

1962

J. T. Chambers v. R. W. Sims : Brief of Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

J. T. CHAMBERS,
Plaintiff and Respondent,

vs.

R. W. SIMS,
Defendant and Appellant,

vs.

MARGARET S. CHAMBERS,
Cross-Defendant and Respondent.

J. T. CHAMBERS,
Plaintiff and Appellant,

vs.

R. W. SIMS,
Defendant and Respondent.

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1962

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No. 9556

REPLY BRIEF OF DEFENDANT AND APPELLANT R. W. SIMS

APPEAL FROM JUDGMENT OF THE DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH, BY DEFENDANT
R. W. SIMS, NO. 9554. APPEAL FROM JUDGMENT BY
PLAINTIFF J. T. CHAMBERS, NO. 9556.

HONORABLE MERRILL C. FAUX, DISTRICT COURT JUDGE

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Defendant and Respondent.

} No. 9556

REPLY BRIEF OF DEFENDANT AND APPELLANT R. W. SIMS

PRELIMINARY STATEMENT

It is clear that neither plaintiff J. T. Chambers nor defendant R. W. Sims agrees with the disposition of the case made by the District Court. Each of them has appealed from the judgment.

The trial court attempted to create a contract for

which neither party contended at any itme, which is utterly inconsistent with the Certificate of Limited Partnership dated May 8, 1948, Exhibit 11-D, and contrary to the express contentions of the parties set forth in their Agreement for Dissolution of Partnership dated August 17, 1959, Exhibit 10-D, and the admissions of Mr. and Mrs. Chambers. There was no consideration nor any meeting of the minds of the partners for such judicially created "implied contract" for "reasonable compensation for the services of plaintiff" and "no compensation for services of defendant."

While defendant disagrees with most of the content of the Brief of Plaintiff J. T. Chambers, defendant concurs in that portion of plaintiff's contention on page 39 which states that "it was error for the Court to consider further evidence on the issue of reasonableness." Before the introduction of any evidence it was expressly agreed between the court and counsel that "*the matter of reasonableness is not an issue in the case.*" The judgment assailed on this appeal is chiefly predicated on such error of the trial court. Plaintiff seeks the benefit of such admitted error. Plaintiff complains that the trial court "only went half way."

Plaintiff's contentions in his brief are contrary to the record and contrary to law, as this reply brief is designed to illustrate.

PLAINTIFF'S FAILURE TO CONTROVERT APPELLANT'S STATEMENT OF FACTS

The Brief of Plaintiff does not comply with Rule 75 (p) (2) which requires a respondent, if he controverts appellant's statement of facts, to "state wherein such

statement is inconsistent with the facts” and to “make a statemenet of the facts as he finds them, giving reference to the pages of the record supporting his statement and contraverting appellant’s statement.”

Counsel for plaintiff does not point out any error in the Statement of Facts set forth in the Brief of Defendant and Appellant R. W. Sims. Plaintiff attempts to brush aside all of the essential facts including the fatal admissions of plaintiff and cross-defendant by saying that “The Statement of Facts made by appellant at pages 2 to 10 is rejected in its entirety.” Plaintiff says that defendant “ignores the evidence of plaintiff,” but does not say what evidence. Most of the facts stated by defendant are those which came from the lips of plaintiff John T. Chambers and cross-defendant Margaret S. Chambers, his wife, or facts which were corroborated by their solemn admissions.

Instead of making any statement of facts, on page 5 of his brief plaintiff says that “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.” We disagree. While the trial court made some correct findings, the court based most of its findings on incompetent evidence, disregarded the admitted agreements between plaintiff and defendant, the express admissions of plaintiff and his wife, and most of the other undisputed evidence including the stipulations of counsel. We take no issue with the cases cited on page 6 of the Brief of Plaintiff. Those cases, however, do not even suggest that findings of fact can be predicated on incompetent evidence, nor that the court can refuse to make findings in accordance with the undis-

puted competent and material evidence, nor create a new contract for the parties which was incompatible with all of their agreements and discussions, nor make some findings which are directly contrary to the evidence, as occurred in this case.

ARGUMENT

POINT I

NO SALARY HAVING BEEN PAID TO EITHER PARTNER, THERE WAS NO "PRACTICE OF PAYMENT," AND THERE COULD NOT ARISE ANY "IMPLIED CONTRACT TO PAY COMPENSATION TO PLAINTIFF AND DENY COMPENSATION TO DEFENDANT.

This is not a case where a salary has ever been paid to either partner. This case is not in point at all with the line of cases which holds that where a salary has regularly been paid by the partners to one of the partners over a long period of time, an agreement can be implied from such established practice to pay such salary to such partner. Plaintiff cites some cases involving payment of salary to a partner, and then on page 16 of his brief claims that *Shulkin v. Shulkin*, 301 Mass. 184, 16 N.E. 2d 644, 118 A.L.R. 629, "is similar to the principal case." That case involved a *long practice of regular salary payments* to partners other than the complaining partner. The complaining partner admitted there was an agreement for payment of salaries to the other partners, and he acknowledged that he had actual notice of salary payments, but he claimed he was

not aware of the precise amount. He said he understood that the other partners "were to draw enough to live on." The Shulkin case as quite dissimilar.

The controversy in this case arises over the unauthorized undisclosed bookkeeping entries and omissions made by plaintiff's wife, none of which entries were ever paid either prior to dissolution, nor under the Agreement for Dissolution of Partnership dated August 17, 1959, Exhibit 10-D. By said agreement the plaintiff and defendant stipulated on a tentative equal division of the assets but no payment of salary to either partner, subject to the right of each partner to an accounting and a right to litigate their disputed claims.

Plaintiff does not cite any competent evidence to support his contention of a "practice" by the partners, but merely refers to the erroneous Finding of Fact No. 7 whereby the trial court declared that "the practice was established, of which defendant had reasonable notice, of *compensating* plaintiff for full-time services, and allowing defendant nothing for his services to the partnership . . . " (R. 185-186. Ab. 320-322). The term "compensate" means to "remunerate" or to "pay." There is not only a lack of any competent evidence of payment of any salary to either general partner, but the evidence is conclusive that no salary was paid at any time to either Mr. Sims or to Mr. Chambers.

Although Mrs. Chambers issued nearly all of the checks over a period of nearly 12 years, at no time during the operation of the partnership nor under the agreement for dissolution of the partnership was any check ever issued either to John T. Chambers or

to R. W. Sims for "salary" or remuneration for services." Mrs. Chambers testified that "various sums of money" were paid at "various times at *irregular intervals*" to Mr. Sims and to Mr. Chambers upon request, *just as they needed money*. (R. 691, 974-978. Ab. 77, 110). She said "There was no regular withdrawals or payments made to either partner"; that bills were paid out of the partnership bank account for each of the partners; and that payments were made "just as each partner needed money":

Q. And that was true with respect to each of the partners?

A. That's right.

Q. So there was *never any pattern* set up as to a certain amount being withdrawn even for your own salary on a particular date, was there?

A. That's right. (R. 722-723. Ab. 83).

The J. T. Chambers memorandum "capital account" sheet now appearing in the ledger, Exhibit 1-P, on which the unauthorized "salary" entries appear, was not prepared until 1955, and the "blue worksheets" which previously appeared "were thrown away." Such changes were made by Mr. Evans on instructions from Mrs. Chambers. (R. 1188-1193. Ab. 143). Mrs. Chambers admitted that the "salary" entries for her husband which appear in the ledger, and the omission of salary entries for Mr. Sims were her own decisions and made without instructions from or consultation with either partner, and that she never told Mr. Sims about them; that those entries had gone on for a period of years "before there was any discovery made of those entries,"

and when Mr. Sims found out about them he became very angry. (R. 715, 721. Ab. 82-83).

Counsel for the Chambers at the opening of trial admitted that those "salary" entries were *never paid*. *Neither partner ever reported on his Federal or State income tax that he had ever been paid a "salary" by the partnership*. It appears that all of the entries were made either during or since 1955, and some entries were back-dated to prior years. As pointed out hereafter, neither partner found out about those unauthorized, secret, undisclosed "salary" entries at least until October 1958. Consequently, the argument of plaintiff that there was a "practice of compensating" J. T. Chambers for full-time services, and a practice of the *partners* not to compensate R. W. Sims, is not only misleading, but it disputes the record. Furthermore statements that Chambers was "allowed" the "salaries" shown in the books, when neither partner knew about them, are also unfounded, for they could not be "allowed" by the partners until they knew about them and until both approved them, which never occurred.

