

1978

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

Utah Supreme Court

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Ben E. Rawlings; James R. Morgan; Attorneys for Respondent;  
R. Earl Dillman; Brant H. Wall; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PRODUCERS LIVESTOCK MARKETING \*  
ASSOCIATION, A Utah Cooperative \*  
Association, \*

Plaintiff-Respondent. \*

vs. \*

CASE NO. 15388

ZANE CHRISTENSEN, \*

Defendant-Appellant. \*

-----

BRIEF OF APPELLANT

-----

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT  
OF DAVIS COUNTY

HONORABLE J. DUFFY PALMER, JUDGE

-----

R. EARL DILLMAN  
BRANT H. WALL  
Suite 500 Judge Building  
Salt Lake City, Utah 84111  
Attorneys for Appellant

BEN E. RAWLINGS  
JAMES R. MORGAN  
1300 Walker Bank Building  
Salt Lake City, Utah 84111  
Attorneys for Respondent

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BRANT H. WALL  
Suite 500 Judge Building  
Salt Lake City, Utah 84111  
Attorneys for Appellant

BEN E. RAWLINGS  
JAMES R. MORGAN  
1300 Walker Bank Building  
Salt Lake City, Utah 84111  
Attorneys for Respondent

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PRELIMINARY STATEMENT

The parties will be referred to as in the trial court.

"R" refers to record and "TR" refers to transcript of record.

NATURE OF THE CASE

The plaintiff, Producer's Livestock Marketing Association, filed a Complaint in two counts. The first count seeks to recover \$23,667.20 and the second count seeks to recover \$25,567.66 which sums were obtained by defendant by drawing drafts upon the plaintiff. The defendant answered, admitting that he had received said sums of money, however, by way of counterclaim, he alleges in five counts that the plaintiff had conducted a course of business with him for many years, involving the purchase, sale and feeding of cattle; that demand was made upon plaintiff for

set forth in each count, less credit for the sums received by the drafts (R 6-10). At the beginning of the trial, the court granted leave to amend count I of the counterclaim to show the sum of \$105,625.62 as the amount due defendant (TR 7).

#### 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 \$23,667.11 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 (R 64-67). After hearing, the court denied the Motion for New Trial and modified paragraph #5 of the Findings of Fact (R 73-74).

#### RELIEF SOUGHT ON APPEAL

Defendant appeals from the judgment of the trial court except as to count V of the Counterclaim, and further appeals from the judgment and Order of the court denying the Motion for a New Trial and Motion to Amend Findings of Fact, Conclusions of

of defendant on all counts and reverse the judgments in favor of plaintiff, or in the alternative, a new trial.

#### STATEMENT OF FACTS

The defendant, Zane Christensen, resides at Talmage, Utah in Duchesne County, and for many years has been engaged in ranching and buying and selling cattle (TR 26-27). In the year 1948, he began dealing with the plaintiff by purchasing cattle for resale based upon their solicitation (TR 39, 40, 122). This relationship grew and expanded during the years until about 1954 at which time the relationship had developed to the point where the defendant would purchase cattle and the plaintiff would sell them and the "profits" would be "split" (TR 40). In about 1954 the plaintiff gave the defendant a draft book to use for financing the purchase of cattle and told him to use it to make money for both of them (TR 40). From that date on, the defendant, with the consent, knowledge and concurrence of J. L. Lindsay, who was the employee, agent and division manager of the plaintiff, conducted a course of business involving the purchase, sale, feeding and care of thousands of cattle and involving millions of dollars (TR 29, 41, 124, 149, 166, 167, 226, 229). In nearly all instances, the parties "split" the profit or loss after jointly paying the costs involved in feeding and shipping (TR 92, 99, 126, 141-143, 156, 172).

