

1953

Rulon M. Keller v. R. V. Wixom : Applicant's Petition for Rehearing

Utah Supreme Court

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George M. Mason; Fred L. Finlinson; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT
of the
STATE OF UTAH

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RULON M. KELLER,
Plaintiff and Respondent,

— vs. —

R. V. WIXOM,
Defendant and Appellant.

Case No. 7778

APPELLANT'S PETITION FOR REHEARING

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FILED

MAY 15 1953

Clerk, Supreme

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF POINTS:	
POINT I. THE SUM OF \$483.14 OF THE ITEM OF \$504.88 SET FORTH IN PARAGRAPH 15, PAGE 5 OF THE FIND- INGS OF FACT AND CONCLUSIONS OF LAW IS NOT PARTNERSHIP INCOME.	11
POINT II. THE SUM OF \$884.54 WITHDRAWN BY WIX- OM FROM THE WASATCH LIVESTOCK LOAN COMPANY WHEN THE PARTNERSHIP LOAN ACCOUNT WITH SAID COMPANY WAS CLOSED OUT IS NOT INCOME.....	12
POINT III. WIXOM IS ENTITLED TO CREDIT FOR \$592.50 FOR PARTNERSHIP EXPENSES PAID BY HIM.....	13
POINT IV. THE DIFFERENCE BETWEEN THE PART- NERSHIP MONEY WITHDRAWN BY KELLER, TO-WIT, \$9,000.00, AND THE AMOUNT RETURNED BY HIM OF \$9,100.00, IS INCOME.	13
POINT V. THE EXPENSES INCURRED BY WIXOM IN SELLING THE PARTNERSHIP REAL PROPERTY IN THE SUM OF \$1,874.19 IS A PROPER PARTNERSHIP EX- PENSE.	14
POINT VI. THE EXPENSES INCURRED BY WIXOM FOR USE OF EQUIPMENT AND AFTER JULY 1949, FOR HIRED HELP, FEED FOR CATTLE AND TRUCKING CATTLE, ARE A PROPER PARTNERSHIP EXPENSE.....	14
POINT VII. WIXOM IS ENTITLED TO CREDIT FROM KELLER FOR INTEREST ON THE BALANCE OF THE PURCHASE PRICE FOR A ONE-HALF INTEREST IN THE PARTNERSHIP AS PER THE TERMS OF MEMORANDUM AGREEMENT.	15
POINT VIII. WIXOM IS ENTITLED TO REIMBURSE- MENT FOR EXPENSES INCURRED BY HIM IN PRO- TECTING TAYLOR GRAZING RIGHTS IN THE SUM OF \$3,411.52.	18
POINT IX. KELLER IS NOT ENTITLED TO REIM- BURSEMENT FOR ALLEGED PARTNERSHIP EXPENSES IN THE AMOUNT OF \$4,866.88.	20
POINT X. KELLER SHOULD ACCOUNT TO THE PART- NERSHIP FOR THE 214 HEAD OF K1 (PARTNERSHIP) CATTLE FED BY HIM AT IDAHO FALLS, IDAHO, AND WHICH WERE SOLD BY HIM.	21
POINT XI. KELLER IS ENTITLED TO RECEIVE FROM THE PARTNERSHIP HIS ACTUAL FEED COSTS FOR FEEDING THE 214 HEAD OF K1 (PARTNERSHIP) CATTLE FED AT HIS FEED LOT IN IDAHO FALLS DUR- ING THE SUMMER OF 1947, WHICH COST SHOULD NOT EXCEED \$30.00 PER HEAD, OR A TOTAL OF \$6,420.00.....	23
CONCLUSION	24

IN THE SUPREME COURT
of the
STATE OF UTAH

RULON M. KELLER,

Plaintiff and Respondent,

— vs. —

R. V. WIXOM,

Defendant and Appellant.

Case No. 7778

APPELLANT'S PETITION FOR REHEARING

The above named appellant respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled case and in support of this petition, represents to the court that the opinion rendered by it in this cause and filed with the clerk of said court on March 31, 1953, fails to consider the fundamental issues, matters and law involved in this case, and assumes the existence of certain facts which are not supported by the record, but are entirely disproved by the record itself.

PRELIMINARY STATEMENT

The appellant contends that the trial court erred in finding "upon an accounting and making all of the charges to each of the parties which should be made to

them” that there was a balance owing from Wixom to Keller of \$13,438.52. The court in its opinion concluded from the record that the trial court had made no errors of law or arithmetical errors. The opinion concludes:

“It is accepted that on appeal from a judgment stating an account, the presumption is in favor of the trial court’s findings on contested items, and except in the case of a fundamental error, the appellate court will not attempt a detailed examination of accounts for the purpose of finding errors not specifically pointed out.”

It is therefore a fair statement that the opinion is fundamentally based upon the proposition that the trial court made no errors, or if errors were made, such errors were not specifically pointed out to the court.