On page 13 of his brief plaintiff makes the unfounded argument that the court held that "the book-keeping entries established the salaries" and inferentially established a *right* to the unauthorized salaries noted in the records, "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." As illustrated under Points 3 and 4 of this Reply Brief there was neither a plea nor proof nor finding of any "acquiescence or

adoption"; and the unauthorized entries appearing in the books were not the practices of the partners. The court found by Finding of Facts No. 10 that there was not sufficient disclosure of the salary entries made by Mrs. Chambers in favor of her husband to become binding on defendant Sims. Consequently, the finding necessarily implies that the entries were unauthorized and that such unauthorized entries did not establish salary for Chambers on the books. Furthermore, plaintiff overlooks the fact that only the partners themselves had any authority to establish partners' salaries, and that neither the plaintiff's wife nor a bookkeeper could divest the partners of that right.

As pointed out by the New York Court of Appeals in *Aron v. Gillman*, 309 N.Y. 157, 128 N.E. 2d 284, 287, parties are not bound by incorrect figures appearing in the books:

"Thus the very purpose of an audit is to verify and reconcile the book entries of a business according to proper accounting practice, and to see that they are accurate . . .

" . . . Nevertheless, plaintiff contends that we should take the inventory figure at \$12,001.15 simply because it is the figure appearing on the books, and despite the fact that it is concededly erroneous. We are not obliged to follow blindly entries in books that are indisputably untrue . . ."

The same applies to entries which are unauthorized. It could not be successfully argued that unauthorized entries are correct entries.

Plaintiff purportedly filed this suit for a "partnership accounting," as permitted by law and as permitted

by Exhibit 10-D, the Agreement for Dissolution of Partnership, dated August 17, 1959; but the purpose of the action by plaintiff was not partnership accounting at all, for plaintiff has never attempted to comply with the principles or rules of partnership accounting which require a party who claims a credit to prove that he is entitled to the credit he claims. Instead, plaintiff actually filed this action to reap the unearned benefits of unauthorized secret salary entries made in favor of plaintiff by his wife, and to reap the benefit of the omission of any salary entries for the defendant Sims. Plaintiff never did prove that he was entitled to the salary entries, for his own proof conclusively established the fact that they were unauthorized by the partners and that the entries and omissions were the bookkeeping manipulations caused by plaintiff's wife in violation of her fiduciary duties to her trusting brother R. W. Sims.

Plaintiff's so-called "accounting" is not in evidence. Plaintiff's accountant, David N. Beal, purported to make an "audit" at the request of Mrs. Chambers in 1955, and again in 1960. His testimony shows that he did not attempt to "verify and reconcile the book entries" or "to see that they are accurate." He testified that he "assumed" that the entries were correct. He even "assumed" that "salaries" had been "paid." He even assumed the functions of a lawyer to "interpret" the Certificate of Limited Partnership, and did not even bother to find out about the agreements from the partners. (R. 306, 331. Ab. 18, 22). Mr. Beal admitted that he found thousands of dollars in errors in the records including "net errors in overstated

income of \$38,000." (R. 335-336. Ab. 22-23). He identified many errors noted in the defendant's accounting Exhibit 5-D, and said that Glendon E. Steiner prepared Exhibit 5-D after the two of them had gone over the records together. (R. 332-334. Ab. 22). As shown by his pleading, plaintiff sought to recover the unpaid unauthorized salary entries appearing in the J. T. Chambers memorandum capital account.

The only accounting in evidence is defendant's accounting, Exhibit 5-D. With respect to the salary items, Mr. Steiner testified that he verified those figures from the deposition of Mr. and Mrs. Chambers and information furnished by Mr. Sims that on May 8, 1948, the partners agreed on monthly salaries of \$400 for R. W. Sims and \$350 for J. T. Chambers and that said agreement was never changed. (R. 1343-1347. Ab. 161). While plaintiff now tries to dispute the veracity of his own statements given on deposition, and the trial court found that the salary "arrangement" of \$400 for Sims and \$350 for Chambers "never became operative," by the pretrial order and by Exhibit 3-P *the plaintiff acknowledged the correctness* of the sum of \$2,507.16 as the balance due to Mary Lois Fors as heir-at-law to the limited partner L. H. Sims. As shown in Exhibit 5-D, the only way that figure could possibly be computed was to recognize the agreed monthly salaries of \$400 for Sims and \$350 for Chambers. By implication, at least, the plaintiff and cross-defendant acknowledged that those figures were right for purposes of determining the unpaid capital account of Mary Lois Fors. While plaintiff concedes that the defendant's accounting is correct for ascertaining the amount due

and owing to Mrs. Fors, plaintiff seeks to dispute the premises for such determination and to claim the benefit of the unauthorized salary entries, which is strange reasoning indeed.

Counsel for plaintiff “grasps for straws” in citing Federal Revenue cases which hold that every partner is charged with knowing what is on the partnership records and what is omitted from the records. The Internal Revenue Code of 1954 charges each partner with such knowledge, *for tax purposes only*. Plaintiff avoids mentioning that all of the partnership returns were signed by J. T. Chambers and none of them by R. W. Sims, so that Sims could not be charged with actual knowledge of the gross errors or inconsistencies or fictitious profits.

Since there is no evidence of any “practice of the partners” to “recognize claims for salaries,” it is difficult to understand why plaintiff refers to paragraph 6 of his complaint which alleges that “The practice of the partners has been to recognize *claims* for services” either by “*making payment or giving credit therefor*, and thereafter to divide net profits equally between plaintiff and defendant.” (R. 2, 1760. Ab. 230). If there was a valid agreement between the general partners for salaries, neither partner had any occasion to make any “claim” to a bookkeeper or to any other employee. Furthermore, a “claim for salary” would require the claimant to state a specific amount, which would be inconsistent with the trial court’s disposition of the case by allowing “reasonable compensation” to plaintiff and “denial of compensation” to defendant. Since there was no payment of any salary, there was

no "practice of making payment" of "claims for salary." Plaintiff did not know he was ever credited with any salary until 1959. That was after this controversy arose. Plaintiff made no claim for any of the unauthorized salary entries appearing in the records until July 1959.

This is not a case where one partner devotes his full time to the business and acts as "managing partner" and the other partner devotes no time to the business. In this case both partners rendered personal services, and Sims was the recognized "head of the company" and Mr. Chambers testified that it was agreed on May 8, 1948, that "every important decision should be referred to" Sims. (R. 886. Ab. 103). It was admitted that Sims never violated his agreements. (R. 279-280. Ab. 15). Nor is this case like two of the cases referred to in the Brief of Plaintiff where a partner says he will not perform his services to the partnership unless he receives compensation for his services. Mr. Chambers could not have rendered services in reliance on being paid the unauthorized salary entries made in his memorandum capital account when he said he did not know about those entries.

Counsel for plaintiff points to no competent evidence which could possibly show an "implied agreement" to compensate plaintiff for his service and deny defendant compensation for his services. The rule is that an implied agreement that *one* partner should receive compensation for his services *must be established by clear and satisfactory evidence*. See *Baker v. McGrane*, 198 Wis. 512, 224 N.W. 737.

The trial court erroneously treated the violation

of Mrs. Chambers' fiduciary duties in making the unauthorized entries in favor of her husband as the very basis for the abortive "implied agreement" to allow plaintiff "reasonable compensation" and to deny defendant any compensation except what Mrs. Chambers as an employee arbitrarily decided to "allow" her employer.

POINT 2.

THERE IS NO COMPETENT PROOF THAT THE *PARTNERS* EVER CONSENTED TO ANY MODIFICATION OF THEIR AGREEMENTS OR EVER AGREED ON AN UNEQUAL DIVISION OF PROFITS.

Point I of plaintiff's brief states: "PARTNERSHIP AGREEMENTS MAY BE MODIFIED BY IMPLIED AGREEMENT OR ACQUIESCENCE." We are not concerned with some academic question whether partners *can* modify their agreement. The question is, *Did the partners* (as distinguished from a bookkeeper or some other employee) decide on modification of the partnership agreements? If they did, how, when and in what particulars did the *partners* actually accomplish a modification?

