

1978

# Producers Livestock Marketing Association v. Zane Christensen : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

PRODUCERS LIVESTOCK MARKETING )  
ASSOCIATION, a Utah Cooperative )  
Association, )

Plaintiff-Respondent. )

vs. )

CASE NO. 15388

ZANE CHRISTENSEN, )

Defendant-Appellant. )

\* \* \* \* \*

BRIEF OF RESPONDENT

\* \* \* \* \*

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT  
OF DAVIS COUNTY

HONORABLE J. DUFFY PALMER, JUDGE

\* \* \* \* \*

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\* \* \* \* \*

BRIEF OF RESPONDENT

\* \* \* \* \*

PRELIMINARY STATEMENT

The parties will be referred to as in the trial court. "TR" refers to transcript of record and "EX" refers to exhibits. The findings of the trial court are set forth verbatim in the appendix.

NATURE OF THE CASE

Plaintiff, Producers Livestock Marketing Association, filed a two-count complaint against the defendant Zane Christensen to recover \$25,567.66, and \$23,667.20 respectively, which represent sums paid on drafts drawn on plaintiff by defendant. In his Answer, defendant admitted receiving the respective sums but claimed a right of set-off and sought an accounting and

judgment against plaintiff on five business transactions upon which defendant counterclaimed.

#### DISPOSITION IN LOWER COURT

The case was tried to the court sitting without a jury, the Honorable J. Duffy Palmer presiding. At the conclusion of the trial, the court rendered judgment in favor of the plaintiff on each count of the Complaint, and awarded judgment of \$23,667.20, together with interest at the legal rate on Count I and the sum of \$26,567.66, together with interest at the legal rate on Count II.

With respect to the Counterclaim of the defendant, the court denied recovery on all counts except as to Count V, upon which he granted judgment in favor of defendant for the sum of \$4,000.00, together with interest (TR 315-318). Thereafter, defendant filed objections to Findings of Fact, Conclusions of Law and Judgment and Motion to Amend same, and also filed a Motion for New Trial. After hearing, the court denied the Motion for New Trial and modified paragraph #5 of the Findings of Fact.

#### RELIEF SOUGHT ON APPEAL

Plaintiff seeks an affirmation of the judgment by the trial court and a denial of defendant's alternative motion for new trial.

## STATEMENT OF FACTS

Plaintiff, Producers Livestock Marketing Association, is a Utah Co-operative Association engaged in buying and selling livestock for its members and other livestock producers.

Defendant, Zane Christensen, resides in Talmadge, Utah, where he owns and operates a ranch maintaining 2,000 head of cattle. In addition to his own cattle operation, defendant is a registered and licensed livestock dealer buying and selling between 20,000 to 25,000 head of cattle per year (TR 26-28).

In addition to its auction facilities, plaintiff maintains a country division with agents who, through direct contact with livestock producers in their local area, arrange for the purchase and sale of cattle (TR 122, 211). Since the mid-1950's, defendant has associated with plaintiff, through its country division, in purchasing cattle for plaintiff. This association has consisted primarily of a partnership relationship wherein defendant would purchase cattle from local ranchers, using plaintiff's draft book for the purchase price, and plaintiff would sell the cattle, with any profit or loss being allocated between the parties on an equitable basis taking into consideration the source of the moneys used to purchase the cattle, the length of time required to complete the transaction, feed costs, freight charges and services rendered by each party (TR 122-124,

140-143).

Plaintiff's two-count Complaint was brought to recover sums paid on outstanding drafts drawn by defendant for the purchase of cattle. In response, defendant filed a five-count Counterclaim demanding an accounting and judgment against plaintiff based upon the following separate and distinct transactions.

Relating to Count I of defendant's Counterclaim, in September 1973, plaintiff, defendant and a third party not before the court, Waitt Cattle Company, partnered on the purchase of 2282 head of calves from the Ute Tribal Livestock Association located in Duchesne County, Utah. Defendant purchased the cattle for the partnership, using plaintiff's draft book, for the sum of \$611,605.38 (TR 52, 279) (EX I). After the cattle were purchased, Waitt Cattle Company purchased 994 head reimbursing plaintiff \$237,429.05 of the purchase price (TR 54, 279) (EX I). Of the remaining 1288 head, 86 were retained on defendant's ranch and 1202 head were placed by defendant in a feed lot in Delta, Utah, operated by Max and Bert Johnson. Pursuant to an agreement between the defendant and the Johnsons when the cattle were delivered to the feed lot, the Johnsons advanced the defendant \$250.00 per head with an agreement that in the spring, defendant would buy the calves back for \$250.00 per head and 42¢ per pound.



gain (TR 54-56, 61-62) (EX P).

Upon receiving the advance from the Johnsons, defendant reimbursed plaintiff \$283,500.00 of the purchase price (TR 56, 279) (EX I). The balance of the purchase price in the amount of \$90,676.33 was maintained on plaintiff's records as an accounts receivable until March 31, 1974 at which time defendant paid the account in full (TR 56, 65, 115-117, 155, 234, 279-280) (EX I).

