided in part:

" * * * that the general partners shall have the sole management of the business and business activities, and shall be entitled to compensate themselves for their services as an expense of operation of the business before computation of profits, to the extent that such compensation for services of General Partners is reasonable under the circumstances. * * * "

And paragraph XIII contemplated that the compensation might be unequal by providing:

"That the General Partners at the present time are equal partners and shall share equally in the profits; provided, that their interest shall be readjusted as they make additional contributions to the partnership in property, money or services, or by adjustment of property values by mutual agreement."

The Court in its first memorandum decision held:

1. That the Articles of Limited Partnership defined the obligations;
4. That the parties departed from the terms of the agreement by their practices;

5. By compensating Chambers for full-time services and allowing Sims nothing for services after 1951 and until 1959;

6, 7, and 8. That the practices did not establish the amount of compensation to which plaintiff was entitled; and

9. That paragraphs XII and XIII of the agreement make "reasonable compensation for Chambers' services" determinable and required further trial (R. 148-150).

This ruling was a disappointment to both parties. Plaintiff had contended that the specific salaries shown on the books had been adopted by the parties; and the defendant had contended that the parties made an oral agreement on May 8, 1948, which the Court should have honored.

In effect, the Court holds that the bookkeeping entries established the salaries except for the confidential relationship existing between the cross-defendant and defendant, which required a more complete and specific disclosure than the acquiescence or adoption which resulted from general practices. In other words, "reasonable under the circumstances" as provided in Paragraph XII of the Limited Partnership Agreement is the agreement of the parties upon which the trial court relied.

B. The allowance of compensation for the partners became a matter of agreement by practice.

During the preliminary discussion of the case, the defendant admitted that practices of the partners could establish a new agreement (R. 267). And the Court indicated that this was his view of the law (R. 267, 282, 283, 295). But the Court in this case has held that the written agreement satisfies the statute and establishes certain practices that go part way towards fixing the compensation but does not establish specific amounts, and that the written agreement, providing for "reasonable compensation" enables the Court to determine that.

We have researched this rather narrow question with the following results:

An annotation at 66 ALR 2d 1023 is on the subject: "Construction and effect of agreement relating to salary of partners." At page 1027 the question we are here interested in is considered, and this general statement is made:

"Where a partnership agreement clearly contemplates the payment of salary to one or more partners, but no amounts are specified, a number of cases recognize the presumption that the contracting partners intended the payment of reasonable salaries."

In *Koehler vs. Hunter*, 166 Ark. 27, 265 SW, 972, 973, the partnership agreement provided that until the company was ready to do business Paul Koehler was not to receive any salary or other compensation for his services. Koehler testified that before he undertook the work, he advised the parties that he was going to charge a salary of \$400.00 per month for running the plant,

and that the matter was mentioned at a later time, and there was no objection. The Court ruled that the agreement contemplated compensation after the plant was in operation but had doubts as to whether an amount was agreed on and said:

“If no amount was agreed upon, appellant should have been allowed a reasonable salary for his services from June 1, 1920, until November 1, 1921. According to the weight of the evidence, appellant devoted most of his time to the management and control of the business, and it was contemplated between the parties that he should be recompensed for his services. The record fails to show what his services were reasonably worth.”

and the case was remanded for determination of the reasonable value.

In *Ziebak v. Nasser* (1938) 12 Cal. 2d 1, 82 P. 2d 375, one partner told the others the theatre managers would be paid \$100.00 per week and then undertook management. The plaintiff made no protests, and the management proceeded. The Court found that \$100.00 per week was a reasonable salary and competitive to the salaries paid to other theatre managers and allowed that amount of compensation before division of profits.

Jones v. Jones (1934) 254 Ky. 475, 71 SW 2d, 999, 1002, was a bitter case involving four brothers whose friendly partnership ended in acrimony and litigation. One of the partners managed the farm, and the Court said:

"We think it was agreed that he should have the active management of the partnership and should be paid a reasonable sum for his services."

Shulkin v. Shulkin, 301 Mass. 184, 16 NE 2d 644, 118 ALR 629, is similar to the principal case. The partnership was established by three brothers by oral agreement, two of whom were to give full time to the business and were to draw salaries while the other was not. The oral agreement was that the two brothers were to draw salaries of \$35.00 and \$45.00 per week, and the third brother said: "That they were to draw enough to get along on." The third brother didn't know how much they were drawing but assumed they were drawing more than the sum originally agreed on and the larger amounts of \$80.00 and \$70.00 actually being drawn were accurately recorded in the account book. (This is similar to the defendant here, who knew that while he was at Kearns Mr. Chambers drew an increased salary because of his discussion with Beckstrom). (Ab. 121, 136, R. 1040, 1132). The Court held that allowance of the recorded salaries was appropriate, saying:

"The right of a partnership for compensation of his services depends wholly upon agreement, express or implied. * * * (citing cases). The entire facts reported warrant the conclusion that the salary rates rested upon agreement and that their amounts were not unreasonable."

And the Court went on to say that allowance of salaries during periods of disability was erroneous and that charging partners for amounts in excess of their regular salaries was proper.

The only case on the questoin we have found, which is later than the annotation, is *McBride vs. Fitzpatrick* (Oregon 1960) 356 P. 2d 947 at 952. In that case Fitzpatrick testified that he and McBride had an understanding that Fitzpatrick would be entitled to a reasonable amount for living expenses until McBride became active in the partnership business. McBride testified that he did not recall any such conversation. The partnership agreement provided:

“That I, Ervin P. McBride, will not expect to receive any remuneration until such time that I am putting in full time exclusively with Fitzpatrick Lincoln Mercury and Fitzpatrick Milwaukee Auto Sales.”

And McBride admitted that when he commenced active participation in the business, each partner was to draw \$60.00 per week. The Court said:

“From these circumstances, we believe that it is reasonable to infer that the parties intended to permit Fitzpatrick to make a reasonable withdrawal for living expense during the time he was operating the Bend business without McBride’s assistance. The provision of the partnership agreement set out above lends support to this inference. The agreement made after McBride joined Fitzpatrick in Bend permitting the former to draw \$60 a week is additional ground for inferring that the original agreement was intended to permit similar reasonable withdrawals by Fitzpatrick prior to McBride’s participation in the affairs of the partnership. We hold that the trial court did not err in allowing a salary of \$2,600 for the period in question.”

Under these authorities, the Court properly found the practices of the parties as to allowance of compensation before division of profits, and the Court fixed "reasonable" compensation from the evidence. This assumes, as the Court found and held, that the specific amounts were not sufficiently adopted by the partners to become fixed. Our second point is that the trial court did not go far enough.

POINT II

THE PARTIES ADOPTED THE BOOKS AND RECORDS AS THEY WERE KEPT.

The Court has gone only part way with the plaintiff on this point. The Court has held that Sims was credited with no salaries after 1948, at the time he went to Kearns and that he never got back on the payroll until a salary of \$2500.00 was entered for him in 1959 (R. 185-186). The Court also held in its memorandum decision and in its findings that the parties acquiesced in and adopted the practice of crediting the plaintiff with salary for his full-time services to the partnership (R. 149 and 186) but held that the fiduciary capacity of cross-defendant and her husband, the plaintiff, called for more specific information to be given to the defendant than was shown by the evidence (R. 149 and 186). It is the point of plaintiff's appeal that the court erred in going only half way. If defendant was charged with knowing and acquiescing in and adopting the practice of crediting plaintiff with regular salaries, then the law

fastens upon the defendant the obligation of knowing what those salaries were, and since they clearly appeared in the records, he is charged with knowing what the records contained.

A. No salary for Sims was claimed or recognized after 1948 until the \$2500.00 in 1959.

The Court found that there was a conversation on May 8, 1948, at which salaries of \$400.00 and \$350.00 per month were discussed. Mr. Chambers testified that this conversation took place months earlier when Exhibit 20P was prepared for Farmers State Bank (R. 899), and he didn't ever testify that the amounts agreed to were \$400.00 and \$350.00. Mrs. Chambers, who was right with her father the evening of May 8, 1948 (R. 1536), heard no conversation that evening about salaries and testified that the first she heard of such salaries was in the taking of her husband's deposition for this case (Ab. 64; App. A, para. 13; and R. 603 and 604). Defendant has attempted to distort the testimony of both of these parties in this regard.

But regardless of that, the testimony is overwhelming that defendant knew that a salary schedule of \$400.00 for him and \$350.00 for plaintiff was never put into operation or practice. He saw the \$2,000.00 salary figure in Book 2-P and discussed it with Mr. Reimann and Mrs. Chambers (Ab. 137, R. 1153); he had a conversation with Mr. Beckstrom (Ab. 136, R. 1132) concerning the 1951 return (Exhibit 23-D), and knew that the salary for Chambers there was \$4,778.60 and

that there was none for him on the return, and that neither of those figured out to the desired amount; he knew that when he left the ready mix business in 1948 and went out to Kearns, he was getting no salary and was entitled to none because of his conversation with Mrs. Chambers about it. (Ab. 120, R. 1037-1038). He knew when he signed Exhibits 63-P and 64-D that he had left the business and gone out to Kearns and that he was not going to receive any salary while he was there; and he knew that no steps were ever taken by him after the Kearns venture was over to get back on the payroll. He filed income tax returns every year and had a figure from the partnership as to his share of the profits and is charged with knowing, particularly in the prosperous years, the basis of that computation; he did not take the stand to deny receiving notice of the income tax deficiency as shown by Exhibits 53-P, 54-P, 55-P and 56-P from which the Court is entitled to draw the inference, which it said it would draw, from those circumstances (Ab. 172, R. 1406). Defendant did not deny the conversation with Mrs. Chambers in March, 1956, when Exhibits 16-P and 17-P were prepared, and he is entitled to neither respect nor credibility when he says that he didn't know that the figures of \$57,000.00 and of \$56,813.00 represented differentials in capital accounts based on wages for Mr. and Mrs. Chambers and none for him (Ab. 165, R. 1363-1364). Mrs. Chambers testified that he went immediately to have Jorgensen prepare Exhibit 8, and that he came back with Exhibit 8 that same afternoon in

order to have his own verification of the difference in capital ownership of the two partners. Mr. Shirley testified that when he prepared the defendant's 1955 and 1956 income tax returns, he had determined how the profit was computed and had general discussions about that profit with Mr. Sims (R. 459-461, 465), although he could not recall a specific conversation in which the situation as to salaries was specifically discussed (R. 45, R. 465). David Beal testified specifically that when he conferred with the defendant in the fall of 1955 or the first part of 1956 concerning Exhibit P-4 and the status of the capital accounts, that defendant:

“ * * * said that I had no right to be dividing other people's money without their permission. At the time I told him that I had taken the books and my understanding I had done just what the partnership agreement called for, and he in return says that he would take care of Chambers' wages or salary or as he put it, and that they would handle dividing the rest, and that my services would no longer be needed.” (R. 319, Ab. 19).

And it is only reasonable to believe that when Russell Evans reluctantly testified that he gave information each year to Mr. Sims either on a large memorandum or on a small slip of paper or over the telephone, that he was testifying to the minimal truth. (Our Appendix A, para. 48, 50, 51; R. 1436-1438, 1483).

And when Sims had the chance to testify as to the kind of superintendent and manager of the business

the plaintiff had been, he emphasized the fact that his home and office overlooked the loading yard (Ab. 292, R. 2172-2173), that he was aware of all that went on there, and that he saw plaintiff innumerable times in the yard (Ab. 289, R. 2163). It is utterly inconceivable that this defendant, who was in the partnership office at least six times a year, would deliberately insulate himself against knowledge of partnership affairs to the extent of knowing how the business was being run, why it was so slow getting into a profit position, and how much of his yearly allocation of ordinary income for tax purposes was offset by wages for the plaintiff and how much division of profit after wages.

And the defendant's employee Steiner, who apparently knew every entry in the partnership records, was asked specifically if he could find any place in the partnership records where the salaries of \$400.00 and \$350.00 per month had been used. And Mr. Steiner was compelled to answer that he could find no single instance. (Our Appendix A, para. 43; R. 1347).

For defendant now to argue that his practice did not accomplish a modification of what he claimed was an agreement and what the Court found was a conversation about salaries in 1948 is to ignore completely the cases which hold that the agreement as to compensation may be implied from the records and the conduct of the parties. Defendant's cases of Vangel vs. Vangel, (supra) and Keller vs. Wixom (supra) go that far. See the notation at 66 ALR 2d 1023 and cases there cited, and the authorities under the next subpoint.

