

1967

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

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# In the Supreme Court of the State of Utah

WERNER KIEPE,

*Plaintiff-Appellant and  
Cross-Respondent,*

—vs.—

ELI D. LeCHEMINANT,

*Defendant-Respondent and  
Cross-Appellant.*

No. ~~10310~~  
18767

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## APPELLANT'S BRIEF

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

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# In the Supreme Court of the State of Utah

WERNER KIEPE,  
*Plaintiff-Appellant and  
Cross-Respondent,*

—vs.—

ELI D. LeCHEMINANT,  
*Defendant-Respondent and  
Cross-Appellant.*

No. 10310

## APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court  
for Salt Lake County  
Honorable Marcellus K. Snow, *Judge*

## STATEMENT OF NATURE OF THE CASE

This is an action on an accounting upon the dissolution of a partnership.

## DISPOSITION OF CASE MADE IN LOWER COURT

1. The lower court entered a judgment dated June 27, 1966, which provided, among other things:

(a) That the Defendant is awarded the sum of \$2,500.00 for service for a period of thirteen months subsequent to the date of dissolution of the partnership in "preserving the mortgage loan asset" of the partnership.

(b) The accounting submitted through Lawrence S. Pinnock, C.P.A., setting forth the account of the par-

ties from January 1, 1963, to the close of business, 1964, is ordered adopted as modified, under which it is determined that the Defendant is entitled to the sum of \$16,433.22 out of the cash on hand of \$28,723.98, together with interest thereon.

(c) The compensation paid to Ruth Barlow and R. L. Christensen are allowed as a partnership expense.

(d) The fee charged by Lawrence S. Pinnock, C.P.A. is a partnership expense.

### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the following portions of the judgment entered June 27, 1966, and judgment in his favor as a matter of law thereon:

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

(2) Adjudging that the Defendant is entitled to the sum of \$16,433.22 out of the cash on hand of \$28,723.98, together with interest thereon.

Appellant also seeks reversal of the order of the Court denying his motion to amend the judgment dated March 12, 1964, to provide that the Respondent pay into a special fund a sum of \$981.96 in addition to the sum of 75 per cent of \$9,819.65 ordered paid by the Court into said fund out of which overcharges made by Respondent from patrons of the partnership should be repaid. (R. 134)

Respondent seeks reversal of the following portions of the judgment dated June 27, 1966:

(1) The compensation paid to Ruth Barlow and R. L. Christensen is allowed as a partnership expense.

(2) The Defendant is awarded the sum of \$2,500.00 for his efforts for a period of 13 months subsequent to the dissolution of the partnership in preserving the mortgage loan asset of the partnership, when Defendant had asked for \$5,000.00.

(3) The fee charged by Lawrence S. Pinnock, C.P.A., is a partnership expense.

(4) Awarding to Respondent a net balance credit of \$16,433.22 out of the cash on hand of \$28,723.90 when Respondent is entitled to an amount in excess of said sum. (R. 146)

### STATEMENT OF FACTS

Appellant and Respondent commenced business as of October 1, 1943, as real estate brokers (R. 3), under an agreement that 50 per cent of all fees and commissions earned for real estate listings, rentals, and sales, appraisals and insurance commissions should be paid to the partner producing the same (R. 3) and the remaining 50 per cent should be put into the profit and loss account from which all expenses of operating the business should be paid, and the balance divided equally between the partners.

Later it was agreed that the division of fees and commissions should be changed to pay to the one producing the same 50 per cent of all such fees and commissions from \$1.00 to \$7,200.00; 52½ per cent of total commis-

sions from \$7,200.00 to \$8,400.00; 55 per cent of total commissions from \$8,400.00 to \$9,600.00; 57½ per cent of total commissions from \$9,600.00 to \$12,000.00; and 60 per cent of total commissions in excess of \$12,000.00 (R. 242 and 294). All sums so paid in excess of 50 per cent of commissions earned have been considered as bonuses and paid at the end of each calendar year.

Subsequent to October 1, 1943, State Mutual Insurance Company of Worcester, Massachusetts, appointed the partnership an agent to make real estate loans for it and collections of payments thereon, and agreed to pay one-half of one per cent of the total outstanding loans belonging to State Mutual Insurance Company each year for such collection service. For the making of such loans, loan fees were charged by the partnership and collected from the borrowers. The making of the loans and supervising of the collections was largely the work of the Respondent (R. 195 and 196). The fees for making the loans and commissions on fire insurance sold with the loans were credited to the partner making them, usually the Respondent.