In the spring when defendant was to buy back the calves from the Johnsons, because the market was so low, defendant renegotiated his agreement with the Johnsons which provided that of the 568 calves delivered to Bert Johnson, defendant would buy back 322 steers at a price of \$102,900.00, plus pay Bert Johnson \$11,946.18 on the feed bill of the heifers. Of the 634 calves delivered to Max Johnson, defendant agreed that Max Johnson would retain the calves and defendant would pay a negotiated feed bill of \$75,000.00. Defendant paid the negotiated settlements out of his own personal funds and from a loan from an independent loan company (TR 57-58, 60-61) (EX 1, 2 and 4).<sup>1</sup>

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<sup>1</sup> In his brief, defendant claims that a portion of the payment made to Bert Johnson was paid by drafts drawn on plaintiff. However, a review of the defendant's testimony and EX 3 indicates that the payment was actually made through a loan from an independent loan company not affiliated with the plaintiff (TR 58-59) (EX 3).

The 322 calves repurchased from the Johnsons and the 86 head retained on defendant's ranch were ultimately sold to a cattle producer named Wheatheart Northwest in October 1974 (EX N). From the transaction, defendant suffered a net loss of \$209,614.17 (TR 54-69, 159-161).

Before the trial court, defendant contended that the parties were partners on the feed lot and buy-back agreement and therefore plaintiff should be responsible for one-half of the loss. Plaintiff contended, and the trial court found, that the defendant acted alone and not in partnership with the plaintiff at the time the calves were placed in the feed lot and therefore was responsible for the total amount of the loss.

Relating to Count II of defendant's Counterclaim, in February 1974, defendant and plaintiff partnered in the purchase of 772 head of cattle, which were purchased for \$303,364.50. The cattle were subsequently sold for \$314,747.64 netting the partnership a profit of \$11,383.14. Plaintiff's agent, after calculating the costs, charges, services rendered, losses sustained and the length of time required to collect moneys, divided the profit with defendant receiving \$4,600.00 and plaintiff receiving \$6,783.14 (TR 161-162, 263-267). Defendant contended that he was entitled to an equal distribution of the profits.

As to Count III of defendant's counterclaim, in March, 1974 plaintiff and defendant partnered in the purchase of 254 head of cattle, which were purchased for \$62,795.40. The cattle were subsequently sold for \$67,696.32 netting the partnership a profit of \$4,900.92. Plaintiff's agent, after calculating the costs, charges, services rendered, losses sustained and the length of time required to collect moneys, divided the profits with defendant receiving \$2,000.00 and plaintiff receiving \$2,900.00 (TR 161-162, 261-272). Defendant contended below that he was entitled to an equal distribution of the profits.

Relating to Count IV in 1970, the parties partnered on the purchase of 1353 head of cattle which were purchased for \$185,711.20. The cattle were subsequently sold for \$188,565.38 netting the partnership a profit of \$5,404.18. Plaintiff's agent, after calculating the costs, charges, services rendered, losses sustained and the length of time required to collect moneys, divided the profit with defendant receiving \$2,550.00 and plaintiff receiving \$2,854.18 (TR 259-262). Defendant contended below that he was entitled to an equal distribution of the profits.

Relating to Count V, during the fall of 1970 defendant agreed to feed 80 head of cattle for plaintiff. Defendant

placed the cattle on a ranch in Duchesne County, Utah and had the cattle fed until spring 1971. Defendant paid the feed costs in the sum of \$4,000.00. Defendant claims that pursuant to the feeding agreement, plaintiff is obligated to pay the feed costs.

## ARGUMENT

### POINT I

THE FINDINGS OF THE TRIAL COURT SHOULD NOT BE DISTURBED BECAUSE THE EVIDENCE BEFORE THE TRIAL COURT CLEARLY PREPONDERATES IN FAVOR OF THE FINDINGS.

In reviewing the instant case, defendant acknowledges that the trial court's findings will not be disturbed if found upon sufficient evidence. In elaborating on the review process in an equity case, this court has recognized that the trial court's findings are presumed correct and that the reviewing court will not upset the findings unless the evidence clearly preponderates against those findings. Del Porto v. Nichols, 27 Ut. 2d 286, 495 P.2d 811 (1972); Nokes v. Continental Mining & Milling Co., 6 Ut. 2d 177, 308 P.2d 954 (1957); Coombs v. Ouzounian, 24 Ut. 2d 39, 465 P.2d 357 (1970).