B. Defendant was amply notified of the salaries practices and acquiesced therein.

In considering what information the defendant had about salaries being credited to the plaintiff, the Court must have believed that defendant got excited in the fall of 1958 on the theory that he then learned for the first time that Chambers was being credited with a salary and he was not. The evidence above recited is overwhelming against any such contention. Mrs. Chambers had recently discussed with Paul Reimann the claimed overdraft by Sims (Ab. 172, 195, 196, R. 1408, 1550, 1552), and Reimann had presumably taken it up with defendant. This caused the defendant to send Steiner to the partnership office to make a tabulation of capital accounts which he did in Exhibit 47-P. It was impossible at that point for defendant to be surprised by what Steiner reported to him since he had learned the same thing from Mrs. Chambers and Mr. Beal more than two years earlier. Steiner reported that Mrs. Chambers expected that there would be some adjustments in the capital accounts, and this took the form of an adjustment of sand and gravel in the first part of 1959 evidenced by Exhibit 26-P prepared by Russell Evans. Sims gave "instructions" that \$2,500.00 of this would be salary for him and that that the balance would be in the form of a sand and gravel adjustment with no salaries thereafter (Ab. 176, R. 1445). This meant the end of the partnership, which shortly came to pass. It was beyond the defendant's fondest hope that he would be able to eliminate the

plaintiff's long standing salaries or have any success whatever in selling to the Court the notion of his \$400.00 and \$350.00 claim going back to 1948. The obstructive, steamroller, overwhelming tactics of defendant's counsel succeeded in cutting \$22,000.00 off the salary of the plaintiff (R. 188), money which the plaintiff had allowed to accumulate in the business and the benefit of which the defendant had reaped over the years while keeping his own capital account comparatively low.

The trial Court has found that the defendant acquiesced in certain practices, including allowance of regular salary to the plaintiff for his full-time effort, which salary along with that of the cross-defendant was accumulated in the capital account, with no salary to defendant. Being charged with that much information as a matter of law, the defendant is charged with the reasonable implications and details of those matters. The trial Court was compelled to permit the defendant to put a blindfold on his eyes and ear plugs in his ears so that he could say he didn't know what the books contained. The law is not that naive.

A number of exhibits was brought to the attention of the defendant during the course of the partnership, and on each of those exhibits was contained information concerning salary from the partnership for either the plaintiff or the defendant or both. And since there is no record of any kind in the partnership records or produced in this trial which shows a salary for the defendant at \$400.00 per month or for the plaintiff for

\$350.00 per month, as Mr. Sims contended should have been the case during all the years (R. 23), each of these documents constitutes a notice to the defendant that the salaries were not being entered in accordance with his desires.

Exhibit 1-P was always available in the office of the partnership in its present form or in the form which it had from time to time, the salary figures always being the same (Ab. 144, R. 1194-1195).

Exhibit 2-P was the first ledger of the partnership and shows only two salaries, namely \$2,000.00 for each of the plaintiff and the defendant during the year 1948, which salaries were deleted as defendant said he knew (Ab. 121, R. 1040).

Exhibits 6-P and 7-P were annual statements of the partnership which Russell Evans testified were supplied to the defendant, by mail, by delivery, by abstract or by telephone (Ab. 175, R. 1436). And certain it is that defendant obtained the net income figure each year for income tax purposes (R. 98).

Exhibit 8-P was a study of capital accounts showing the disparity of drawings and of capital balances for the two partners, prepared by Mr. Jorgensen, defendant's father-in-law, and prepared according to Mrs. Chambers at the specific request of the defendant (Ab. 56, R. 529).

Exhibit 13-P is the 1955 partnership income tax return prepared by Mr. Shirley (Ab. 36, 38; R. 425,

426) with the revised depreciation schedule, which he made for the partnership. It is related to Exhibit 19-P, which is the annual profit and loss statement of the partnership for 1955 and which contains adjustment figures in accordance with the depreciation schedule changes. Mr. Shirley then assisted Mr. Sims with his own income tax returns for 1955 and the following year (Ab. 39, R. 428).

Exhibit 14-P is the partnership information returns for 1956 which were available to Mr. Shirley, as he assisted Mr. Sims with his 1956 return. Each of these returns has a reconciliation of partners' capital accounts and figures of net income for that year as follows: Chambers' capital—\$109,370.78, income for 1956—\$27,161.75. For Sims—\$24,866.66 total capital, and \$10,781.74 income for that year; with total capital at the end of the year in the amount of \$137,237.44 for Chambers and \$37,943.49 for Sims. Mr. Shirley testified that he was informed as to the income figures and the records of the partnership, as an accountant preparing income tax returns should be (not abstracted, R. 428, 431, 438) and that he discussed the appropriate matters with Mr. Sims, including salaries (Ab. 41-44, R. 439-444, 447, 453, 461, 465). Although, when he was pressed to recall a specific conversation in which salaries were specifically discussed, he was unable to do so (Ab. 45, R. 465).

Exhibit 15-P is the study of capital accounts made by Russell Evans, (Ab. 54, 174; R. 520, 1421-1422)

and which gave rise to the conferences between Mrs. Chambers and Mr. Sims in March, 1956. (Ab. 54, R. 518). At this conference also was discussed the figures given by Mr. Beal from 4-P of 90% plus for the Chambers' capital and 3½% for the Sims' capital. 15-P shows Chambers to own 72% of the capital of the business. It was 15-P and 4-P that led Mrs. Chambers to take the matter up with her brother; and at that conference, they made between them Exhibits 16-P and 17-P partly in the handwriting of each. Mrs. Chambers' testimony on this conference appears at Ab. 54-58, R. 518-533. Mr. Sims' testimony is at Ab. 128 and 129, R. 1081 and 1084. On Exhibit 16-P is seen the circle with 90.5% and 9.% accompanied by the figure \$200,000.00 and \$180,000.00 and \$250,000.00. And on the same page are the figures showing the interest of the partners as R. 4/9ths, T. 4/9ths and L. 1/9th. There was then a recess while according to Mrs. Chambers, Exhibit 8-P was obtained by Mr. Sims from Mr. Jorgensen and then Exhibit 17-P was written during the further conference of the parties. On that appears in Mrs. Chambers' handwriting the figures \$56,856.15 and in Mr. Sims' handwriting the figures 57 subtracted from \$250,000.00 with the remainder again divided in two, giving \$96,500.00 to which is added the \$57,000.00 to bring Tal's share to \$153,500.00, thus showing the theory that the unbalanced capital accounts would be first deducted from the total assets of the partnership and the remainder divided fifty-fifty, which was the theory Mr. Sims was demonstrating to Mrs. Chambers.

The words "wages M. & T." opposite \$56,856.15 were written on the page during the conversation, according to the testimony of Mrs. Chambers (Ab. 58, R. 541). On examination of Mr. Sims, it was plaintiff's counsel who was mistaken as to which item was written on afterwards. It was the pencil item "would be paid before fifty-fifty split" and not the ink item in the same ink and written at the same time as the rest of the document, which got plaintiff's counsel off the track at Ab. 128, R. 1081.

Exhibit 18-P was another annual statement which was presumably delivered to Mr. Sims since that was the purpose of preparing them, according to Mr. Evans (Ab. 175, R. 1437).

Exhibit 21-D was produced by the defendant from the partnership files and was identified as a memorandum on salaries which was the forerunner of Exhibit 1-P. This ties in with the conversations that all of the parties and Mr. Reimann had with Mr. Beckstrom (Ab. 121 and 136, R. 1039 and 1132). The longhand notation at the bottom of the fourth page was put on by Mrs. Chambers. It reads:

"Decrease Rowe's and increase Tal's capital for old note, etc." (R. 1565).

Mrs. Chambers testified that this was the suggestion of Mr. Beckstrom and that she took it up with the defendant, and following the conversation, she wrote the next longhand, which reads:

“No, Rowe says pay it first, but increase capital account for salaries of Tal and Margaret.” (Ab. 193, 197, R. 1539, 1566).

This testimony indicates that the whole method of keeping the capital accounts was discussed with the defendant in connection with 21-D and that his suggestion was carried out. Exhibit 23-D reflects this. Mr. Sims testified concerning this document that when he first saw it there had been no line run through the salary for John T. Chambers and that he told her that the salaries were a memorandum item only. He was not present when the revised income figures were written on the returns (Ab. 121, R. 1041-1042, Ab. 164, R. 1361). It is significant that on this tax return when first prepared there was a salary only for John T. Chambers and in the amount of \$4,778.60 for the year 1951.

Exhibit 26-P is a memorandum made by Russell Evans concerning a meeting with Mr. Sims in January, 1959. The third page contains Sims' instructions to Evans to make an adjustment in sand and gravel in a total amount of \$11,722.93 spread back over the previous nine years, and that the adjustment should be \$9,196.97 for sand and gravel and \$2,500.00 for salary. The second page has a notation that there is to be no salaries from the first of January for the partners until further decision, with Rowe to take an active part. The first page contained the date of the meeting, January 13, 1959 (Ab. 176, R. 1444). This document plainly shows the realization of Sims as of that time that the salary differentials were of long standing and were

terminated as of January, 1959, until further notice. But far from demanding a revision of salaries back over the years, he simply made the adjustment in sand and gravel and asserted a salary of \$2,500.00 for himself as part of that adjustment.

Exhibit 47-P is the study made by Steiner of the capital accounts in 1958 with computations at the bottom to indicate that the purpose of the study was to consider distribution of assets in the event of dissolution.

Exhibits 53-P, 54-P, 55-P and 56-P were introduced through the witness Russell Evans (Ab. 170-172, R. 1389-1411). Defendant refused to produce any records relating to this adjustment of tax for the years 1952, 1953, and 1954, which resulted in a net over-assessment and refund. Exhibit 53-P was sent to Mr. Evans and called for execution of Forms 870 by both of the partners. It will be noted that the second page of this exhibit schedules the distribution of income for those three years as between Sims and Chambers and shows for 1952 \$2,764.90 as against \$8,167.88 for Chambers; for 1953 \$4,731.98 as against \$9,463.68 for Chambers; and for 1954 \$9,825.60 as against \$22,241.84 for Chambers. Exhibit 54-P was subsequently sent to the partnership acknowledging the agreement of the taxpayer, and indicating that both partners had executed the respective forms 870. This exhibit contains schedules for each of the years showing the adjustments to the distribution of the income from the South East

Ready Mixed partnership. Exhibit 55-P is the report sent to Chambers individually and showing the deficiency and penalty and the adjustments to income for Chambers individually. Exhibit 56-P is the covering page from a similar statement sent to the defendant and his wife and produced from the files of defendant. Defendant refused to produce the rest of the report, but 56-P was admitted as raising an inference that the balance of 56-P would be like 55-P and that both were tied in to the Form 870 and the original preliminary report and the final report which are 53-P and 54-P. Both 53-P and 54-P contain on the same pages the comparative incomes for the two partners for those three years. In admitting these exhibits the Court said:

“You have it within your power to disprove this if it is false.” (Ab. 172—R. 1406).

And it is of some significance that defendant offered no evidence from the Internal Revenue Department or from his own files or any testimony of his own to disprove the inference that he had received these reports and been cognizant of the comparative income figures for those three years of the two partners.

It is of significance also that the income tax figures reporting income from the partnership by the defendant were identical with the figures shown on the net profit page of Exhibit 1-P for each of the years of the partnership. The defendant made attacks on 1-P and attempted to show that the figures had been changed from time to time and the book itself was of recent creation. If

that were true, it would be expected that the income tax figures used by the partners would have been thrown off by the change of records, which was not the case in any instance. That, we submit, was adoption of the records by the defendant.

Pursuant to the order of the Court, a statement was filed by the defendant showing his reported income on income tax returns for each year of the partnership. This appears at R. 98. A comparison of these figures with the net profit page of 1-P shows that the defendant for each year reported for income tax purposes the identical figures shown on 1-P. His returns for some of these years were prepared by his attorney, Mr. Reimann (Ab. 114, R. 1005); for some years by the accountant Mr. Evans (who knew all of the figures connected with the partnership) (Ab. 136, R. 1130); for some years by Mr. Shirley, who had revised the partnership information return for 1955 and then proceeded to prepare Mr. Sims' own income tax returns for 1955 and 1956 (R. 438-429, Ab. 39); he then had assistance for the years 1957 and 1958 from the very inquiring and well informed Mr. Steiner (Ab. 47, 136, R. 477, 1131). And the defendant has the temerity to suggest that neither he nor any of these well informed persons ever had occasion to inquire about and inform him whether profit and income from the partnership was being correctly computed and reported to him, although his share of the income was a substantial item—in 1954 more than \$9,000.00 and in 1956 more than \$10,000.00, and in 1958 more than \$19,000.00 (R. 98).

In addition to notice indicated by the foregoing documents there were a number of significant conversations, which inevitably gave the defendant information about the salaries that were accruing on the records. There were the conversations between him and Mrs. Chambers in 1949 and 1951 involving Exhibits 2-P and 21-D, which cannot be ignored in view of Mrs. Chambers' meticulous habit of making notes on documents to keep matters straight in her mind. Mr. Sims talked to Mr. Beckstrom on the telephone in 1951 concerning salary matters of the partnership (Ab. 121, R. 1039, and Ab. 136, R. 1132). He also talked to Mr. Reimann on the telephone concerning his previous conversation with Mrs. Chambers in October 1952 (Ab. 195, R. 1548). He could not but have been alerted by this to the method of accruing salaries into the capital account of Chambers. And defendant testified that Reimann was his agent in such matters (Ab. 117, R. 1023, Ab. 133, R. 1115). When the defendant left the partnership for the purpose of going to Kearns, he discussed the changes with Mrs. Chambers which would certainly result in a different handling of salaries (Ab. 169, R. 1383-1384). There is no testimony that upon his return from the Kearns project he ever looked into the records of the practices concerning salaries to determine what had been done and to arrange for a change closer to his desires as to the future. This is because he already knew how the books were being kept.