Before introduction of any evidence, the trial judge summarized plaintiff's contention that "the practice has so modified the original agreement that there is in effect little of the original agreement to guide us." Plaintiff's counsel approved that statement. (R. 281. Ab. 10). It was conceded by the court that "an unauthorized act of a bookkeeper is not binding upon the

partners." (R. 285. Ab. 12). Since plaintiff inferred an "adoption" by the partners, the court correctly held that in order to have an "adoption" by the *partners* it "must be concurred in by both partners." (R. 282. Ab. 11).

Throughout his brief plaintiff makes repeated arguments to the effect that the partnership agreement was "modified by the practice," but none of the citations to the record show that the *partners* ever decided on any modification. Instead of offering evidence of "modification" by the *partners* of their agreements, plaintiff merely presented evidence of unauthorized undisclosed acts and omissions of plaintiff's wife, who was the trusted record-keeper.

Sub-point "A" of Point I of plaintiff's brief is that "*The Partnership Agreement of May 8, 1948, provides for compensation before division of profits.*" Compensation to whom? On page 13 plaintiff argues that "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." The court did not *follow* Paragraph XII at all, but contradicted the express language thereof by Finding of Fact No. 11: "Paragraphs XII and XIII of the partnership agreement contemplate reasonable compensation to the plaintiff for his services to the partnership." The court also created an "implied agreement" of "reasonable compensation for plaintiff" and "no compensation for defendant" except such amount as plaintiff's wife had decided to "allow" him.

Paragraph XII quoted on page 12 of plaintiff's

brief does not state that "plaintiff shall be entitled to reasonable compensation" nor that "defendant shall be denied compensation." It states that the general partners (defendant and plaintiff) "shall be entitled to *compensate themselves* for their services as an expense of operation of the business *before* computation of *profits*." It requires both general partners to determine the amount of their compensation. If they desired compensation for *their* services, they were required to compensate themselves as an expense of operation of the business, and it had to be done in any accounting period before profits were computed. Otherwise such compensation could not have been used as an expense, nor used in computation of profits. The agreement did not say "reasonable compensation to be determined by the court." It specified that the partners might compensate themselves, but as a protection to the limited partner it limited them "to the extent that such compensation . . . is reasonable under the circumstances."

On page 19 of his brief plaintiff makes the unfounded charge that "Defendant has attempted to distort the testimony" of both Mr. and Mrs. Chambers with respect to the subject of monthly salary of \$400 for Sims and \$350 for Chambers. Plaintiff also argues:

"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 his conversation took place months earlier when Exhibit 20-P 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 . . . "

Plaintiff did not testify that the discussion of \$400

per month for Sims and \$350 for Chambers took place "months earlier when Exhibit 20-P was prepared."

Upon interrogation by his counsel at the trial plaintiff Chambers testified: "I do not now *recall* any conversation between me and Mr. Sims of \$400 a month for Mr. Sims and \$350 a month for me." (R. 937. Ab. 107-108). He admitted that on deposition February 27, 1960, he *did testify* that there was a discussion about salaries on May 8, 1948 "in order to compute or determine the profit or the portion of the profit that L. H. Sims would be entitled to receive." Chambers acknowledged that *it was agreed* that he would receive a salary of \$350 per month and R. W. Sims would receive a salary of \$400 a month. Chambers also volunteered, "His [Sims'] was higher," and he admitted that Sims' agreed salary was \$50 per month higher than Chambers' salary. Plaintiff said, "Yes, I *agreed* to it." He further admitted that it was the "only salary agreement" ever made with respect to the partnership. (R. 874. Ab. 101). Mr. Chambers then stated that the *bookkeepers* (not the partners) later "changed" that agreement, but he testified that "he never said anything to the bookkeepers about salaries." (R. 787. Ab. 102). Although Mr. Chambers read over his deposition with his attorney and made corrections to other portions of his deposition, he never corrected the quoted portions. (R. 875. Ab. 101).

On further interrogation by Mr. Bird, plaintiff represented to the court that he was "threatened" at the time of taking the deposition. (R. 936. Ab. 107). Chambers later admitted that the purported "threatening remark by Mr. Sims" did not occur during his depo-

sition, but a *week after* it was concluded. (R. 966-969). Ab. 109). Defendant tendered proof that plaintiff did not hesitate to answer or to refuse to answer questions, and that in refusing to answer questions plaintiff made remarks which indicated that he was not frightened nor intimidated; for example he said, "I won't waste any time—unnecessary questions." (R. 1501. Ab. 183-184). The trial judge said: "As I understood Mr. Chambers' testimony, he claimed statements in his testimony were made under the influence of a threat. *Now it appears that the threat was not made during his testimony, but after his testimony was concluded.*" (R. 1507. Ab. 184). The representation that he testified to a salary agreement of \$400 for Sims and \$350 for himself under the influence of a "threat" was palpably false, and destroyed his credibility.

Paragraph XIII of the Certificate of Limited Partnership specifies that Sims and Chambers were then "equal partners." As stated in *Baston v. Drummond*, (Ark.), 249 S.W. 547:

"In the absence of any contract on the subject, neither partner would be entitled to charge anything by way of salary for his services; but if they were to be paid, and there was no express contract in regard to the sum to be paid, the presumption would be that they were to receive the same payment, as they were equal partners . . ."

Paragraph XIII does not relate to compensation for personal services, but relates to partnership "interests" and division of profits. However, on page 12 plaintiff says that "Paragraph XIII contemplated that the *compensation* might be unequal." Such paragraph does not so state:

“That the General Partners at the present time are *equal partners and shall share equally in the profits*; providd, that their *interest* shall be re-adjusted as they make additional contributions to the partnership in property, money, or services, or by adjustment of property values by mutual agreement.” (Italics added.)

Plaintiff heretofore has stated that the plaintiff and defendant were “treated as equal partners,” and even alleged in the complaint that there was an *equal division of profit* “after salaries.” The proof shows that no salaries were ever paid to either partner. Although Mrs. Chambers made a number of secret entries in favor of her husband, she never made any entry which purported to show that Mr. Chambers was entitled to some special advantage under paragraph XIII. She was conscious that defendant R. W. Sims, not J. T. Chambers, was the partner who made substantial additional contributions.

J. T. Chambers testified that on May 8, 1948, he agreed to “devote full time” to the partnership business, whereas R. W. Sims only agreed to devote part time (R. 879. Ab. 102). Just *how* could Chambers possibly increase his *full time contribution*? Sims was the only partner who could increase his service contribution.

In the Brief of Plaintiff there are unfounded remarks that Sims “left the ready mix business in 1948 and went out to Kearns” (pages 20 and 33), and that “he never got back on the payroll” until 1959 (page 18). The unwarranted inference is that defendant breached his agreement and ceased to perform services to the partnership and that he was not entitled to com-

pensation. It was stipulated that R. W. Sims never violated his agreements, and that he performed services each and every year and the findings so indicate. (R. 279-280, 882, 910. Ab. 10, 102, 105). Plaintiff's invalid argument infers that R. W. Sims as "head of the company" had to apply to Mrs. Chambers, an employee, to "get on the payroll." Mrs. Chambers' own testimony refutes plaintiff's strange argument.

Mrs. Chambers testified that starting in July 1948 Mr. Sims was trying to line up a big job at Kearns "so that we could have the concrete orders for it." (R. 504. Ab. 52). Her testimony shows that Mr. Sims did *not* discontinue his services to the partnership "when he went to Kearns," but got the concrete business for the partnership there in 1949 and 1950. She also admitted that Mr. Sims on behalf of the partnership went out to various projects and took charge of pouring of concrete if there was any sizeable job; and if other problems came up which she thought were important they were taken up with Sims. (R. 627-628. Ab. 70). Plaintiff neglects to mention that Mrs. Chambers testified that the salary of R. W. Sims was always "fixed" *higher* than that of her husband because Sims knew more about the business. (R. 604-605. Ab. 65). Mrs. Chambers knew that because of the business ability of her brother, his skill and "know-how", his part-time services as "head of the company" were worth more to the partnership than the full-time services of her husband, who did not possess such skill and who previously had been employed as a laborer in Sims' gravel pit.

Plaintiff's argument overlooks the fact that not-

withstanding the salary of Sims was *always fixed higher* than the salary of plaintiff Chambers, without authority Mrs. Chambers as trusted record-keeper decided to omit Sims' salary from the records after July 1948 and to credit plaintiff with unauthorized figures which substantially included what should have been credited to Sims. She credited only \$4,500 "salary" to Sims, who was entitled to the higher amount, and she credited \$93,350 or 21 times more to her unsuspecting husband.