The justification for this rule was clearly defined in the Nokes case wherein this court stated:

"...credit should be indulged in favor of the findings of the trial court because of the advantages peculiar to his position in immediate contract with the trial. It is indeed often true that, "the manner hath more

eloquence than naked words portend." There are intangibles of expression and attitude which give color and meaning not apparent from words alone. The trial judge feels the impact of the personalities of the parties and the witnesses: He is able to observe their appearance and behavior; their forthrightness or hesitancy in answering; their frankness and candor, or lack of it. Similarly revealing to him are indications of surprise, anger, resentment or vindictiveness, pleasure or other emotions which may be discerned from expressions of the countenance or voice. He also has some advantage in appraising their abilities to understand and their capacities to remember. Furthermore, he is in a position to question the witness himself to clarify doubtful points or verify his impressions on the matters just mentioned. All of this combines to afford him better insight as to the truthfulness of the testimony offered than does a perusal of the cold record. It is a sound and well recognized policy of the law to repose some confidence in the verity of the actions of the trial court, and not to interfere with them unless it clearly appears that he is in error." (Footnote omitted) Id. at 6 Ut.2d at 178, 308 P.2d at 955.

Thus, in order for the defendant to prevail on appeal, the evidence must clearly show that the trial court's findings are arbitrary and capricious because they are not based upon sufficient evidence.

Defendant contends that the only probative and credible evidence before the trial court were his own self-serving statements and those of a witness, J. L. Lindsay, a terminated employee of the plaintiff. However, a review of the evidence before the court shows sufficient and preponderating evidence to support

each finding and raises serious questions as to the credibility of Lindsay's testimony.

- A. THE TRIAL COURT DID NOT ERR IN FINDING LINDSAY TO BE ADVERSE TO PLAINTIFF BECAUSE THERE WAS EVIDENCE OF INTEREST AND BIAS IN FAVOR OF DEFENDANT.

Because defendant's appeal relies so heavily on Lindsay's testimony, plaintiff addresses defendant's second point of argument preliminarily.

One of the witnesses called by defendant was Lindsay, a former employee who worked for plaintiff approximately 27 years and who was terminated for cause in the summer of 1975 (TR 120-122, 220-222). When defendant called Lindsay, defendant moved that Lindsay be declared an adverse witness. The trial court denied the motion and further found Lindsay to be adverse to plaintiff.<sup>2</sup> (TR 120-121). Defendant challenges that finding, contending there is no evidence in the record indicating that Lindsay was either biased or interested in the outcome.

Testimony before the court revealed that Lindsay was the manager of plaintiff's country division and the agent who had solicited defendant's association with plaintiff and was the exclusive agent representing plaintiff in the numerous transactions with defendant (TR 39-41, 121-125, 211, 225-227).

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<sup>2</sup> See Appendix, Finding 6.

record also reveals an ongoing business relationship between the defendant and Lindsay since Lindsay left plaintiff's employment.

Defendant admitted that for at least a two-year period prior to trial he had been selling cattle to the Peter Waitt Cattle Company, the same company for which Lindsay had been acting as an agent (TR 28, 103-104, 138, 168). Lindsay also testified that since being terminated from plaintiff's employment, he has personally continued to purchase cattle from the defendant (TR 167-168). Thus, not only is there a question of bias against the plaintiff because of his termination, there is also sufficient evidence in the record to show an interest on Lindsay's part due to his continuing business relations with defendant. This evidence not only supports the trial court's findings, but also raises serious question as to the credibility and probative value of Lindsay's testimony. It is also important to note that on critical points of defendant's case, the testimony given by Lindsay was seriously impeached (TR 169, 170, 202-209, 214-218).

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B. THE TRIAL COURT'S FINDINGS ARE BASED UPON  
DOCUMENTARY EVIDENCE AS WELL AS OTHER ORAL  
TESTIMONY SUFFICIENT TO BE SUPPORTED ON  
APPEAL.

Contrary to defendant's contention that the only probative evidence is the testimony of himself and Lindsay, the trial court

also had before it documentary evidence in the form of "deal sheets" prepared by plaintiff which, in essence, were summary sheets prepared for each cattle transaction. As explained by plaintiff's accountant, when cattle were purchased, plaintiff prepared a deal sheet which showed on the top of the sheet the party from whom the cattle were purchased; the number, kind, weights of the cattle; and the price paid for the cattle. The bottom of the sheet showed the sale of the specific cattle, including the name of the purchaser, the number of head purchased and the purchase price (TR 18-20). Also reflected on the deal sheet were the feed, freight and servicing charges incurred on the purchase and sale, as well as any partnership profit or loss division.

Defendant dismisses this documentary evidence as "self-serving" and "lacking in proper foundation". However, it is important to note that the deal sheets were prepared contemporaneously with the specific transactions in question and generally under supervision of Lindsay (TR 16-20, 139-140, 168-169).

It is also interesting that defendant on many occasions provided the information contained on the deal sheets and a trial testified the information contained in the deal sheets was reliable. Defendant's own accountant testified that he reviewed the deal sheets, used them in compiling defendant's exhibits



concurred in their accuracy (TR 53-54, 107-109, 177-194). Also on this point, defendant admitted he had his own books and records, but none were introduced to rebut plaintiff's deal sheets (TR 108, 177-194). Thus, the deal sheets stand as unrefuted evidence in determining the nature of the parties' agreements and the actions of the parties at the time the specific transactions were in process.

Perhaps even more important than the documentary evidence are the actions of both the defendant and Lindsay at the time each transaction was in process because those actions conflict with their own testimony on several critical points as hereinafter indicated.