David Beal had a pointed conversation with the defendant previously recited under Point II A as did

Robert Shirley, the other certified public accountant, who was aware of the capital account study of Mr. Beal, had made the depreciation schedule for the partnership for 1955, and prepared the defendant's personal income tax returns for 1955 and 1956 (Ab. 36, 38, 39, R. 416, 426, 428).

There was a further conversation between Mrs. Chambers and Mr. Reimann before February 13, 1957, about overdrafts, (Ab. 195, R. 1550) which would have been notice to anyone who was not already well informed, as plaintiff insists the defendant was, that the partnership accounts showed a situation unfavorable to the defendant.

At the Church Dinner in 1957, Mrs. Chambers very properly brought to the defendant's attention the unbalanced capital accounts and suggested taking in a piece of property from Mr. Hansen, which could go to the plaintiff and Mrs. Chambers to reduce their capital balance. Mr. Sims said such was not necessary; it could be taken by South East; all of which indicated an understanding of the capital account situation and no surprise (Ab. 58, R. 542).

From this welter of evidence, the defendant was reasonably and fairly notified as to the method of keeping salary accounts and capital accounts of the partnership. He lived next door and was in the vicinity almost every day. He had no excuse for not examining the records and knowing what was contained in them and used the information from the partnership records

in connection with his business at the sand and gravel pit and his income tax returns. He must be charged with knowledge of all that was on the records and be held to have acquiesced in and approved the salaries credited to the plaintiff on the books of the partnership.

CJS on Partnerships, Section 173 (c) makes this statement:

“Since each partner is presumed to know what appears on the partnership books, as discussed infra Section 227, where an entry is made in such books of a transaction which was beyond the scope of the partnership business, after the lapse of a reasonable time each partner will be presumed to have knowledge thereof in support of a ratification.”

And in Section 227:

“It is presumed that each partner knows the entries in the firm books, provided he has access to them. The possession of access to the firm books by a partner has been held to be presumed, but the presumption is rebuttable by *evidence of non-access*.” (Emphasis supplied).

Significant also are Sections 48-1-16, 48-1-17, and 48-1-2 UCA 1953. Section 16 provides that the books shall be kept at the place of business and that “every partner shall at all times have access to and may inspect and copy any of them.” Section 17 requires the rendering of any information affecting the partnership which a partner may request and Section 2 charges partners with knowledge of a fact “not only when he has actual knowledge thereof, but also when he has knowledge

of such other facts that to act in disregard of them shows bad faith." And notice is provided in the said Section 2 where there is delivered through the mail or by others means of communication a written statement of a fact to a person at his place of business or residence.

Under the statutes cited, the books of the partnership are simply the books of the partnership and each partner is charged with knowledge of the contents if the partner has access to the books.

Under the decided cases, in interpreting the uniform partnership law, partnership books are held to be sufficient if an accountant can determine the financial condition of the business and the total amount for which the bookkeeper is accountable. (*Duncan v. Bartie*, 188 Ore. 451, 216 P. 2d 1005; *Dale v. Dale*, 57 N.M. 593, 261 P. 2d 438).

There is some latitude in determining the sufficiency of the accounting, some of the factors being the nature of the business, the intelligence of the partners or the persons who keep the records, and the circumstances under which the work is done. (*Dale v. Dale*, (*supra*) ; *Bracht v. Connell*, 313 Pa. 397, 170 A. 297).

And far from being inferior evidence, the partnership books are presumed to contain the true history of the partnership, so that in the absence of evidence to the contrary reliance may properly be placed on them to determine the partnership agreement and the partnership account, and where access to the books

has been available to both parties, they are extremely valuable evidence of the true partnership agreement. (Darlington v. Perry, 354 Ill. 22, 187 N.E. 796).

And the ordinary records of the partnership are prima facie evidence of the facts contained in them and casts the burden of challenging upon the other person. (Bracht v. Connell (supra)).

And we submit that the use of partnership information as to income or profit in the filing of individual income tax returns charges the defendant with knowledge of how the profit or income was computed.

For instance, in the case of Bernard Stoumen v. Commissioner, 12 Tax Court Memorandum Decisions 267, the tax court considered the situation of a taxpayer who claimed he did not know that the partnership had additional income, blaming the fraudulent withholding of income on a partner who killed himself at the commencement of the investigation. The tax court went on to say at page 273:

“A taxpayer is under a legal duty to exercise reasonable care in assembling data for the filing of an accurate return and may not ignore information accessible to him. Petitioner discharged that duty by reporting all of the profits shown to be distributable to him in an audit report of the books of the partnership in the absence of any knowledge of other partnership income.”

In the same case before the Third Circuit Court of Appeals (208 F. 2d 903) that court held that the

taxpayer had discharged his obligation to verify income figures by the following comment:

“For the taxable year in question, Abraham had an accountant audit the firm’s records and determine its income. Using the information obtained from that accountant, another accountant made up the firm’s and petitioner’s income tax returns. Petitioner’s returns showed his full share of partnership income as reflected by the firm’s books.”

A similar view is indicated in *Estate of Louis L. Briden v. Commission of Internal Revenue*, 11 Tax Court of United States Reports, 1095 at 1135, where the court said:

“The record fails to show whether or not the decedent took part in the preparation of his returns or the partnership returns. Most of them were in the handwriting of Gladys Coleman. She signed the affidavit of preparation for decedent’s 1940 and 1941 returns. His signature appears on his personal returns. However, he cannot escape his responsibility for a correct return by committing its preparation to others.”

POINT III

WAS REASONABLENESS A PROPER ISSUE?

As above noted, both parties thought they could prove specific schedules of salaries as being the agreement of the partnership. Plaintiff by showing the entries in the books and records upon which all parties

had relied and the defendant by showing an oral agreement concerning salaries which was never put into operation. Having found against the defendant and having gone only part way with the plaintiff, the Court concluded that in order to finish the case it was necessary to determine what compensation should be awarded to the plaintiff under all the circumstances of the case. Defendant vigorously resisted further trial on this issue, claiming that it was beyond the jurisdiction of the District Court. (See Ab. 226 and R. 151-158, also Ab. 226-234 and 236, R. 1740-1782).

The plaintiff under Point II of this argument has attempted to show that it was error for the Court to consider further evidence on the issue of reasonableness and should have held that the defendant was bound by the records of the partnership.

Both parties are in agreement that consideration of the issue of reasonableness was a last resort in the District Court, and both parties are apparently in agreement that it is not before this Court unless this Court first decides as to the plaintiff that the amounts of salaries in the books and records were not binding on the defendant, and as to the defendant that he has failed on his counterclaim by which he sought to establish agreement of specific salaries.

Plaintiff submits that if the District Court was right on those two matters then the District Court was within its powers and was promoting justice and bringing this trial and this partnership dissolution to a logical

conclusion by ordering a further trial on the issue of reasonableness of salaries to plaintiff.

It should be borne in mind that the Court did not want a further trial. The Court invited the parties to cover this issue by stipulation, lest it consider the appointment of an accountant as a master in chancery (R. 150). The defendant challenged the authority of the Court to appoint a master in chancery without his approval (Ab. 226, R. 1747), and the plaintiff encouraged the Court to believe that the taking of evidence on this issue would not be lengthy (R. 1749). (Defendant's refusal to stipulate the reasonable compensation and his objections to appointment of a master are contained in a pleading at R. 151 to 158. It is set out further at R. 1741 to 1744. The plaintiff's suggestion is found at R. 1748 to 1749).

A. It was within the pleadings and Pre-Trial Order.

Paragraph 5 of the Complaint refers to the plaintiff's "earnings for services performed" and in paragraph 6 alleges "that practice of the partners has been to recognize claims for salaries for services performed for the partnership by plaintiff and his wife, Margaret S. Chambers, and to the defendant when services were rendered by the defendant by making payment or by giving credit therefor, and thereafter to divide net profits equally between plaintiff and defendant" (R. 1 and 2). These allegations relate the claims to services performed and, therefore, it is submitted, were subject

to attack on the basis of reasonableness or the lack thereof.

These allegations were denied in the answer (R. 20).

The 12 page answer and counterclaim and cross-claim contains numerous allegations which suggest issues of reasonableness. For instance in paragraph 3 of the First Count of the Counterclaim and Cross-Claim, it is alleged that plaintiff prior to partnership, "was an employee of defendant in said sand and gravel business working as a laborer" (R. 22). And in paragraph 6 that the initial salary schedules were "based on the situation of the parties as it then existed, including the services then being performed to the partnership and the responsibilities of the respective partners and the amounts invested by L. H. Sims" (R. 23). In paragraph 12 that when R. W. Sims left active participation in the business, "He would allow plaintiff the sum of \$250.00 per month for the time necessarily spent to supervise the gravel pit and to perform some of the activities which defendant would perform if defendant Royal W. Sims were not away" (R. 24). In paragraph 17, the reference to the Agreement of Dissolution indicates that "items in dispute relate to salaries, actual contributions to capital, questions of unauthorized salaries, failure to accredit salaries, withdrawals made by partners, and other matters" (R. 28). And the prayer for relief asks "for such other and further relief as shall be equitable and appropriate in the premises" (R. 29).

The pre-trial order includes this paragraph:

“4. This issue will involve a contest of every salary or partnership distribution entry in the book and also an issue on the entries that the defendant Sims claims should have been made that were not made.” (R. 86).

Paragraph 7 provided:

“Parties have stipulated and reached an agreement that they can start from the balance sheet figure and make adjustment on the issues involved in this case, on that balance sheet figure. (which was then set out).”

B. Defendant suggested at the opening of the trial that it be eliminated.

In the plaintiff's opening statement, it was said that the plaintiff's

“salary has been entered in the book regularly, increasing as that is the amount his salary has increased from year to year, and from time to time we say commensurate with the increase in wages generally and the general inflation we have experienced and also in accordance with the growth of the business which has been substantial.” (R. 262).

And again at page 265 the opening statement referred to increases in salaries commensurate with changed circumstances.

After discussion of how the plaintiff proposed to prove agreement by practice of the parties or modification of agreement, Mr. Burton said:

“In view of this, the question of the amount of the services in this action should be entirely immaterial because he is going to rely solely on the practice.” (R. 283).

and again:

“Merely this, that the amount of services, what these partners did, aren’t going to be of any materiality or relevancy on the matter of a waiver. On the matter of any agreement, that shouldn’t come into it. We ought to eliminate that entirely, that part of this, of any evidence in this case.”

Plaintiff’s counsel responded:

“I would like to agree * * * .” (R. 287).

And Mr. Reimann then remarked:

“The question of reasonableness is out of the question because the statute fixes that.” (R. 288).

At R. 289 Mr. Bird indicated that he thought reasonableness was one of the issues; and if not, he would like to avoid it. From these statements, the Court concluded:

“That the contention with respect to salaries is that the salary has been specifically determined by the practice and that you will endeavor to show by your evidence that there was a practice and that practice established a specific salary and that the matter of reasonableness is not an issue in the case.” (R. 292).

C. *The possibility that both might fail in their claims of specific compensation was recognized.*

Both parties expected to succeed in establishing their claimed specific salaries.

The plaintiff argued:

“Now it is our position that if we are going to eliminate the modifications as the practice of the parties has established it, we should return not to some fanciful agreement but to the actual partnership agreement. Now we are in effect before the Court, each of us, asking the Court to apply a modification of the original agreement. The plaintiff is asking that the Court apply as the agreement of the parties, the practice of the partnership in their conversations and in their record keeping. The defendant is asking the Court to apply an entirely different theory, and we are both in effect asking to Court to set aside the original agreement.

“Now our position is that if the Court finds against the plaintiff, it is going to have a hard time lodging upon the position of the defendant, and may be compelled to apply the partnership agreement as it was originally written, there being no meeting of the minds hence, but our position is not that.” (R. 265).

In view of all of the foregoing, it was reasonable to shorten the trial by eliminating the issue of reasonableness, and each side is still contending before this Court that it was successful and that reasonableness is still not an issue.

D. The Court had the right to hear the further issue and complete the case.

The action is primarily for a partnership accounting and requires an answer from the Court. Either the accounting based upon the books is tenable or it is not tenable; and to say that it is not tenable does not give an enforceable answer to the problem. For this Court to hold that reasonableness could not be determined would force the District Court to choose between two alternative positions, both of which had, in the opinion of the Court, failed.

The Rules of Civil Procedure encourage the District Court to do what was done in this case in an effort to shorten the trial, but with the necessary power to obtain justice in the final result:

Rule 54(c) (1) provides:

“Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.”