With respect to count I of the defendant's Counterclaim,

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defendant appeared at a public auction involving the sale of approximately 2280 calves belonging to the Ute Indian Tribe, the defendant having purchased calves from the Ute Tribe in previous years for himself and the plaintiff for resale (TR 50-51). The defendant was instructed by J. L. Lindsay, division manager for plaintiff, to purchase the calves based upon his own judgment, (TR 52, 127) and that the plaintiff was sending a purchaser by the name of Carl Short to sit in on the auction who wanted to buy most of the calves. The defendant was the successful bidder at the sale and purchased 2282 calves for a total of \$611,605.38 and issued a draft on plaintiff in payment therefor (TR 52).

By mutual agreement between the defendant and J. L. Lindsay as division manager for plaintiff, 994 of the calves were sold to Waitt Cattle Company at a price of \$237,429.05 and the remaining 1288 calves were left in possession of the defendant due to the fact that Carl Short was unable to obtain funds with which to purchase same (TR 54). At that point in time, the price of cattle was declining and by mutual agreement, Lindsay and Christensen agreed that the calves would be placed in a feed lot until the following spring, at which time the parties hoped they could sell and recover their money (TR 54, 112, 113, 129, 130).

The market continued a drastic decline and in the fall of 1973 the parties worked out a plan and agreement whereby all of the calves, except 86 head which could not be accommodated in the

feed lot, would be delivered to Max Johnson and Bert Johnson at Delta, Utah, who conducted a feed lot operation. (TR 54, 129, 130). The agreement provided that the Johnsons would pay \$250.00 per head for the calves, feed them during the winter and then resell them to the parties the following spring on the basis of \$250.00 per head plus 42¢ per pound for weight increase (TR 54-56, 61-62) (Ex. "P").

The Johnsons paid \$283,500.00 upon delivery of the calves which sums the defendant paid over to plaintiff (TR 56). Thereafter, at the request of plaintiff's division manager, J.L. Lindsay, the defendant paid by personal check the sum of \$90,676.33 to the plaintiff to alleviate a financial problem then being experienced by plaintiff, upon the representation by Lindsay that a later accounting would be made to adjust the sum paid (TR 56, 65, 115, 116, 117, 155).

Of the total calves delivered to Bert Johnson (568) there was a buy back of 322 steers for \$102,900.00 plus a payment of \$11,946.18 for feeding 238 heifers or a total of \$114,886.18. \$83,336.08 of said total sum was paid by drafts drawn on plaintiff and the balance of \$31,550.10 was paid by defendant's personal check. (TR 57-58) (Ex. 4).

With regard to the 634 calves delivered to Max Johnson, the parties and Johnson mutually agreed that instead of repurchasing the calves per prior agreement, they would settle with

and defendant would pay the feed bill, which was negotiated at \$75,000.00 and was paid by the defendant from his personal account (TR 60-61) (Ex. 1 & 2).

The 322 steers which were re-purchased from Bert Johnson were returned to the defendant's ranch in Duchesne County, and placed with the 86 head which defendant had to keep and feed on his ranch during the winter months (TR 61-62) due to the fact that the Johnsons did not have room for them (TR 61-62). In October 1974, the plaintiff sold the 408 head of cattle for a total of \$89,591.05, however, after payment of shipping and freight charges of \$4,956.71, the net recovery on the 408 head was \$84,634.34. Plaintiff then issued a check to defendant whereby \$83,815.80 was paid to defendant on the "Indian calves", the plaintiff retaining \$818.54 (TR 63-65) (Ex. 4).

The defendant fed the 408 head of cattle for several months prior to sale and incurred feeding costs of \$10,740.00 (TR 67)

In summary, the total transaciton involving the 2282 head of calves pruchased from the Ute Indian Tribe resulted in a net loss of \$209,614.17 which has been borne solely by the defendant and according to defendant, the plaintiff should respond for one half of said loss. (TR 56, 71-72, 99, 133, 134, 153, 165) (Ex. 4)

In regard to Count II of the Counterclaim, the relevant facts are that in February 1974 the defendant, pursuant to instructions and agreement with plaintiff, negotiated the purchase

of \$2,038.00 for a total obligation of \$299,603.00 (TR 72-73). These cattle were thereafter sold for \$325,786.14 which resulted in a net gain of \$26,183.14 (TR 72-73) (Ex 5). The plaintiff paid defendant \$4,600.00 leaving a balance of \$8,491.57 as his share of the profits unpaid (TR 74-74). This transaction, as in many similar transactions, was to be handled as a partnership "50/50" deal (TR 71).