## POINT II

THE TRIAL COURT'S FINDINGS RELATING TO THE NATURE OF THE PARTNERSHIP RELATIONSHIP, THE ACCOUNTING AND THE DIVISION OF PROFITS AND LOSSES ARE SUBSTANTIATED BY PREPONDERATING EVIDENCE AND THEREFORE SHOULD BE AFFIRMED.

Germane to all of defendant's counterclaims (except V, not at issue on appeal) is a fact determination relating to the nature of the business relationship between the parties.<sup>3</sup> In Findings #5, 6 and 7, the court found that the parties were engaged in a partnership and that when a transaction was completed

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<sup>3</sup> See Appendix, Finding 5, 6 and 7.

an accounting would be made between the parties and the profits or losses would be divided on an equitable basis after considering factors such as the time, services and money provided by each party.<sup>4</sup>

Neither plaintiff nor defendant challenge the finding of partnership. However, defendant challenges that portion of Finding #7 relating to whether actual accountings had occurred and the reasonableness of the allocation of profits. Defendant apparently contends that even though accountings were discussed they were frequently postponed or ignored. A more accurate representation of the testimony would be that in each instance complained of by defendant, an accounting actually occurred but that defendant disagreed with the amount of profit allocated to him (TR 74, 77, 81-82, 84).

In understanding the nature of the partnership and the distribution of profits and losses, both defendant and Lindsay testified that plaintiff settled the transactions, as reflected on the deal sheets, and that Lindsay had the sole discretion.

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<sup>4</sup> Defendant challenges that portion of Finding #5 indicating that defendant purchased livestock from plaintiff, claiming there is no testimony or evidence to support the finding. However, before the court were three deal sheets which specifically show that defendant did in fact purchase cattle from the plaintiff (TR 265, 269-270, 272, 281).

allocating profits and losses between the parties. (TR 71, 92-95, 100, 126, 142-143). As to how the percentage of profit was allocated to the respective parties, the testimony is in conflict. Defendant testified that items such as freight, fuel costs, handling charges and interest were deducted before dividing the profits on a 50/50 basis (TR 100). However, Lindsay testified that all of these factors, including whose money was used to acquire the cattle and how long the money was tied up before collection, entered into his decision on whether or how much profit or loss would be allocated to the defendant, and the profit was not always divided evenly (TR 94, 100, 126, 142-143, 161-165). Thus, with the testimony in conflict it is obvious that the trial court chose to accept Lindsay's version on profit allocations. It is significant that the deal sheets corresponding to each transaction in question, except for Count I of the Counterclaim, supports Lindsay's testimony (EX C, E, F, G, H, Q and 9). Therefore, the findings on allocation of profits are supported by substantial evidence and should not be altered on appeal.

### POINT III

THE FINDINGS UPON WHICH THE TRIAL COURT DENIED RECOVERY ON COUNTS I, II, III AND IV OF DEFENDANT'S COUNTERCLAIM ARE SUPPORTED BY EVIDENCE IN THE RECORD AND SHOULD BE AFFIRMED.

A. COUNT I: THE 1973 UTE INDIAN CATTLE TRANSACTION.

Findings #8, 9 and 10 relate to Count I of defendant's

Counterclaim involving the purchase of calves from the Ute Tribal Livestock Association in 1973.<sup>5</sup>

Of the many cattle transactions upon which plaintiff and defendant jointly participated, at least one transaction would occur yearly in the fall. That transaction was the purchase of calves from the Ute Tribal Livestock Association located in Duchesne County, Utah. Because of the repetitive nature of those yearly purchases, plaintiff introduced deal sheets relating to the 1971, 1972 and 1975 purchases to show the significant differences between those transactions and the 1973 transaction. Finding #8 is merely a summary of the facts before the court relating to the 1971, 1972 and 1975 transactions. The court found the parties partnered on those purchases and that there had been partnership accountings and profit allocations.

Defendant makes a broad and vague assertion that Finding #8 is inconsistent with overwhelming evidence; however, no contrary evidence is cited to refute the finding. In supporting Finding #8, the following testimony from Lindsay is significant:

Q. And prior to that time, had there been some deals made by you and Mr. Christensen with the Ute Cattle and Live Company?

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<sup>5</sup> See Appendix Findings 8, 9 and 10.

A. Oh, yes, many times.

Q. And what was your participation in those deals?

A. Well, we more or less just shared the profits and things and if there was more than one participant, then they shared with us (TR 125).

Specifically relating to the splitting of profits on the 1971 and 1972 deals, Lindsay further testified as follows:

Q. Did most of these transactions, or all of the transactions that took place prior to this Ute Indian deal, what was the nature of the division of profits that you would make or how would you treat the profits from the sale of the cattle?

A. Well, as close as possible, we tried to stay fairly equally. It depends on the expenses of each of us. Sometimes, I had very little expense, and sometimes I had to fly some people in there or do something or another. But the division was as close to the middle as we could.

