

1980

William B. Harris v. Genave H. Tanner, Grace H. Mcphie, Bannie H. Durfee, and Grant H. Harris and James H. Harris v. William B. Harris : Brief of Appellant

Utah Supreme Court

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HUNT, LAREW & KINATEDER; Attorney for Respondents; E.J. Skeen; Attorney for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM B. HARRIS,

Plaintiff-Appellant,

vs.

GENAVE H. TANNER, GRACE H.  
McPHIE, BANNIE H. DURFEE,  
and GRANT H. HARRIS,

Defendants-Respondents,

and

JAMES H. HARRIS,

Plaintiff in Inter-  
vention-Respondent,

vs.

WILLIAM B. HARRIS,

Defendant in Inter-  
vention-Appellant.

etc.

Case No. 16810

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District  
in and for Tooele County  
Honorable David K. Winder, District Judge

SKEEN AND SKEEN  
by E. J. SKEEN  
536 East 400 South  
Salt Lake City, Utah 84102

Attorneys for Plaintiff-Appellant

HUNT, LAREW & KINATEDER  
By HOLLIS S. HUNT  
345 South State Street, Suite 200  
Salt Lake City, Utah 84111

FILED

APR 21 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM B. HARRIS,  
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vs.

GENAVE H. TANNER, GRACE H.  
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and GRANT H. HARRIS,  
Defendants-Respondents,  
and

JAMES H. HARRIS,  
Plaintiff in Inter-  
vention-Respondent,  
vs.

WILLIAM B. HARRIS,  
Defendant in Inter-  
vention-Appellant.

---

In the Matter of the Estate  
of

JAMES HENRY HARRIS, also  
known as JAMES H. HARRIS,  
Deceased.

---

WILLIAM B. HARRIS,  
Plaintiff-Appellant  
vs.

GRACE HARRIS McPHIE, et al,  
Defendants-Respondents.

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Supreme Court

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SKEEN AND SKEEN  
by E. J. SKEEN  
536 East 400 South  
Salt Lake City, Utah 84102

Attorneys for Plaintiff-Appellant

HUNT, LAREW & KINATEDER  
by HOLLIS S. HUNT  
345 South State Street, Suite 200  
Salt Lake City, Utah 84111

Attorneys for Defendants-Respondents

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APPELLANT'S BRIEF

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STATEMENT OF KIND OF CASE

The above consolidated cases Nos. C-8326 and C-8984 arose out of a partnership between James H. Harris, now deceased, and his son William B. Harris, the appellant, and involve the identification of partnership property, accounting, and the winding up of partnership affairs.

### DISPOSITION IN LOWER COURT

The trial court made and entered a judgment determining the value of certain items of partnership property, determined that William B. Harris must pay the estate of his deceased partner for the property in his possession, denied further partnership accounting, and declared that there had been a winding up of the affairs of the partnership and that William B. Harris had no claim against the Estate of James H. Harris, Deceased.

### RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the judgment and a remand for the purpose of hearing evidence on remaining issues in the two adversary cases and for an order requiring that the personal representatives make an accounting in the James H. Harris Estate in accordance with the probate code, so that the appellant will have an opportunity to claim ownership of certain property listed in the inventory.

### PRELIMINARY STATEMENT

The records in the consolidated adversary cases and in the probate proceeding are numbered separately as are the transcripts. All references in this brief will be to page numbers in an identified record or the transcript. It will be noted that the pages in the records are numbered from the bottom



of the file to the top. Thus, the first page of a document in the file bears a higher number than the last page.

### STATEMENT OF FACTS

James H. Harris and his son William B. Harris, herein referred to as "James" and "William", became partners in the operation of a livestock and farming business in the 1930's, which partnership is herein referred to as the "Harris-Harris" partnership. About 1943, both James and William entered into a partnership with Wilton Fidler and Merrill Fidler, herein referred to as the "Harris-Fidler" partnership. The Harris-Fidler partnership was dissolved by a court decree in 1970 when James was nearly 90 years old. Three of his daughters and a son claimed that their brother, William, had no interest, as a partner or otherwise, in land, sheep or other assets of the business and prevented him from continuing in the livestock and farming operations. William filed a suit, No. C-8326, against his sisters and brother to restrain them from interfering with the livestock and farming business, for damages and for other relief. James intervened, claiming ownership of certain land that appeared on the record in William's name and certain personal property, and that William had defrauded him. (R. 8984 - p. 109)

