1982

Weldon S. Abbott v. Newell Christensen and Newell Christensen v. Weldon S. Abbott : Brief of Respondent and Cross Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

WELDON S. ABBOTT,)

Plaintiff-Appellant,)

vs.)

NEWELL CHRISTENSEN,)

Defendant-Respondent,)

Case No. 17616

NEWELL CHRISTENSEN,)

Plaintiff-Respondent,)

vs.)

WELDON S. ABBOTT,)

Defendant-Appellant.

BRIEF OF RESPONDENT AND CROSS APPELLANT

APPEAL FROM A JUDGMENT OF THE
DISTRICT COURT OF DUCHESNE COUNTY
HONORABLE J. ROBERT BULLOCK

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BRIEF OF RESPONDENT AND CROSS APPELLANT

GENERAL STATEMENT

This Appeal involves three (3) separate actions from the Fourth Judicial District Court of Duchesne, County, wherein Abbott was plaintiff in two (2) of them, and Christensen was plaintiff in the other. For both convenience and consistency in this Brief, all references to these parties shall be either to Abbott or Christensen, respectively.

NATURE OF THE CASES

Abbott and Christensen had been Partners or Joint Venturers in a land-cattle operation in the Uintah Basin, which commenced in the Fall of 1970 and terminated by the end of December, 1974. The

three (3) consolidated actions arose from the termination of this business relationship. In 1976, Abbott commenced the first action to replevy 28 head of cattle, and the second to recover a $29,000.00 down payment on a Real Estate Contract. Christensen counterclaimed, seeking a consolidation; the appointment of a Receiver; an accounting; etc. In April 1977, Abbott removed the 424 shares of water from the "Reary place", and Christensen commenced the third action requesting: the water be left where it was; Abbott enter into escrow; Abbott deliver water certificate to escrow agent; etc.

The parties stipulated to: a consolidation of the three cases; and the Court appointment of a special master. In substance, these actions are in equity.

DISPOSITION IN LOWER COURT

A. ROLE OF SPECIAL MASTER:

From January 19, 1977, through Judgment, the special master reviewed documents and prepared an accounting. He prepared three "tenative" reports or accountings which each party was allowed to review, etc. Each report attempted to conform to and fully reflect information furnished by the parties. A report was available for trial, and was thereafter adjusted to reflect the facts and/or conclusions the trial court reached during trial.

B. TRIAL:

The consolidated cases were tried on July 9, 10, and 14, 1980. On November 21, 1980, the trial court made and entered it's own

Findings of Fact and Conclusions of Law.

C. JUDGMENT

After the special master's final accounting, and arguments of the parties were heard, on February 24, 1981, the Court's Judgment was filed, and Christensen was the "prevailing party."

D. APPEAL:

Abbott filed Notice of Appeal on March 16, 1981, and Christensen Cross Appealed.

RELIEF SOUGHT ON CROSS APPEAL

Christensen seeks the affirmation of the report and accounting of the special master, and of the Judgment, except to that part of the decision that: requires Christensen to pay Abbott a $29,000.00 down payment on the Lindsay Place; that fails to give Christensen credit for $80,000.00 of his contribution; fails to return the mare and two colts and account for the Winterton steers; and, award a reasonable attorneys fee and costs.

STATEMENT OF FACTS

While recognizing the need for brievity, Christensen also recognizes that without an adequate history of the joint venture, it will be difficult, if not impossible, to understand this litigation and/or appeal. Hopefully to assist the court in that regard, Christensen offers this detailed account of the facts:

I. PERIOD PRIOR TO FALL 1974:

A. BACKGROUND:

Abbott is and was a medical doctor whose residence and practice is in Salt Lake City. Christensen is and was a resident of Mt. Home, Utah. When Christensen first met Abbott, Christensen owned a home at Mt. Home, and was employed by the U. S. Government as a "Wilderness Ranger". They had a mutual acquaintance in John E. "Ringneck" Fausett (Fausett hereafter).