The Respondent at all times supervised the keeping of the books of the partnership. Until after the Appellant gave notice of the termination of the partnership on December 30, 1962, he was unfamiliar with the books. After the Respondent gave notice of termination of the partnership, Appellant checked the books and upon his findings filed suit against the Respondent alleging that the Respondent had used for his own individual use and benefi



sums of money exceeding his share of the partnership income, and that he refused to account therefor to the Appellant (R. 1).

Trial was held on November 26, December 9, 10, 11, 12, 13, 19 and 20, 1963. Court ordered the Respondent to pay to the Appellant on account thereof \$4,697.70 by the judgment of March 12, 1964 (R. 61, 62). By said judgment the Respondent was ordered to place into a special account 75 per cent of \$9,819.65 and Appellant was ordered to pay into said account 25 per cent of said \$9,819.65, from which overcharges to customers of the partnership made by the Respondent should be repaid and the balance remaining after said shipments should be divided 50 per cent to the Respondent and 50 per cent to the Appellant (R. 61, 62). From Exhibit P. 10 (R. 61-62), it appears that the Respondent had received 75 per cent of \$9,819.65 plus a bonus of \$981.96 thereon, and Appellant had received 25 per cent of \$9,819.65 (R. 316).

The appelllant served notice of the dissolution of the partnership upon Respondent on December 30, 1962. Respondent agreed to the dissolution.

From January 1, 1963, to February 1, 1964, the partners continued to operate the business in the same manner as they had done prior to notice of dissolution. On February 1, 1964, Respondent removed from the office space occupied by the partnership, and the Appellant took full control of the books, records, and other assets of the partnership.

On February 13, 1964, a hearing was had upon Re-

spondent's claim for "compensation for his preserving the mortgage loan account with State Mutual Insurance Company" during the period of January 1, 1963, to February 1, 1964, and upon his motion that wages paid to R. L. Christensen and Ruth Barlow be paid by the Appellant instead of by the partnership for the same period (R. 174-157).

At the conclusion of the evidence, the purport of the evidence was discussed by the Court with Counsel, during which counsel for the Respondent made the following statement:

"I said if they would be willing to invoke the partnership agreement all the way down the line, we would be willing to do that. But they want to omit the renewal insurance and that means that much more disadvantage to us."  
(R. 244)

The Court then stated:

"All right. The Court will adopt the suggestion of Mr. Backman that we go all the way down the line \* \* \*. *Neither partner will receive any special compensation for services during this interim period*, and all of the expenses by whichever department incurred or by whom will be lumped together and deducted from the profit and loss account, if there is sufficient in there, and the balance shall be distributed equally between the partners. I won't need to take it under advisement, and you can proceed accordingly and wind up today if you want." (R. 245)

A judgment was signed on March 12, 1964, pursuant to the Court's decision aforesaid (R. 60-64) which pro-

among other things, as follows:

11. The judgment herein entered *constitutes an accord and satisfaction of all claims each of the parties hereto has against the other*. The court retains jurisdiction of this action *to hear and determine any unresolved disputes which may now exist.*" (R. 64)

The transcript of evidence taken at said hearing (R. 245), more than half thereof was devoted to testimony concerning the preservation of the mortgage loan asset by the Respondent. As above stated, at the conclusion of the testimony, the Court stated that neither party could receive any special compensation for services rendered during the interim period (R. 245). The provisions of the judgment quoted, that the judgment constitutes accord and satisfaction of all claims each of the parties had against the other, referred particularly to the Respondent's claim for special compensation for "preserving the mortgage loan asset." This decision resolved the dispute between the parties over the claim of Respondent for compensation for "preserving the mortgage loan asset." The judgment constituted an accord and satisfaction of all claims of each party against the other including the matter of payments to R .L. Christensen and Carl Rowland (R. 64). This judgment became final on June 13, 1964.

On June 13 and June 24, 1964, hearings were had on the motions filed by each of the parties against the other for an order to show cause why the other should be punished for contempt of court for failure to com-

ply with the judgment of March 12, 1964.

When the hearing commenced on June 13, 1964, counsel for the Respondent stated:

"This is a proceeding — an order to show cause issued by the Court for Mr. Kiepe to show cause why he should not be found in contempt of court."  
(R. 246)

No pleadings were submitted. Not a word of evidence was adduced, and not a word was mentioned on the matter of payment of any compensation to the Respondent for his efforts in "preserving the mortgage loan asset" of the partnership. (R. 246 to 307) At the conclusion of that hearing, the Court stated that he would accept briefs only on the following matters:

1. Contempt.
2. Bonuses to be paid over and above the 50 per cent producers basic compensation.
3. Salary paid to Mrs. Barlow.
4. Salary paid to Mr. Christensen.