In 1975, James died and the above entitled probate proceeding was filed. Thereafter, the second suit, No. 8984,

was filed against the personal representatives in that capacity and as individuals for an accounting for Harris-Harris partnership money and property and for hay and grain converted and sold, for the winding up of the partnership business and for other relief. (R. 8984 - p. 8) The three cases were consolidated for trial and were tried before Hon. Bryant H. Croft, who wrote a detailed memorandum decision, dated November 3, 1977, (R. 8984 - pp. 110 - 90), which the parties stipulated would be considered findings of fact and conclusions of law. (R. 8326 - pp 52, 61) A judgment dated December 14, 1977, based on such findings and conclusions determined that James and William were partners, that they were equal partners in the Harris-Fidler partnership, that William, individually, owned certain land and that other land was partnership land; and that certain designated and described personal property, consisting of farm and livestock equipment, was partnership property. (R. 8326 - pp 69 - 62)

The court also determined that the accounts for partnership income for the years 1972, 1973 and 1974 were settled and determined that the assets of the Harris-Harris partnership consisted of (a) certain farm and sheep equipment, listed below, taken from the partnership income tax return:

<u>Item</u>	<u>Date Acquired</u>	<u>Cost</u>
Plow	1971	\$2,100.00
Sprayer	1971	871.00
Sheep Camp	1971	1,600.00
Tents	1971	522.50

<u>Item</u>	<u>Date Acquired</u>	<u>Cost</u>
Bucks	1971	135.00
Disc	1970	1,651.00
Bucks	1970	467.00
Bucks	1969	360.00
Loader	1969	325.00
Truck	1969	3,780.00
Drill	1969	3,000.00
Elevator	1968	258.00
Truck	1968	6,000.00
Plow	1967	923.00
Baler	1967	2,170.00
Tractor	1965	5,340.00
Typewriter	1964	203.00
Tiller	1964	2,070.00
Plow	1962	481.00

Also, all fully depreciated items which formerly appeared in the partnership depreciation schedule; (b) all Bureau of Land Management Grazing Permits; (c) all property which came to James and William upon the dissolution of the Harris-Fidler partnership; (d) certain cashiers checks; and (e) land in Tooele County.

The Court gave a judgment to William for \$5,287.50 for William's one-half of the proceeds from the sale of certain grazing permits to one Joe Fawcett, and directed that the cashier's checks be cashed and the proceeds be equally divided. In paragraphs 6, 7 and 8 of the judgment it is provided:

"6. All monies contained in the James H. Harris bank accounts as testified to by Genave H. Tanner, including those funds transferred by her before the death of James H. Harris, shall be accounted for by the co-executrices in the probate estate.

"7. That the claims of the Estate of James Henry Harris, Deceased, against William B. Harris and the claims of William B. Harris against the Estate of James H. Harris for an accounting for income received from the farming and sheep businesses conducted by the partnership through the years 1972 to 1974, inclusive, are dismissed, as the income tax returns show that the partners had approximately equal receipts.

"8. Only one-half of the assets that came out of the Harris-Fidler partnership and one-half of the assets of the James Henry Harris and William B. Harris partnership, are assets of the estate of James Henry Harris deceased, and are subject to probate, and none of the interest of William B. Harris in such partnership assets are subject to the obligations or expenses of said estate." (R. 8326, p. 64)

All claims and counterclaims for money damages asserted by the parties in Cases Nos. 8326 and 8984 and for attorneys fees and costs were dismissed.

No appeal was taken from the Judgment.

In July 1978, William filed a motion in the consolidated cases for an order enforcing the Judgment to require (1) that the Harris estate pay to William \$5,287.50 as ordered by the Court; (2) that the estate pay to William one-half of all money received from the Harris-Fidler partnership upon its dissolution; (3) that the personal representatives of the estate make an accounting for all Harris-Harris partnership property in their possession; (4) that such personal representatives make an

accounting in writing for all Harris-Harris partnership property sold by James H. Harris and by his estate, with the sales price set opposite each item; (5) that the personal representatives to disclose to the court, in writing, the amounts of Harris Estate funds disbursed, with or without a court order, since the trial; (6) that the personal representatives disclose to the Court in writing the amounts on deposit in certain bank accounts; and (7) that the personal representatives disclose to the court the amounts of money withdrawn from the bank accounts. (8984 - pp. 118 to 116.) On August 9, 1978, William filed a written report of items of personal property in his possession, with the appraised value of each item. (8984 - pp. 121 - 120.)