Mrs. Chambers' probably did not prepare the memorandum in Exhibit 21-D until 1955, when she back-dated salaries for her husband all the way to 1949. Said memorandum, prepared without the knowledge or consent of the partners, contradicted the memorandum Exhibit 22-D which she prepared in May 1949 which showed equal salaries for both general partners; and also a memorandum which she had in 1951 showing a salary of \$4,778.60 for her husband which was stricken by agreement in March 1952. Such figure of \$4,778.60 likely included the \$4,200 salary for Mr. Chambers which had been agreed on between the partners on May 8, 1948. (R. 667-668. Ab. 74-75). Those unauthorized manipulations which credited salary to Chambers and none to Sims, contradicted part of Exhibit 44-D, the original partnership return for the year ending September 30, 1949, in which no salary was shown for Mr. Chambers, but a salary of \$2,980.18 was shown for R. W. Sims. That salary was eliminated by an amended return which stated, "This figure does not include salary to any partner." No "practice" by the partners which could modify their salary agreement was ever shown.

Substantial additional contributions in funds to

the partnership were made by Sims. As shown by Exhibit 5-D the contention that plaintiff left substantial amounts of his share of the profits in the partnership are grossly exaggerated. In 1950 Chambers was overdrawn. He was overdrawn again in 1959. In contrast, R. W. Sims made very substantial contributions. He furnished \$18,600 in 1955 and paid another \$5,000 to the partnership in 1956. Mrs. Chambers as a salaried agent of Sims in his sand and gravel business from 1947 to 1955 collected \$19,293.89 owing to Sims from customers other than the partnership and deposited those funds in the partnership bank account, as shown in Exhibit 1-P. Between 1950 and 1952 there was a grand total of \$33,759.20 owing to Sims from the partnership for sand and gravel which was not entirely paid until 1955. Mrs. Chambers used those funds of Mr. Sims as working capital in the partnership, according to her own testimony. (R. 976-978. Ab. 110). She never issued a check to either Mr. Chambers or to Mr. Sims at any stated interval, but upon their requests as they needed money.

The contributions made by Mr. Sims after 1948 were substantial and real. The unauthorized "salary" credits secretly entered on behalf of Mr. Chambers by his wife, did not add one cent to partnership assets nor pay any bills.

There is no evidence of any modification of paragraph XII by the partners. Plaintiff neither pleaded nor proved any right to preferential treatment under paragraph XIII; but proved that R. W. Sims was the only partner who made any substantial contributions to the partnership after May 8, 1948.

POINT 3.

THE COURT DID NOT FIND THAT DEFENDANT "ACQUIESCED" IN NOR "ADOPTED" ANY OF THE UNAUTHORIZED BOOKKEEPING ENTRIES MADE BY MRS. CHAMBERS, AND THE EVIDENCE REFUTES THE CLAIM OF "ACQUIESCENCE" AND "ADOPTION."

Plaintiff argues "acquiescence" in a number of places in his brief. Plaintiff's Point II is that "THE PARTIES ADOPTED THE BOOKS AND RECORDS AS THEY WERE KEPT." His sub-point "B" is that "*Defendant was amply notified of the salaries practices and acquiesced therein.*" There is no competent proof of either "acquiescence" or "adoption" of any of the bookkeeping manipulations. They were carried on behind the backs of the general partners and nondisclosure was a necessary part of the operation. Although Mrs. Chambers had numerous conversations with her brother R. W. Sims, who was the recognized "head of the company," at no time did she ever reveal to her brother what was going on behind his back. She even concealed her unauthorized operations from her husband whom she sought to unjustly enrich by the flagrant breach of her fiduciary duties to Sims.

Anything Mrs. Chambers wanted her brother to know about, she told him, and the fact that she did not tell Mr. Sims what she was doing behind his back shows that she did not want him to know.

On page 18 of the Brief of Plaintiff it is claimed that the trial court made "findings that the parties

acquiesced in and adopted the practice of crediting the plaintiff with the salary for his full-time services to the partnership (R. 149 and 186)". Such unfounded claims are argued also on pages 13, 24, 35 and mentioned on page 50. There was no finding of either "acquiescence" or "adoption." Finding of Fact No. 10 is inconsistent with the claim of "acquiescence" and it negatives the claim of "adoption," for the court found that by reason of the relation of confidence and trust between defendant Sims and his sister Margaret Chambers a "more complete disclosure" was required of the salary credits entered in the Chambers' capital account before such credits could become binding on defendant.

The very nature of that finding indicates that the entries complained of by defendant were unauthorized and not sufficiently disclosed and that Sims did not have adequate knowledge of them to enable him to acquiesce in them, and that they were therefore not binding on him. It was impossible to "acquiesce" in them or "adopt" them without full knowledge of all material facts, and the evidence clearly shows that Mrs. Chambers made no disclosure whatsoever.

There is no plea of "acquiescence" nor of "ratification" nor of "adoption." No such claim was asserted at the pretrial for the obvious reason that counsel for plaintiff was conscious of the fact that the Agreement for Dissolution of Partnership dated August 17, 1959, negatives the possibility of "adoption" of or "acquiescence" in any of the unauthorized bookkeeping entries and omissions. By said written agreement, Exhibit 10-D, the plaintiff and defendant agreed on a tentative equal division of the assets of the partnership and ac-

counts receivable, *without payment of salary to either partner*, subject to the right of each partner to partnership accounting, and the right of each party to litigate his disputed claims. By said written agreement executed by both plaintiff and defendant "*Sims asserts that the books and records of the partnership he has recently examined do not conform to the partnership agreement.*" That completely refutes all of the contentions in the Brief of Plaintiff that defendant "acquiesced" in or that he "adopted" the salaries shown in the books. By paragraph 17 of that instrument the parties specifically agreed:

"17. There are a number of items which are unsettled and which are presently *in dispute* or questioned by one party or the other, which remain to be settled by negotiation, partnership accounting, by court proceedings or otherwise. The unsettled and disputed items include actual contributions to capital, services rendered to the partnership including claims asserted by Margaret S. Chambers, *partnership salaries, questions of unauthorized salaries, failure to accredit salaries, withdrawals made by partners, balance of capital accounts*, back charges on costs of materials furnished by the Sims companies, claims of Thelma J. Sims, and alleged preferential rights to withdrawal of funds prior to division of remaining assets, questions of rights to interest on any or all of such items, and other matters, *including questions of proper bookkeeping and record-keeping.*" (Italics added).

On August 17, 1959, plaintiff in writing acknow-

ledged that there had been *no acquiescence* in *nor adoption* of the challenged bookkeeping entries, and that the items still in dispute included “partnership salaries, questions of unauthorized salaries, failure to credit salaries, . . . and . . . questions of proper bookkeeping and record-keeping.” Plaintiff attempts to dispute the plain language of a written instrument, to which he is a party, by unfounded argument.

The very nature of “acquiescence” or “ratification” (or “adoption”) necessitates *knowledge of all of the material facts*. As stated in *Holmes v. Hrobon*, (Ohio App.) 103 N.E. 2d 845 at 869, “acquiescence” embraces all elements of assent to the act or conduct *with full knowledge*, while “ratification” is confirmation after the act *with full knowledge*. Mrs. Chambers as well as her husband refuted his argument of “acquiescence” or “adoption,” by the following specific admissions, which also conclusively demonstrate that she acted without authority, secretly, contrary to the will of the partners, and that Sims never “acquiesced” in her manipulations after he found out about them, but demanded correction:

She had a duty to keep correct records. (R. 663-664. Ab. 74). She knew Sims trusted her *implicitly* in record-keeping. (R. 700. Ab. 78). She knew bookkeeping was “way out of his line.” (R. 665. Ab. 74). Plaintiff himself testified that he was not familiar with the books. He said, “That wasn’t my job.” (R. 914. Ab. 106). She was aware that Mr. Chambers testified that it was agreed on May 8, 1948, that he would devote his full time to the partnership business, but that Sims would devote only a portion of his time. (R. 879-881.

Ab. 102). She knew her husband had worked as a laborer in the Sims gravel pit, and that R. W. Sims had vastly superior business ability, skill and "know-how." Mr. Chambers testified that it was agreed that R. W. Sims would be considered "head of the company" and that "every important decision should be referred to him." (R. 886. Ab. 103). She knew Sims "was the recognized head" of the company. (R. 623. Ab. 69).