The Court stated:

"These four items are the only items concerning the Court" (R. 307).

On November 9, 1964, judgment was entered on the hearing of June 13, 1964, continued to June 24, 1964, which provided, among other things:

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

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

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

4. That each partner shall be paid \$535.00 as a bonus.

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

Appellant filled a motion to amend the judgment of the Court dated March 12, 1964, to provide that the Respondent pay into the special fund for refunds of overcharges an additional sum of \$981.96 (R. 13.)<sup>4</sup> The Court denied the motion (R. 144).

Appellant filed his appeal upon the following points, among others:

Point One. The award of \$2,500.00 to the Respondent by the judgment of November 9, 1964, is not supported by pleadings or Findings of Fact.

Point Three. The issue upon which that portion of the judgment of November 9, 1964, awarding Defendant LeCheminant \$2,500.00 for his efforts in "preserving the mortgage loan asset of the partnership" was tried and decided contrary to the said portion of said judgment of November 9, 1964, by the judgment of the trial court entered on March 12, 1964, which judgment had become

final and was res judicata of said issue at the time of the entry of said judgment designated Order of November 9, 1964.

Point Four. There are no pleadings or Findings of Fact or Conclusions of Law nor any evidence or other proof to support that portion of the judgment awarding each party \$535.00 as a bonus, . . . which brings the credits to which Defendant is entitled to \$20,101.93.

Point Five. There are no pleadings or Findings of Fact or Conclusions of Law nor any evidence or other proof to support the following portion of the judgment designated Order of November 9, 1964, which reads: "This brings total credits to which Defendant is entitled to the sum of \$20,101.93, less refunds of \$3,668.71 heretofore ordered by the Judge to be made by the Defendant results in a net balance credit to which Defendant is entitled of \$16,433.22 out of the cash on hand of \$28,723.98 shown by the account filed herein.

Point Six. The Court erred in denying Plaintiff's motion to amend judgment of Mar. 12, 1964.

After hearing the appeal, this Court on the 5th day of May, 1966, entered the following decision:

"This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court be and the same is vacated and set aside. The cause is remanded to the trial court for the making of Findings of Fact, Conclusions of Law and Judgment based thereon, and/or for such further proceedings as the trial court may in its discretion deem advisable in the premises, each party to bear his own costs." (R. 150)

When the files in this case were received in the District Court, the Court permitted counsel for the Respondent to draw Findings of Fact, Conclusions of Law and Judgment, which the Court signed on June 27, 1966 (R. 153-158). Plaintiff then filed a motion for amendments of Findings of Fact, Conclusions of Law and Judgment (R. 159-162), which the Court denied. (R. 164)

The Plaintiff then timely filed his notice of appeal. (R. 165--166)

Appellant appeals from the following portions of said judgment:

"4. Defendant is awarded the sum of \$2,500.00 for his efforts for service for a period of 13 months subsequent to the date of dissolution of the partnership in "preserving the mortgage loan asset of the patnership."

"6. The accounting submitted through Lawrence S. Pinnock, C.P.A., \* \* \* is ordered adopted as modified under which it is determined that Defendant is entitled to the sum of \$16,433.24 out of the cash on hand of \$28,723.98, together with interest thereon."

Appellant appeals from the following Findings of Fact which included, among other things, the following:

"The compensation awarded by this court to the defendant in the sum of \$2,500.00 for the preservation of assets should be added to the sum of \$17,066.93 shown as credit due defendant from the credit shown as due Plaintiff in said account of \$10,847.05 in order to carry out the judgment of this court as the same applied to the graduated bonus plan of the partnership in determining

commissions to be allocated to each party hereto, and which amounts to the sum of \$1,070.00 of which each party is entitled to one-half thereof or \$535.00. This brings total credits to \$20,101.93 to which Defendant is entitled, less refunds of \$3,668.71 heretofore ordered by the court to be made by the Defendant, and results in a net balance credit to which Defendant is entitled of \$16,433.22 out of the cash on hand of \$28,723.98 shown by the account filed herein."

Respondent cross-appeals from said judgment upon the following grounds:

1. The Court erred in adjudging that the compensation paid to Ruth Barlow and R. L. Christensen should be allowed as a partnership expense.
2. The award of \$2,500.00 to Respondent should be \$5,000.00.
3. The Court erred in charging the fee of Lawrence S. Pinnock, C.P.A. to the partnership.
4. The Court erred in finding that the Respondent is entitled to receive only the sum of \$16,433.22 out of the cash on hand of \$28,723.98.