In September 1978, the personal representatives filed a document entitled "Motion to Compel Disclosure and Objections to Items of Personal Property in Possession of William B. Harris" in which it is stated that William had omitted from his list of personal property certain items sold or used for trade-in purposes; that an order should be made compelling William to produce his books and records regarding utilization of such partnership property since 1973; that the personal representatives object to the appraised valuation of the items in William's list; and that William should be required to account in writing for all property sold or otherwise disposed of prior and subsequent to the death of James. (8984 - pp. 124 - 122).



On September 26, 1978, the personal representatives filed objections to William's motion discussed above, denying (1) that they were obligated to pay to William \$5,287.50 as ordered by Judge Croft; (2) that they were obligated to pay one-half of the money received upon dissolution of Harris-Fidler; and (3) that William has no right to the disclosure of James H. Harris Estate money matters because he was disinherited and had withdrawn his objections to the probate of the will. (8984 - pp. 129 - 126.)

The personal representatives also filed, (a) a list of items of personal property in the possession of the estate, and (b) a list of items of partnership property sold or otherwise disposed of, prior and subsequent to the death of James, consisting of two items: (1) a new Sheep Camp, appraised value \$2,200.00, and (2) "Miscellaneous horses and sheep sold through Lyman Warr as temporary administrator, as per court approved" -- "See Court file". (8984 - pp. 132 - 130.)

With reference to the second item above, it should be noted that in the "Order Authorizing Administrator to Sell livestock and to deliver horse to Vendee upon collection of Sums Due", dated September 8, 1975, it is stated:

"It is further ordered that any claim of William B. Harris to the livestock which is to be sold at auction shall attach to the proceeds of such sale for ultimate resolution in connection with litigation pending, and that the administrator shall pass title to said livestock to the purchaser free and clear of any and all claims of any nature whatsoever." (Est. File No. 1 - 30 - 29)

The estate file contains a petition by the special administrator for approval of first and final account which lists under the heading, "Receipts", livestock and other partnership items, and also hay which William produced and owned, as follows:

"RECEIPTS

"Pine Canyon Dairy, sale of hay	\$ 414.00
The Proud Porker Ranch, sale of hay	250.00
The Rocking R Rodeo Co., sale of hay	1,130.00
Grant Thunderson, sale of hay	15.00
The Proud Porker Ranch, sale of hay	533.75
Gordon Manzione, sale of hay	14.50
Evelyn Johnson, sale of hay	30.00
Gary Ahlstrom, sale of hay	50.00
U. S. Treasurer, tax rebate	200.00
Cook Sheep Company, sale of sheep camp	2,200.00
Proud Porker Ranch, sale of hay	100.00
State Insurance Fund, return of deposit	48.52
Eddie Roberts, sale of sheep	550.00
Foster Nix, sale of bucks	240.00
Producers Livestock, sale of bucks	55.53
Rick Martinez, boarding horse	75.00
Commodity Credit, wool settlement	266.40
Lloyd Cox, sale of horse	150.00
William B. Harris, sale of horses	310.00
Production Credit Assn., shares sale	265.00
Commodity Credit Corp., wool incentive payment	2,206.89
Total Receipts:	<u>\$9,104.59"</u>

(Probate - p. 139)

The motions were set for hearing before the Honorable David K. Winder. At the hearing, after a discussion by the Court and counsel, the Court said:

"Well, let's take, for example, this first item, assets of the Harris-Fidler partnership. I think that we have got to determine what the assets of that partnership were that were distributed to James H. Harris and William B. Harris by the Order. I don't think that Judge Croft -- that there is anything in his decision that adjudicated that. He said, 'One thing is clear and that whatever assets came to the Harris's

were owned equally by James and William and neither could deprive the other of the latter's interest merely by taking over the assets." (Tr. 6-19-79 - p. 8)

Counsel for the respondent argued that Judge Croft's judgment was res judicata as to the assets that came from the Harris-Fidler partnership and that the matter of determining who got what was improper. (Tr. 6-19-79 - pp. 9 - 13). We quote from that transcript, p. 14:

"The Court: I don't relish trying to do it again, but your motion is denied. We are going to go into it. Let's put in the evidence and move this case at hand."