It is the contention of appellant that the record discloses the errors made by the trial court in said accounting, but concedes that it is difficult to determine from an examination of the record such errors, and it was for that reason that appellant urged the court to require the trial court to make findings on the items making up said account. Counsel for appellant, believing that the trial court committed fundamental error in its accounting, submit that they can do no less than call the same to the attention of this court, and that such errors entitle appellant to a reconsideration by the court of its decision. For the assistance of the court, and in order to point out specifically the fundamental errors made by the trial court, counsel for appellant have prepared from the record a detailed account of the partnership operations showing all of the items of account which were admitted into evidence by the court, and showing all receipts and

expenditures from the inception of the partnership operations up to the time when said operations ceased. The account shows all of the sources of income and receipts, by whom received, and the expenditures, the purpose of same and by whom made. Said account is as follows:

Item No.	Date 1947	Nature of Item or Transaction	Partnership Receipts	Partnership Receipts Received By			Reference to Record	
				Wixom	Keller	Wasatch Loan %	Page of Transcript	Number of Exhibits
1.		Advance	\$ 1,000.00	\$	\$ 1,000.00	\$	15, 77, 359, 363, 465	C, K, 35
2.	7-15 7-18	Sale	12,057.64			12,057.64	17, 234, 261, 359, 360, 361, 365, 438, 441, 443, 574	C, D, 8, 33, 34, 74
3.	8-13	Sale	12,913.12			12,913.12	17, 234, 263, 362, 444	C, D, 24
4.	8-14	Sale	6,283.90		6,283.90		18, 78, 264, 362	C, D, K, 71
5.	8-21	Sale	6,124.62			6,124.62	18, 234, 362, 363	C, D, 71, 26
6.	8-23	Sale	5,805.84			5,805.84	18, 234, 265, 363	C, D, 73, 26
7.	9-11	Sale	32,538.31	8,815.66	3,722.65	20,000.00	10, 16, 20, 234, 241, 243	C, D, E, K, P, Q
8.	9-12	Sale	5,502.00	5,502.00			351, 355 10, 20	C, E, Q
9.	9-8	Av. Steer	223.73		223.73		195, 196, 244	C, K
10.	1947	Add. Advance	60.00		60.00		149, 363, 465	35
11.	7-16	Add. on Sale.....	507.92		507.92		645	
12.	10-13	Withdrawal	21.74		504.88	-483.14	104, 105, 235, 267 to 270	A, C
13.	9-8	Dead Steer .....	.50		.50		314, 347, 348, 496 10	C
14.	1947	Doggie Steer	68.00		68.00		267, 311	
15.	7-24	Keller Advance	9,100.00			9,100.00	162, 163, 170, 232, 262, 328, 406 407, 409, 413 to 415, 436, 437	8, 23

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\$ 92,207.32 \$ 14,317.66 \$ 12,871.58 \$ 65,518.08

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Item No.	Date 1948	Nature of Item or Transaction	Partnership Receipts	Partnership Receipts Received By			Reference to Record	
				Wixom	Keller	Wasatch Loan %	Page of Transcript	Number of Exhibits
16.	8-4	Sale	\$ 2,269.08	\$ 2,269.08	\$	\$	10, 19	A, C, F
17.	8-4	Sale	302.88	302.88			10, 20	A, C, F
18.	8-20	31 Strs. to Keller..	6,207.94		6,207.94		16, 347, 496, 590	A, C
19.	8-2	Sale	11,793.14			11,793.14	10, 20, 237, 346	A, C, F, 17
20.	8-18	Sale	12,167.88			12,167.88	10, 20, 347	A, C, F, 17
21.	8-20	Sale	27,442.50			27,442.50	10, 20, 238, 347	A, C, F, 17
22.	8-24	Sale	8,600.30	8,600.30			10, 20	A, C, F
23.	8-24	Sale	175.72	175.72			494	A, 51, 53
24.	8-27	Sale	6,702.10	6,702.10			10, 20, 569	A, C, F
25.	9-8	Sale	18,451.53	18,451.53			10, 20	A, C, F
26.	9-15	Sale	8,528.01		8,528.01		16, 489, 490, 567	A, C, F, 50
27.	9-15	Sale	186.99	186.99			482, 488, 490, 567, 570	A, 46, 53
28.	9-29	Sale	4,645.33		\$ 4,645.33		16, 486, 487, 490, 562, 569	A, C, F, 49
29.	9-29	Sale	205.38	205.38			482, 485, 486, 487, 561, 570	A, 45, 53
30.	10-6	Sale	811.68	811.68			484, 485, 566	A, 44
31.	10-13	Sale	2,617.77	2,617.77			10, 20, 474, 510, 522, 556, 558	A, C, F, 39
32.	11-3	Sale	355.11	355.11			482, 483, 558	A, 43, 53
33.	11-15	Sale	207.90	207.90			494, 495	A, 52, 53
34.	11-24	Sale	157.96	157.96			492	A, 48, 53
35.	12-8	Sale	605.34	605.34			482, 491	A, 47, 53
			<u>\$204,641.86</u>	<u>\$ 55,967.40</u>	<u>\$ 31,752.86</u>	<u>\$116,921.60</u>		