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

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

Mr. LeCheminant was the first witness called. He testified in effect that the mortgage loan business con-



sisted of making collections from some 600 accounts on a monthly basis. The work of seeing that the accounts were kept current is more than a clerical operation. That was the work he performed. During the year they had had 81 of the 600 accounts which required more or less collection effort every month. State Mutual Insurance Company required a delinquency statement and a statement of the reasons for delinquencies each month (R. 165).

When Mr. Kiepe terminated the partnership, State Mutual Life could have cancelled its contract with the partnership at any time and it was necessary to put forth additional effort to make sure that the accounts were properly handled (R. 166).

It was necessary to call personally upon some of the delinquent mortgagors. Respondent went to Draper on two or three occasions and to Magna on one. He went to Bountiful and Centerville. During the year he made 20 to 25 personal visitations and had personal conversations with mortgagors. Some calls were made after office hours, some during the day. During the year he further checked 70 to 100 homes. When Mr. Saunders of State Mutual Insurance Company was in Salt Lake City, he inspected with him probably 20 houses (R. 167). During the year he submitted about 8 or 9 residential loans and in addition about 11 commercial loans on which he had done considerable work. They were all turned down (R. 168).

He said he spent at least a part of each working day

at the office on the business of maintaining the loans (R. 170).

At the beginning of 1963, the total amount of mortgage loan business which they were servicing was close to \$7,000,000.00 (R. 174). During 1963 the submission of loans was minor, and the insurance renewals until September, 1963, were negligible. From May to September, 1963, they had about 60 policies of insurance that had to be registered and sent out to customers and after that time there were some 400 that were all renewed at practically the same time (R. 171).

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

Respondent further testified that the partnership income approximated \$33,000.00 on the mortgage loan account and the insurance account, with an expense of \$10,700.00; so that Respondent's share of the income from the mortgage loan department would net \$11,150.00 and Appellant's share would be the same.

In addition, during 1963 Respondent's income from appraisal work was approximately \$1,000.00 and approximately \$110.00 from real estate sales and listings. His commissions on one commercial loan was \$5,600.00, and on two residential loans about \$350.00, and on personal

insurance commissions \$800.00 or \$900.00 (R. 182).

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

He was then asked the following question and gave the following answer:

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

Answer: "That is substantially correct." (R. 196)

The Respondent wrote 5 to 7 letters a month to State Farm Mutual Insurance Company on collections. It would take maybe 15 minutes to write a letter (R. 198).

Appellant introduced into evidence and read into the record a letter dated December 9, 1963, from State Mutual Insurance Company to the Respondent which is most uncomplimentary of Respondent's handling of the mortgage loan account (R. 203-204)

Ruth Barlow was called and testified in substance as follows: During 1963 from February 17 to August 31, the period of time during which she was employed by the partnership, the Respondent arrived at the office on the average about 9:30 in the morning. His leaving time

was at 3:00 or 3:30 each day. On at least two or three days a week he would leave about 11:00 and come back at 1:00. He usually spent the time between 11:00 and 1:00 at the Deseret Gym. When he left the office in the afternoon he usually went home or to the Deseret Gym. He had a standing appointment two days a week at 3:00 with Brother Jonathan at the Deseret Gym. (R. 210-211).

Respondent spent part of a morning twice a month dictating on delinquent accounts (R. 212). When she worked with Respondent, he dictated reports to State Mutual Insurance Company and she typed them, usually two-page letters. It didn't take long. She was his secretary in 1960, 1961 and 1962. His coming and going during those years was the same as 1963 (R. 212-213).

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

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

Appellant finished \$28,825.00 of appraisal work in 1963 and produced \$3,295 in real estate commissions (R. 242). Thus Appellant produced \$32,120.00 income during 1963, one-half of which was turned into the partnership.