Q. And was that the understanding that you had in the participating in these respective Indian deals?

A. Yes (TR 126).

Documentary evidence concerning the 1971, 1972 and 1975 Ute Tribal Livestock Association transactions also confirms Finding #8. Relating to the 1971 transaction, plaintiff's accountant testified that there apparently was a partnership

split between plaintiff and defendant, with defendant receiving \$14,084.00 and plaintiff receiving \$16,061.18 (TR 272-274). With respect to the 1972 transaction, the deal sheet reflects that there was a three-way partnership split, with the defendant receiving \$2,871.76, plaintiff \$3,798.39 and a third party \$2,696.76 (TR 274-278). Similarly, the 1975 deal sheet reflects a partnership split with defendant receiving \$3,567.00 and plaintiff receiving \$4,023.15 (TR 278-279). The various exhibits show that defendant did in fact use plaintiff's drafts for the purchases, and testimony from both the defendant and Lindsay support the other elements of the partnership transaction contained in the finding (TR 274-279).

Defendant challenges three specific elements of Finding #9 relating to (1) the price paid for the cattle, (2) the defendant's contracting for the feeding of the calves, and (3) the reimbursement by defendant of the \$90,676.33.

Relating to the purchase price, defendant claims that the evidence does not support the fact that the calves were purchased in excess of the agreed upon bid price. Contrary to defendant's claim, the record shows the parties actually conferred concerning the price range within which the calves were to be purchased and that the actual price was far in excess of that range. Significantly, at trial defendant denied that

there had been any instructions concerning price, but that he was merely to use his own judgment (TR 51, 52, 105). Conflicting with that testimony is the following testimony by Lindsay:

Q. Now, with respect to the Ute Cattle deal of 1973, did you have a conversation with Mr. Christensen prior to the time with respect to how much money you should pay for the cattle.

\* \* \*

A. Yes, we did discuss it.

Q. What was the nature of your conversation?

A. I told him about what I thought we should do and that Mr. Short would be there and he would just have to play it by ear.

\* \* \*

Q. Did you set an exact amount?

A. No.

Q. Did you set a range.

A. Yes, we did set a range (TR 143-144).

Later Lindsay testified that they anticipated that the cattle would be purchased for approximately 85¢ per pound (TR 148). In actuality, the cattle were purchased for 96¢ per pound at the same time the average market price for similar cattle was just over 70¢ per pound (TR 146-148). Testifying on his reaction upon learning the inflated purchase price, Lindsay stated that he

"about dropped dead" (TR 127). The court should also note that the point of an actual purchase price limit was the subject matter of impeaching testimony affecting the credibility of Lincoln's testimony (TR 205). Thus, there was sufficient evidence before the trial court to justify the finding that defendant purchased the calves at a price exceeding the price agreed upon between the parties.

Defendant's remaining challenges of Finding #9 are inextricably related to his challenge of Finding #10 because they relate specifically to his theory for recovery under Count I of his Counterclaim. In Finding #10, the trial court in essence found that on the 1973 Ute Indian transaction, the parties were partners only for the purchase of the calves, and that thereafter the partnership ended and the defendant acted alone in placing the calves in the feed lot. Defendant contended both at the trial court and now on appeal that after the cattle were purchased, it was a joint decision between the parties to place the calves in a feed lot during the falling market. He also asserted that the joint venture continued until the calves were ultimately sold at a substantial loss and that plaintiff should participate in that loss. Conversely, plaintiff's position is that defendant acted alone in placing the cattle in the feed lot and therefore are not participants in the loss.



Factually, three parties participated in the purchase of the calves. These parties consisted of plaintiff, defendant, and Waitt Cattle Company. Defendant was at the sale and purchased the calves for the parties at a price far in excess of the agreed upon price. Defendant drafted on plaintiff for the full purchase price of \$611,605.38. After the purchase, the deal sheet shows that Waitt Cattle Company purchased 994 head reimbursing plaintiff \$237,429.05 of the purchase price (TR 53-54).

From this point, even though both defendant and Lindsay testified they acted in concert, the facts show both acted as if the remaining cattle were sold to defendant. So successful was defendant in acting alone, that plaintiff's management was unaware defendant claimed it had an interest in the calves until eighteen months after the calves were placed in a feedlot.

Concerning defendant's actions, testimony from Bert Johnson revealed that in prior years the defendant had placed his own cattle in the Delta feed lot on a price per pound gain basis (TR 238-299). However, in 1973 defendant negotiated a new feeding arrangement calling for the Johnsons to advance \$250.00 per head upon delivery to the feed lot, together with a price per pound gain basis (TR 242-243). When the cattle were delivered, Max Johnson received 634 head advancing the sum of \$158,500.00 and Bert Johnson received 500 head advancing \$125,000.00 to defendant (TR 55-56). Significantly, defendant in turn endorsed the advances over to plaintiff which were credited against the outstanding purchase price and shown as a sale to defendant (EX I).