Rule 59(d) provides that there may be a new trial on initiative of the Court within the limits of Rule 59(a) which provides for a trial on a limited issue, provided the new trial is ordered before 10 days after

the entry of judgment. The Court's order in this case was well within that time and was conformable to that rule.

Rule 4(b) provides:

"The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues."

And in Section 78-7-5 under Powers of Court, subsections 8 and 9 provide:

"Courts have power to amend and control its process and orders so as to make them conformable to law and justice.

"9. To devise and make new process and forms of proceedings, consistent with law, necessary to carry into effect the powers and jurisdictions possessed by it."

We believe there is ample authority in the Court to conduct the trial and defer the trial in the manner it was done. The Court did all it could to conserve its own time and the time of the parties.

E. If reasonableness was a proper issue, the Court's decision was supported by evidence and is sound.

Plaintiff proved a poor prognosticator in suggesting that the issue of reasonableness could be tried briefly. That portion of the trial fills two fat volumes

of transcript. The various issues and aspects were thoroughly explored and were fairly summarized in the Court's supplemental memorandum decision (R. 181-183). This Court has held that it will affirm an issue of fact if it is supported by any credible evidence.

Defendant in his brief makes no attack on the Findings of Fact relative to reasonableness of the salary awarded to the plaintiff. His attack is directed to the error of the Court in dismissing the counterclaim and the right of the Court to hold a further trial and make a determination of reasonableness of compensation. In the absence of such attack and an effort to show that there was no evidence to support the determination of the Court, a review of the evidence is superfluous. There is an abundance of evidence to support each of the items mentioned by the Court in its supplemental memorandum decision. This Court has held that findings or verdicts on issues of fact will be upheld if there is substantial evidence to support them. *Lowe v. Rosenlof*, (supra); *Valcarce v. Bitters*, (supra). In *Jewell vs. Horner* (supra) the rule is in an equity case where clear and convincing proof is required, that findings will be upheld unless it manifestly appears that the evidence has been misapplied or that the finding is clearly against the evidence. In *Cassity v. Costagno*, 10 U. 2d, 347 P. 2d 834, the rule is that findings will not be disturbed where "It does not appear that the evidence is such as to compel" a different finding. In *Parrish v. Richards*, 8 U.2d, 419, 336 P. 2d 122, the rule cited from another case is that the findings will be

upheld "unless it is manifest that the trial court has misapplied proven facts or made findings clearly against the weight of the evidence."

Defendant apparently recognizes, as the plaintiff does, that there was ample evidence to support the Court's determination of what compensation should be allowed to Chambers before division of the profits, and that the conflict in the evidence was such as to give the trial judge wide latitude in what evidence it would accept and what weight should be given to various portions of the testimony.

POINT IV

DEFENDANT IS BARRED ON HIS COUNTERCLAIM BY THE STATUTES OF LIMITATIONS.

A. *Claim for salaries is barred by Section 78-12-25, UCA 1953.*

B. *Action for salary based on fraud, concealment or deceit is barred by Section 78-12-26 (3) UCA 1953.*

These defenses were preserved at the trial (R. 1582), and in the statement of points on cross-appeal (R. 227).

Since the counterclaim was dismissed on plaintiff's motion, it would appear to serve no purpose to argue these points. If the Court should reverse the trial

Court and reinstate the counterclaim, plaintiff would not like to be accused of abandoning these defenses.

SUMMARY AND CONCLUSION

Each of the parties went to trial initially in the firm belief that specific salaries had been established which should be paid to the partners before equal division of the profits. The plaintiff relied upon long standing practice of the parties evidenced by the keeping of records that certain amounts were credited to the plaintiff for compensation for his services and the remainder was divided equally with the defendant. This practice had been uniform from 1954 to the time of dissolution although admittedly, prior to that time, the basis of the computation was not consistent. But whether consistent or not, it was established by the records and has never been changed and has, therefore, been accepted by the parties.

The defendant, on the other hand, relied on a claim which has never received one speck of support in the records or the practices of the parties from May 8, 1948, until the time of dissolution. The defendant's claim that there was an oral agreement made between the partners in the limited partnership was not borne out by any bookkeeping entries or by any conversation, document or claim in which the plaintiff or the cross-defendant or the bookkeeper Russell Evans ever acquiesced or supported. Defendant claimed that the purpose of the agreement was to provide a basis for

division of profits for the limited partner who could not render any services (Ab. 121, 135, 164, R. 1040, 1130, 1360). The limited partner, L. H. Sims, died in October, 1948, which was before the end of the first year of the partnership so that there was never any necessity for determining compensation to general partners as far as the limited partner was concerned. If this was the reason for the agreement, then the reason terminated with the death of L. H. Sims. In any event, the claimed agreement was sharply disputed by the plaintiff and cross-defendant, and the books and records of the partnership contain no support whatever for the claim of defendant. The Counterclaim was properly dismissed.

The Court found that a number of practices were established by the books and records, acquiesced in and adopted by the partners and that these included crediting of the cross-defendant's salary to the capital account of the plaintiff, recognition that the interest of L. H. Sims had been partially absorbed by the plaintiff with the consent of cross-defendant and by the defendant as to his own one-ninth and that Lois Fors had been treated as a continuing limited partner with a one-ninth interest; that no salaries or compensation were payable to the defendant after the year 1948 until he demanded \$2500.00 in 1959; and that the plaintiff, because he was devoting full-time and long hours to the business, was entitled to a salary before division of profits. In other words, all of these matters were communicated to the defendant by reason of the entries in the books

and records, by reason of conversation, and by reason of documents, knowledge of the contents of which are chargeable to the defendant.

Plaintiff submits that all of the things which gave actual or constructive notice to the defendant of all of these practices likewise gave actual and constructive notice to the defendant of the amounts of salaries being credited to the plaintiff from year to year. It seems that the trial court considered the amount of salaries larger than the Court was wont to allow the plaintiff before division of profits and that "reasonableness" entered into the mind of the Court during the first trial, even though it had been excluded by stipulation of the parties. In this the Court erred. Plaintiff's brief has recounted the many documents and conversations which brought to the attention of the defendant the facts contained in the books and records concerning salaries and capital accounts. The brief has recounted also preparation of defendant's tax returns by four different and well informed accountants or lawyers, each of whom had access to the records and each of whom knew or should have known the precise basis upon which salaries were being paid and profits were being distributed. It is unreasonable to assume that no one of these persons would have gotten through to the defendant the facts shown so plainly on the books and records.

And the existing books and records without more were chargeable to the defendant as a matter of law. He lived next door to the office, he conversed with the

plaintiff almost daily, he was in the office many times during the ten or eleven years of the partnership, was friendly with all of the persons who had access to the records or were working on them and can point to no reason why he should not be charged with knowledge of the books and records of the partnership and, therefore, charged as a matter of law with what the records contained.

But if the Court holds otherwise and agrees with the trial Court that because of the confidential relationship existing, defendant should have been tied down and forced to listen while entries were read to him or forced to listen to a recital of exactly how salaries were being computed and why, then it was proper for the Court to complete the case, complete the partnership accounting and dissolution and receive evidence on the issues of how much did each partner contribute to the partnership and what compensation should be allowed to each, all things considered. On this branch of the case, the Court was patient and received all evidence offered by both parties. Its determination of the facts is unassailable.

The accusations of defendant against his sister are unworthy of the defendant and his counsel. Their efforts to prove withholding of records, concealment of records, and misleading of the Court fail completely, and the Court found "no scintilla of evidence" to support their accusatory charges. The constant reiteration of these accusations by counsel during the trial and the

numerous arguments must not be confused with evidence. And it is to be hoped that the frequent repetition of charges in the records filed with this Court will not thereby be dignified by credence, but that this Court will recognize that there was “not one scintilla of evidence” in support of these irresponsible accusations.

Respectfully submitted,

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APPENDIX A

The Abstract of Record of Trial Proceedings did not abstract the pleadings or the exhibits. The abstract was not submitted to respondents, and they had no opportunity to make any suggestions or objections. If it had been, the bias in the abstract, apparent from a comparison of the record with the abstract, might have been avoided.

This Appendix A is limited to objections to specific statements in the abstract and to omissions therefrom. The comments, which are included in parentheses, are intended to give context to the material pointed out, and it is admitted that the purpose of this Appendix is to make up in part for the omission of evidence favorable to respondents from the printed abstract.

1. (Although the Court pointed out (R. 279) that the opening statements were not evidence in the case, the first 15 pages of the abstract is devoted to the opening statements and the discussions of issues. As a result of these matters, the issue of reasonableness of salaries claimed was eliminated from the law suit. Eliminating the issue was suggested by counsel for appellant (R.

265 and 282).) Respondents thought reasonableness was an issue in the case:

“ * * * The plaintiff is asking that the Court apply, as the agreement of the parties, the practice of the partnership in the conversations and in their record keeping. The defendant is asking the Court to apply an entirely different theory, and we are both in effect asking the Court to set aside the original agreement.

“Now our position is that if the Court finds against the plaintiff, it is going to have a hard time lodging upon the position of the defendant and may be compelled to apply the partnership agreement as it was originally written, there being no meeting of the minds since, but our position is not that. Our position here is that the practice of the parties as reflected on the books and distribution has become the modified agreement of the parties and is the agreement which this Court should enforce in this separation. I think that presents our views.” (R. 266).

And at R. 289 after the Court had indicated that reasonableness of services might be eliminated from the case, respondents' counsel said:

“Yes. I thought that was one of the issues. If it isn't, I would like to avoid it. If there is no question here that the amount of salary paid to Mr. Chambers and to Mrs. Chambers was reasonable for the services they rendered, then I would like to have the burden of proving only the implied agreement of the parties.”

2. (Ab. 15 tries to make it appear that plaintiff set out to prove an express agreement as distinguished

from a specific salary as pointed out by the Court.) The Court and counsel many times during the trial reiterated the position of respondent to be that the practice of the parties in the partnership established salaries as contained on the books although there was no express, formal agreement to that effect. (Ab. 37, 48-49, 70, 229, and 231; and R. 418, 486, 632-641, 1751-1757, and 1763). (It is not easy to determine why appellant has italicized words on pages 14 and 15 of the abstract unless it is to attempt to confuse this Court.)

3. Ab. 22 starts the 8th line from the bottom with the word “are,” which in the record is “were.” (This slight change makes plain the fact that the books were accurate and that errors occurred when those working with the books in the regular course of the business took items from the books. As abstracted, it could mean that errors presently result from the use of figures from the books.)

4. Ab. 24, line 10, contains a statement by Mr. Beal that:

“My own books are kept that way.”
That statement was made in answer to the Court’s question:

“The Court: But would I understand from that practice, Mr. Beal, in an informal way, after that credit had accrued to Mr. Sims for gravel sold, that there is no serious objection as classifying it as a credit in his capital account?”

5. All of the material from line 8 of page 34 to

line 6 inclusive of page 35 should be deleted from the abstract. (This discussion dealt with the question of what were partnership records, which was reiterated many times by counsel for appellant, but which is material to no issue in the case, and in any event, the portion objected to was not in any part evidence.)

6. The argument of Mr. Burton on Ab. 37 is not evidence and is an attempt to confuse the Court and counsel by his gratuitous reference to "the burden of an express contract," which was not plaintiff's position.

7. The reference "Mr. Bird" in line 10 at Ab. 44 should either be deleted or accompanied by the further explanation of R. 457 that Mr. Shirley did not recall the presence of Mr. Bird at those conferences. (This is significant because of the statement of Mr. Chambers that Mr. Bird was not employed until a much later time and after the partnership was in jeopardy. Ab. 109, R. 952).

8. The first three lines of Ab. 45 do not make plain the fact that Mr. Shirley testified that in a conference with Mr. Reimann he had with him certain papers showing disparity in capital accounts, which were discussed with Mr. Reimann, and that these included a balance sheet, a profit and loss statement, a list of equipment, list of accounts payable and accounts receivable, "All of the financial information of that type." And also on R. 461, Mr. Shirley had testified that he had discussed with Mr. Reimann the uneven

capital accounts as shown on the books and in the specific amounts that appear there.

9. The last three lines on Ab. 48 and the first three lines on Ab. 49 should be stricken as another effort to push on to plaintiff the burden of proving an express agreement as to salary rather than an agreement implied from the practice of the parties and the partnership.

10. Ab. 50, line 5, italicizes "written" and then neglects to include the statement from the bottom of R. 492 that the only agreement in writing as to salaries of the partners is with the Farmers Bank in Woods Cross. (This agreement was later produced as Exhibit 20-P, R. 580 and 856).

11. Ab. 56, 5 lines from the bottom states: "I don't know what Mr. Jorgensen did with the statement." But Mrs. Chambers testified that Mr. Sims brought the statement (Exhibit 8-P) to their second conference with him (R. 531).