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

<i>Year</i>	<i>LeCheminant</i>	<i>Kiepe</i>
1959 .....	\$ 4,046.34	\$ 2,368.14
1960 .....	1,676.39	2,001.00
1961 .....	1,862.62	2,139.20
1962 .....	1,848.58	1,731.37
1963 .....	908.19	2,364.96

The earnings of the parties during the period of January 1, 1963, to February 1, 1964, were (R. 120-122):

	<i>LeCheminant</i>	<i>Kiepe</i>
Commissions .....	\$ 9,190.95	\$16,479.79
Bonus .....	980.19	2,365.96
Share of Profits .....	15,556.44	15,556.44
<hr/>		
Total .....	\$25,655.58	\$34,403.19

## ARGUMENT

## POINT ONE

THE JUDGMENT THAT DEFENDANT IS AWARDED THE SUM OF \$2,500.00 FOR SERVICES FOR A PERIOD OF 13 MONTHS SUBSEQUENT TO DATE OF DISSOLUTION OF THE PARTNERSHIP IN PRESERVING THE MORTGAGE LOAN ASSET OF THE PARTNERSHIP IS NOT SUPPORTED BY THE EVIDENCE.

The judgment of June 27, 1966, provided, among other provisions, as follows:

"4. Defendant is awarded the sum of \$2,500.00 for his efforts for service for a period of 13 months subsequent to the date of dissolution of the partnership in preserving the mortgage loan asset of the partnership."

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

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

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

The Respondent by his evidence attempted to prove that he had rendered great service to the partnership in preserving the mortgage loan asset,, but in fact by his own testimony he established that he had performed no *extra services* in that particular during the period January 1, 1963, to February 1, 1964 (R. 195-196), and at the conclusion of the testimony the Court stated:

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

Pursuant to said ruling, a judgment was entered on March 12, 1964, (R. 60-64) which provided, among other things:

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

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

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

Respondent was paid \$40,000.00 by Appellant for his interest in the partnership assets (R. 61), which was almost entirely for the mortgage loan asset. He received more for his half interest in that asset from the Appellant than he was willing to pay to Appellant for his half interest therein (R. 61). The Court ordered the income from January 1, 1963, to February 1, 1964, to be distributed in the same manner as provided in the partnership agreement (R. 63). This is in accordance with the provisions of Section 48-1-27, Utah Code Annotated, 1953, relative to winding up of a partnership after dissolution.

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

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

It was chiefly the income from the asset which the Appellant paid \$40,000.00 for Respondent's half interest which resulted in the payment to Respondent of \$25,655.58, his 1963 income (R. 121).



Respondent's manner of "preserving the mortgage loan asset" brought a severe reprimand from State Mutual Insurance Company. See letter of December 19, 1963, to Respondent (R. 203-204). This letter raises the question: Did Respondent preserve the mortgage loan asset or did he put it in jeopardy?

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

## POINT TWO

THE ISSUE UPON WHICH THE AWARD OF \$2,500 TO THE RESPONDENT BY THE JUDGMENT OF JUNE 27, 1966 WAS TRIED ON FEBRUARY 13, 1964, AND WAS ADJUDGED AGAINST THE RESPONDENT BY THE JUDGMENT OF MARCH 12, 1964, WHICH JUDGMENT HAD BECOME FINAL AND WAS RES JUDICATA OF SAID ISSUE AT THE TIME OF THE ENTRY OF JUDGMENTS OF NOVEMBER 9, 1964, AND OF JUNE 27, 1966. NO MOTION FOR A NEW TRIAL OR MOTION TO BE RELIEVED OF SAID JUDGMENT OF MARCH 12, 1964, HAS EVER BEEN FILED, NOW NEARLY THREE YEARS SINCE IT WAS ENTERED.

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

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

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

"9. All income of each party hereto from January 1, 1963, to February 1, 1964, is hereby ordered to be received and distributed in the same manner as is provided by the partnership agreement, and as has heretofore been received and distributed. \* \* \*

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

Of the transcript of evidence taken at said hearing (R. 153 to R. 245), more than half thereof was devoted to evidence concerning the preservation of the mortgage loan asset by the Respondent. As above stated, at the conclusion of the testimony the Court said that neither party would receive any special compensation for services during the interim period (R. 245). The provisions of the judgment quoted, that the judgment constituted an accord and satisfaction of all claims each of the parties had against the other, referred particularly to the Respondent's claim for special compensation for "preserving the mortgage loan asset" (R. 64).

The judgment became final on April 11, 1964. On June 13, and on June 24, 1964, a hearing was had upon petitions filed by each of the parties against the other for an order to show cause why the other should not be punished for contempt of court for failure to comply with the judgment of March 12, 1964.