Mrs. Chambers admitted, "*We always fixed Rowe's salary a little more because we figured he knew more about that particular business than my husband did.*" (R. 604-605. Ab. 65). The term "fixed" means to "decide definitely; settle, determine." Following the meeting of May 8, 1948, she made some memoranda or work sheets "with respect to salaries of Mr. Chambers and Mr. Sims." (R. 606-607. Ab. 66). It would have been impossible to have made a memorandum on *salaries* of the *two partners* if those salaries had not been definitely established. She never had any discussion with either Sims or Chambers about changing those salaries. (R. 607. Ab. 65). She destroyed the original salary memorandum, and made other salary memoranda which do not harmonize with each other, Exhibits 21-D and 22-D.

At no time did Mr. Chambers tell her to keep a record of hours spent by the partners, but he refused to keep a record of his time. Mr. Chambers told her that "*there wasn't any need for either partner to keep a record of his time.*" (R. 1868. Ab. 250-251). She knew that neither Mr. Sims nor her husband ever authorized her to compute any salaries for them on an hourly basis. It was her decision to do so. (R. 621-622. Ab. 68). Sometime in 1954 or 1955 Mrs. Chambers prepared

the memorandum in Exhibit 21-D, whereby without authorization of any kind she attempted to put a salary for her husband on an hourly basis. She used in some places on Exhibit 21-D the same hourly rate for both her husband and Mr. Sims. After the name of Sims, instead of putting an amount, she put a question mark. (R. 621. Ab. 68). Without mentioning anything to either partner, she and Russell Evans decided to *omit* any salary for Mr. Sims on the records for the period following July 1948. (R. 703. Ab. 80). Regardless of the services she knew Mr. Sims performed, she made no entry as salary for him after July 1948. (R. 623. Ab. 69). She knew that a "salary" of \$4,778.60 for Mr. Chambers for 1951 had been stricken by agreement when Mr. Sims found out about it; but some months later or several years later she secretly put a salary of \$7,200 in the Chambers memorandum account and back-dated it to 1951, without saying anything to any person. (R. 654-658, 702. Ab. 72-73, 79-80).

Mrs. Chambers blamed Russell Evans for the salary entries of \$11,700 in 1955 in favor of Chambers, but she *never told Mr. Sims about them*. (R. 701-702, 708-710, 714, 715, Ab. 79-81). Successive entries were made without consulting either Mr. Sims or her husband. (R. 715. Ab. 81). She knew "*these entries had gone on for a period of years before there was any discovery made of those entries.*" (R. 721. Ab. 83). She said that when Mr. Sims *found out* about those entries for her husband and lack of entries for Sims, *Mr. Sims became very angry*. (R. 715. Ab. 82). When Sims learned of the bookkeeping irregularities in October 1958, he demanded correction of the records. Instead

of making correction, behind his back she made another entry of \$11,700 for her husband for December 31, 1958.

Mrs. Chambers testified that salary entries were made once each year, at "income tax time." She explained, "*I would discuss it with Mr. Evans and then forget it.*" (R. 835. Ab. 97). She not only forgot to tell her brother about such unconscionable activities, but she even forgot to tell her husband. After Sims in October 1958 found out about the shocking bookkeeping irregularities, he asked her whether "Tal knew anything about those salary entries on the books," and she told Sims that she did not think her husband knew about them. She said that "Tal had never had a check to know he was getting a salary." (R. 826. Ab. 95-96). Mr. Chambers was then asked a day or two later as to his recollection of salaries. He told Sims, "My salary was less than Leonard's and your salary was more than Leonard's, and the figures that I have in my mind are \$350 a month for me and \$400 a month for you." There never was any discussion between the partners about changing salaries. (R. 1052-1053. Ab. 123-124).

At first Mr. Chambers disclaimed any responsibility for the unauthorized entries. As late as July 1959 he said he told Mr. Sims that prior to that time he did not know that he had ever been credited with any salary on the books, and he told Mr. Sims he did not know what the entries were. (R. 922-923. Ab. 107). As proof positive that Mr. Sims did not "adopt the books and records as they were kept" by Mrs. Chambers, after Sims as "head of the company" failed in his efforts to obtain correction by Mrs. Chambers, who had an

admitted duty to keep correct records, Mr. Sims appealed to his co-partner John T. Chambers for correction of the records in July 1959. Mr. Chambers testified that at that time he told Mr. Sims he "*was not going to stand for any changes in the books because it reflected on Margaret's honesty.*" (R. 922. Ab. 107).

Plaintiff's attempt to take advantage of his wife's unauthorized bookkeeping entries and manipulations, made it impossible for defendant to continue in business with plaintiff. Under their Agreement for Dissolution of Partnership dated August 17, 1959, Exhibit 10-D, none of the unauthorized salary entries were paid, and the parties agreed that "Sims asserts that the books and records of the partnership . . . do not conform to the partnership agreement." That document shatters the claim of "acquiescence" and "adoption."

POINT 4.

**"ACQUIESCENCE" OR "ADOPTION"
COULD NOT ARISE FROM DISCUSSIONS
OF NON - SALARY ITEMS, NOR FROM
STATEMENTS WHICH OMITTED ALL REF-
ERENCE TO SALARIES, NOR FROM ANY
ALLEGED "NEGLECT" OF SIMS TO EX-
AMINE RECORDS; AND THE ARGUMENT
OF PLAINTIFF CONTRADICTS THE REC-
ORD.**

In arguing that Sims was "amply notified" of, and "acquiesced" in, the admittedly unauthorized conduct of his sister, plaintiff makes the unique contention that failure of Sims to find out what was going on until

the fall of 1958 was due to his own "neglect" to examine records "always available to him." Plaintiff attempts to shift the blame onto defendant, and thereby divert attention from Mrs. Chambers' flagrant breaches of her fiduciary duties to Sims, and also to obscure plaintiff's inequitable conduct as a partner in 1959 in trying to take advantage of his wife's undisclosed prejudicial conduct.

Just how *available* to Sims was the *information* of what was going on behind his back? Some partnership records were at the office, some in a file, some in a desk drawer, and some were even in a box in the deep freeze. (R. 806. Ab. 92). Notwithstanding Exhibit 10-D dated August 17, 1959, required Mrs. Chambers to deliver *all* of the partnership records to Sims by September 15, 1959, she admitted that in July 1959 she removed some documents from the partnership records and they were kept in either her possession or in the custody of her attorney. She said she knew that in 1959 Mr. Sims was anxious to get all of the partnership records, and her own admissions show that she frustrated him with respect to at least some of them. (R. 581-584, 587. Ab. 61-62). That shows she did not want Mr. Sims to have access to some of them at least. On April 18, 1961, after defendant had made an additional demand for surrender of the partnership documents, Mr. Bird delivered 13 certificates of title (offered by defendant as Exhibit 92-D). Mr. Bird offered the following excuse for his clients: "We have a lot of files in our place of business. In *our opinion* we have disgorged all from our files that defendant is entitled to." He then offered to allow Mr. Evans to look at those

files, but refused to permit either Mr. Sims or his accountant or his attorney to do so. (R. 1843-1844. Ab. 243-244).

If Mrs. Chambers forgot about the records she put in the deep freeze, how would Mr. Sims know where to look, particularly when he was unfamiliar with the records? Mrs. Chambers breached her fiduciary duties to her brother to keep him properly informed, by refraining from disclosing what she had done.

Since the unauthorized entries were not made until 1955, even if Mr. Sims had actually examined the records prior to 1955 he could not have found any of the entries which now appear for the years 1949 to 1954, for they were backdated. Exhibit 22-D made in May 1949 showing an equal salary for both partners, is inconsistent with Exhibit 21-D which Mrs. Chambers made about 1955 when she decided to "compute" partners' salaries on an "hourly basis", and omit all salary for her brother for the period following July 1948. Exhibit 21-D was found among some miscellaneous papers, about one month before trial.

Notwithstanding plaintiff's attempts to charge Mr. Sims with the duty of finding out about the bookkeeping manipulations without any one telling him, Mrs. Chambers herself, who was responsible for keeping accurate records, at first disclaimed any responsibility for the salary entries of \$11,700 made in favor of Mr. Chambers from and after 1955. She blamed Russell Evans, and Evans blamed her. She testified, "I didn't know about any of these items until this controversy arose, because I argued so strenuously about it and I thought there would probably be a change made." (R. 783. Ab. 90).