After the advances were credited, the deal sheet reflects that there was still outstanding the sum of \$90,676.33 (TR 56). Significantly, on March 31, 1974, defendant paid the outstanding balance in full from his own personal funds (TR 56-57, 235) (EX I). If plaintiff remained a partner in the feed lot operation, defendant's actions in getting the account received paid off are inexplicable.

It is also significant that at no time did plaintiff or an agent or employee participate in the negotiations with the Johnsons. Testimony from Bert Johnson revealed that neither at the time the Johnsons visited defendant's ranch to negotiate the feeding agreement, nor the time the cattle were delivered to the feed lot was plaintiff represented. All negotiations were with the defendant alone, and in fact, the written agreement was entered into solely with defendant (TR 157, 250-253) (EX P).

Even more contradictory to his own theory are defendant's actions at the time the calves were removed from the feed lot. In June 1974, when the time came for the calves to be removed from the feed lot, the market still was at a very low mark. Therefore, rather than take all the cattle back, defendant negotiated the agreement with the Johnsons. The result was that of the 500 calves delivered to Bert Johnson, defendant bought back 322 steers for \$102,900.00 and also paid a feed bill:

the heifers retained by Johnsons of \$11,946.98. Of the 634 calves delivered to Max Johnson, defendant and Johnson agreed that Johnson would keep the calves and defendant would pay the feed bill of \$75,000.00 (TR 57-58, 60-61). If plaintiff were still a partner, it would be a simple matter for the defendant to draft on plaintiff for the amounts owed to the Johnsons because he still had possession of a draft book (TR 28-30). However, instead of drafting on plaintiff, which would have brought the calves back on plaintiff's book as inventory, defendant made payment to the Johnsons directly from his own personal funds and a personal loan from an independent loan company (TR 55-59) (EX 3).

The remaining cattle repurchased by defendant from the Johnsons and returned to his ranch were sold approximately four to five months later to another cattle producer named Wheatheart. The deal sheet on this subsequent transaction shows that the cattle were owned by defendant and sold to Wheatheart with defendant receiving all the proceeds except for a dealer sales commission paid to the plaintiff (TR 63-65, 161). Thus, even at the point the remaining cattle were ultimately sold, there was no evidence or record that plaintiff had a partnership interest in the cattle.

One has to question the reliability of Lindsay's testimony

that the plaintiff was a partner in the feed lot agreement when he prepared the deal sheets showing a "cleaned-up transaction" instead of a "deal in progress" or "cattle in inventory," particularly in light of a regulation of the plaintiff which precludes feed lot operations without prior approval which Lindsay testified he did not have (TR 148-155, 211-214). Perhaps the most incredible aspect of Lindsay's testimony relates to the alleged buy-back agreement with defendant because when examined Lindsay concerning the sale of the remaining cattle to Wheaton, Lindsay could not identify the cattle and merely indicated that it was a sale of cattle owned by defendant and sold to Wheaton with plaintiff retaining a sales commission only (TR 159-161 (EX N)). Thus, Lindsay was totally unaware of the disposition of the cattle he allegedly was partnering on.

In summary of the evidence relating to Finding #10, the only evidence supporting a theory of partnership are the contradicted testimony of the defendant and Lindsay, neither of which are consistent with their own actions or the documentary evidence and testimony before the trial court. By contrast, the findings are supported by the testimony of an independent third party, Bert Johnson, and the deal sheets prepared under Lindsay's supervision.

B. COUNTS II, III AND IV.

Defendant merely makes a general assertion that the remaining findings are fraught with similar errors. No attempt is made to document or substantiate from the record any of the alleged errors. In doing so, only a general response seems appropriate.

On each of the transactions referred to in Counts II, III and IV, the trial court received the corresponding deal sheet which reflected that defendant did receive an equitable partnership distribution. Significantly, also, Lindsay testified that on these transactions defendant received a fair distribution after considering the participation of each party (TR 135-137, 161-164, 165).

CONCLUSION

On appeal, the only evidence the defendant presents to challenge the trial court findings is the defendant's own self-serving testimony and that of J. L. Lindsay, a biased former employee of the plaintiff. By contrast, the more reliable and preponderating evidence upon which the trial court's findings were based consists of documentary evidence and the testimony of an independent third party which clearly show a contradiction between the defendant's action and testimony. Viewing that evidence in its totality and recognizing the deference accorded

to the trial court's decision based upon its unique position. judge the veracity of the evidence as it is presented, the court's decision should be affirmed.

Respectfully submitted,

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APPENDIX

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IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

PRODUCERS LIVESTOCK MARKETING	)	
ASSOCIATION, a Utah Cooperative	)	
Association,	)	
	)	FINDINGS OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
	)	
vs.	)	Civil No. 21270
	)	
ZANE CHRISTENSEN,	)	
	)	
Defendant.	)	
	)	
	)	

This case came on regularly for hearing on the 25th day of April, 1977, before the Honorable J. Duffy Palmer, one of the judges of the above entitled court, sitting without a jury, and plaintiff, Producers Livestock Marketing Association, appearing through Joseph I. Jacob, executive secretary and by counsel Ben E. Rawlings and James R. Morgan, and defendant, Zane Christensen, appearing personally and by his counsel, R. Earl Dillman and Brant H. Wall, and before the court were the claims of the plaintiff and the counterclaims of the defendant to be tried,

Whereupon, witnesses were sworn and evidence presented both oral and written in support of the allegations of the complaint and counterclaim, and the court having heard the evidence so adduced by the plaintiff and defendant, and being fully advised in the premises, now makes the following:

#### FINDINGS OF FACT

1. That the plaintiff, Producers Livestock Marketing Association, is and at all times herein mentioned was a Utah co-operative association engaged in the buying and selling of livestock for its members and other producers.