When the hearing commenced on June 13, 1964, counsel for the Respondent stated:

"This is a proceeding — an order to show cause issued by the Court for Mr. Kiepe to show cause why he should not be found in contempt of court." (R. 246)

No pleadings were submitted. Not a word of evidence was adduced, and not a word was mentioned on the matter of payment of any compensation to the Respondent for his efforts in preserving the mortgage loan asset of the partnership (R. 246 to 307). At the conclusion of that hearing, the Court stated that he would accept briefs only in the following matters:

1. Contempt.
2. Bonuses to be paid over and above the 50 per cent producers basic compensation.
3. Salary paid to Mrs. Barlow.
4. Salary paid to Mr. Christensen.

The Court stated:

"These four items are the only items concerning the Court." (R. 307)

On September 14, 1964, the Court gave a written memorandum decision on the hearings of June 13 and June 24, 1964, which included the following:

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

Since February 13, 1964, no evidence has ever been introduced on the matter of awarding Respondent compensation for "preserving the mortgage loan asset." No

motion to amend the judgment or for any relief therefrom has ever been filed. The judgment could not be set aside or amended without filing a motion to amend within a reasonable time, which in this case would not be more than ninety days (Rule 60(b), Utah Rules of Civil Procedure.

The law of res judicata has been well established in prior decisions of this court. In *Knight vs. Flattop Mining Company*, 6 Utah 2d 51, 305 P. 2d 503, this court, quoting from 30 Am. Jur. 920, Section 178 of Judgments, stated:

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were there admitted or judicially determined, are conclusively settled by the judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action with the same parties or their privies, regardless of the form the issue may take in the subsequent action. \* \* \*"

In 30 A Am. Jur., Page 388, Section 346, the following is stated:

"In stating the doctrine of res judicata, reference is frequently made by the courts to 'an existing judgment'. The doctrine of res judicata prevails as long as the judgment used as a basis thereof remains in full and operative effect and has not been reversed or otherwise set aside."

In 30 A Am. Jur., Page 400, Section 359, the following is stated:

"Generally speaking, the rule of res judicata applies to all judicial determinations, whether made in actions legal or equitable and in special or summary proceedings. \* \* \*"

In Section 360 of 30 A. Am. Jur., Page 400, the following is stated:

"\* \* \* But the effect of an adjudication of res judicata is not confined in its application to subsequent independent proceedings, but applies to a collateral proceeding in the same action. When an issue has been finally determined, the principle of res judicata prevents a re-litigation of that issue, whether in the same or in an independent suit."

Apparently the trial court took the position that he could change any judgment entered by him at any time. In the case of *Frost vs. District Court of Box Elder County*, 96 Utah 196, 83 P. 2d 737, the Court quoted with approval from Freeman on Judgments, Volume 1 of the Fifth Edition, Section 141, as follows:

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

The only control over the judgment which the court retained was as follows:

"The court retains jurisdiction of this action to hear and determine any unresolved disputes which may now exist or which may hereafter arise between the parties relative to the subject matter in this action." (R. 64)

The above is a portion of the judgment of March 12, 1964.

The matter of special compensation to the Respondent was the chief subject of the hearing of February 13, 1964, and resolved the disputes as to that matter.

The judgment further stated:

"11. The judgment herein entered constitutes an accord and satisfaction of all claims each of the parties hereto has against the other." (R. 64)

As this court stated in *Kettner vs. Snow*, 13 Utah 2d 384, 375 P. 2d 28:

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

Said Rule 60(b) relative to judgments provides:

*"On motion and upon such terms as are just, the Court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: \* \* \**

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

*"The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules by an independent action."*

In the same case, Headnote 4 reads:

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

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

As before stated, to this day, now nearly three years since judgment was entered, no motion for a new trial or to be relieved of said judgment has ever been filed.

As stated in Am. Jur. 30A, page 605, Section 632:

"Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open, modify, or vacate a judgment is, generally speaking, within the judicial discretion of such court. \* \* \* The discretion, however, is not a loose, arbitrary and unlicensed jurisdiction, untrammelled by the observance of the methods prescribed by law. It does not authorize a capricious exercise of power and will, but is limited to an impartial exercise of a sound legal discretion, which may not be abused. In the exercise of its discretion, the court is guided and controlled by fixed legal principles to which the action of the court must conform, particularly where the application to open or set aside the judgment is made after the term of the rendition thereof."

The Supreme Court of the State of California in *Bowman vs. Bowman*, 178 P. 2d 751, stated:

"Trial courts can modify or amend their judgments only as prescribed by law."

The trial court erred in awarding the Respondent the sum of \$2,500.00.