Item No.	Date	Nature of Item or Transaction	Partnership Receipts	Partnership Receipts Received By			Reference to Record	
				Wixom	Keller	Wasatch Loan %	Page of Transcript	Number of Exhibits
36.	2-4	R.R. Steer	\$ 150.00	\$ 150.00	\$	\$	13, 49, 590	A, C
37.	7-15	Calif. Steer	245.10	245.10			12, 49	C
38.	9-7	Sale	999.37	999.37			281	29
39.	9-8	Sale	1,330.38	1,330.38			281, 284	29
40.	10-10	Sale	357.94	357.94			281	29
41.	11-28	Sale	1,491.33	1,491.33			281	29
42.	48-49	Pasture	1,772.70	1,772.70			423, 463	
43.	5-3	Sale	192.01		192.01		62, 270	C
44.	1949	Withdrawal		884.54		-884.54	238, 241, 347	17, R
			<u>\$211,180.69</u>	<u>\$ 63,198.76</u>	<u>\$ 31,944.87</u>	<u>\$116,037.06</u>		
1950								
45.	2-27	Sale	\$ 476.30	\$	\$ 476.30	\$	281, 285, 312	29
46.	3-6	Range Sale	31,500.00	30,000.00	1,500.00		12, 212, 215, 216, 229, 245, 318	C
							16, 319	
Total Receipts			<u>\$243,156.99</u>	<u>\$ 93,198.76</u>	<u>\$ 33,921.17</u>	<u>\$116,037.06</u>		

Item No.	Date 1947	Nature of Item or Transaction	Partnership Expenditures	Partnership Expenditures Paid By			Reference to Record	
				Wixom	Keller	Wasatch Loan %	Page of Transcript	Number
47.		Range Lease	\$ 87.32	\$ 87.32	\$		13, 61	C, D
48.		Interest	1,526.13			1,526.13	61, 226, 228, 343	C, D, 17
49.		Kimber Hay	8,670.00	8,670.00			13, 61, 220	C, D, E, P, Q
50.		Kimber Pasture	1,842.75	1,842.75			13, 16, 61, 198, 350	C, D, E, Q
51.		Supplies	134.32	134.32			14, 61, 251	C, D
52.		Vaccine and Br.	17.65	17.65			14, 61	C, D, E
53.		Br. Chute	192.50	192.50			61, 205, 206	C, D, 13
54.		Wages	95.60	95.60			61	C, D
55.		Freight	1,755.04	1,755.04			61, 205, 206, 249, 250	C, D, 13
56.		1947 Taxes	231.48	231.48			14, 251, 252, 360	C, D, 20
57.		Purchase	168.87	168.87			14, 22, 61	C, D, H
58.		Feed Lot	10,619.07		10,619.07		62, 105 to 115, 172, 195, 215, 224	C, D, K, T
59.		Freight	586.88		586.88		16, 193	C, D, K, T, 9
60.	6-9	Purchase	3,710.88			3,710.88	232	D, H, 17
61.	6-9	Purchase	1,107.20			1,107.20	232	D, H, 17
62.	8-13	Purchase	6,277.62			6,277.62	233	H, 17
63.	8-20	Purchase	12,047.81			12,047.81	233	D, H, 17
64.	8-26	Purchase	4,039.33			4,039.33	234	D, H, 17
65.	9-29	Purchase	622.81			622.81	235	D, H, 17
66.	9-29	Purchase	436.00			436.00	235	D, H, 17
67.	10-13	Purchase	4,654.35			4,654.35	235	D, H, 17
68.	10-13	Purchase	1,030.14			1,030.14	235	D, H, 17
69.	10-13	Purchase	1,191.80			1,191.80	235	D, H, 17
70.	10-13	Purchase	1,188.70			1,188.70	235	D, H, 17
71.	10-13	Purchase	318.20			318.20	235	D, H, 17
72.	9-29	Purchase	1,500.00			1,500.00	235	D, H, 17
73.	10-20	Purchase	14,379.30			14,379.30	235	D, H, 17
74.	11-8	Purchase	12,321.65			12,321.65	236	D, H, 17
75.		Keller Advance	9,000.00			9,000.00	162, 163, 170, 232, 262, 328, 406, 407, 409, 413, 414, 415, 436, 437	17
76.		Wasatch Note	32,252.77			32,252.77	95, 100, 184, 230, 241, 404	4, 17

Item No.	Date 1948	Nature of Item or Transaction	Partnership Expenditures	Partnership Expenditures Paid By			Reference to Record	
				Wixom	Keller	Wasatch Loan %	Page of Transcript	Number of Exhibits
77.		Freight	\$ 90.09	\$ 90.09	\$	\$	61, 250, 359	C
78.		Graz. Fee	266.92	266.92			61, 305, 415	C
79.		R.R. Lease	87.32	87.32			14, 61	C
80.		Graz. Assn.	117.84	117.84			14, 61	C
81.		Kimber Hay	1,037.36	1,037.36			61, 300, 310	C
82.		Inspections	15.00	15.00			14, 61	C
83.		Wages	915.50	915.50			14, 61	C
84.		Supplies	395.26	395.26			14, 61	C
85.		Freight	747.50	747.50			61, 250	C
86.		Freight	165.70	165.70			61, 250	C
87.		Wages	1,117.60		1,117.60		98, 389	N
88.		'48 Taxes	788.49	788.49			253	21
89.		Pasture	81.00	81.00			316	
90.		Interest	1,337.32			1,337.32	236, 245	17
91.	3-17	Purchase	2,523.10			2,523.10	237	17
92.	3-19	Purchase	4,571.95			4,571.95	237, 349	17
93.		Freight	52.80	52.80			250	
94.		Supplies	133.50		133.50		16, 276	C, M
			<u>\$146,450.42</u>	<u>\$ 17,956.31</u>	<u>\$ 12,457.05</u>	<u>\$116,037.06</u>		