The relevant facts pertaining to Count III of the Counterclaim are essentially as follows:

In about November, 1973, J.L. Lindsay, district manager for plaintiff, requested defendant to negotiate the sale of 254 head of cattle and the parties agreed to "split the profits, 50/50" (TR 76). The sale produced a profit or gain of \$4,900.92 and plaintiff paid defendant \$2,000.00, leaving a balance of \$450.46 unpaid (TR 77) (Ex 6).

Count IV of the Counterclaim involved a transaction with parties generally referred to as "M M U". In the fall of 1970 the plaintiff and defendant had purchased cattle for "M M U" and shipped them to Nevada. The defendant had paid \$960.00 for freight which was to be repaid when the transaction was concluded and the profit was to be divided equally. The sale failed due to a death of one of the purchasers and by negotiation the cattle were resold and \$6,000.00 was paid to plaintiff, no part of which was paid to defendant (TR 81) (Ex 7).

In the spring of 1975, the defendant made demand upon the plaintiff for a total accounting, which was refused, and hence this litigation (TR 69).

## ARGUMENT

### POINT I

IN THE LIGHT OF ALL ATTENDANT CIRCUMSTANCES AND COUNTERVAILING TESTIMONY, THE FINDINGS OF THE TRIAL COURT ARE SO CLEARLY AND PALPABLY UNREASONABLE THAT NO FACT TRIER ACTING FAIRLY AND REASONABLY COULD ACCEPT SAME, AND SAID FINDINGS SHOULD BE REJECTED AS A MATTER OF LAW AND THE FACTS DETERMINED OTHERWISE.

We are not unmindful of the long line of cases propounded by this court which stand for the proposition that the trial court findings will not be disturbed if based upon sufficient and proper evidence, the cases being so numerous and well documented as to require no citation here. However, the subject action, in our opinion, falls within that line of cases which recognizes the right of this court to review the evidence, testimony, and record, and reach its own independent conclusion from the evidence therein contained.

This case involves an accounting, and as such it invokes the power of this court to review questions of both law and fact. (Douglas Reservoir's Water User's Association v. Cross, 569 P2d 1280; Stevens v. Grav, 123 Utah 395, 259 P2d 889; West v. West, 16 Utah 2d 411, 403 P2d 22; Coombs v. Ouzounian, 24 Utah 2d 30.

In the West case, this court stated:

"Inasmuch as this is a suit over an accounting in a partnership, it is a suit in equity and it is the responsibility of this court to review questions of both law and fact."

The major problem with the facts found by the trial court is that they find no support by the overwhelming evidence and testimony, and are in many instances in direct conflict with unrefuted, substantial and probative testimony and evidence.

A review of the critical testimony becomes necessary to bring into focus the error committed by the court.

It is undisputed that the plaintiff and defendant began dealing with each other in numerous and varied business transactions involving the sale, purchase and feeding of cattle as early as 1948, (TR 39, 123) and continued until the date that an accounting was demanded by the defendant in the spring of 1975. (TR 123, 124, 144).

During this extensive period of time the plaintiff relied entirely upon their agent, employee and district manager, J.L. Lindsav, to work out the details of each transaction and conclude the negotiations on whatever basis he saw fit. (TR 123, 128, 148, 149, 226, 229).

The trial court in it's ruling made the following comments:

"As to what has been designated as the Ute transaction, there is no question in the court's mind that there has been a method of dealing between the parties, perhaps contrary to the regulations of the governmental agencies involved where both of them are licenced dealers, both of them knew they should not

have been in a partnership relationship, each of them knew they should not have been issuing split commissions to one another and yet these transactions persisted. It's not hard to find the partnership transactions...."