### POINT THREE

THE FINDING OF FACT CONTAINED IN PARAGRAPH 6 OF THE FINDINGS OF FACT THAT EACH PARTY IS ENTITLED TO \$535.00 BONUS IS NOT SUPPORTED BY A WORD OF PLEADINGS NOR BY ONE WORD OF EVIDENCE OR ANY OTHER PROOF, AND AS APPLIED IN THE JUDGMENT WOULD GIVE RESPONDENT \$535.00 TOO MUCH AND APPELLANT \$535.00 TOO LITTLE.

As appears from the statement prepared by Lawrence S. Pinnoek, C.P.A., (R. 122) the Appellant earned a bonus



of \$2,365.96 and Respondent earned a bonus of \$908.19 (R. 122). The bonus of \$535.00 to each would be additional.

If an additional \$535.00 is awarded to each of the partners, it must come out of the profits for the year which were divided equally between the partners, and would thus reduce the profits allowed to each of the parties, to wit, \$15,556.44 (R. 120-122).

No mention was made in the court's memorandum decision of a bonus of \$535.00, or any amount (R. 107-108).

Respondent is aware that there is no such bonus owing to either party. However, as contained in the Findings of Fact and Conclusions of Law, he adds \$535.00 to the amount that Respondent is entitled to receive and thus diminishes by \$535.00 the amount Appellant would receive (R. 156).

#### POINT FOUR

THAT PORTION OF PARAGRAPH 6 OF THE JUDGMENT WHICH READS: "\* \* \* AS MODIFIED UNDER WHICH IT IS DETERMINED THAT THE DEFENDANT IS ENTITLED TO THE SUM OF \$16,433.22 OUT OF THE CASH ON HAND OF \$28,723.98" IS NOT SUPPORTED BY THE EVIDENCE.

As set out in the schedule of capital accounts reflecting transactions from January 1, 1963, to close of business, 1964, by Mr. Pinnock (R. 122), the distribution of the earnings for the period of January 1, 1963, to the close of business, 1964, is reflected in the following three items:

	<i>Kiepe</i>	<i>LeCheminant</i>
Commission .....	\$16,479.79	\$ 9,190.95
Bonus .....	2,365.96	908.19
Share of Profits .....	15,556.44	15,556.44

Any payments that would be made to the parties would necessarily come from the share of profits which would be divided one-half each after the credits were taken out to Mr. Kiepe and Mr. LeCheminant.

The share of profits before division is \$15,556.44 each, or a total of \$31,112.88.

If the Respondent is awarded \$2,500.00 for "preserving the mortgage loan asset" plus \$535.00 as additional bonus, a total of \$3,035.00, and Mr. Kiepe is awarded the \$535.00 as additional bonus, there is to be deducted from the total amount of profits, \$31,112.88, the three items: \$2,500.00 plus \$535.00, plus \$535.00, a total of \$3,570.

Total Profits .....\$31,112.88

Total Awards ..... 3,570.00

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Balance of Profits .....\$27,542.88

This profit would then be divided one-half to each of the partners, giving each \$13,771.44—share of profit:

In calculating the final figure used in Paragraph 6 of the judgment, there would, therefore, be deducted from the figure of \$17,066.93 used by Respondent the differ

ence between \$15,556.44, Respondent's share of profits as shown in Mr. Pinnock's statement, and the aforesaid figure of \$13,771.44, a difference of \$1,785.00. This reduces the figure of \$17,066.93 to \$15,281.93.

There would then be added to said figure of \$15,281.93 the \$2,500.00 plus the \$535.00, a total of \$18,316.93. From this figure would be deducted \$3,668.22 mentioned in said paragraph 6, leaving an amount of \$14,648.71, instead of \$16,433.22 mentioned in said Paragraph 6.

As in this brief discussed, the Respondent is not entitled to \$2,500.00 for "preserving the mortgage loan asset" and he is not entitled to \$535.00 as an additional bonus, and Mr. Kiepe is not entitled to \$535.00 as an additional bonus.

The parties can adjust the balance due to each other after the Court has ruled upon the said matters of \$2,500.00 and \$535.00.