Item No.	Date 1949	Nature of Item or Transaction	Partnership Expenditures	Partnership Expenditures Paid By			Reference to Record	
				Wixom	Keller	Wasatch Loan %	Page of Transcript	Number of Exhibits
95.		R.R. Lease	\$ 87.50	\$ 87.50	\$		14, 61	C
96.		Winter Steer	20.00	20.00			14, 61	C
97.		Survey	50.00	50.00			14, 61	C
98.		Graz. Fee	269.29	269.29			14, 61, 309	C
99.		Recond. Deed	3.25	3.25			14, 61	C
100.		Oats	41.00	41.00			15, 61	C
101.		Fencing Sup.	2,374.57	2,374.57			15, 61	C
102.		Wages	1,036.26	1,036.26			15, 61	C
103.		'49 Taxes	393.38	393.38			61, 257, 259	C, 22
104.		Trucking	120.00		120.00		16	C
105.		Fenc. Sup.	95.38		95.38		276, 277	M
106.		Grass Seed	23.75		23.75		67, 279	
107.		Steel Tape	11.00	11.00			341, 451	
108.		Hay Advance	2,000.00	2,000.00			311	
109.	3 yrs.	Equip. Use, Wages..	2,500.00	2,500.00			317, 340, 341, 342, 459, 501	
110.	49	Legal, Abstract	592.50	592.50			310, 319	
111.	48-49	Walt Thurston	325.00	325.00			310, 311	
112.	3 yrs.	Wixom, Gas, Oil....	6,885.00	6,885.00			316, 337, 338, 339, 340, 459	
113.		Land Pur.	1,000.00	1,000.00			14, 61	C
114.	3 yrs.	Keller Expense	4,866.88		4,866.88		453, 457, 459, 460	38
115.		Purchase	2,115.88		2,115.88		64, 239, 308	C, R, 17, 27, 28
116.		Purchase	2,497.38	2,497.38			14, 61, 239, 276, 308	C, 28
			<u>\$173,758.44</u>	<u>\$ 38,042.44</u>	<u>\$ 19,678.94</u>	<u>\$116,037.06</u>		
117.	1950	Range Sale	\$ 1,874.19	\$ 1,874.19	\$	\$	216, 217, 218, 219	15
			<u>\$175,632.63</u>	<u>\$ 39,916.63</u>	<u>\$ 19,678.94</u>	<u>\$116,037.06</u>		

MEMO:
Keller owes Wixom

A—On Note	\$ 7,873.62
B—Interest on note allowed by Court	275.57
C—Jeep Repair	4.00
D—Gasoline	12.69
E—Difference on Posts, Wire, etc.	62.00
	<u>\$ 8,227.88</u>

Reference to Record	
Page of Transcript	Number of Exhibits
9, 184, 313, 346, 347, 348, 464	
313, 314, 315, 345 to 348, Findings of Fact §12	A, D, E, Q, 17
313	
313	
645	

RECAPITULATION

	Received or Paid By		
	Wixom	Keller	Wasatch Loan %
Total Partnership Receipts.....	\$ 243,156.99	\$ 93,198.76	\$ 33,921.17
Total Partnership Expenses.....	175,632.63	39,916.63	116,037.06
Net Partnership Income.....	<u>\$ 67,524.36</u>	<u>\$ 53,282.13</u>	<u>\$ 14,242.23</u>
One-half Net P. Income.....	\$ 33,762.18		
Keller Received	14,242.23		
	<u>\$ 19,519.95</u>		
Memo. Keller owes Wixom.....	8,227.88		
Balance Wixom owes Keller.....	<u>\$ 11,292.07</u>		

Appellant, in an effort to reconcile the foregoing with the trial court's judgment of \$13,438.52, makes the following explanation: The items numbered 12 and 44 of said account were probably considered as partnership income; items 109 and 110 of said account were probably omitted from the trial court's calculations as partnership expense; the \$100.00 difference between items 15 and 75 of said account was probably not considered by the trial court; item 117 of said account was considered as \$1762.79 in the Findings of Fact, which would result in Wixom owing Keller \$13,527.86 or \$89.34 more than the amount of the trial court's judgment, which difference might be accounted for by arithmetical errors. The appellant's contentions of fundamental error will be hereinafter emphasized.

POINT I.

THE SUM OF \$483.14 OF THE ITEM OF \$504.88 SET FORTH IN PARAGRAPH 15, PAGE 5 OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IS NOT PARTNERSHIP INCOME.

The item in paragraph 15, page 5 of said Findings is identified as follows:

"10-15-47	Sold at Ogden, Utah
3 steers	\$504.88"

This item is identified in the account set forth in this petition as Item 12.