12. Ab. 62 in the middle refers to a conversation between Mrs. Chambers and Mr. Sims concerning a potential sale of the business and neglects to include Mrs. Chambers' testimony that:

"The difference in percentage in the capital account was the main cause of discussion." (R. 589, lines 26 and 27).

13. Two mistakes on Ab. 64 are significant. In the second answer quoted, the second word is "believe"

and not "believed." In both the deposition and the record it correctly appears as "believe." In the second answer quoted, the eighth word is "have" and not "had." In the record it appears as "had," which is incorrect, as the deposition says "have." (Dep. p. 63). (These are significant because it is Mrs. Chambers' position that the first time she ever heard the figures \$400.00 and \$350.00 as salaries was at the taking of Mr. Chambers' deposition, when they were included in Mr. Reimann's question to Mr. Chambers but never used by Mr. Chambers. The two above errors would make it appear that Mrs. Chambers was speaking as of the time of the original conversation in 1948 instead of at the deposition a few months before trial.)

14. Ab. 71, lines 7 and 8, state that Exhibit 28-D shows salaries for Mr. Chambers and Mr. Sims at \$4,750.00 each for the year 1949. This statement occurs in the question of Mr. Reimann, and is, therefore, not evidence; and the question was answered negatively. (It is, therefore, consistent with Exhibit 1-P referred to in the same paragraph of Ab. 71, which likewise does not show such salary for either partner in 1949.)

15. At Ab. 74, first question and answer refer to "instructions" by Mr. Sims, and the next question and answer refer to something volunteered with asterisks separating them. The portions covered by the asterisks are that Mrs. Chambers said:

"It was just understood for years."

and that Mr. Sims did not tell her what her duties were, but:

“I volunteered it because we had no one else to do it, and someone had to keep some kind of order.” (R. 662).

16. Ab. 75 includes several questions and answers as though they were consecutive and as though Mrs. Chambers recognized testimony by Mr. Chambers that there was an agreement concerning salaries. There should be asterisks between lines 8 and 9, which asterisks should indicate omission of the following significant questions and answers:

“Q. Now, Mrs. Chambers, there isn’t any doubt in your mind now, is there, that there was such an agreement between your husband and Mr. Sims on May the 8th, 1948, is there?

“A. Yes.

“Q. There is doubt?

“A. Yes.

“Q. You don’t question his testimony on deposition, do you?

“A. Yes.” (R. 668).

17. Ab. 77 in the middle of the page says the item of \$810.00 as charged does not appear in the book. This is not accurate. Mrs. Chambers testified that it does not appear in the book, “As a charge against Mr. Sims” (R. 687), although it appeared that the item does appear in the books in the John T. Chambers capital account (R. 689).

18. At Ab. 78 and 79 several questions and answers are quoted. At the top of page 79 there is a paraphrase of the most important question and answer as follows:

“Q. Well, didn’t he tell you that you were to run the office and take care of things at the office?

“A. He said Tal and I were to run the business, that he had other plans, and he did not want to be bothered with it.” (R. 700).

19. At Ab. 79 in the middle, the sense in which Mrs. Chambers said “We still haven’t established it” is obscured by the asterisks. The asterisks indicate “Now, Mrs. Chambers, I hope you will answer my question.”

20. Ab. 80 has some asterisks between a question asking the witness whether a statement of “no time” was false and a question which accuses her of not informing Mr. Beckstrom about an agreement as to salary. The omitted portions are lines 1 to 11 of page 707 as follows:

“Q. Well, but you didn’t tell Mr. Beckstrom then, informed Mr. Beckstrom that he was doing anything for the partnership, did you?

“A. I didn’t, I don’t think.

“Q. Well, did you tell him anything about Mr. Sims doing anything for the partnership?

“A. We didn’t go into a lot of details about it.

“Q. Well, you emphasized with Mr. Beckstrom how much work Mr. Chambers was doing, didn’t you?

“A. He observed it. He was there in our office, in our home for about six weeks.” (R. 707).

21. The paragraph at the top of Ab. 82 is a self-serving question which was not answered, and the question was stricken. (R. 716, lines 10 and 11). The paragraph should be stricken.

22. Ab. 82 following the question and answer at the bottom omits the following (which indicates that Mr. Chambers was kept fully informed as to the book-keeping practices on salaries) :

“Q. Mrs. Chambers, prior to the time Mr. Steiner came over to the office of the South East Ready Mix Concrete Company, you had not discussed it with your husband up to that time, had you?

“A. Yes, we discussed it on trips, he was always —when we would go to the coast, he didn’t want to go back. ‘What do we have to go back for, just work and nothing but work.’ And I say, ‘We have got to work and keep on working until we can get something to leave with. We can’t just go out with our suitcases.’ We discussed that many times because he was so tired of working night and day.” (R. 719).

23. Ab. 83 middle of page. The abstract states that Mrs. Chambers remembered a conversation with Mr. Sims about no salaries until the equipment was paid for. On page R. 721 Mrs. Chambers also testified that she recalled no discussion with Mr. Sims “that unless the company can pay salaries to both partners, it can’t pay a salary to either one.”

24. Ab. 83 at the bottom refers to a loan to South East of \$10,100.00 although that matter upon objection by counsel and discussion of the Court was withdrawn by Mr. Reimann (R. 725, line 7).

25. Ab. 84, the question and answer are quoted. (If it amounts to a matter of recollection of previous testimony, her previous testimony at R. 519 should be noted where she testified that salaries and share of the profits had been mentioned to Mr. Sims. But actually the word used on Exhibit 17-P and which indicates the probable conversation, is "wages" and not "salaries".)

26. Ab. 84 in the middle of the page refers to a stipulation that the books don't show overdraft of the Sims' account. The record makes plain that only overdrafts at the end of the year would appear on the books because of their annual accounting, and that the overdrafts complained of appeared on worksheets made by Mr. Evans. (See Exhibit 57-P) (R. 729 to 731).

27. Ab. 84 bottom of page. The abstract does not mention from the testimony of Mrs. Chambers that Exhibits 16-P and 17-P were shown to appellant and counsel at the taking of deposition (R. 733-734).

28. Starting at the bottom of Ab. 84 and through the first paragraph of 85 is a discussion of whether Exhibits 8-P and 9-P are part of the records. At R. 773 it is shown that 8-P is part of Exhibit 21-D, which was produced by appellant from the records of the partnership, although no reference is made to that fact in Abstract 89 where R. 773 is passed over.

29. Ab. 90 at bottom of page. The abstract omits R. 786 line 27 to R. 787 line 9, where Mrs. Chambers testified that it was her practice to put slips in the books or a faint pencil mark and then, "Maybe once a year after income tax, or just before income tax, to see if the things are like Mr. Evans says they are."

30. Ab. 91 in the second to the last paragraph refers to our interest in showing that Sims' confidence in Mrs. Chambers was great, but the abstract omits the statements of Mr. Reimann: "We will admit that he had unbounded confidence in Mrs. Chambers, * * * " but without admitting that she was given authority to supplant the partners in the management of the business (R. 794, 797-798).

31. Ab. 92 below the middle of the page refers to Exhibit 25-P but does not mention that she made it in 1955 and discussed this memo with Mr. Evans on the following income tax time and not until August, 1957, did she make the notation about salaries and "Aug. 1957" at the bottom of the memo (R. 801).

32. Ab. 93 toward the end of long paragraph states that Evans made an entry and called it salary for Mr. Sims, but omits the testimony that the entry was made "at Mr. Sims' suggestion" (R. 816).

33. Ab. 96 at beginning of bottom paragraph. In addition to making the statement attributed to Mr. Sims, Mrs. Chambers testified that he said:

"You and Tal have been running things long

enough. I am going to run it from now on, and you can either do it my way or get out.” (R. 829.)

34. Ab. 96 and 97 fail to refer to the testimony concerning Exhibit 25-P that it was discussed with Mr. Evans shortly after it was made and the notation was put on “August 1957” at that later time (R. 833-834).

35. Ab. 98 in the top paragraph erroneously refers to Mr. Sims saying he did not want the partnership to have a bookkeeping machine, when it was Mrs. Chambers who said that, and the abstract fails to mention the more important controversy over the purchase of six mixers indicated by this testimony of Mrs. Chambers:

“He (Sims) says, ‘Why won’t Tal go along with this thinking? I have been working on it for some time,’ and I said, ‘Because we don’t need six mixers, we only need one at the time, and we don’t have the money for it. We are tired of doing without.’ ” (R. 850).

36. Ab. 128 last part of middle paragraph. (The abstract correctly recites that counsel for respondent stated that Mrs. Chambers had testified that the words “Wages, M. & T.” were put on the memorandum after the conversation. This only proves that counsel was mistaken in his recollection, since an examination of Exhibit 17-P and a comparison with Mrs. Chambers’ testimony at R. 541 indicate that those words, “Wages, M. & T.” were put on during the conversation with Mr.

Sims, and were not the pencil notations put on later to fix the conversation.)

37. Ab. 142. At R. 1183 Mr. Evans testified that the conversation in October, 1958, between Mrs. Chambers and Mr. Steiner is the first conversation in October, 1958, between Mrs. Chambers and Mr. Steiner is the first conversation in which she expressed any doubt as to the correctness of the practice of putting salaries in the Chambers capital account. And following the conversation with Mr. Evans, she never again expressed any doubt as to that practice (R. 1186).

38. Ab. 143 at middle of the page. Evans does not deny that prior to 1955 he kept track of the salaries of John T. Chambers and Margaret Chambers and entered them in a capital account, and there was a page for that capital account prior to the one now in the book Exhibit 1-P (R. 1193).

39. Ab. 143 bottom of page. Evans further testified that there is no false information contained in the present John T. Chambers capital account in Exhibit 1-P (R. 1193, line 26).

40. Ab. 144 and 145. (The abstract glosses over the cross-examination of Russell Evans and makes it appear to be a meaningless controversy between counsel as to the effect that Evans' testimony on cross-examination and in his earlier deposition had on his testimony on direct examination. In his opening statement Mr. Reimann had emphasized the claim that Exhibit 1-P

had not been prepared as to its capital accounts until 1955 (R. 273, Ab. 8). Mr. Evans had so testified on his direct examination and had testified that the net profit page was not made until 1957 (Ab. 141, R. 1178). The extended cross-examination and effort to impeach this testimony by comparison of Mr. Evans' earlier deposition thus had an importance and an effect which the abstract completely ignored.)

Evans was asked why he had not said at the taking of his deposition that the John T. Chambers' capital account was a new page in 1955, and the witness asked whether the question had been asked him (R. 1194). Evans also said that the only records kept of net profit was on income tax returns, and he was asked why he had not made that statement, thinking of his deposition, and he said he would have if he had been asked (R. 1196, line 13). Evans first testified that the net profit page was made up from information on the tax returns and that there was no earlier page on net profits before the present one was written (R. 1197). Evans then admitted that Mr. Beal could have examined the net profit page in a ledger in 1955, and that it could have been written before 1955, and that it is all in his handwriting (R. 1199). Exhibit 40-P was then introduced in evidence. Mr. Evans testified that the tax return was his work and that he determined the partners' capital accounts total at \$80,186.80. (The significance of this is that the figure of \$80,000.00 does not agree with the total capital of the partners as shown on the capital accounts 701 and 703 and Exhibit 1-P, thus tending

to belie the former testimony that these accounts were prepared from the tax returns at a later date (R. 1201).

Questions and answers from Evans' earlier deposition were then read to him wherein he testified that he had never heard of the conversation between Mr. Sims and Mrs. Chambers in which Sims asked why salary had been entered on the books for Chambers and nothing for him, as contrasted with his direct examination when he recalled the conversation plainly. The witness then said that what he meant on the deposition was that he was not present at the conversation (R. 1207).

Questions and answers from the deposition were then read which implied that Evans was keeping a record of net profit divisions currently from 1952 on without making any suggestion that the pages had been rewritten in 1955 (R. 1209). The witness was then read further questions and answers in the deposition in which he had testified that the current accounts were adequate although there was a question as to whether the salaries would be altered, contrasting with his testimony on direct examination (R. 1215). Following objections of counsel for defendant, the Court noted that the impression created by the witness on his direct examination as to these matters had been gradually modified and that his testimony had now become contrary to that testimony on direct (R. 1215). Upon reading further from the deposition, it appeared that the witness had never discussed inadequacy of the rec-

ords with Mr. Shirley or with Mr. Beal or done anything else about it although the matter of posting from the net profit account to the capital accounts was a matter of simple arithmetic (R. 1217). The Court also commented on this as being a change from his testimony on direct (R. 1217 to 1218).

As to the time when the net profit account was created, further questions and answers from the deposition were read indicating that the net profit account had been in existence during the time of posting to the capital account and not created later (R. 1221).

41. Ab. 154, lines 4 to 7 state that the Court said evidence there was no regular system of withdrawals is "knocking down their case." (R. 1293 shows no such implication in the Court's comments, but only that the offering of a book showing incomplete records was part of their counterclaim, if material at all, because plaintiff claimed nothing for the book offered.)