Mr. Wilton Fidler and William B. Harris testified at some length about the money and items of personal property which went to the Harris' upon the dissolution of the partnership. (Tr. 6-19-79 - pp. 14 - 46 and 46 - 60). Mrs. McPhie testified about partnership trucks and farm equipment and then was asked whether she had a list of the assets of the estate and about what money was in the bank. She was then asked about bank accounts existing at the time of her father's death. She said she did not have the bank statements or cancelled checks on hand, but would produce them at 2:00 p.m. (Tr. 6-19-79 - p. 87.)

When court reconvened at 2:00 p.m., and the witness was asked if she had the cancelled checks, Judge Winder stated that during the noon hour he had been reviewing Judge Croft's memorandum decision and had decided that the only partnership property still involved in the case were the items listed on



the depreciation schedules appearing in the Croft Judgment and fully depreciated items formerly listed. He said the \$5,287.50 paid to William for the Joe Fawcett BLM permits squared the account through 1974 and that the monies in the bank account were, according to Judge Croft's memorandum, to be accounted for in the probate estate. The Court held that all items listed in the judgment had been adjudicated to be partnership property and that we are not concerned with any other property except that which had been depreciated out. (Tr. 6-19-79 - pp. 116 - 120)

The trial court, by the reversal of his original ruling, limited the trial to the items of personal property (farm machinery and trucks listed in the Croft Judgment and depreciated items) and made and entered a judgment dated November 8, 1979, declaring that the property listed in para. 1a is in the possession of William and is personal property of the Harris-Harris partnership, with the values having been determined by the court, and the property listed in 1b. is in the possession of the James H. Harris Estate. The judgment then recites that William shall have the right to retain possession of all personal property itemized in 1(a) and the estate shall have the right to retain possession and ownership of all property itemized in paragraph 1(b). In paragraph 6 of the judgment, William B. Harris is ordered to pay the estate \$8,243.50. (R. 8326 - pp. 105, 104).

The judgment then declares, in paragraph 7, that the Harris-Harris partnership is

"....hereby terminated, wound up and the assets consisting of real and personal property are hereby fully and completely designated and distributed to the partners, their heirs and assigns. This termination and distribution of all partnership property both real and personal is inclusive of all the proceeds of the Harris-Fidler Partnership terminated in 1970, which proceeds are included in the distribution of the partnership property of James H. Harris and William B. Harris." (R. 8326 - p. 103)

We also quote paragraph 8:

"8. William B. Harris, as a partner and on behalf of his partnership interest in the Harris-Fidler Partnership and in the James H. Harris and William B. Harris partnership, shall have no further claim whatsoever on the Estate of James H. Harris; his partnership interests being fully adjudicated and determined in this Court proceeding and the prior proceeding before Judge Bryant H. Croft, on July 6, 1977, whose decision was filed on or about November 3, 1977." (R. 8326 - p. 103)

This appeal is taken from the November 8, 1979, judgment.

#### STATEMENT OF POINTS

1. The Court erred in declaring and determining that the assets of the Harris-Harris partnership, including the proceeds from the Harris-Fidler partnership, have been fully and completely designated and distributed and that there has been a winding up of the affairs of the Harris-Harris partnership.

2. The Court erred in determining that William --

"....shall have no further claim whatsoever on the Estate of James H. Harris."

### ARGUMENT

#### POINT I

THE COURT ERRED IN DECLARING AND DETERMINING THAT THE ASSETS OF THE HARRIS-HARRIS PARTNERSHIP, INCLUDING THE PROCEEDS FROM THE HARRIS-FIDLER PARTNERSHIP, HAVE BEEN FULLY AND COMPLETELY DESIGNATED AND DISTRIBUTED AND THAT THERE HAS BEEN A WINDING UP OF THE AFFAIRS OF THE HARRIS-HARRIS PARTNERSHIP

After hearing arguments on the motions of the appellant and respondents to enforce, supplement and carry out the judgment by Judge Croft in the consolidated cases Nos. C 8326 and C 8984, the trial court first decided to take testimony as to the assets of the Harris-Fidler partnership and then changed its mind and stated that the only items of partnership property still involved in the case were the items listed in Judge Croft's memorandum decision and judgment taken from the depreciation schedules and fully depreciated items formerly appearing in such schedule. (Tr. 6-19-97 - pp. 116 - 120). The remainder of the hearing was devoted to these items.