During the fall of 1970, Abbott indicated to Fausett he would like to acquire, for tax purposes, a cattle ranch in the Uinta Basin, if he had someone to run it for him. Fausett offered to help "find" an appropriate person. Fausett arranged a meeting at his ranch, where he introduced Abbott and Christensen, and assisted them in formulating their agreement.

B. AGREEMENT:

Abbott and Christensen agreed that: Abbott would supply the necessary capital to acquire the land, and cattle for a cow-calf operation; Christensen would manage the operation for a guarantee of $500.00 per month, his beef, a place to live and his utilities; and, they would split the annual profits from the calf "crop". Christensen's monthly guarantee of $500.00 was to be deducted from his share of the profits, if any. Christensen was not to share in the losses and losses were not be be carried from year to year. Initially, Christensen was to have no interest in the cattle herd or Abbott's real property. (See Findings of Fact #1, Record, Pg.

135, Case No. 6169)

C. IMPLEMENTATION OF AGREENENT - Reary Place:

By January 1971, Christensen had negotiated the purchase of the "Reary" place, and assisted in the purchase of 60 "mother cows". Included in the purchase of the Reary Place was 240 acres of land, an older home with out buildings, 424 shares of water in the Farnsworth Canal Co., 30 shares of oil, gas and mineral rights (Exhibit #35), and certain items of farm equipment (Exhibit #36). By April, Christensen moved his family to the Reary Place and started discharging his agreed duties.

D. BLEAZARD PLACE - Expansion of Agreement:

Shortly after acquiring the Reary Place, an adjoining ranch belonging to Grant Bleazard also became available, which Abbott desired to acquire. However, Abbott did not have sufficient personal funds. Christensen offered to assist by trading to Bleazard his home for $10,000.00 and some land and mineral rights for $25,000.00. On May 1, 1971, Abbott used Christensen's land and minerals as a down payment to acquire the "Bleazard Place", consisting of 620 acres, together with certain water shares and personal property. (see Exhibit #15).

As a result of Christensen's contribution, and Abbott's interest in acquiring more land, the parties agreed that in addition to the cattle operation, Christensen would negotiate the purchase of additional properties; Abbott would continue to furnish the necessary capital; and, the profits (if any) from the re-sale of the ranches would be divided between them. The parties further agreed that when the joint venture ended, the "Reary Place" would

belong to Christensen and the "Bleazard Place" would belong to Abbott. However, at no time was a written agreement prepared, although Abbott acknowledged that the agreement had "change[d] from time to time as our situation changed". [Abbott's deposition, Pg. 6, lines 5-6; Record Pg. 0062, Case No. 5799]. Christensen claimed that only the items being joint ventured changed, and not the basic agreement.

E. BANK ACCOUNTS - "Ranch Account":

Abbott, maintained at least two "Ranch Accounts", each of which he treated, at least in part, as his personal account. One of these was at Zions First National Bank, at Roosevelt, Utah, on which Christensen was approved to sign checks.

F. CATTLE BRAND:

The brand,  , was registered with the State Brand Inspector, in both of their names. Abbott alleged that Christensen was included as an owner as a convenience to sell the cattle. Christensen claimed that he was registered as a owner because he was an owner of at least part of the cattle with that brand. All cattle owned by Abbott or the partnership were branded with this brand.

G. WINTERTON HEIFERS:

During the first year of the joint venture, the parties purchased 100+ head of heifers from the Winterton Brothers of Roosevelt, Utah, to be "fed out" and sold in the fall of 1971. At the time of sale, Abbott elected to retain some of the heifers as "mother cows". Christensen claimed that Abbott agreed to compensate Christensen for what would have been his share of the

"profits" from the heifers at the rate of $100.00 per head, which Abbott denied.