42. Ab. 157 bottom of page. The abstract fails to mention that Exhibit 47-P was in Mr. Steiner's handwriting and was prepared from Exhibit 1-P in carrying out Mr. Sims' instructions to determine what the capital accounts showed (R. 1323-1324). And the Exhibit goes beyond the question of overdraft to show a tentative division of the total assets of the business (R. 1325).

43. After the first paragraph on Ab. 161, there should be added:

"Q. Where do you find in 2-P a reference to

\$400.00 for Mr. Sims and \$350.00 for Mr. Chambers?

“A. I said it was a clue.

“Q. I see. You figured that because of this \$357.00 for Mr. Mortensen you might make stick the argument that Mr. Sims was to be a little higher and Mr. Chambers a little lower?

“A. That had been my understanding with Mr. Sims.

“Q. But you have found no entry and I know you have searched the records for this, which supports \$400.00 a month for Mr. Sims and \$350.00 for Mr. Chambers, have you?

“A. No, I haven't.” (R. 1347, lines 14-25).

44. Ab. 164 bottom paragraph, as to a theoretical memorandum showing salaries as claimed by Mr. Sims, Mr. Sims testified that he did not know that there was such a memorandum and had never asked to see such (R. 1362).

45. Ab. 165, bottom line. In addition to stating that he did not accept the difference in their capital accounts, Mr. Sims testified:

“We talked about it in terms of them having 90 per cent of the business because according to her statement there, he had more capital in the business than I did at that time.” (R. 1365-1366).

46. Ab. 167 bottom paragraph. After stating that some drilling and blasting will have to be done, Mr. Sims testified that he was not suggesting that the part-

nership should remove the concrete on his land but only that the land contributed to the partnership (R. 1373).

47. Ab. 173 at end of first full paragraph Mr. Evans testified that he did not recall whether Mrs. Chambers requested the preparation of Exhibit 57-P (R. 1413), and after refreshing his recollection from his former deposition, he recalled that he prepared the chart without any request from anyone and for his own information and the information of Mrs. Chambers (R. 1414).

48. Ab. 175, line 9. In addition to saying that information was available to Mr. Sims, Mr. Evans testified that he made a written statement of net profit for some years and definitely for 1954, and is not certain whether every year was in writing, (R. 1436) and the copies were forwarded to the place where Mr. Sims was (R. 1437). Mr. Sims never requested any information from him concerning the net profit figure he had computed (R. 1437-1438).

49. Ab. 175, line 18. The handwriting to the left on Exhibit 19 is either that of Mr. Shirley or Mr. Sims (R. 1438).

50. Ab. 181, line 11. Mr. Evans also testified that Exhibit 15-P was prepared "To show what percent Tal had in the business" (R. 1481).

51. Ab. 181, line 18. With reference to Exhibit 7-P, which is a statement of profit for 1954, Mr. Evans testified that he doesn't know whether a copy of the

document “was sent up or whether it was delivered in person” but “I suppose that I would have delivered it.” (R. 1483, lines 8-14).

52. Ab. 193, line 2. Concerning the meeting at Mr. Reimann’s home in May, 1948, Mrs. Chambers testified that she and her father were not separated during the entire evening and that she was beside him the whole evening (R. 1536).

53. Ab. 193, line 13. Mrs. Chambers testified that following a conversation about Exhibit 21-D with Mr. Sims and, she thinks, her husband, she made some notation on Exhibit 21-D (R. 1538-1539).

54. Ab. 195, line 4. Mrs. Chambers testified to conversations about overdrafts by defendant with Mr. Reimann two or three times on the telephone and once when she and her husband were at his place having some legal papers signed, the earliest in 1952 and again in 1954 after the travel batcher was producing (R. 1547).

55. Ab. 200, after the first full paragraph, in addition to the matters abstracted, counsel asked Mrs. Chambers when, during the depositions, the phrase, “None of your business” was first used (R. 1589). And she then read from the deposition of Russell Evans that Mr. Reimann objected to a question “as wholly incompetent, irrelevant, and immaterial” and then:

“Mr. Bird: That objection is reserved by statute, Mr. Reimann, and you know it.”

“Mr. Reimann: It is none of your business if he had 100 employees, it makes no difference.”

(This is probably immaterial, as is the long colloquy quoted at Ab. 187 to 191).

56. Ab. 200 in middle of page. Mrs. Chambers testified that purchasing material from another source was not at Mr. Sims' expense because the partnership did the biggest part of the hauling (R. 1592).

57. Ab. 231 after line 7. The Court was also referred to Rule 54(c) (1) and to *Morris vs. Russell*, 236 P 2d 451, 26 ALR 2d 947, 120 U. 945, as giving the Court authority to inject a new issue so as to give a party the relief to which he is entitled (R. 1764).

58. Ab. 233 after the second paragraph. (The important part of the long discussion as to how the trial could go forward after the memorandum decision, was not the contentions of the parties but the view of the Court, which appeared at R. 1770 and is omitted from the abstract):

“The Court: The Court believes in accordance with the statute that partners in limited partnership agreement complied with the statutes with respect to compensation and that had there been a fuller disclosure between Mrs. Chambers and Mr. Sims so that it would have a *period* [appeared?] clearly to have been binding upon him, I would have found in accordance with the book, but I was not convinced that it was a full disclosure, that it was frank, that it was understandable between the two, as I think should have

been the case where that situation and relationship of trust and confidence, brother and sister, existed, and if I had been so convinced of that, I would have found in accordance with what Mr. Bird contended was a practice and which I could not see as a practice under the circumstances adopted by the parties so that it would enable the Court to by implication find that they had agreed upon it."

59. Ab. 233, bottom of page. The Court indicated its view that because of the written partnership agreement providing that the partners may compensate themselves, the statute was satisfied, and the practice of the parties became admissible to show that Chambers was to receive compensation for his full time and that Sims was not claiming compensation. Except for a written or oral agreement fixing salaries month after month and year after year, the partners could have recovered only their share of profits (R. 1771-1772 and 1774).

60. Ab. 235 at the bottom of the page. The abstract sets forth at length a motion of defendant for production of documents and brushes aside the answer and objections of the plaintiff, which, in addition to alleging that the defendant's motion is frivolous, derogatory, cantankerous and scandalous, charges that the motions are dilatory, an effort to obscure the issues, resort to prejudice and slander, to encumber unduly the record, and to delay the decision, and that any issue of contempt for failure to produce documents should be based upon a charge, an answer, the forming of issues and a hearing, but not as part of this case or in a manner to delay

decision, obscure the issues and impede justice (R. 171-173).

61. Ab. 57, six lines from the bottom erroneously refers to the handwriting of Mrs. Sims instead of, obviously, Mr. Sims (R. 539). The previous line accurately reflects the record but the record is obviously wrong in using the figure "\$123,057 and \$180,000." An examination of Exhibit 17-P will make plain that the witness referred to the figures "One hundred twenty three thousand, fifty seven, and One hundred eighty thousand" with those words and that the reporter missed the comma inflection after "one hundred twenty-three thousand."

APPENDIX B

Note: A vast number of exhibits were received in evidence and quite a large additional number were offered and refused. The abstract fails in many cases to indicate the character of the exhibits or the purposes for which the exhibits were offered. Presumably, the defendant handled this abstract in the way it thought was most desirable. Plaintiff offers herewith, as an abstract of plaintiff's exhibits, and as a convenience to the Court in assimilating the great mass of oral and documentary evidence the following comments as to the purpose for which plaintiff's exhibits were offered and the nature of the exhibits:

EXHIBIT 1-P was the ledger of the partnership and constituted the basis of the accounting in the action. The plaintiff contends that under the proprietor tab were accounts of net profit and capital accounts of both partners which were sufficiently definite to constitute the final basis of settlement between the parties.

EXHIBIT 2-P was the first ledger used in the partnership business and was superseded by 1-P. It is in the handwritings of Mr. Sims (the back portions

R. 1151), but mostly Mrs. Chambers, Shirley Smith and Mr. Evans. (Ab. 50, R. 494, 496).

EXHIBIT 3-P was a summary of the partners' capital account prepared by Mr. Beal and showing the effect of the contentions of the respective parties as to allowance of salaries. 3-P was made the basis of the pre-trial order.

EXHIBIT 4-P is one of the exhibits prepared by David N. Beal in 1955 and into 1956 from the records of the company. It is a study of the capital accounts of the partners built up a year at a time and in accordance with Mr. Beal's understanding of the partnership agreement. The exhibit sheet does not show it, but P-4 was admitted into evidence at R. 420.

EXHIBIT 4-P(b) was apparently not received in evidence.

EXHIBIT 6-P is a series of balance sheets and profit and loss statements prepared by Russell A. Evans, bookkeeper for the partnership. There was considerable testimony on both sides as to whether these various documents were delivered or sent to Mr. Sims or whether some information from them was telephoned to him or delivered on a slip of paper.

EXHIBIT 7-P was similar to 6-P but as to the 1954 statement contained more specific information about salaries than the other yearly statements. There was considerable testimony as to 7-P and in what form, if any, Mr. Sims had access to it.

EXHIBIT 8-P is a longhand statement of capital accounts made by Mr. Jorgensen, the father-in-law of Mr. Sims, and in his handwriting (Ab. 33, R. 382). Mr. Sims denied that it was prepared at his instance (Ab. 128, R. 1078); Mrs. Chambers said that Mr. Sims requested it of Mr. Jorgensen (Ab. 56, R. 529); and Mr. Jorgensen wasn't sure how he came to prepare it (Ab. 35, R. 409, 411), except he had testified Mr. Sims did not request it (Ab. 35, R. 383, 390, 406).

EXHIBIT 9-P is a typewritten copy of 8-P, with figures for an additional year added.

EXHIBIT 12-P is a copy of a letter sent to the partners by Mr. Ray Liljenquist in 1956 with a schedule which is the result of Mr. Shirley's work on the books of the company.

EXHIBITS 13-P and 14-P are, of course, the partnership information returns to the United States and the State of Utah for the years 1955 and 1956. 13-P shows the division of salaries and profits for that year between Chambers and Sims as does Exhibit 14, and each shows 100 per cent of Chambers' time devoted to the business and none of Sims'.

EXHIBIT 15-P is a study of capital accounts of John T. Chambers through the year 1955 and showing his percentage ownership of the business. This was made by Russell Evans.

EXHIBITS 16-P and 17-P are notes made during conversations between Mrs. Chambers and Mr.

Sims on March 7, 1956, and discussing the conclusions as to ownership of capital as shown on Exhibits 4-P, 8-P and 15-P. Part of the figures and drawings are those of Mrs. Chambers and part are those of Mr. Sims, and the pencil notations were put on by Mrs. Chambers after the conversation.

EXHIBIT 18-P is a typical year end statement made by Russell Evans for the benefit of the partners and showing salary for Chambers and none for Sims.

EXHIBIT 19-P was a similar statement for 1955, but showing net profit only with adjustments in pencil, which became the basis of the 1955 tax returns of the partners.

EXHIBIT 20-P is a copy of document filed at the Farmers State Bank in Woods Cross in 1947 and the document about which Mr. and Mrs. Chambers both testified as being the only agreement concerning salaries that was made in the early stages of the partnership (R. 899 and 492).

EXHIBIT 21-D was offered by defendants but is a set of work sheets or memoranda made by Mrs. Chambers concerning salaries and which was preliminary to the salary schedules placed in 1-P. It also contains a copy of Exhibit 9-P.

EXHIBIT 25-P is a memorandum in the handwriting of Mrs. Chambers which she testified was a notation concerning her questioning of the salary of Mr. Chambers in 1955 in the amount of \$11,700.00,

and her notation concerning that salary and which she said was discussed with Mr. Evans. The notation of August, 1957, is also in her handwriting, which she stated was put on two years later. (Ab. 92, R. 798, 802).

EXHIBIT 26-P is two thermofax pages of originals made in Mr. Evans' handwriting and a yellow sheet which is a copy of a memorandum made by Russell Evans concerning a conference in January, 1959, as a result of which adjustments in sand and gravel charges were made and the salary item of \$2500.00 was put on the books for Mr. Sims.

EXHIBIT 27-P is a copy of a letter from Mr. Chambers to Mr. Sims typed by Mr. Evans and which is self-explanatory.

EXHIBIT 32-P is not scheduled by the reporter in his summary sheets for some reason. It was offered and received at R. 1008 for the purpose of identifying the time of a conversation with Mr. Reimann which related to the \$2,000.00 salary for each of the partners originally shown on Exhibit 2-P and originally claimed on the partnership return and then amended.

EXHIBIT 39-P is a record kept in 1948 of which some of the entries were in the handwriting of Mr. Sims (Ab. 182, R. 1497). The purpose and extent of the book were not established. Mr. Sims testified the first two pages were not in his handwriting (R. 1149); then that June and July pages were his (R. 1149-1150); then that he was not sure (R. 1155); and then that the first three pages were his (R. 1159, 1497).

EXHIBIT 40-P is the U. S. Partnership Return of Income for 1953 which shows one-third of Mr. Sims' time devoted to the business and two-thirds of Mr. Chambers', with income reported in those proportions.