The trial court, in its Findings of Fact and Conclusions of Law, considered this item as partnership income. The evidence clearly shows that on October 13, 1947, the partnership purchased cattle at Ogden, Utah, amounting to \$2,221.94. (See Items No. 68 and 69 of the account herein, and Tr. 105 and 268.) In making this purchase,

Keller issued a partnership draft for \$2,705.08 (Tr. 268-270, and Ex. 17 and R.) The difference between the purchase price of the partnership cattle and the amount of the draft is \$483.14, which latter amount was appropriated by Keller for his own personal use. (Tr. 268-270 and Ex. 17 and R.) Wixom, therefore, charged Keller interest for the use of this money in the sum of \$21.74, which is identified as partnership income and designated as Item No. 12 of the account herein. (Tr. 104, 105, 235, 267 to 270, 314, 348, 496 and Ex. A, C, D, H, 17 and R.)

Close scrutiny of the record reveals that it is void of any evidence whatsoever that there was a sale of partnership cattle for the amount of \$504.88, but on the contrary, clearly shows that the trial court made an error in its Findings of Fact and Conclusions of Law in crediting this amount as a partnership receipt from the sale of cattle.

It is submitted that the sum of \$483.14 is not partnership income, but rather partnership funds used by Keller for his own personal use.

POINT II.

THE SUM OF \$884.54 WITHDRAWN BY WIXOM FROM THE WASATCH LIVESTOCK LOAN COMPANY WHEN THE PARTNERSHIP LOAN ACCOUNT WITH SAID COMPANY WAS CLOSED OUT IS NOT INCOME.

The appellant directs the court's attention to Item No. 44 in the above detailed account in the sum of \$884.54. There is no specific finding made by the trial court as to whether it was considered an item of income or not.

If this was considered as income, it was clearly error for the reason it was a check drawn by Wixom to close

out the Wasatch Livestock Loan Company partnership loan account. (Tr. 238, 241, 314 and Ex. R.)

POINT III.

WIXOM IS ENTITLED TO CREDIT FOR \$592.50 FOR PARTNERSHIP EXPENSES PAID BY HIM.

At Item No. 110 of the account herein, for the sum of \$592.50, the cost of abstract and legal fees on partnership property (Tr. 310, 319, Wixom deposition 32, 33), the trial court did not make any specific finding regarding this item, and it cannot be determined by the appellant whether or not this amount was considered in any manner by the trial court in arriving at its decision. Assuming that it was not, appellant contends that the court was in error for the reason that based upon the record and the evidence which is undisputed, it was a proper partnership expense.

POINT IV.

THE DIFFERENCE BETWEEN THE PARTNERSHIP MONEY WITHDRAWN BY KELLER, TO-WIT, \$9,000.00, AND THE AMOUNT RETURNED BY HIM OF \$9,100.00, IS INCOME.

The court's attention is called to Items No. 15 and 75 of the account herein. On June 4, 1947, Keller drew a draft on the partnership account with the Wasatch Livestock Loan Company in the amount of \$9,000.00 in favor of Valdo D. Benson for the purchase of feed. (Ex. 17) He returned this money to the partnership account with said Loan Company on July 26, 1947, together with \$100.00 interest, described as a penalty in Exhibit R and 23.

There is no specific finding on these two items, whether the \$100.00 comprising a part of Item No. 15 was

treated as income or not, or even considered by the trial court. If it were not treated as income, the trial court erred. (Tr. 162, 173, 170, 232, 262, 328, 406, 407, 409, 413 to 415, 436 to 437, and Ex. 8, 17, 23 and R.)

POINT V.

THE EXPENSES INCURRED BY WIXOM IN SELLING THE PARTNERSHIP REAL PROPERTY IN THE SUM OF \$1,874.19 IS A PROPER PARTNERSHIP EXPENSE.

The range land belonging to the partnership was sold the early part of 1950. In paragraph 11 of the trial court's Findings of Fact and Conclusions of Law, the court found the expense of sale to be \$1762.79.

The record shows that said expenses were as follows: Real estate commission, \$1500.00; legal fees to McNamara and Robbins, Elko, Nevada, \$236.69; Nevada Bank of Commerce, \$62.50; and Wixom travel, telephone and wire expense, \$75.00, for a total of \$1874.19. See Item No. 117 of account. (Tr. 216 to 219, and Ex. 15.)

POINT VI.

THE EXPENSES INCURRED BY WIXOM FOR USE OF EQUIPMENT AND AFTER JULY, 1949, FOR HIRED HELP, FEED FOR CATTLE AND TRUCKING CATTLE, ARE A PROPER PARTNERSHIP EXPENSE.

Wixom expended for and on behalf of the partnership for use of tractor, post hole digger, steel warehouse, bunkhouse and tools, and after July, 1949, for hired help, feed for cattle and trucking cattle, the sum of \$2500.00. See Item No. 109 of account herein. There is no specific finding whether the amount was allowed or rejected by the trial court in arriving at its judgment. If the trial court did not allow this item, then appellant submits that the court was in error. (Tr. 317, 340-342.)

POINT VII.

WIXOM IS ENTITLED TO CREDIT FROM KELLER FOR INTEREST ON THE BALANCE OF THE PURCHASE PRICE FOR A ONE-HALF INTEREST IN THE PARTNERSHIP AS PER THE TERMS OF MEMORANDUM AGREEMENT.