She said she made a notation of “wrong” in the ledger which she later erased. (R. 786. Ab. 90). How could she have made such a notation or have argued strenuously about it, if she did not know? Although she said she thought there would be a “change made,” she did not make any strenuous efforts to correct the records or any efforts to notify Mr. Sims about such wrongful entries.

A classic example of the unfounded attempt of plaintiff to claim that Mr. Sims knew about the book-keeping irregularities for a long time, appears on pages 25 and 26 of the Brief of Plaintiff, wherein plaintiff infers that Robert E. Shirley, a C.P.A., in 1956 “discussed appropriate matters with Mr. Sims, *including salaries*. (Ab. 41-44, R. 439-44, 447, 453, 461, 465). Although, when he was pressed to recall a specific conversation in which salaries was specifically discussed, he was unable to do so (Ab. 45, R. 465).” Page 45 of the Abstract shows that Mr. Shirley’s testimony refutes the claims of plaintiff:

“I cannot state definitely what I showed Mr. Reimann at his home other than the letter (Exhibit 12-P). I knew that Mr. Reimann was making inquiry as counsel for Mr. Sims. (R. 467).

“I recall saying that Tal Chambers had left a portion of *his share of the profits* in the business and had not drawn out all of his share of the profits and there would have to be some adjustments by reason of that. *The subject of salaries was never discussed at the meeting between Mr. Reimann and me.* (R. 464). *I don’t remember* whether the subject of salaries was ever discussed with either Mr. Sims or Mr. Reimann.

“I do not recall a specific conversation in which salaries to Mr. Chambers was discussed. *That is what I would like to have the record show.* (R. 465).

“When I said I discussed income with Mr. Sims I refer to the fact that I told him what the figure was as to his share of the income. *I don’t have any recollection that I exhibited any partnership return to him.*” (R. 466).

Mr. Shirley was called as a witness for plaintiff and cross-defendant. He admitted that he knew Mr. Sims was “not familiar with bookkeeping entries or bookkeeping methods.” (R. 468. Ab. 46). Mr. Shirley was hired by Ray Liljenquist in 1956 to make an examination of the partnership records for Mr. Liljenquist as a prospective purchaser of partnership assets. (R. 413. Ab. 36). Mr. Shirley expressly stated that he never informed either defendant or his attorney of any bookkeeping irregularities. He had a conversation with Mr. Reimann as attorney for Mr. Sims on March 16, 1956. Mr. Shirley said he told Mr. Reimann “*that it was pretty hard to find things on the books the way the records are kept.*” Mr. Shirley further told Mr. Reimann that he “*did not find anything irregular on the books.*” (R. 446-447). Ab. 42). Just how would Mr. Sims be alerted to any of the irregularities by the report of such an investigation by a C.P.A.? That would be sufficient to lull Mr. Sims into a sense of security since he had implicit trust and confidence in his sister. Since it was “pretty hard” for even a C.P.A. to “find things on the books the way the records are kept”, just how much chance would a person like Mr. Sims who was unskilled in bookkeeping have to find anything? Mr. Shirley did

not disclose to either Mr. Sims or his attorney that he had made no inquiry to ascertain whether proper entries had been made in the ledger. (R. 445. Ab. 42).

The J. T. Chambers memorandum capital account appears in about the middle of the ledger, Exhibit 1-P. It appears under the tab, "Proprietorships." There is no tab on "Salaries." There is no index nor any chart of accounts in the ledger. An inexperienced person unfamiliar with bookkeeping, particularly the hybrid system used by Mrs. Chambers, would have a hard time to stumble onto the sheet where the unauthorized entries appeared. That sheet had a "semi-honorable burial" in a mislabeled part of the ledger. If a person started at the beginning of the ledger he would become so confused and discouraged that he likely never would reach the middle. When these facts were brought out in the testimony of Glendon E. Steiner, Sr., Mr. Bird himself proceeded to cinch the point by the following explanation concerning the ledger, Exhibit 1-P:

"MR. BIRD: This book is not made for any ordinary layman to examine. * * * This is an accountant's record, a bookkeeper's record and made for his use. If anybody examining his books can't find anything, he can ask the bookkeeper. It isn't intended that anyone who walks in can pick up a set of books and find what he is looking for without help." (R. 1284. Ab. 153).

At pages 26 to 28 plaintiff argues that discussion between Sims and his sister in March 1956 shows that he was aware of what was on the books. The discussion related to a proposed sale which never materialized.

Mr. Bird so admitted. (R. 534. Ab. 57). The entire conversation was incompetent. It related to how the assets would be divided in the event of a proposed sale. Exhibits 16-P and 17-P were incompetent. Exhibit 17-P was altered out of the presence of defendant. Salaries were *not* mentioned in the negotiations according to Mrs. Chambers' own admissions. Mrs. Chambers represented to her brother that the figure of \$56,856.15, which appears on Exhibit 17-P, was the difference between the plaintiff's capital account and Sims' capital account at that time. Mrs. Chambers was very careful not to show Mr. Sims those capital accounts, but tried to get him into an agreement on the division of the assets. She falsely represented that Mr. Sims had "overdrawn" his account. She knew the books did not show Mr. Sims overdrawn, and Mr. Bird said, "We will stipulate that the books don't show that." Mr. Bird said, "Apparently they do not show any overdraft at any time." (R. 729, 731-732. Ab. 84). Mrs. Chambers first testified that she told her brother that "I couldn't see why it should be so different, only that our salaries and our profits had been plowed back into the company whereas he had been having to take his for expansion of his pit operation." (R. 519. Ab. 54). On cross examination when asked about her statement made on direct examination about "salary" she said, "I don't know that the word 'salaries' should be in there." (R. 729. Ab. 84). Her own qualification of her testimony shows that she did not discuss salaries with her brother during that negotiation on a sale proposal. Furthermore, notwithstanding the efforts of Mr. Bird to contradict the record, Mr. Sims testified that the words "wages M. &

T.” opposite the figure of \$56,856.15 were not put on Exhibit 17-P during that conversation nor in his presence. Sims testified that she told him that “Tal’s portion of the profits and *her* wages were plowed back into the business, and that made that difference between us.” (R. 1080-1081. Ab. 128). Mr. Bird cut off further interrogation as to the alteration of Exhibit 17-P out of the presence of Mr. Sims by stating that Mrs. Chambers put those words “wages M. & T.” on later. (R. 1081. Ab. 128).

Counsel for plaintiff refers to a number of documents which were prepared by Mrs. Chambers, Mr. Evans, Mr. Beal and others. Contrary to the record he claims that those documents were either delivered to Mr. Sims or exhibited to him. On page 26 he refers to Exhibit 15-P which was a statement prepared for Mr. Chambers, but never exhibited to Mr. Sims. Such statement contradicts the records. Said statement is utterly ridiculous for it shows distribution of all profit for 1950 to 1952 to Mr. Chambers, including the amount on Exhibit 23-D which was owing to Mr. Sims for sand and gravel. Mrs. Chambers said she did *not know* if she had Exhibit 15-P with her when she talked to Mr. Sims. (R. 520. Ab. 55).

On page 28 plaintiff argues that 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).” Contrary to such assertion Mr. Evans said he had no recollection that any copy was ever forwarded to Mr. Sims. (R. 1437. Ab. 175). Mr. Sims never received such document. It never could have been prepared for

Mr. Sims, for it disputes not only the figures Mrs. Chambers had put in the ledger in 1955 and backdated to 1949 to 1951, but it also contradicts the statement attached to the partnership tax return for the period in question in Exhibit 44-D. It could not have been a statement for an original partnership return, for the original return for the period ending September 30, 1949, *showed a salary of \$2,980.18 for R. W. Sims and none for J. T. Chambers*. Such return was later amended to show no salary for either partner, with the following notation: "This figure does not include salary to any partner." (See Exhibit 44-D). It is significant that Exhibit 18-P was not in the partnership records, but in the possession of Mrs. Chambers.