"....I find that the partnership did exist;...." (TR 317)

The trial court having found and concluded that a partnership existed, it logically follows that the issue of whether or not an accounting was ever accomplished becomes pivotal in this case. A review of the pertinent testimony and evidence conclusively shows that at no time did defendant ever acknowledge or conclude a settlement and the testimony of plaintiff's own district manager J.L. Lindsay, corroborates this fact (TR 99, 100, 102, 107, 112, 113, 115, 116, 117).

The relationship involved thousands of transactions and millions of dollars and during this time the defendant was a trusted associate and made the plaintiff a great deal of money (TR 40, 41, 123, 124, 166, 167). On some occasions, the parties had experienced losses and shared same on an approximately "50/50" basis (TR 133, 200, 231, 283).

Generally speaking, the losses were carried over for a period of time and worked out in later dealings (TR 133, 162, 163). The arrangements were very informal and Lindsay made the ultimate decisions as to when and how the payments were made for settlement of the various deals (TR 126, 129, 229, 231). The record discloses that Lindsay was given a free hand by the plaintiff to deal with

Christensen on any basis he thought appropriate (TR 123, 126, 127, 129, 133, 134, 148, 149, 162, 164, 165, 231). However, it was not

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until the substantial loss occurred in 1973-1974, involving the "Indian calves" that the plaintiff tried to disavow any authority on the part of Lindsay, and attempted to disclaim any duty toward the defendant. We find it of interest, and difficult to understand, why and how the trial court, having found a partnership to exist, has seen fit to ignore the testimony of the defendant and that of the plaintiff's district manager, in concluding that a partnership settlement had been achieved when both Lindsay and Christensen have directly and unequivocally testified to the contrary. The only possible evidence which would give rise to such a conclusion or inference are the "deal sheets", which are, at best, self-serving documents prepared solely under the supervision of the accounting personnel of the plaintiff and lacking in proper foundation, plus the hearsay testimony of the general manager as to what he concluded from a discussion between himself and Lindsay. For the trial court to reach such a conclusion it had to ignore the only probative, direct and undisputed oral testimony given on the subject. It is true that certain inconsistent testimony, if believed, was elicited on rebuttal to impeach some aspects of the testimony of Lindsay. However, this testimony was admitted in evidence for "impeachment purposes only" and cannot form the basis of such a finding. (TR 205-207). See AmJur 421 Sec. 770; 20 AmJur 404, Sec. 458. This would at best leave the undisputed testimony of the defendant himself, who testified that no final settlement was ever attained, and the



Also, the court seemed to get carried away with the idea that the plaintiff had no way of protecting itself from the machinations of it's own district manager, and for some reason, which we fail to understand, takes this as a further unwarranted basis for it's ruling (TR 317). The testimony of the plaintiff's general manager stands undisputed that Lindsay was given full authority to manage his books and affairs (TR 226-229).

In the case of Continental Bank & Trust Company v. Stewart, 4 U2d 228, 291 P2d 890, the court was confronted with the problem of giving weight to the testimony of a key witness who had an obvious financial interest in the outcome of the litigation and in passing upon this issue, the court stated:

"While it is true that the testimony of a witness such as Mr. Cheney would ordinarily be regarded as sufficient to compel the affirmation of the trial court's finding, that is not necessarily so under all circumstances. Defendant is correct in arguing that even though the testimony standing alone might be sufficient to support a finding, it must always be appraised in the light of all the attendant circumstances and countervailing testimony. If when so viewed, it appears so clearly and palpably unreasonable that no fact trier acting fairly and reasonably could accept it, then it must be rejected as a matter of law, and the fact determined otherwise. This is particularly so here where Mr. Cheney had such a vital personal interest in the controversy, since it obviously would be greatly to his advantage if he could fix upon Mr. Stewart the responsibility of paying this large unsecured personal debt." (Emphasis added)

It is obvious from the ruling of the trial court that the

of singularly sustaining a loss of approximately \$210,000 on the transaction involving the "Indian calves". We cannot find sufficient basis in testimony or evidence which warrants such a drastic result.