EXHIBIT 46-P is a drawing made by Mr. Steiner of the situation of the parties in Mr. Reimann's office at the taking of the deposition of Mr. Chambers.

EXHIBIT 47-P is a study of the capital accounts of the partners made from Book 1-P by Glendon Steiner in 1958.

EXHIBITS 53-P, 54-P, 55-P and 56-P are all related to deficiency assessments or overpayment of income tax by the Federal Government and documents which were submitted to the partnership and handled by Mr. Evans and which the plaintiff contended were brought to the attention of Mr. Sims in the process of handling.

EXHIBIT 57-P is a graph made by Russell Evans to show the year to year supplies of sand and gravel to the partnership by Mr. Sims and his withdrawal of funds and to demonstrate what were called by the bookkeeper overdrafts of his account.

EXHIBIT 62-P is an order of the district court and is self-explanatory.

EXHIBIT 63-P was the exhibit offered when the case was reopened by the plaintiff for the purpose of showing the confidence which Mr. Sims had in Mrs. Chambers and that he was unable to devote time to the partnership affairs.

APPENDIX C

ANSWER TO BRIEF OF APPELLANT NOTE:

Plaintiff's Brief should answer the Appellant's Brief. Much of that has been done, although not in precise manner. When the brief was put together it was too long under the rules. The affirmative argument has been retained and the answering portion placed here so the Court can disregard it if it wishes, along with comparable portions of Appellant's Brief's Appendix.

To attempt to answer the Brief of Appellant an item at a time and cover all items would only get us and the Court lost in denial and refutation and would accomplish nothing. The record is too long and too verbose.

Typical of this is a 12 page answer to a 3 page complaint (R. 1 to 3 and 19 to 30). And for what it may be worth, plaintiff has examined the pleading file in this case consisting of 245 numbered pages and submits that of those pages plaintiff has supplied 47, the defendant 135 and the Court 52, and 11 pages relate

to supplemental proceedings in the District Court after entry of judgment and should not be in this record.

Defendant's brief continues a typically distorting note from the trial by stating under "Disposition of Case in District Court" that plaintiff claims an express agreement establishing partners' salaries. The complaint alleges in paragraphs 5 and 6 that the practice of the partners modified the written agreement, and the prayer asks for a determination of whether this practice modified the written agreement (R. 1, 2 and 3). This was made plain in the opening statement and discussion with the Court, (Ab. 6, R. 267) where the Court said:

"Well, I think we could agree as a matter of law that a practice established by the partners could modify a written agreement."

At Ab. 15, R. 292, the Court again noted that the plaintiff would rely on a salary that had been specifically determined "by the practice, and that you will endeavor to show by your evidence that there was a practice, and that practice established a specific salary, and that the matter of reasonableness is not an issue in the case." And yet the defendant delighted in refusing to recognize the issue as thus formed by stating repeatedly that the plaintiff had undertaken to prove an express contract fixing the salaries contained in the books and records of the parties (Ab. 37, R. 420; Ab. 48, 49, R. 486; Ab. 70, R. 631 by the Court; R. 633 by Mr. Reimann, R. 638 Mr. Reimann, R. 638 to 639 Mr. Burton, Mr. Bird and the Court;

XXX

Ab. 229 and 230, R. 1757 and 1760 where the Court said:

“The Court will not listen to any statement of that sort. There was no contention made of an express contract and the Court understands what an express contract is * * * .”

and again:

“That says nothing about an express contract. We are going to have no more conversation about express contract.”

At the bottom of page 2 of his brief, defendant refers to the memorandum decision as holding there was not sufficient disclosure of the entries to become binding on Sims, whereas the decision plainly provided that the practice was binding on Sims, but that in view of the confidential relationship between Mrs. Chambers and Mr. Sims, the amount of the salaries set up on the books was not sufficiently disclosed or imparted to the defendant to establish the amounts (R. 149 to 150).

On page 3 of his brief in the middle of the page, it is stated that the Court “denied salary to Sims after July 1948” although finding number 7 allows the \$2,500.00 claimed in 1959 (R. 185 to 186).

And finally, defendant states on page 3 that plaintiff filed Notice of Appeal from the entire judgment, although plaintiff plainly designated his statement of points on appeal as follows:

1. The practices of the parties establishes the capital accounts in Exhibit 1-P.

2. Salaries and withdrawals are those shown in the books.

3. Plaintiff's judgment should be increased by \$22,000.00 (R. 226).

Cross-appellant has previously said that the entire statement of facts is unacceptable. To controvert each misstatement would take too long and profit but little. We shall content ourselves with the following:

a. At page 5 it is said initial capital investments were R. W. Sims \$16,355.90 and J. T. Chambers \$6,582.72 (Exhibit 5-D). There was no issue on this as the pre-trial order plainly provided; and the plaintiff's account although in the file was not made a matter of evidence as it was immaterial. Exhibit 4-P, however, shows the initial capital investment to be: At the end of 1947—\$6,562.72 for Chambers and \$5,860.54 for Sims; and Exhibit 1-P capital accounts shows that at the end of 1947 (partnership started May 8, 1948) \$6,582.72 for Chambers and \$10,641.23 for Sims, and the certificate of limited partnership itself recites only the investment of the limited partner L. H. Sims, which is stated to be \$8,500.00. There was no testimony on this matter at the trial.

b. On page 5 defendant says under (c) that monthly salaries were fixed in the amount of \$400.00 for R. W. Sims and \$350.00 for Chambers, although this was exactly what the Court did not find in its memorandum decision (R. 148 to 150) and its Findings of Fact (R. 184 to 189).

c. Page 6 of his brief. Defendant says that following the May 8th meeting and on "the next day Mrs. Chambers prepared a memorandum or work sheet with respect to salaries of Mr. Chambers and Mr. Sims" (Ab. 65 and R. 607 do not state that anything was done the next day or for a couple of years, and the first memorandum was probably Exhibit 21-D, which was probably prepared in 1952 since the first page of longhand in Exhibit 21-D runs through December 31, 1951.)

d. In the middle of page 6 of defendant's brief it is stated that Mrs. Chambers destroyed the original memorandum. The witness did not testify that the memorandum was destroyed or that she destroyed it. At R. 498 she testified:

"It was probably destroyed when it was all entered into the books. We had no further use for it."

But defendant had Exhibit 21-D unknown to the witness and had her identify it at R. 609 after testifying at R. 608 that she:

"put them on a large spread sheet and had it checked back. I didn't see any further use of them. I might still have them in my personal files. I generally don't throw anything away."

e. Middle of page 7 of his brief defendant states that salaries for Sims were omitted "without any discussion with either partner" ignoring the fact that Sims told Mrs. Chambers he would be away from the business to take care of his affairs at Kearns. (Exhibit

63-P and R. 1037 and 1038, Ab. 120 where Sims said he would absent himself for a period of time.)

f. Middle of page 7 defendant says Mr. Chambers did not authorize Mrs. Chambers to change salaries. Actually, Mr. Chambers relied on her completely, gave her full authority in the office, and was advised by many conversations as to the salaries. Chambers left this matter to his wife, (R. 877, see also Ab. 135). He received such general statements as satisfied him (Ab. 106, R. 114). He and his wife had many conversations about salaries (Ab. 95, R. 826). Salaries were discussed a dozen times (R. 917). When Mrs. Chambers was upset by her conversations with defendant in the Fall of 1958, the plaintiff advised her that the salaries were in conformity to the partnership agreement, that everybody told him that (Ab. 205, R. 1617).

g. Middle of page 8 the brief states that no one told Mr. Sims about the explicit entries or omissions until October, 1958. This is fully considered under Point II C of this brief.

h. On page 9 statements are made about errors in partnership records. Mr. Beal testified that the errors were summary errors (Ab. 202, R. 1605), and Mr. Steiner testified that after 1952 no changes were made except based upon depreciation (Ab. 157, R. 1321).

i. The brief at page 9 quotes counsel's statement about Mrs. Chambers that "she was confused about" whether she was a partner. This is commented on because

it seems to reflect on Mrs. Chambers. Paragraph 4 of the complaint alleges that Mrs. Chambers as heir of one third of her father's interest: "has treated her partnership interest as being added to plaintiff's interest" (R. 1). The Answer denies that Mrs. Chambers is a partner, and disclaims knowledge of how she treated the assets inherited from her father (R. 19-20). The pre-trial order refers to J. T. Chambers and Margaret S. Chambers as "plaintiffs" for convenience (R. 86) then recited: "The pre-trial Court was not sure of her position in the partnership and denied the motion" (R. 88). In the opening statement, counsel stated that Mrs. Chambers' right had never been formally considered "and we are making no point of that, we are not contending that she is a partner * * *. The parties have assumed that they on one hand and the defendant on the other hand were equally partners. * * *." And again, "There has never been any formal assignment of that which is true and exactly the status of the cross-defendant I don't believe is material, but it may be" (R. 257). She testified that she was authorized to sign titles as a partner (Ab. 63, R. 600). And the Court asked at R. 600, "Do you contend she is a partner?" It is no wonder that she didn't know her status and that she was confused about it. Perhaps she was confused about the handling of her father's partnership interest; but that is not to suggest or admit that she was confused in any way in her recollection of the facts of the partnership or anything but methodical in the making and keeping of memorandums.

ARGUMENT OF THE DEFENDANT AND APPELLANT

The record in this case is unreasonably long for the type of problem presented to the Court. The trial was a constant struggle between expansion and contraction of what was material; and when immaterial matter came in, it had to be met with the other side of the coin lest the Court place some weight upon it.

And so, in answering appellant's argument, there is a practical problem of uncertainty as to what may impress the Court and, therefore, call for some explanation or answer.

This answer to the argument of the appellant will, therefore, be limited to a few matters, in the hope that we will touch on the ones which may be of some assistance.

The first argument concerns "What agreements were made between the partners?" (Brief p. 10). There follows an enumeration of nine so-called agreements, none of which was given the dignity of the "Partnership Agreement" in the trial of the case. It is true that plaintiff made no contention that defendant had violated *the partnership agreement*. Appellant now attempts to twist that statement by a wild, confusing, illogical, enumeration of eight collateral matters injected by the defendant over the objections of the plaintiff, none of which was accepted by the Court, and all of which are in controverted areas of fact. There

was only one partnership agreement in this case and that was Exhibit 11-D. This matter was settled during the opening statements and discussion, and is abstracted at page 10 (R. 280).

On page 12 of his brief, defendant refers to "The solemn admissions of the plaintiff and cross-defendant under oath" that salaries were fixed on May 8, 1948, at \$400.00 and \$350.00. The solemn admission of Mrs. Chambers was an implied denial.

"Q. In which the salary of \$400.00 a month was fixed for your brother and \$350.00 was fixed for your husband?

"A. We always fixed Rowe's salary a little more because we figured he knew more about that particular business than my husband did."

(Ab. 65, R. 605).

and Mrs. Chambers later testified directly as to the conversation on May 8, 1948, in which she said her father was ill and she was not separated from him during the entire meeting and that there was no conversation at all on that occasion about salaries (R. 1536 to 1538).

And when Mr. Chambers was asked whether it was agreed that the salaries should be \$400.00 and \$350.00 per month, he testified: "Not to my recollection" (Ab. 100, R. 873). And portions of his deposition were read, where, in a leading question, counsel included a conversation of May 8th and the figure of \$350.00 and \$400.00, and Mr. Chambers answered: "I believe it was that. His was higher" (Ab. 101, R. 873).

But he also testified that he was mistaken as to the occasion of the salary discussion. When asked about the salary agreement in May, 1948, he testified:

“Not at that date, there was nothing mentioned about it.

“Q. Nothing mentioned about that?

“A. Only one time wages were discussed was out at Wood Cross Bank, that was to get a loan.” (R. 898 not abstracted.)

And as evidence of that occasion Exhibit 20-P was put in evidence.

At page 13 defendant's brief again refers to lack of authority to change salaries, which is commented on at page xxxiv hereof. It was for the plaintiff to act directly or through his agent in matters concerning the partnership, and he approved at the time and approves now the fixing of salaries in the amounts they were shown on the record. The formality with which a principal authorizes an agent to act, or ratifies the act of an agent, is for the principal to decide.

No exhaustive research has been done on this question, since it seems fundamental that Mr. Chambers had the right to authorize Mrs. Chambers to be his agent in financial transactions and in the management of the partnership. It was for him and Mrs. Chambers to decide the formality which would be required. The agency can be formal or informal, or can be implied from words or conduct. See *Corpus Juris Secundum*, Title Agency Section 23, where it is noted at page 1048

that family ties make agency more likely and at page 1050 that acquiescence may be presumed from silence or from permitting the agent to carry on the business. A principal is bound where he permits the agent to act in his behalf. (*Gaines v. A. Fisher Brewing Co.*, 6 U. 332, 23 P. 755). Acceptance of benefits is ratification of a contract. (*Floor v. Mitchell*, 86 U. 203, 41 P. 2d 281 at 287). And ratification with knowledge of what has been done relates back to the time when the unauthorized act or contract was performed or entered into. (*Jones v. Mutual Creamery Co.*, 81 U. 223, 17 P. 2d 256 at 259, 85 ALR 908). The evidence is that Mr. Chambers discussed these matters with Mrs. Chambers, that he left this part of the business to her, that when she had a question in her mind in October, 1958, he bolstered her and told her that the salaries were proper and lawful and has confirmed and ratified the contents of the books and records by his position in the dissolution of partnership and in the prosecution of this litigation (Ab. 95, 48, 205. R. 826, 483, 1617).