On page 28 plaintiff argues that Exhibit 21-D "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)." There were no conversations stating that J. T. Chambers should receive a salary and Sims should be denied a salary. Mr. Beckstrom prepared a form of capital account which Mrs. Chambers admits is attached in Exhibit 21-D. The Beckstrom capital account did not include a salary to either partner. As shown by Exhibit 21-D which was secretly made in 1955 without any authority, Mrs. Chambers devised salary figures for her husband for periods of 1949 to 1954 and back-dated them to the years in question, and she even computed a "salary" for her husband on an "hourly basis" when she knew her husband had refused to keep a record of his time and had told her it was not necessary for either partner to keep any record of his time. On Exhibit 21-D yellow

memorandum sheets Mrs. Chambers based an inflated salary for her husband in part on “overseeing” the Sims gravel pit, which could not be chargeable to the partnership—a service which Chambers himself denied that he ever rendered.

On page 29 plaintiff contradicts the record by saying that “This testimony indicates that the whole method of keeping the capital accounts was discussed with the defendant in connection with 21-D and his suggestion was carried out.” There never was any discussion about Exhibit 21-D for Mr. Sims never saw it until a month before the trial, and Mrs. Chambers herself repeatedly admitted that she did not discuss any of those “salary items” with Mr. Sims. Plaintiff contradicts the testimony of his wife. Plaintiff also said that “Exhibit 23-D reflects this”, when it is utterly inconsistent with Exhibit 23-D. Plaintiff then contends: “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.” It certainly is significant, for that figure does not agree with any figure in the ledger. Furthermore, although that figure was stricken by agreement of the parties after Mr. Sims and his attorney learned about it, so that no salary was shown for J. T. Chambers for 1951, some months later or several years later in defiance of that agreement Mrs. Chambers had a new “salary” of \$7,200.00 secretly entered and back-dated to 1951, which was \$2,421.40 in excess of the figure which had been stricken by agreement made on March 14, 1952. At the trial counsel for plaintiff said, “We will stipulate that neither of them knew about it at the time.” (R. 1047. Ab. 122).

Exhibit 26-P was prepared behind the back of R. W. Sims after an adjustment of \$11,722.93 in his favor in the price of sand and gravel had been agreed on between Sims and the Chambers. Exhibit 26-P was incompetent. Contrary to the argument of plaintiff on page 29 there was no agreement to deduct \$2,500 or any other sum from that settlement figure. Instead of entering the \$11,722.93 in the records as the agreement required, as soon as Sims' back was turned, Mrs. Chambers had only \$9,196.97 entered as owing for sand and gravel. There was deducted an amount in excess of \$2,500 without authorization and \$2,500 was falsely noted on the records as "salary". Mr. Evans, who made the entries under the supervision of Mrs. Chambers, did not testify that Mr. Sims had anything to do with such abortive exhibit. He admitted that the "item of \$2,500 represents the adjustment made in the price of sand and gravel. It was not really a salary at all." (R. 1453. Ab. 176). There was no excuse for such bookkeeping manipulation. If it had been salary it would have been a charge against the partnership, and not a charge against R. W. Sims nor against his sand and gravel account. Mrs. Chambers tried to shift the blame onto Mr. Evans. (R. 816. R. 93). No wonder the court exclaimed: "Well, it is beyond the understanding of the court." (R. 1455. Ab. 177). Mr. Bird offered the untenable excuse that "it took the form of salary as a means of making the sand and gravel adjustment." There was no occasion to resort to some bookkeeping manipulation after the figure of \$11,722.93 had been agreed on as the amount owing to Sims. The correct figure should have been entered in the books.

On page 25 plaintiff argues that defendant received copies of the annual statements, Exhibit 6-P. Not even Mrs. Chambers claimed he did. None of those annual statements shows a salary to Mr. Chambers, and only two of them refer to "capital accounts." Mr. Sims denied that he received any of them. Instead of testifying that those statements were delivered to Mr. Sims as represented in the plaintiff's brief, Mr. Evans testified that he did not know if copies were delivered. (R. 1437. Ab. 175). Exhibit 7-P contradicts Exhibit 1-P. There was no proof of delivery of either the original or a copy. The only statements ever delivered to Sims consisted of Exhibit 6-P-A, which show the charges made against him for checks issued to him or for the sand and gravel business from the partnership, his drawing account, and credits for the total amount of sand and gravel. (R. 569, Ab. 61). Mrs. Chambers gave Mr. Sims statements in writing, Exhibit 6-P-A, which did not show any salary to Mr. Chambers. She gave him only the information she wanted him to have.

The annual profit and loss statements did not show any salary to either partner. Even if they had been delivered to Sims, which they were not, they would not have constituted "accounts stated", nor have been "binding" on Sims. See *Caveney v. Caveney*, 234 Wis. 637, 291 N.W. 818. Chambers could not have performed any service in reliance on any of the salary entries in the books, nor in reliance on omission of salary for Sims in the books; for plaintiff did not know about the unauthorized bookkeeping activities of his wife.

On page 20 plaintiff makes the unwarranted claim

that Sims “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.” The document was immaterial and irrelevant, for there is not one word which states that Sims had left the partnership business, nor is there anything mentioned about salaries of partners, nor anything which intimates that Sims was not to receive any salary while he was at Kearns, nor that Chambers was to receive a salary. Sims conducted business for the partnership at Kearns. The documents constituted a *pledge* by Sims to his sister Mrs. Margaret S. Chambers of his partnership assets *as security* for a loan which Mrs. Chambers admittedly never consummated. Mr. Bird stated in arguing his motion to reopen the case to introduce Exhibit 63-P that “It appears on its face to constitute a sort of pledge. We have never regarded it as being an effective pledge.” (R. 1656. Ab. 211). See the affidavit of R. W. Sims which states that Mrs. Chambers never completed the loan and represented that she returned all copies to him. (R. 132-137). Ab. 220-225). Mrs. Chambers testified on November 3, 1960, that she *returned* the document and “never used it in any way against my brother.” (R. 792. Ab. 212).

Counsel for plaintiff mentions various conversations between Mr. Sims and Mrs. Chambers and between Mrs. Chambers and Mr. Sims’ attorney, but fails to show that the subject of salaries was ever discussed, except on March 14, 1952, when it was agreed that the salary of \$4,778.60 shown on Exhibit 23-D would be stricken. On page 34 plaintiff refers to a discussion at a church dinner in 1957 at which it is claimed

that Mrs. Chambers said the capital accounts were "unbalanced." Mrs. Chambers made various excuses for not telling Mr. Sims about the unauthorized salary entries, but on this occasion she had a "captive audience" and she had every opportunity to confess to Mr. Sims what had been going on behind his back, but she again cautiously refrained from disclosing the facts which she had a solemn duty to disclose.

Plaintiff has found it necessary to contradict the record in many instances in his unwarranted argument of "acquiescence." The record shows that Sims did not have a full knowledge of the facts essential to acquiesce in or adopt the wrongful manipulations made in the books by Mrs. Chambers. As stated in *New York Life Ins. & Trust Co. v. Kane*, 45 N.Y.S. 543, at 547, "acquiescence" imports active consent, and cannot be inferred from acts which are doubtful or ambiguous. Plaintiff argues that on various occasions Sims had the opportunity to investigate, but the fact is that Mrs. Chambers had the fiduciary duty to disclose all important facts to Mr. Sims without an investigation because he trusted her implicitly. As soon as the plaintiff learned of his wife's wrongful conduct he had a fiduciary duty to aid his co-partner to obtain correction of the records. Plaintiff tried to profit from his refusal to do his duty to his co-partner, and to take advantage of the unauthorized salary entries and omissions.

POINT 5.

CONTRARY TO ARGUMENTS OF PLAINTIFF, "REASONABLENESS" WAS NOT A PROPER ISSUE, BUT IT WAS THE UN-

FOUNDED PREMISE FOR CANCELING
THE CONTRACTS MADE BY THE PARTIES
AND SUBSTITUTION OF A PURPORTED
"IMPLIED AGREEMENT" CREATED BY
THE COURT TO WHICH THERE NEVER
WAS ANY ASSENT .