In the case of Continental Bank & Trust Company v. Stewart, supra., this court, discussing a concept of law dealing with contracts between parties, cites Page, Treatise On Contracts, as follows:

"As between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which makes it unfair and unreasonable, the former should always be preferred."

Although this case was dealing with a principal of interpreting contract law where an uncertainty exists, it nevertheless carries with it an equitable principle we believe apropos in the instant case. To allow the ruling of the trial court to stand, in effect gives greater credibility to that construction which smacks of gross unfairness and unreasonableness, considering some 25 years of dealings between the parties where the plaintiff has eaten the fruit of profit and now refuses to bear a portion of the losses on a pick and choose basis.

With regard to the Findings of Fact adopted by the trial court, no issue ever existed with respect to the two sums of money received by the defendant by virtue of drafts which he drew upon the plaintiff in the amount of \$23,667.20 and \$26,567.66

as set forth in Findings #3 and 4, and it was conceded that these amounts would constitute a credit to plaintiff in the final accounting sought by defendant (TR 9, 10, 15).

Finding of Fact #5 recites that defendant purchased livestock from the plaintiff. This Finding is not supported by any testimony or evidence and is typical of many such erroneous findings.

That portion of Finding #6 relative to the witness Lindsay being adverse to the plaintiff is consistent with the ruling of the court (TR 317) but totally lacking in substance. A total reading of the record shows that this witness gave testimony, favorable and unfavorable, to both parties.

It seems the only reason the court came to such a conclusion was the fact that the testimony of this witness did not support or square with the court's ruling. The mere fact that a witness testifies truthfully under oath should not, per se, make him an "adverse witness". Such a finding is not supported by the record and was in error.

The record does not support that portion of Finding #7 which recites that "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.

The record contains extensive testimony relative to the fact that accountings were frequently discussed and frequently

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postponed or ignored. (TR 56, 68, 69, 88, 93, 95, 96, 99, 100, 117, 120, 133, 135, 136, 137, 156, 157, 158, 163, 164). The testimony indicates that neither Christensen or Lindsay were too concerned with an exact date for accounting, and as testified by Lindsay, "as long as Christensen wasn't squealing too loud" the bad deals were ignored and settlement deferred to a later date (TR 162-164). This testimony is further supported by that of the general manager, Joe Jacobs, when he testified that Lindsay was given full discretion in how he handled his books and how Christensen was treated (TR 229).

Finding #8 is not consistent with the overwhelming evidence.

Finding #9 recites in part that Lindsay, plaintiff's agent, and the defendant, agreed on the price to be paid for the Indian calves, which are the subject of the first count of defendant's counterclaim. How this finding can be sustained defies the imagination in light of the testimony illicited on the subject. At pages 127 & 128 of the transcript of record appears the following testimony of J. L. Lindsay, plaintiff's agent:

"Q. Did you discuss with Mr. Christensen the amount that should be paid for these Indian cattle?

A. Yes, I think we did talk in general figures.

Q. And was the matter left to his final discretion as to whether or not he purchased them or bid them out? I understand it was an auction sale.

"A. Yes, we have always had it that way.

Q. All right. What happened after the sale, do you recall?

A. Yes. He called me up and told me what he had given for them and I about dropped over dead. And I said, well, I guess you was there and if that's what you had to do, that's the way it is.

The testimony of Christensen is essentially the same. At pages 51-52 of the Transcript of Record appears the following:

"Q. It was an auction. Had you received any instructions from Producer's Livestock as to that particular transaction?

A. I talked to J.L. about it. He said go there at the auction and try to buy the calves. He said, we will have a man there by the name of Carl Short that wants the big end of the calves and he will sit with you.

Q. And were you given any instructions as to how much you should pay for them?

A. No.

Q. What, if anything, was said about that?

A. He said, use your own judgment."

The evidence does not support a finding that defendant bid in excess of the "agreed" upon bid price. Lindsay and Christensen were the only witnesses who testified regarding this matter. (TR 51, 52, 127, 128)

That portion of the same finding which states that Christensen "personally contracted" with the Johnsons is likewise lacking in support and in direct conflict with the only probative testimony on the matter. At pages 54 & 55 of the transcript of record appears

the following testimony of Christensen:

"Q. And did you have any discussion with Mr. Lindsay as to what disposition should be made of the calves that you still had?