## POINT FIVE

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

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

"As to Item 6 of Plaintiff's schedule received in evidence as Exhibit P. 10, reflecting items totaling \$9,865.00, it is ordered and adjudged that this amount shall be placed in a special account, 75 per cent thereof to be paid by the defendant and 25 per cent thereof to be paid by the plaintiff. That all overcharges to customers of the partner-

ship collected by the partnership for anything shall be paid from the aforesaid special account \* \* \*. Costs of making such refunds shall be paid out of said special account. When all refunds have been made and all costs deducted, the balance remaining in said special account shall be paid one-half thereof to each of the parties." (R. 61-62)

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

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

Exhibit P. 10 showed items totalling \$9,819.65 plus a bonus of \$918.65 taken by Respondent. It was an obvious mistake or clerical error that the amount of \$9,819.65 was written into the judgment and not \$9,819.65 plus the bonus of \$981.96, totalling \$10,801.61, of which amount, respondent should return 75 per cent of \$9,819.65 plus \$981.96 into the special account, since it was the intent of the Court that all moneys received by the parties in this matter should be returned into the account.

Appellant's motion to amend was argued on July 15, 1965. Before counsel for Appellant made the argument the Court stated:

"If there is a typographical mistake, naturally:

can be conformed by stipulation of the parties, but other than that, I have heard the case and I am not going to make any new—receive any new evidence or make any different determination.” (R. 314-315)

Counsel for Appellant then stated:

“It wouldn’t make a different determination. It would not require any evidence. \* \* \* Looking at the exhibit, it can be seen from the exhibit that that amount is wrong.” (R. 315)

The Court then stated:

“Well, Mr. Backman can see it as well as the Court can, can’t he?” (R. 315)

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

“I can’t understand Mr. Iverson. This is the first time we will admit, and we have discussed it a number of times, and I have followed his contention, and I believe we can work it out, and if there is an apparent error, we drew the judgment.” (R. 317)

At the conclusion of the hearing, the Court stated:

“Unless Mr. Backman consents to this amendment, motion to amend this paragraph and so on, then I will deny it.” (R. 318)

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

The rule against giving relief from judgments unless motions are filed in time does not apply to relief from clerical errors. As heretofore stated in this brief, the law on this matter is stated in the case of *Frost vs. District Court of Box Elder County*, 96 Utah 196, 83 P. 2d 737. This Court quoted with approval from Freeman on Judgments, Vol. 1, Fifth Edition, Section 141, as follows:

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

This is a unique decision. Counsel for Respondent admitted Appellant was right (R. 317). Yet the Court denied the petition to amend. The Court at no time indicated that Appellant was not right. He took the position that he would grant the amendment if Respondent's counsel would consent thereto, but not otherwise (R. 318).

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

## POINT SIX

THE STATEMENTS CONTAINED IN THE THIRD UNNUMBERED PARAGRAPH OF FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE FALSE AND ARE NOT SUPPORTED BY THE EVIDENCE.

The last paragraph on the first page and the balance thereof on the second page of the Findings of Fact (R. 153-154) prepared by counsel for the Respondent are entirely false and prejudicial and are not supported by the evidence.

The Court did not read the Findings of Fact and Conclusions of Law before he signed them.

The following statement taken from said Findings is totally false:

"Both parties having requested that the Court retain jurisdiction of the case to adjudicate the rights and obligations of each party during the said 13-month period provided plaintiff and defendant were unable to reach an agreement, which the Court consented to and did do."

The judgment of March 12, 1964, on the hearing had of February 13, 1964, finally adjudicated the matters of compensation to be paid to Ruth Barlow and R. L. Christensen, the fee to be paid to Lawrence S. Pinnoek, and the matter of compensation to the Defendant for services rendered during the thirteen months prior to the said hearing, all of which were adjudged against the Respondent (R. 60-64).

The Court stated at the end of the hearing on February 13, 1964:

"Neither partner will receive any special compensation for services during this interim period, and all of the expenses, by whichever department incurred or by whom, will be lumped together and deducted from the profit and loss account."  
(R. 245)

There was no unresolved dispute on the matter of compensation to be paid to Mr. Christensen or Mrs. Barlow or the special compensation for "preserving the mortgage loan asset" after the judgment of March 12, 1964, was entered.

As stated in said judgment, the same constituted an accord and satisfaction of all claims each of the parties had against the other as of that time (R. 64).

## CONCLUSION

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

1. The award of \$2,500.00 to Respondent for "preserving the mortgage loan asset" of the partnership be set aside.
2. That the bonus of \$535.00 to each partner be set aside.
3. That the portion of the judgment which provides the amounts of credits to which Respondent is entitled, which fixes the amount of refunds due the Appellant, and




the balance credit due Respondent, be set aside, and the parties be left to settle their accounts when the other portions of the judgment are ruled upon.

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

Respectfully submitted,

MOFFAT, IVERSON AND TAYLOR

By

A handwritten signature in cursive script, appearing to read "Grant Iverson". The signature is written in dark ink and is positioned to the right of the word "By".