We believe that the case was only partly tried because the trial court ignored many items which were admitted by the respondent to be partnership property and were considered by Judge Croft in his memorandum decision and Judgment to be

partnership property. These are:

1. "Miscellaneous horses and sheep sold through Lyman Warr, as temporary administrator, as per court approved." (R. 8984 - pp 132 - 130)

2. "All property which came to James and William from Harris-Fidler, upon its dissolution, including money, sheep, other personal property, and the proceeds from the sale of partnership property, not included in the individual income tax returns of the partners for the years 1972, 1973, and 1974." (8326 - p. 67A)

3. Money in the bank accounts of James H. Harris, unidentified and unaccounted for by the Personal Representatives.

With respect to Item 1, above, it was admitted that miscellaneous horses and sheep were partnership property, and an inspection of the list of items included in the special administrator's first and final account that, in addition to sheep and horses amounting to \$1,305.53 that the following other items were also partnership property:

"State Insurance fund return of deposit	\$ 48.52
Commodity Credit, wool settlement	266.40
Production Credit Assn., shares sale	265.00
Commodity Credit Corp. - wool incentive pmt	<u>2,206.89</u>
Total	\$2,786.81"

(Probate - p. 139)

The hay items covering hay which the undisputed testimony shows belonged to William personally amounted to \$2,356.75. (Tr. 7-6-77 - pp. 41 - 43.)

For some reason, unknown to the writer, the trial judge made the estate give credit for the sale of the sheep camp to Cook Sheep Company, \$2,200.00, but ignored all of the remaining items in the list. These items could not have been covered in the 1972, 1973, and 1974 tax returns, because the sales took place after James' death.

Item 2, the Harris-Fidler assets, was specifically covered in the Memorandum Decision and Judge Croft's judgment and adjudged to be partnership property, but the trial judge changed his mind after hearing some testimony and he indicated that he would hear no further testimony, except pertaining to farm machinery and equipment. (Tr. 6-19-79 - pp. 116 - 122).

A discussion of Item 3, relating to money in the James H. Harris bank accounts before and after his death, requires a consideration of the testimony of Genave H. Tanner. She testified at the trial before Judge Croft that she handled James' bank accounts before and after his death; that account 0 3340031 at Zions First National Bank had in it about \$26,000.00 at the time of her father's death. She was asked whether at the time of the trial the account was still in the bank in the same names. She answered:

"It was until two months ago. I took the balance left and put it in my own name, which was legal by law, I am sure." (Tanner Tr., pp. 11, 12)

Mrs. Tanner further testified that there was an account in the Commercial Security Bank in James' name and her name with



a balance of \$11,691.62. She was asked if that account was still in existence. She said,

"No, Sir. The day dad passed away he told us to get to the bank. I withdrew \$11,000.00. That we put in First Security under Genevieve H. Tanner, Ellen H. Smith." (Tanner Tr. - 14)

Mrs. Tanner was asked about money in other accounts that came from her father. She said,

"Yes, Sir, in Tracy Collins." (Tanner Tr., p. 15)

She said there was \$12,000.00 at the time the account was opened in 1968; that \$3,700.00 had been drawn out to put in James' checking account.

The check from Fidlers, Ex. P-53, was deposited in James' account.

In view of the testimony referred to above, Judge Croft's memorandum decision and the Judgment require the making of an accounting. He directed such an accounting. See paragraph 6 of the Croft Judgment - page 6, this brief. (R. 8326 - p. 64)

It is apparent that in the review of the memorandum decision and Judgment by Judge Winder, that there was a failure to distinguish between capital assets of the partnerships and income. Judge Croft carefully distinguished between them when he stated unequivocally that the partners were each entitled to one-half of the assets. He said,

"One thing is clear and that is whatever assets came to the Harris's were owned equally

by James and William and neither could deprive the other of the latter's interest merely by taking over the assets." (R. 8984 - p. 106)

Judge Croft determined the issue as to accounting for income by comparing the amounts each partner received during the years 1972, 1973 and 1974. The Judgment reflects this. (R. 8326 - 68 - 66.) The information he used came from income tax returns. Capital assets were not identified.

When Judge Winder decided that all issues as to accounting were settled, he relied on the income settlement for the three years and on the fact that James' Estate had paid to William one-half of the amount, (\$5,287.50) received by James for the BLM permits sold to Joe Fawcett.