A. We, we talked about it several times.

Q. And was there anything agreed upon?

A. We finally agreed that if we could find a place to put them and feed them, possibly in the spring we could get out on the calves and maybe get our money back out of them.

Q. And pursuant to that, what happened?

A. The market just kept going down, down, and but in the meantime, we made a deal with the Johnsons in Delta to feed the calves."

Christensen further testified: (TR 112)

Q. Who made the deal to sell the cattle to the Johnson Brothers?

A. They came up to see me and I talked with them. They told what they could do. I called J.L. Lindsay and told him. You see, what do you think, and he said, I think we ought to try it.

The testimony of J.L. Lindsay appearing at pages 129-130 of the transcript of record is also significant:

"A. Well, Peter had, Mr. Waitt had a place to go with some of the calves down into Texas where he had some cheap feed and he said that he would take some of the calves and, I can't tell you the exact time, but Zane finally said that he could tell, he could send the calves down to the Johnsons and if we buy the cattle back

so that it isn't a severe loss.

Q. Did you know the Johnsons?

A. Oh yes.

Q. Had you dealt with them prior to that time in the feed lot operation?

A. Many times.

Q. So that you knew who he was sending the cattle to?

A. I introduced him to Mr. Johnson.

Q. And you then concurred with his evaluation as to what should be done with the cattle?

A. That was about the only alternative we had.

Q. But at any rate, they were sent down to Johnsons to be fed until spring; is that correct?

A. That's correct.

Q. And you recall the amount that Johnsons were to pay at the time they took the cattle and then you say to be repurchased in the spring?

A. No, I don't recall the exact figures.

Q. But you did concur with this arrangement?

A. Yes."

In light of this undisputed testimony, it is obvious that the arrangement with Johnsons for the feeding of the calves was jointly initiated and agreed to by both parties.

The final portion of said finding which is in direct conflict with the testimony is that portion which recites that the defendant "reimbursed plaintiff" for the \$90,676.33. Both Christensen and Lindsay testified that the money was paid by Christensen to alleviate a financial problem on the part of the plaintiff and that the matter would be adjusted later. Christensen testified as follows:

"Q. So what we have is that the Johnson Brothers pay off approximately 275 -- \$280,000 towards the purchase price of those cattle, and there's the \$90,000 that's left over. Now what happens with respect to that \$90,000?

A. J.L. came to me and said that they had a tremendous loss, Producers, had a tremendous loss, and was there any way that I could let them have that money until they could get things recuperated and gathered together again"(TR 115). \* \* \*

"Q. J.L. Lindsay said he needed the money. Did he indicate to you that there was pressure for him to clean off the accounts receivable?

A. No.

Q. He indicated that he did need the money. What did you say?

A. He said he needed the money. J.L. said that he needed the money and that we would straighten up at a later time"(TR 116, 117).

Lindsay, testifying relative to the payment of the \$90,676.33 clearly indicated that he was interested in getting the account



straightened up in connection with the "buy back" arrangement and that he realized there would have to be a settlement "sooner or later" (TR 156-157). He further testified the he, Lindsay, wanted to get the money because the plaintiff was short of funds and "plaintiff was participating in the buy back just like Mr. Christensen was" (TR 155).

The most gross missapplication of the testimony and evidence is found in Finding #10. With the exception of the first sentence the remainder of the finding is totally inconsistent with the credible evidence and testimony. At no time did either the defendant or Lindsay, plaintiff's agent, testify that the partnership had been finalized or that a final accounting attained, but to the contrary, each party testified that an accounting was to be had and that the defendant was entitled to such (TR 43, 56, 99, 100, 133, 134, 135, 136, 156-158, 162-164). The general manager for plaintiff, Joe Jacobs, failed to refute or deny the testimony of Christensen found on page 43 of the transcript of record where Christensen testified that Jacobs acknowledged an accounting should be had.