The trial court erred in not allowing interest on the personal obligation due Wixom by Keller on the unpaid balance of the purchase price of the one-half interest in the partnership as per the terms of purchase agreement. In paragraph 12 of the trial court's Findings of Fact and Conclusions of Law, the sum of \$275.57 was allowed as interest.

By the Memorandum Agreement executed by the parties hereto, dated March 19, 1947, Keller agreed to pay Wixom \$7,873.62 principal, the balance due on purchase price of the one-half interest, together with interest at 7% per annum from March 19, 1947 until paid. (Ex. B, Tr. 4 to 9, 230, 313 to 315, and 464 to 465). The trial court determined, as set forth in Para. 12 of the Findings of Fact and Conclusions of Law, that there were sufficient partnership profits in the possession of Wixom to satisfy the personal obligation of Keller to Wixom as of September 13, 1947, and the court computed the accrued interest to be \$275.57.

Appellant contends that the calculation of the trial judge was wholly erroneous and not based on the facts and the evidence in the case.

March 19, 1947, Keller and Wixom were jointly indebted to the Wasatch Livestock Loan Company in the sum of \$32,252.77 (Tr. 95, 100, 184, 230 to 241, 404 and Ex. 4, 17, B, R and S), and they continued at all times to be indebted to said loan company throughout the year

1947, and up to August 27, 1948. (Ex. R.)

On September 11th and again on September 12, 1947, Wixom sold partnership cattle and received partnership funds amounting to \$38,040.31. (Tr. 10, 16, 20 and Ex. C, D, E, K, P and Q.) These were the only partnership funds received by Wixom in 1947. Wixom used this money to pay partnership obligations as follows:

Wasatch Livestock Loan Co. on loan.....\$20,000.00

(Tr. 16, 243 and 365, Ex. E and R)

Rulon M. Keller on Idaho Falls Feed Lot Bill.. 3,722.65

(Tr. 16, 243 and Ex. E)

For the Payment of 1947 Partnership

Operating Expenses 13,195.53

(Tr. 13, 14, 205, 226, 250, 360 and

Ex. C, D, E, G and H) _____

Totaling\$36,918.18

The balance of \$1,122.13 was used by Wixom to pay on 1948 partnership operating costs. (Tr. 14, 250, 253, 300 and 389.)

It is obvious there were no partnership profits available in Wixom's possession or in any partnership funds to discharge the personal obligation of said note of Keller to Wixom during the year 1947.

In 1948, Wixom received partnership funds totaling \$41,649.74. (Tr. 10, 16, 482, 484, 485, 491, 492, 495, and Ex. A, F and C.) Wixom paid partnership operating expenses in 1948 in the sum of \$4,760.78 (Tr. 14, 16, 250, 253, 300, 316, 359 and 415), leaving a balance of \$38,011.09.

During 1947 and 1948, Keller received partnership funds in the sum of \$31,752.86. (Tr. 10, 16, 77, 235, 244,

264, 267 and 645.) During these two years, Keller paid partnership expenses of \$12,457.05. (Tr. 16, 172, 276 and 389.) The balance of partnership funds in Keller's possession for these two years was \$18,295.81.

At this time, funds held by Wixom exceeded partnerships funds held by Keller in the amount of \$19,715.28. The partnership continued operations during 1949 and the partnership funds in the possession of each of the respective parties hereto were used to purchase livestock, feed and pay operating costs and expenses.

In 1949, Wixom received partnership funds in the sum of \$7,231.36. (Tr. 13, 62, 270, 281, 347, 423 and 463.) Wixom paid partnership expenses in the amount of \$20,086.13. (Tr. 14, 15, 64, 310, 340, 341, 342, 451, 459, and 501.) Wixom's partnership expenditures for 1949 exceeded partnership receipts that came to him in the amount of \$12,854.77. In 1949 Keller's partnership receipts totaled \$192.01. (Tr. 62, 270.) Keller paid partnership expenses during this year amounting to \$7,221.89 (Tr. 64, 120, 277, 279, 453), which sum included the arbitrary amount of \$4,866.88 allowed him by the Trial Court for claimed partnership expenses. (Tr. 453 to 460 and Ex. 38 and Item No. 114 of account herein.)

At the close of 1949, the partnership was still a going concern and it was not until March 6, 1950, when the range land belonging to the partnership (Schedule B of Exhibit 3), was sold for \$31,500.00, that there were sufficient partnership funds available to discharge all obligations of the partnership, and make available to Keller sufficient partnership funds to pay his personal obligations in the form of a note to Wixom in the amount

of \$7,873.62, plus interest at the rate of 7% per annum from March 19, 1947 until paid.

It is submitted that the trial court erred in not allowing Wixom interest in accordance with express terms of the agreement, to-wit: The sum of \$1633.56 interest, instead of the sum of \$275.57 as determined by the court in paragraph 12 of the Findings of Fact and Conclusions of Law.

POINT VIII.

WIXOM IS ENTITLED TO REIMBURSEMENT FOR EXPENSES INCURRED BY HIM IN PROTECTING PARTNERSHIP TAYLOR GRAZING RIGHTS IN THE SUM OF \$3411.52.