2. That the defendant, Zane Christensen is and at all times herein mentioned was an owner of livestock as well as a licensed livestock dealer engaged in buying, owning, feeding, and selling of livestock.

3. That with respect to Count I of plaintiff's complaint, the defendant drew a draft on plaintiff in the sum of \$23,667.20 for the alleged purchase of cattle, which draft was honored by the plaintiff and for which the plaintiff has not been reimbursed.

4. That with respect to Count II of plaintiff's complaint, on or about June 13, 1975, the defendant drew a draft on plaintiff in the sum of \$26,567.66 for the alleged purchase of cattle, which draft was honored by the plaintiff and for which the plaintiff has not been reimbursed.



5. That over the course of many years, the parties hereto have engaged in several types of business relations with each other. That initially, the defendant sold livestock to and purchased livestock from the plaintiff. That for many years, the business relationship between the parties has included feeding and partnership transactions.

6. That the partnership agreement between the parties while varying with each transaction, consisted primarily of the following types:

(a) The purchase of livestock from various sellers by the defendant, and the subsequent sale of livestock by plaintiff.

(b) The purchase of livestock by the plaintiff and the subsequent sale of said livestock by the defendant.

(c) The purchase and sale of livestock by the plaintiff with the defendant providing services and handling. That in formulating and implementing each type of partnership transaction, the defendant acted personally and the plaintiff acted through J. L. Lindsay, who was plaintiff's agent until his employment was terminated in July, 1975. That the said J. L. Lindsay testifying in behalf of defendant was adverse to the plaintiff in the instant action.

7. That with respect to each of the foregoing partnership transactions, when a partnership deal was completed, the defendant personally and the plaintiff through its then

agent and employee, J. L. Lindsay, would have a partnership accounting. By the terms of the oral partnership agreement, if a profit or loss was realized on the transaction, plaintiff agent, J. L. Lindsay, and defendant would then determine the percentage of profit and loss to be allocated to each party, based upon several factors including the time and services provided by each party, the money contributed by each party, the time required to complete the transaction, and the time required to have the money repaid.

8. That with respect to Count I of Defendant's Counterclaim, during the fall of the years 1971, 1972, and 1973, and the spring of 1975, plaintiff and defendant partners on the purchase of cattle from the Ute Tribal Livestock Association. That the partnership transaction for the years 1971, 1972, and 1975 consisted of the defendant personally and the plaintiff through its agent, J. L. Lindsay, agreeing on the price to be bid for the cattle, defendant purchasing the cattle using plaintiff's draft to pay for the cattle, plaintiff receiving the cattle, and plaintiff and defendant working together to sell the cattle. That on each yearly transaction after the cattle were sold, the defendant personally, and the plaintiff through its agent, J. L. Lindsay had a partnership accounting wherein the profits realized on the respective transactions were split approximately equally between the parties.

9. That with respect to the 1973 purchase of cattle from the Ute Tribal Livestock Association, the plaintiff and defendant together with Waitt Cattle Company partnered on the purchase of 2,282 head of cattle. That while the defendant personally and plaintiff's agent, J. L. Lindsay agreed on the price to be bid for the cattle, at the time the cattle were purchased, the defendant bid in excess of the agreed upon bid price. That the cattle were purchased for the sum of \$611,605.38 which sum was paid by the plaintiff. That after the cattle were purchased by the defendant, Waitt Cattle Company took 994 head of cattle, reimbursing the plaintiff \$237,429.05 of the purchase price. That of the 1288 head remaining, the defendant personally contracted with Max and Bert Johnson of Delta, Utah to feed 1202 head. That for the cattle which were delivered to the Johnsons, the plaintiff was reimbursed \$283,500.00 in the form of two checks written by the Johnsons to the defendant which were subsequently endorsed by the defendant over to the plaintiff. That the remaining 86 head of cattle were kept on the defendant's ranch in Duchesne, Utah. That the remaining \$90,676.33 of the purchase price for the cattle remained on plaintiff's books and records as an accounts receivable until March 30, 1974, at which time, defendant reimbursed plaintiff said amount in full.

10. That a partnership existed between the plaintiff and the defendant on the purchase of the Ute Indian cattle in 1973. That said partnership was terminated when the remaining cattle rather than being sold as in prior years were placed by the defendant on his ranch in Duchesne, Utah, and in the Johnson Feed Yards in Delta, Utah. That a final partnership accounting was made as of March 30, 1974 when the defendant paid the plaintiff the sum of \$90,676.33, which was the amount outstanding on the original purchase price. That at the time defendant made said payment, the partnership between the parties was terminated and any subsequent transactions relating to the said cattle were carried on by the defendant without knowledge or consent of the plaintiff.