"So in other words, it seems to me that all we are talking about, really, is what is listed on the Depreciation Schedules plus personal property fully depreciated prior thereto. And he specifically said that the \$5,287.50 settled it, squared the account through 1974." (Tr. 6-19-79 - p. 117)

The money, testified to above, the sheep, other BLM permits, the wool incentive of \$2,206.89, the horses, and the equipment (except for that listed in the Winder judgment) were completely ignored.

The winding of the Harris-Harris partnership affairs has been irregular and contrary to law from the beginning. It is settled law that once a partnership is shown to exist, there is a presumption that it continues and the burden of proof is on him who asserts its termination. Ogden P & P Co. vs. Wyatt, 59 Utah 481, 204 P. 978 at P. 983, 22 A.L.R. 359. See also

Burke Mach. Co. vs. Copenhagen, 138 Or. 314, 6P2d 886 at p. 888.

In the case of Ferrin vs. Ferrin, 7 Utah 2d 5, 315 P2d 978, one partner expelled the other from the business and took over complete control. The Court held that this did not terminate the partnership.

The case of Graham vs. Street, 109 Utah 460, 166 P 2d 524, holds that where one partner sold the partnership property, it did not terminate the partnership, but equity will treat the partnership as existing and require an accounting for the profits. See also Graham vs. Street, 2 Utah 2d 144, 270 P. 456.

The attention of the Court is called to the statutory provisions relating to the right to wind up the partnership and the rights of the parties respecting the application of partnership property. See Sections 48-1-34, and 48-1-35, UCA 1953.

Section 75-11-9 provides that when a partnership exists between the decedent at the time of his death and any other person, the surviving partner is entitled to the possession of the partnership property and shall wind up its affairs. It has been held that this section is declaratory of the common law.

Wilson vs. Meyer, 23 Utah 529, 65 P. 488.

The Utah Supreme Court has decided that where there was an existing partnership under such circumstance the executors have no right to wind up its affairs.



Cobb v. Harlenstein, 47 Utah 174, 152 P. 424.

Bankers Trust v. Riter, 56 Utah 525, 190 P. 1113.

Sharp v. Sharp, 54 Utah 262, 180 P. 580.

Under the plain language of the statute and the cases cited above, William was entitled to possession of the partnership property and the proceeds from the sale of the partnership property and to wind up the partnership affairs. The proceeds from the sale of the sheep and from the sale of the partnership property by the special administrator itemized in this brief (p. 9) and as set forth in the probate file should be ordered divided between the Estate of James H. Harris and the plaintiff, and all other partnership money should be so divided.

In this case there is no evidence whatever that the partnership affairs were wound up prior to the death of James H. Harris. In fact, by settling the accounts for 1972 - 1974, Judge Croft treated it as a partnership through 1974. The burden of proof of termination has not been sustained by the respondents and under the statutory provisions quoted above, the winding up of the affairs of the partnership should have been ordered by the Court and the necessary testimony should have been taken for an accounting. The burden of going ahead with the accounting was on the personal representatives who had possession of everything except the farm machinery. They have made no accounting, and the court required none.

## POINT II

THE COURT ERRED IN DETERMINING THAT WILLIAM ---  
"....SHALL HAVE NO FURTHER CLAIM WHATSOEVER  
ON THE ESTATE OF JAMES H. HARRIS."

As stated in the first sentence of the memorandum decision, cases Nos. 8326 and 8984 were consolidated and came on for trial on July 6, 197 ,

"....together with consideration of Probate Case No. 3552, the issues concerning which were deferred pending trial of the two consolidated cases." (emphasis added) R. 8984 - p. 109)

Neither the memorandum decision, which by stipulation constitutes the findings of fact and conclusions of law, nor the judgment include findings, conclusions or determinations of any issues in the probate proceeding. As indicated above, Judge Croft specifically states that such issues were deferred pending the trial of the consolidated adversary cases. However, the memorandum decision indicates on page 11 (R. 8984, 100) that,

"All moneys contained in James bank accounts as testified to by Genave, including those funds transferred by her before James' death are to be accounted for by the co-executrices in the probate estate."