At Item 7 of Point I, Appellant's Brief on appeal herein, the appellant asserts that he is entitled to a specific finding on his expenditures of \$3411.52 for conserving partnership summer Taylor grazing rights. The trial court, while there is no precise finding on this claim for partnership expenditures, indicated that it was not an allowable claim. (Tr. 458.) For this reason your petitioner has not included said expenditure as an item in the account herein. The court's attention is directed to the fact that the summer Taylor grazing rights comprised a valuable part of the partnership assets. (Tr. 303, 305, 307, 357, 400 to 401, 427, and Ex. 3.)

The summer Taylor grazing rights belonging to the partnership were dependent upon and were established by the base property, which is specifically described in Exhibit A of part of appellant's Exhibit 3.

In order to enjoy the Taylor grazing rights on the public domain, the winter base property and the summer range rights must be beneficially used by the partners. (Ex. 37, p. 7, sec. 6 (c), (1), (6), (7), and (9) .)

During the summer of 1948, Kimber, the party purchasing the base property from Wixom (see Exhibit 3), with Keller's permission only (Tr. 94) pastured the hay land on said winter base property, and consequently no hay was harvested and available to winter cattle on the winter base property during the winter season of 1948-1949. (Tr. 220, 428.)

In the fall of 1948, the Taylor grazing permittees who enjoyed summer grazing rights in the same area where the partnership was allotted its summer grazing rights on the public domain, contested the summer grazing rights of the partnership on the ground the partnership had no base property. (Tr. 307, 427.) To protect and conserve the summer grazing rights required the wintering of partnership cattle on said base property during the winter season of 1948-1949. Keller refused to winter any partnership cattle on the winter base property at this time. Wixom, to protect said partnership rights, purchased a minimum number of cattle to winter on the base property. (Tr. 430, 431.) No hay having been harvested on the base property and no feed being available in the vicinity of the base property, Wixom was compelled to buy feed at Twin Falls, Idaho, and truck the feed to the ranch at an additional cost of \$3411.52 over and above what the cost would have been had the feed been available on the winter base property or in the immediate vicinity of the same. (Tr. 246, 430, 431). It is the *extra* expense of \$3411.52 over and above what the cost would have been had feed been available on the base property or in the immediate vicinity and which extra expense was incurred by Wixom to conserve partner-

ship assets that Wixom contends the partnership should pay, (Tr. 90, 246, 307, 316, 336, 357, 427, 428, 429, 430, 431, 458 and Ex. 37), since in so doing Wixom succeeded in preserving the summer Taylor grazing rights of the partnership and said rights were sold with the range land March 6, 1950. (Tr. 245.)

POINT IX.

KELLER IS NOT ENTITLED TO REIMBURSEMENT FOR ALLEGED PARTNERSHIP EXPENSES IN THE SUM OF \$4866.88.

The court's attention is directed to Item No. 114 in the account, supra, in the sum of \$4866.88, and for which there was no specific finding made in the trial court's Findings of Fact and Conclusions of Law. This item involves the expense Keller claimed to be expended on partnership business for the years 1947, 1948 and 1949. Keller based his claim on a percentage of his personal business operations at Idaho Falls and Preston, Idaho, and which were entirely separate and apart from partnership operations, (Tr. 453-457 and Ex. 38), and there was no direct testimony on his partnership activity. That said amount is an arbitrary figure, see the statement of Mr. Anderson, counsel for plaintiff, that said claim was offered only as rebuttal to Wixom's expense (Tr. 457) and how the amount was arrived at by the court cannot be determined either from the record or the Findings of the court. This fact is further supported by the testimony of Wixom, which is undisputed, that he in his calculations allowed for Keller's partnership expenses during said period. (Tr. 337-340.)

POINT X.

KELLER SHOULD ACCOUNT TO THE PARTNERSHIP FOR THE 214 HEAD OF K1 (PARTNERSHIP) CATTLE FED BY HIM AT IDAHO FALLS, IDAHO, AND WHICH WERE SOLD BY HIM.

Appellant further invites the court's attention to the trial court's error in failing to make a specific finding in the Findings of Fact and Conclusions of Law regarding 214 head of partnership K1 steers that were fed at Idaho Falls, Idaho, and marketed under the supervision of Keller, as to whether the proper cattle and the correct proceeds were accounted for. Keller sold 211 head of the steers to Cudahy Packing Company and the appellant contends that on the basis of the record the proper cattle and proper moneys were not accounted for.

To assist the court in this regard, appellant is setting out a schedule of the shipments of K1 cattle to Cudahy Packing Company by Keller and the moneys which were accounted for as shown by the record, except the \$5.00 per head advance under the Cudahy contract, (Ex. 35 and Items 1 and 10 of account herein) :

<i>Item</i>	<i>Date of Delivery</i>	<i>Amount Received</i>	<i>Money to us</i>	<i>K1 Partner-ship</i>		<i>Ex. No.</i>
				<i>Cattle</i>	<i>Other Cattle</i>	
1	7-15-47	\$ 6,399.84	Yes	28	2	66, 74
2	7-16-47	5,658.06	Yes	....	31	33
3	7-18-47	6,165.98	No	28	2	34
4	7-23-47	5,472.26	No	3	33	60, 69
5	8-13-47	12,913.12	Yes	61	....	57, 58
6	8-14-47	6,283.90	Yes	30	....	59, 71
7	8-15-47	6,124.62	Yes	30	....	56, 71
8	8-22-47	12,250.82	No	....	6	63, 70
				....	28	64, 73
9	8-23-47	5,805.84	Yes	....	7	
				2	24	62, 73
				27	4	61, 73
10	9- 4-47	5,488.82	No	2	28	54, 68
Total				211		

From the above schedule, which is based on the record, it is obvious that moneys received from the sale of other cattle than K1 partnership cattle were accounted for, and moneys received from the sale of K1 cattle belonging to the partnership were not accounted for.