11. That with respect to Count II of Defendant's Counterclaim in the spring of 1974 plaintiff and defendant partnered on a transaction wherein 772 head of cattle were purchased from Dearden Brothers. That the cattle were sold to various cattle purchasers. That the cattle were purchased for \$303,364.50 and were subsequently sold for \$314,747.64, netting the partnership a profit of \$11,383.14. That the defendant personally and the plaintiff through his agent, J. L. Lindsay, had a partnership accounting on this transaction wherein the profit was split, and the defendant received \$4,600.00 cash.

The plaintiff, after deduction of loss realized from sale of part of the subject cattle, received \$6,783.14.

12. That with respect to Count III of Defendant's Counterclaim, in the fall of 1973, plaintiff and defendant partnered on a transaction wherein 254 head of cattle were purchased from Reed Robinson and subsequently sold to Meagher Company. That the cattle were purchased for \$62,795.40 and subsequently sold for \$67,696.32, netting the partnership a profit of \$4,900.92. That the defendant personally and the plaintiff through its agent, J. L. Lindsay, had a partnership accounting wherein the profit was split and the defendant received \$2,000.00, and the plaintiff received \$2,900.92.

13. That with respect to Count IV of Defendant's Counterclaim in the year 1970, plaintiff and defendant partnered on a transaction wherein cattle were purchased from various cattle producers and sold to McKinley and Unruh in Nevada. That after the cattle were sold, the partnership realized a net profit of \$5,300.00. That the defendant personally, and the plaintiff through its agent J. L. Lindsay, had a partnership accounting wherein the defendant received \$2,500.00 and the plaintiff received \$2,800.00.

14. That with respect to Count V of Defendant's Counterclaim, the defendant agreed to feed certain cattle for plaintiff during the fall of 1970. That pursuant to

said agreement, the plaintiff through its agent, J. L. Lindsay, delivered 80 head of cattle to the defendant. That the defendant placed the cattle on the ranch of Joe Wilkins in Duchesne County, Utah. In the spring of 1971, the defendant paid said Wilkins \$4,000.00 for the feeding of said cattle, and defendant delivered said cattle back to the plaintiff. That the defendant has made requests of the plaintiff for payment of the \$4,000.00, which remains unpaid.

#### CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. That the plaintiff, Producers Livestock Marketing Association is entitled to a judgment against the defendant in the sum of \$23,667.20, plus interest at the legal rate from May 21, 1975 on the draft drawn on plaintiff by defendant on or about May 17, 1975.

2. That the plaintiff, Producers Livestock Marketing Association is entitled to a judgment against the defendant in the sum of \$26,567.66, plus interest at the legal rate from June 23, 1975 on the draft drawn on the plaintiff by defendant on or about June 13, 1975.

3. That on Count I of Defendant's Counterclaim, a partnership existed until the defendant took possession of the cattle and a partnership accounting was held between

the parties by the defendant paying \$90,676.33 to the plaintiff on March 30, 1975 at which time the transaction was completed, and therefore defendant's claim for further accounting is denied.

4. That on Count II of Defendant's Counterclaim, a partnership accounting was held between the parties by the allocation of profits to defendant in the sum of \$4,600.00 at which time the partnership transaction was completed, and defendant's claim for further accounting is denied.

5. That on Count III of Defendant's Counterclaim a partnership accounting was held between the parties by the allocation of profits to defendant in the sum of \$2,000.00, at which time the partnership transaction was completed, and therefore defendant's claim for further accounting is denied.

6. That on Count IV of Defendant's Counterclaim a partnership accounting was held between the parties by the allocation of profits to the defendant in the sum of \$2,500.00 at which time the partnership transaction was completed, and therefore defendant's claim for further accounting is denied.

7. That on Count V of Defendant's Counterclaim, the defendant Zane Christensen is entitled to a judgment against the plaintiff in the sum of \$4,000.00 plus interest at the legal rate from January 1, 1971 for feed costs connected with the defendant's agreement to feed cattle for plaintiff during the fall of 1970 and the spring of 1971.

Dated this 7 day of June, 1977.

BY THE COURT

(s) J. Duffy Palmer  
District Judge

ARMSTRONG, RAWLINGS, WEST  
& SCHAEFFER

By \_\_\_\_\_  
James R. Morgan  
Attorney for Plaintiff  
1300 Walker Bank Building  
Salt Lake City, Utah 84111

MAILING CERTIFICATE

True and correct copies of the foregoing  
Findings of Fact and Conclusions of Law were mailed to:

R. EARL DILLMAN  
10 Broadway Building  
Salt Lake City, Utah 84101

BRAND H. WALL  
Judge Building  
Salt Lake City, Utah 84111

attorneys for Defendant, this \_\_\_\_\_ day of June, 1977.

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