On pages 19 and 20 of the decision, Judge Croft again discussed the probate proceeding:

"....To this petition William appeared specifically to challenge the jurisdiction of the court to make such determinations concerning William. I think the challenge to this court's jurisdiction on the mere filing of the petition, without any service of process on William, in the probate case is properly taken and I so rule. William as an heir or devisee, if any he be, is

not a party to the probate proceedings so as to have his interest in the matters related in the petition subject to a determination by the court. Such claims against William were nowhere asserted in the pleadings in either case No. 8326 or No. 8984." (R. 8984 - pp 92 - 91)

The first sentence in the Judgment like in the memorandum decision refers to Civil Nos. 8326 and 8984, followed by the words

"....together with consideration of the probate case No. 3552."

The only other references to the probate proceeding are in paragraph 6 of the judgment and paragraph 8. The wording of paragraph 6 is practically identical with the quotation from page 11 of the memorandum decision and paragraph 8 states that only one-half of the assets that came out of the Harris-Fidler partnership and one-half of the assets of the Harris-Harris partnership are assets of the estate of James Henry Harris and are subject to probate. (R. 8326 - p. 64.)

It is apparent from the foregoing (1) that the probate proceeding was not and has not been consolidated for trial; (2) that Judge Croft deferred action in the probate matter until the determination of the two consolidated cases; (3) that the court had no jurisdiction of William for the purpose of determining the issues set out in the executrices' petition as discussed on page 19 of the memorandum decision, quoted above; (4) that since the decision and judgment and no other action has been taken to give the court jurisdiction of

the person of William; (5) William's property rights in the partnership money, the Harris-Fidler assets, and the sheep and horses cannot be disposed of in the consolidated cases as, quoting Judge Croft,

"Such claims against William were nowhere asserted in the pleadings in either Case No. 8326 or No. 8984." (R. 8984 - p. 91)

(6) The probate matter must be permitted to proceed in accordance with the statutes; (7) an accounting must be filed in the probate; and, (8) William's right to object and to challenge efforts to distribute to the heirs his sheep, horses, hay and money cannot be denied, except by a court with jurisdiction of the subject matter and of his person.

Referring to (5) above, it should be noted that the personal representatives admitted that miscellaneous horses and sheep sold by special administrator Lyman Warr were partnership property. Also, the judge in the probate proceeding when authorizing the sale of livestock recognized that the livestock were claimed by William and directed that his claim would attach to the proceeds of the sale. (See page 8 of this brief.)

There was before the court the testimony of William as to the ownership and sale of hay. (See page 14 this brief.) Mrs. McPhie testified about the hay at the June 19, 1979 hearing (Tr. 6-19-79, pp 88 - 90) All of these matters were brought to Judge Winder's attention at the October 29, 1979, hearing and he made the following comments:



"THE COURT: Well, I think Findings of Fact and Conclusions of Law have got to be drafted. And what I intended to do, and this is such a complex matter and I know nobody is satisfied but we can't litigate it time after time after time, and I've gone back and read Judge Croft's decision again today, or partially read it, and I had read it about three or four times, and I reiterated again and again at the June 19th-20th hearing that I thought there were just a few issues that had been left by Judge Croft. It was my idea that they were dealt with on June 19th and 20th, and the only sense in which I think the probate matter remains open is simply that--that I wasn't dealing with the probate matter in the sense of decreeing the distribution but I certainly--it was not my intention that you come back now in the probate matter. And if it hasn't been decided and relitigated in the probate matter, what I decided at the 19th and 20th trial, because that was the opportunity to try all of these issues about the partnership and whether hay or what or equipment or anything else belonged. And as Judge Croft noted when he decided this and as was so apparent to me, to go back and try and reconstruct things in this complicated situation after years have gone by and memories have faded and records are gone, it is virtually an impossibility. And I'll be the first to acknowledge that maybe what I did at the end of the June 19-20 hearing may seem a little arbitrary but I think there's such a great advantage to laying this matter to rest, and I tried to do it as fairly as I could. And it's obvious that William Harris and his daughter and his wife and Mr. Skeen don't agree but the remedies are going to have to be by appeal because what I think, you said it fairly well in the Order that you just referred to. And other than the obvious error in Paragraph 2--or what is it?"

The court had read Judge Croft's memorandum decision many times and must have been aware of the lack of jurisdiction over William in the probate matter (which was not consolidated for trial) as is so clearly pointed out by Judge Croft. It is certain that he had made up his mind that only the farm machinery and livestock equipment matters were left unresolved and that his

decision could, as a matter of law, end the litigation.

The probate proceeding was not affected by the judgment from which this appeal was taken. The motions under consideration by Judge Winder related only to the issues in the adversary cases which were tried and adjudicated by Judge Croft.