On page 39 of his brief plaintiff states that "it was error for the court to consider further evidence on the issue of reasonableness," but then proceeds to attempt to uphold the admitted error. Plaintiff says, "*It was within the pleadings and Pre-Trial Order,*" but there never was any such pleading and nothing was stated in the pre-trial order. On page 42 plaintiff refers to the balance sheet figure which was taken from Exhibit 3-P. One look at that clearly indicates that the question of reasonableness was not involved for each party claimed specific salaries in specific amounts. As stated by plaintiff's witness David N. Beal, Exhibit 3-P was made up, exhibited and used at the time of the pre-trial conference as a "starting point." Mr. Beal said they "were not trying to make any determination as to which claim was right or which was wrong. We were trying to show the *differences specifically* where they were in salaries, and Exhibit 3-P illustrates those differences." That exhibit was made as a result of a conference between Mr. Beal as accountant for plaintiff and Glendon E. Steiner as accountant for the defendant. (R. 1893-1894. Ab. 255-256). Thus, it is clear that "reasonableness" was not an issue at the pre-trial and was never mentioned because the accountants set forth the specific salary claims.

Plaintiff says that "*Defendant suggested at the*

opening of the trial that it be eliminated." Defendant contended all along that "reasonableness" was not an issue. After the court said to Mr. Bird that he understood "from your statement now that reasonableness of services will not enter into the lawsuit" (R. 289, Ab. 14), Mr. Burton pointedly asked:

"... is it Mr. Bird's contention that the practice on which he said he is relying is one that the parties have by some practice established an agreement that there will be a reasonable amount allowed for services?"

"MR. BIRD: Oh, no, no." (R. 290-291. Ab. 14.)

The court said that Mr. Bird was going to show "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, Ab. 15).

Under subpoint "C" plaintiff argues "*The possibility that both might fail in their claims of specific compensation was recognized.*" Plaintiff says, "Both parties expected to succeed in establishing their claimed specific salaries." If the court was right in ruling that neither party proved his claim of a specific salary agreement, under the statute neither party became entitled to a salary and the judgment should be reversed and judgment should be entered in favor of defendant against plaintiff and his wife because the Chambers were overdrawn. The trial court held that both plaintiff and defendant failed to prove an agreement for specific salaries. Both partners performed personal services, but the trial court could not entertain any evidence that the services of one partner were of greater value

than the services of the other partner. Instead of denying salary to each partner as such determination would require, the court decided that the plaintiff should have "reasonable compensation" for his services and defendant should be "denied compensation" for his services. The court thus struck down the agreements which the partners made and substituted one which was utterly inconsistent with the claims of either party for which there never was any assent or consideration.

On page 45 to 48 plaintiff makes the contention that "*The Court had the right to hear the further issue and complete the case.*" Plaintiff infers that the court could create an issue which was inconsistent with the theories of both parties and give the plaintiff another "day in court" while denying defendant the same privilege. Contrary to the argument of plaintiff the Rules of Civil Procedure do *not* "encourage the District Court to do what was done in this case." The cited rules do not declare that after a plaintiff has failed in his proof that he should be permitted to have a new trial on an entirely inconsistent theory. *None of the rules give the courts authority to cancel a contract made by the parties and to substitute some "implied agreement" which is utterly inconsistent with the claims of both parties.*

Plaintiff then says that "*If reasonableness was a proper issue, the Court's decision was supported by evidence and is sound.*" It was not a proper issue, and there was no competent evidence and the decision is inequitable. Plaintiff then disregards just about everything in the Brief of Defendant and Appellant by saying that defendant "makes no attack on the Findings of Fact relative to reasonableness of the salary awarded to the

plaintiff." Plaintiff overlooks defendant's brief, and particularly pages 37, and 40 to 44.

The court actually *dispensed with any proof* of "reasonable" compensation for 1949 to 1951 and generously allowed plaintiff the full amount of those unauthorized back-dated salary entries, although there were partnership losses and no profits. On April 18, 1961, the trial judge said:

"I intend to adopt the salaries claimed through 1951, and from there on out, it is necessary for me to find what is a reasonable amount of compensation under the circumstances." (R. 1842. Ab. 243).

There is not even a finding of "reasonableness" for 1949 to 1951. There was no competent proof offered by plaintiff of "reasonable compensation" for the years 1952 to 1959 and plaintiff points to none. The trial court at the request of plaintiff used the hourly rate for the man at Magna who was classified as an "operating engineer," without proof of comparable activities. Although plaintiff testified to "long hours," he admitted that he had an agreement with Sims on May 8, 1948, that he would devote "full time" to the business while Sims, who was made "head of the company," was only required to devote a portion of his time. Plaintiff admitted that he spent part of his time at Smith's Inn, and that he claimed "reasonable compensation" for the time he spent there. (R. 1855-1856. Ab. 247). He never made any record of his time because he told Mrs. Chambers that there "wasn't any need for either partner to keep a record of his time." (R. 1868. Ab. 251). Mrs. Chambers admitted that she testified on deposition that she personally knew that Mr. Chambers went to Smith's

Inn quite a few times during the day for coffee breaks, and that she told him to go there. She said he would state, "I'm going to the corner. If anything comes up, call me there." She said, "*And he practically had a private line to Smith's.*" (R. 2206-2207. Ab. 297).

The evidence showed that everything which Mr. Chambers testified he did could be done in 4½ to 5 hours in the summer and about 2 hours in the winter, by persons without previous experience. Mr. Chambers had an extra man with him in the batching plant. The business operated just as well when Mr. Chambers was away as when he was there, and after dissolution of the partnership a reduced portion of the business at the Holladay plant operated at less cost per concrete yard. (R. 1899-1953. Ab. 257-266). Mr. Evans, who testified for plaintiff, indicated Mr. Chambers spent a lot of time needlessly, and that the business sometimes operated better when he was away. (R. 2059-2061. Ab. 277).

When there was a cement shortage from trucks hauling in cement, Mr. Sims endeavored to get the evidence of short-weights. Mr. Chambers agreed to have all trucks weighed after Mr. Sims had the new scales installed. Mr. Chambers weighed only 12 loads, 10 of which had a shortage, but he falsely reported to counsel for Mr. Sims that there was no shortage. There was a shortage of 2,900 pounds in the 10 loads as shown in Exhibit 75-D. (R. 2133-2140, 2261-2266. Ab. 285-286, 308). The partnership suffered a loss of approximately \$28,000 over a period of years through the indifference of Chambers and his false representations to his co-partner.

Sims rescued the partnership from some of the financial problems which Mr. Chambers created by breach of his agreement with his co-partner. Sims was instrumental in having his attorneys settle a \$45,000 controversy over cement shortages and alleged unpaid accounts, without paying any part of the disputed \$25,000 claim of a cement company. See Exhibit 81-P. Sims saved the partnership thousands of dollars which Mr. and Mrs. Chambers wanted paid on an unjust claim.

Sims as "head of the company" never neglected to perform his agreements. It was stipulated that he never breached his partnership agreements. There was no equitable basis for cancellation of any contract with his co-partner or the substitution by the court of an inconsistent "implied agreement" to favor Chambers with "reasonable compensation" in the aggregate amount of more than 80% of the wrongful bookkeeping entries and to deny Sims any right to compensation except such amount as Mrs. Chambers as an employee acting without authority had secretly decided to "allow" her employer Sims.

POINT 6.

HAVING FAILED TO RENDER HIS PRETENDED "ACCOUNTING" UNTIL AFTER SUIT WAS FILED, PLAINTIFF CANNOT TAKE ADVANTAGE OF ANY UNAUTHORIZED ENTRIES BY A PLEA OF ANY STATUTE OF LIMITATIONS.

Plaintiff cites no cases to support his plea of the statutes of limitations, nor any facts which could possibly make any statute applicable. The rule is that the

statutes of limitations do not commence to run until either termination of the partnership relation or the filing of a proper partnership accounting, which plaintiff neglected to do. Plaintiff's pretended "accounting" was not even filed until several months after suit was filed.

See *Kimball v. McCormick*, 70 Utah 189, 259 P. 313, *Davis v. Alexander*, (Wash.), 171 P. 2d 167, and *Reindel v. Reindel*, 253 Mich. 680, 235 N.W. 861 at 862.

The trial court erred in dismissing defendant's counterclaim, but not in ruling against plaintiff on his plea of the statutes of limitations.

CONCLUSION

Neither the facts nor the law support the contentions of plaintiff, nor justify the judgment entered by the court. The judicially created "implied agreement" inconsistent with the written and oral agreements of the partners, was prejudicial error.

As pointed out in the Brief of Defendant and Appellant R. W. Sims, the judgment should be reversed and vacated in its entirety and defendant should have judgment against the plaintiff and cross-defendant for their overdraft.

Respectfully submitted,

McKAY and BURTON

By WILFORD M. BURTON, and

By PAUL E. REIMANN

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