At Item 1 of the above schedule, the sum of \$6,399.84 went to the partnership, and in this particular shipment there were two head of cattle which did not belong to the partnership. At Item 4 of the schedule it appears that Keller delivered three head of K1 cattle to Cudahy for which no moneys were received by the partnership. Also, at Items 8, 9 and 10 there were 31 head of K1 cattle delivered to Cudahy, and the schedule shows that the partnership received \$5,805.84, but it cannot be determined whether this was the money received from the sale of K1 cattle or other cattle.

The court's attention is further called to the fact that at the first trial Keller accounted to the court in Item 2 for \$5,658.06 when there were no K1 cattle delivered to Cudahy Packing Company, and at the second trial the trial court made an adjustment of this particular item and required Keller to account for the proceeds set out as Item 3 of the schedule in the sum of \$6,165.98, and here again the record shows that there were 28 head of K1 cattle delivered to Cudahy Packing Company and 2 head of other cattle.

In regard to the other 3 head of K1 cattle herein questioned, the record shows that one of these steers died (Tr. 10), one doggie steer was sold by Keller for \$68.00 (Tr. 267 and 311), and the other steer, making a total of 214 head of K1 cattle, and which was described by Keller

as an average steer, was sold for \$223.73. (Tr. 195, 196, 244, and Ex. C and K.)

Based on the above record, it is submitted by the appellant that Keller didn't account for all of the K1 (partnership) cattle sold by him. (Tr. 20, 21, 69 to 73, 76 to 78, 115, 148 to 153, 161 to 166, 259 to 267, 319, 358 to 366, 395 to 399, 433 to 444, 459 to 465, 466, 641 to 645, Keller's deposition 16, 20, 21, 23, 24, 25, 26, 39, 40.)

One hundred twenty-one head of K1 (partnership) cattle were accounted for (Items 5, 6 and 7 of schedule above), leaving a total of 90 head which were sold by Keller with other cattle. There is no way of determining what the 90 head of K1 (partnership) cattle brought and what the other cattle (Keller's feed lot cattle) brought. If Keller's testimony that the average K1 steer brought \$223.73, the 90 head would have brought a total of \$20,135.70, whereas Keller accounted to the partnership for the 90 head the sum of \$18,826.40.

POINT XI.

KELLER IS ENTITLED TO RECEIVE FROM THE PARTNERSHIP HIS ACTUAL FEED COSTS FOR FEEDING THE 214 HEAD OF K1 (PARTNERSHIP) CATTLE FED AT HIS FEED LOT IN IDAHO FALLS DURING THE SUMMER OF 1947 WHICH COST SHOULD NOT EXCEED \$30.00 PER HEAD, OR A TOTAL OF \$6,420.00.

During the summer of 1947, 214 head of K1 (partnership) cattle were fed at Idaho Falls, Idaho, in Keller's feed lot by Keller.

The partnership was to pay Keller for feeding said cattle his actual costs (Tr. 113, 192, 193) estimated by Keller to be \$27.50 to \$30.00 per head. (Tr. 113, 192, 193.)

Keller submitted to Wixom an unsupported statement (Ex. T) that the feed costs amounted to \$10,619.07

(Tr. 432, Ex. T and K), or \$49.62 per steer.

The record is silent as to Keller's actual feed costs, and appellant submits that the partnership cannot be charged for the cost of feeding said steers until the costs have been determined, and the trial court erred in allowing Keller an offset of \$10,619.07.

From the record (Tr. 113, 192, 193) the amount of Keller's feed cost for feeding 214 head K1 (partnership) cattle at his Idaho Falls feed lot should be reduced to \$30.00 per head, or \$6420.00, making a deduction of \$4,199.07. (Tr. 62 to 64, 105 to 114, 159, 160, 192 to 198, 243, 259, 260, 311, 312, 432, 446 to 448, 459, 460, Keller Deposition 16, 17, 18, 21.)

CONCLUSION

The issue of this case is whether fundamental error was committed by the trial court in its accounting between the partners.

It is submitted that such error was committed and because of it, Keller was given judgment for \$10,397.80 more than can be justified or supported by the evidence and the law.

Wherefore, appellant prays for an order of this court granting him the privilege of reargument and rehearing.

Respectfully submitted,

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Served the foregoing Petition for Rehearing upon
Newel G. Daines, Cache Valley Bank Building, Logan,
Utah, and Walter H. Anderson, 306 North Main, Poca-
tello, Idaho, attorneys for plaintiff and appellee, by mail-
ing copies this day of May, 1953.