Page 16 says: "Both general partners rendered personal services." This was never disputed, but the plaintiff rendered full-time, exhaustive service to the partnership, and the defendant served only intermittently and when invited to consider special problems. Sims worked hard in the beginning (Ab. 51-52), then was away on his Kearns enterprise (Ab. 80, 120), and never returned to regular work but only to special matters (Ab. 52, 66, 74, 117, 118, 197). Defendant had extensive interests in his sand and gravel pit, his

Travel Batcher Company and his Mountain View Construction Co. Plaintiff on the other hand worked 15 to 16 hours per day, month in and month out in this business (Ab. 239 to 241, Exhibit 67-P).

Page 20 of brief, defendant schedules some computations of his accountant to show revisions in the profit and loss accounts according to accounting standards (Ab. 22, R. 334). Plaintiff objected to this testimony as immaterial because there was no issue in it. There was no other testimony concerning it and it was, and is, immaterial to the issues of the case. Defendant attempts to inject it here to prejudice the Court. Regardless of the rate at which salaries were computed, the losing business would suffer further paper losses because of the salaries. But in this case, the business later made money, was worth \$250,000.00 in 1955 (Ab. 54, R. 518, Exhibit 17-P) and has had its best years since 1955 according to the net profit account in Exhibit 1-P.

Under Point II at page 22, defendant again refuses to recognize the issue before the Court by italicizing trial on the issue of “express agreement,” which has been discussed at pages xxx-xxxii of this brief.

At page 24 of his brief, defendant is pleased to comment that Mrs. Chambers said bookkeeping was “way out of his line” (defendant). It is not unusual for a substantial business man not to do his own accounting work and not to prepare his own income tax return. But defendant was no ignoramus, and he was

no dupe. He kept part of the record in 39-P. He also had innumerable opportunities to confer on accounting matters with expert persons. Mr. Reimann prepared his early tax returns (Ab. 114, R. 1005), conferred on tax matters (Ab. 44, R. 456, 457, 458), and represented Mr. Sims generally (Ab. 117-118, R. 1023; Ab. 133, R. 113). Mr. Evans was an accountant and was sufficiently valuable that Mr. Sims has continued to employ him (Ab. 136, R. 1133). He had opportunity to converse with David N. Beal, a CPA, (Ab. 19, R. 319) and did confer with Robert Shirley, a CPA, who prepared his 1955 and 1956 tax returns (Ab. 39, R. 428; Ab. 43, R. 453; Ab. 136, R. 1129-1131). Mr. Steiner, with 35 years accounting experience, (Ab. 46, R. 472) was employed by Mr. Sims from December 1, 1955 (R. 476). Mr. Jorgensen, his father-in-law, was employed by the partnership, and was also an accountant (Ab. 32-33, R. 381). He also conferred with Mr. Beckstrom of the Internal Revenue Service (Ab. 121, R. 1040). He made the divisions of profit in the beginning (Ab. 52, R. 510), and gave some intelligent testimony about capital accounts (R. 1363 to 1365, Ab. 165). If accounting was "way out of his line" it was because his talents were better employed elsewhere.

At page 27, defendant's brief repeats the statement,

"We always fixed Rowe's salary a little more because we figured he knew more about the particular business than my husband did."

In the beginning this was true as evidenced by

Exhibit 21-D, which shows Sims at \$1.50 per hour, Tal Chambers at \$1.25 an hour, Bob Chambers at \$1.15 an hour and Margaret Chambers at \$1.00 per hour. The notation on the fourth page of that exhibit was put on following a conversation between defendant and cross-defendant, in which defendant advised Mrs. Chambers to pay the note first and to increase the capital account for the salaries of Tal and Margaret since there wouldn't be money to pay them after paying the note (Ab. 197, R. 1566).

Exhibit 2-P plainly shows \$2,000.00 for each of the plaintiff and defendant for 1948. This was discussed with Mr. Beckstrom and Mr. Sims and possibly Mr. Reimann (Ab. 114, R. 1009), and defendant also testified that he saw those \$2,000.00 entries in Exhibit 2-P (Ab. 137, R. 1153).

Another unequal salary that came to defendant's attention was the \$4,478.00 on the 1951 tax return, which was crossed out and changed so that income was reported for each of the two general partners. Mrs. Chambers testified that she discussed this with Rowe and then crossed it out (Ab. 72, R. 655), and defendant testified that he saw it and discussed it (Ab. 121, R. 1041 and 1042). Exhibit 22-D shows the same salaries for plaintiff and for defendant, and this was discussed with defendant in May, 1949. Mr. Chambers testified that Mr. Sims' handwriting was on the document (R. 641, not abstracted). Since the amount of time spent by the two partners in the business was so dispropor-

tionate, the approximate hourly rate was certainly the most appropriate and undoubtedly would have been continued had both partners continued to work in the business. The unevenness of the salaries is no problem under the partnership agreement since Paragraph XIII contemplates that the capital accounts may become unequal through contributions of capital or services.

Page 27 of the defendant's brief accuses Mrs. Chambers of "secretly" putting salaries on an hourly basis. This accusation has substance only in the minds of defendant and his counsel. Defendant testified he did absolutely nothing to inform himself as to the salary account. Testimony is that he received statements, held numerous conferences, Mrs. Chambers attempted to discuss matters with him, the books and records were always open and available, and even though he lived next door, he testified he didn't bother to obtain any information. These matters were detailed with reference to the records at pages 23 to 34 of this brief.

On page 32 defendant's brief decries Mr. Chambers' "huge salary" of \$11,700.00 per year. A salary is large or small in comparison with surrounding circumstances. Mrs. Chambers questioned this salary at first and then upon computation of hours worked and rate per hour as compared with other employees, concluded that it was a reasonable salary (Ab. 90, R. 782-783). If plaintiff worked 15 hours a day, 6 days a week, he would work 4,680 hours a year or \$2.50 per hour. The

business grew from 13,071 cubic yards in 1948 to 42,709 in 1955, when it was worth \$250,000.00 (Ab. 57, R. 533) and to 55,704 cubic yards in 1958 (Ab. 49, R. 487). According to Exhibit 1-P, Account Net Profits, the profits distributed were \$10,781.74 in 1956 and slightly less than that in other years with \$19,127.00 to each partner in 1958, (R. 41) on an original investment of a few thousand dollars. The gross receipts in 1958 were \$686,683.05 (Exhibit 1-P, Amount No. 801) compared to \$100,163.73 in 1948 (Exhibit 44-D). Defendant's salary from just one of his other enterprises was \$11,000.00 in each of 1957 and 1958 (R. 42).

By what standard of comparison does the defendant call this plaintiff manager's salary "huge"?

At page 35 defendant's brief says that Exhibits 21-D and 22-D "escaped destruction" and then cites a case involving "willful destruction, suppression, alteration, or fabrication of documentary evidence." Defendant and his counsel spent so much time on insinuation, accusation, and examination of witnesses about destruction of records and failure to produce records that the Court gave him a chance to prove and found not one scintilla of evidence to support the elaborate accusations. At R. 167 to 169, the Court said:

"To clear the record, then the Court will hear no further evidence on the motions of defendant R. W. Sims filed April 21, 1961, and the Court finds from the evidence on the sampling of these motions, no scintilla of evidence developed as indicating that the plaintiff or the cross-defend-

ant has willfully, intentionally, purposely destroyed or concealed or refused to deliver records and that there is not evidence nor a scintilla of evidence produced by their sampling of the motion of an intent to willfully and intentionally defraud the court.” (Ab. 319, R. 23, 28-29).

By what weird process defendant’s counsel justified themselves in saying at page 36, “Mrs. Chambers admittedly altered Exhibit 17-P behind the back of her brother by adding ‘Wages M. & T.’ after the figures of \$56,865.15” is difficult to comprehend. She testified specifically that those words were written on during the conversation with her brother on March 7, 1956, and that only the pencil figures were her own notations made afterwards. When the exhibit was offered in evidence, Mrs. Chambers testified that the figures \$56,856.15 were in her handwriting and the figures on the right hand side were in the handwriting of her brother and then that below the word “Notes” there are some pencilled words in her handwriting which were not written during the conversation (R. 540). We asked to erase the pencil markings to which there was objection, so the pencil markings were left on. Then this question:

“ Now there are a number of other markings on this exhibit, were those other markings made during the conversation?

“A. Yes. There is an asterisk that was referring from the \$56,866.15 down to the figure just like it in the other—down in the lower part, and it says: ‘Wages, Margaret and Tal.’

“Q. Well, did Mr. Sims say anything about that?

“A. That the wages would be paid before the split of the other assets.” (R. 541, abstracted in part at p. 58).

Then on cross-examination, counsel for defendant asked Mrs. Chambers if she mentioned “because our salary and share of the profit had been plowed back into the business” and she answered that she wasn’t sure of the word “salaries” (Ab. 84, R. 729). There was no specific cross-examination as to the part that says: “*Wages M. & T.*” And in the examination of Mr. Sims, his attention was directed to Exhibit 17-P as abstracted at page 128, R. 1081. The question was:

“Now I call your attention, Mr. Sims, to a notation on this document over on the side, the figure ‘56,865.15’. There is the notation *Wages M. & T.*, was that put on in your presence?

“A. Not that I recall. This is made up with a pen.”

It is obvious that at that point both the Court and counsel for plaintiff mistook the words about which counsel was interrogating Mr. Sims for the pencil notations referred to in the previous question, which were made in pencil and which counsel offered to strike from the exhibit, and that mistake is made plain from the following comments:

“Mr. Bird: Now if the Court please, I regard that as a ridiculous question. We ask that that

be stricken, because Mrs. Chambers testified that those were her words and she put them on later, and counsel refused to let them be stricken. They said she wanted them on. Now he is apparently attempting to impeach our case by showing that those words were not there at the time, and I ask how ridiculous can we be.

“Mr. Reimann: If he says now that they were put on later, I will accept that statement.

“Mr. Bird: I said so at the time, and Mrs. Chambers so testified, and we wanted to strike them and counsel refused to let them be stricken.

“Mr. Reimann: That isn’t the way I remember.

“The Court: It is my recollection of the testimony to the effect that they were added at a later date, Mr. Reimann.

“Mr. Reimann: But she was—and that they were not added in the presence of Mr. Sims.

“Mr. Bird: And we asked to have them stricken and counsel refused.

“Mr. Reimann: There is a cross mark and following that the word is ‘Wages, M. & T.’ ” (R. 1081-1082).

and counsel then went on to other matters.

It is, therefore, plain that Mrs. Chambers’ testimony was not withdrawn, and she plainly testified that those words “Wages M. & T.” were put on during the conversation and in ink. It was counsel and the Court who were mistaken as to what words were put on in pencil, and furthermore the words “behind the back

of her brother” had no justification whatever. As to the pencil markings on the exhibit, Mrs. Chambers frankly testified that they were put on afterwards and for her own information (R. 539, 540). But as to the portions written in ink, her testimony was definite that they were written during the conversation.

One of the problems in trying a long case is the recollection of precise testimony given by the witnesses. This was just an instance of faulty recollection by one counsel and by the Court. The point was put in issue by the conflicting testimony with counsel’s statement; but the nature of the ink and the appearance of the document all favor the testimony of Mrs. Chambers. And her pencil notations were admittedly put on by her later.

And at the same page of the brief, it is stated that Mrs. Chambers “falsely represented to Mr. Sims that \$56,865.15 was the balance of the Chambers capital account in excess of the Sims account.” The difference in capital accounts as shown in Exhibit 1-P at the end of 1955 is \$53,291.71. The difference on the tax return, 13-P, is \$62,538.99, which was made after the adjustment of the depreciation account by Mr. Shirley and 19-P shows the increase of income by some \$7,000.00. Exhibit 13-P is undated, and it is reasonable to assume that on March 7, 1956, the date of the making of Exhibits 16-P and 17-P (Ab. 55, R. 522) a different figure had been computed by Mr. Evans using the profit and loss statement, which is 19-P. Defendant did not go

into this matter at the trial, and it was, therefore, not possible to have Mr. Evans reconstruct the figure of \$56,856.15. But there is no support whatever for the charge that it was falsely represented by Mrs. Chambers.

At page 47, the defendant again harps on the refrain "that there is an express agreement" which has previous been referred to. Some people believe that if you say a thing often enough and loud enough, it will gain acceptance regardless of its truth.