All of the Findings are fraught with the same errors as referred to hereinabove and the judgment based thereon should not be allowed to stand.

Rule 52 (a) U.R.C.P. provides that the court shall find the facts specially and state separately it's conclusions of law

thereon. The Findings adopted by the court were prepared by counsel for plaintiff and a reading shows that it was not a disinterested mind which prepared the Findings.

It has long been a trend in the courts to view with disfavor the Findings prepared and adopted verbatim by one side, and as the Supreme Court of the United States observed in the case of United States v. Marine Ban-Corporation, Inc., (1974) 418 U.S. 602, 41 L ed 2d 978, 945 ST 2856, at footnote 13:

"In adopting verbatim proposed Findings of Fact in a complicated Section 7 antitrust action, the District Court failed to heed this Court's admonition voiced a decade ago." (Citing United States v. El Paso Natural Gas, op. cite.)

The Findings of Fact conclusively establish J.L. Lindsay as the agent of the plaintiff, until July, 1975 (R 55), and having so found, the burden of proof was upon the plaintiff to prove that they were not bound by his conduct and knowledge. (3 C.J.S., Agency, p. 295).

At page 317 of the transcript of record, the court stated in it's oral ruling "that the subsequent transaction (March 1974) was carried out without knowledge or consent and without the giving of any notice to or any ability on the part of the plaintiff to protect himself because they didn't know about the transaction until sometime in May or June (1975)\*\*\*"

Viewed in this light, we are of the opinion that under the facts and circumstances, as supported by the record, the trial court misconceived the law concluding in effect, that the plaintiff was not bound by it's agent's actions and knowledge, which

constitutes reversible error. (Mehbrandt v. Hall, 213 P2d 605 (Colo. 1950); Prosser v. Schmidt, 262 P2d 272.

POINT II

THE TRIAL COURT ERRED IN FINDING THE WITNESS J.L. LINDSAY TO BE ADVERSE TO THE PLAINTIFF AND THUS FAILED TO GIVE PROPER WEIGHT TO HIS TESTIMONY

The court's ruling that the witness J.L. Lindsay was "adverse to the plaintiff" is without merit. The only basis for such a conclusion seems to be the fact that Lindsay's testimony was not favorable to the plaintiff's contentions.

There was no evidence to show that this witness had any interest in the outcome of the lawsuit or that he harbored any animosity toward either party. Generally speaking, the absence of any bias operates in favor of the witness (Thurlock v. United States, 295 Federal 905; Suddeth v. Commonwealth County Insurance Company, 454 SW 2d 196; 32 A C.J.S., Evidence, Sec. 1037 (d), p. 727).

It has been recognized and held that where a former employee is called as a witness, he is considered a disinterested witness, absent any showing of bias, etc. (Pyle v. Phillips, 164 SW 2d 569).

The ruling of the trial court that Lindsay was an adverse witness to plaintiff is not supported by the record.

In 32 A C.J.S., Evidence, page 697-698 the general rule

"...The testimony of a party to a case or other interested witness, should not be disregarded or considered inherently improbable in the absence of conflicting proof or circumstances justifying doubt as to it's truth..."

### CONCLUSION

The only evidence and testimony offered by the plaintiff which would tend to support the critical findings of the trial court were "deal sheets" prepared by the plaintiff, which, at best, were self-serving documents, lacking in foundation and substance.

The testimony received in variance with that of the witness J.L. Lindsay was for "impeachment purposes only" and as such is totally improper as a basis for sustaining any Finding of Fact or Judgment.

When the total evidence and testimony is weighed in the light of all circumstances, it appears obvious that the defendant should prevail, and that the lower court committed reversable error.

Respectfully submitted,

R. EARL DILLMAN  
BRANT H. WALL  
Attorneys for Appellant  
Suite 500 Judge Building  
Salt Lake City, Utah 84111