There was no pending petition and response in the probate or other pleadings which presented issues for judicial determination. If, in the probate proceedings, a petition or other pleading had been filed to try the issues as to the ownership of the items sold by the special administrator and proper notice had been given to the interested parties, it is clear that the probate court would have had authority to try the issues.

In re Rue's Estate, 11 Utah 428, 182 P2d 111

Nielsen's Estate v. Nielson, 107 Utah 564, 155 P2d 968.

But in the instant case the court had before it motions to carry out and enforce the judgment in the consolidated adversary cases. It went beyond all issues and decided that in the probate proceeding, William had no claims against the estate.

Section 75-1-304 provides that unless specifically provided to the contrary in the code or unless inconsistent with its provisions, the rules of civil procedure shall govern formal probate proceedings. There were, of course, no plead-

ings or other proceedings to form issues for trial.

The personal representatives filed a petition several years ago in the probate proceeding for interpretation of the will, instructions as to ademption, for an accounting by William and for the determination of William's interest in the property inventoried. (Probate 157-153) William made a special appearance by motion attacking the jurisdiction. This was heard by Judge Croft and he disposed of it as follows:

".....To this petition William appeared specifically to challenge the jurisdiction of the court to make such determinations concerning William. I think the challenge to this court's jurisdiction on the mere filing of the petition, without any service of process on William, in the probate case is properly taken and I so rule. William as an heir or devisee, if any he be, is not a party to the probate proceedings so as to have his interest in the matters related to the petition subject to a determination by the court. Such claims against William were nowhere asserted in the pleadings in either case No. 8326 or No. 8984." (R. 8984 - pp. 92, 91)

This ruling ended the efforts of the personal representative to pursue the matter and no other petition was filed to raise the issues as to the ownership of inventoried property and no process was served on William.

We quote from In re Tripp's Estate, 51 Utah 359, 170 P. 975:

"The district court, sitting as a court of probate in the first instance, has no jurisdiction to settle the accounts between the surviving partner and the representatives of the deceased partner, but is limited to the power of requiring the surviving partner to properly account. This being done, the limit of its powers sitting as a court of equity is

is reached until proper proceedings are instituted to invoke the equity powers of the court. In re Auerbach's Estate, 23 Utah 535, 65 Pac. 488. As is said in Andrade v. Superior Court, 75 Cal. 459, 17 Pac. 532, cited in respondent's brief:

'The court cannot settle and adjust the account. If unsatisfactory, this can only be done by a court of equity.'"

Judge Croft pointed out the proper method of raising the issues in the probate proceeding, but the personal representatives refused to follow it. Section 75-3-1001 sets out the procedure for closing estates. This was ignored.

The trial court erred in failing and refusing to require the personal representatives to file an accounting and erred in making and entering a judgment, holding that William had,

"....no further claim whatsoever on the Estate."

This judgment denied William's right to his day in court to determine the issues of ownership of hay, sheep, wool, horses and the wool incentive, all of a value in excess of \$6,900.00.

### CONCLUSION

The trial court erred in failing and refusing to require an accounting for sheep, horses, money and other items of partnership property which were in the control of James and his personal representatives. The elementary law that the partner in possession must account was completely ignored. The trial court misconstrued Judge Croft's memorandum decision and



judgment in holding that the only assets remaining for distribution to the partners were the items of farm machinery listed in the memorandum decision and depreciated items formerly listed in the income tax returns.

The court proceeded to adjudicate William's partnership interests in the proceeds from the sale of partnership property described under the heading "Receipts" in the probate proceedings. This was error for the reasons, (1) the probate court had no personal jurisdiction over William, (2) the probate proceedings had been deferred until the consolidated adversary cases had been tried and was not before the court at all, and (3) there were no issues framed in the probate proceedings by any pleadings.

The judgment should be reversed and the cases remanded for further proceedings consistent with the law.

Respectfully submitted,

SKEEN AND SKEEN



E. J. SKEEN  
Attorney for Plaintiff-Appellant  
536 East 400 South  
Salt Lake City, Utah 84102

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Appellant's Brief was mailed to the attorney of the defendants-respondents, postage prepaid, addressed as follows:

Hollis S. Hunt  
HUNT, LAREW & KINATEDER  
345 South State Street  
Suite 200  
Salt Lake City, Utah 84111

on this 21<sup>st</sup> day of April, 1980.

  
Secretary