H. OTHER LAND ACQUISITIONS: After the "Reary" and "Bleazard" places, the parties commenced to buy other ranches.

1. Birch #1 and Birch #2: Christensen was negotiating the purchase of these properties in 1972, when the owner died. As a result, the land was in probate for a time. The required funds were to be furnished by Abbott, but when they were needed, Abbott did not have the same. Christensen personally borrowed $15,000.00 at Zions First National Bank, deposited the same to the Ranch Account and paid the Birches. Christensen had to repay said $15,000.00 from his personal funds. The special master considered this contribution in his accounting. These places were acquired in Christensen's name, and went to Christensen in the distribution.

2. Taylor Place: In January of 1973, Abbott purchased an adjoining "dry" ranch of 160 acres, for $16,000.00. Said ranch had no irrigation or water rights, but was adjacent to both the Bleazard and Reary places. It was treated as Abbott's place from the beginning.

3. Lindsay Place: On June 21, 1973, the parties jointly purchased a nearby ranch, hereafter referred to as the "Lindsay Place (See Exhibit #16). It had 160 acres of land, 49 head of cattle, 65 head of sheep, 392 1/2 shares of water, and miscellaneous farm equipment. The payments on the Lindsay place are covered by the special master. This place went to Christensen in the distribution.

4. Whitehead Place: On April 2, 1974, Christensen personally

purchased the Whitehead Ranch, consisting of 240 acres, 86 shares of Dry Gulch Irrigation Water, 34 head of cattle, and miscellaneous farm equipment for $105,000.00, with $26,000.00 down. The payments are covered by the special master. In the final distribution, this place went to Abbott.

I. ZANE CHRISTENSEN RANCH: On or about June 4, 1974, the parties attempted to purchase an additional ranch consisting of 1513 acres, plus certain water rights, from Zane Christensen for $681,000.00. They were to pay $200,000.00 down, of which they paid $50,000.00 in cash and gave a Promissory Note for $150,000.00. The $50,000.00 came from the "Ranch Account," and the parties entered into possession of and "ran" the ranch for the 1974 season. However, for numerous reasons, and since the joint venture was breaking up, the parties elected not to complete this purchase. Zane did not compel specific performance of the parties but he simply forfeited the parties interest [Exhibit #20]. The Court did not consider this purchase as part of the Joint Venture. [See Record, Pg. 173, Paragraph 1, Case No. 6169]

J. CHRISTENSEN'S CONTRIBUTION OF CAPITAL: From time to time Christensen, either jointly with Abbott or by himself, borrowed funds and deposited the same to the ranch accounts. In addition, as indicated under sub paragraph "D" above, regarding the Bleazard Place, Christensen turned over his home and certain mineral rights to Abbott, so Abbott could acquire the Bleazard place. Christensen received credit for all of his contributions to the Joint Venture, except:

1. The $10,000.00 for his home;

2. The $25,000.00 for his mineral rights; and

3. $45,000.00 borrowed from Zions First National Bank and deposited to the Ranch Account.

K. 1973 CALF CROP: In 1973 the price of cattle was severally depressed, and rather than sell the entire calf crop and divide the profits at that point, the parties elected to retain the best calf heifers and sell the rest. From the calves sold, the parties had sufficient income to pay their expenses, and the retained heifers were their "profit." [See Deposition of Abbott, pg 34, lines 12-14, found in Record at Pg. 62, Case No. 6169). Originally 58 calf heifers were thus retained. Abbott claimed that when the calves became mother cows, Christensen lost all right to them, but since costs had been fully paid, Christensen claimed to own half.

L. HORSES: Christensen bought seven (7) horses with Ranch Account funds, five (5) of which were resold with sufficient profit to pay for all of them. Of the two (2) kept, Abbott took one (1) and Christensen kept a registered mare, which in 1974 he paid to have bred to a registered stud.

II. DISSOLUTION PERIOD:

A. SUMMER OF 1974: During the summer of 1974, the parties determined to terminate their joint venture. The parties had relatively little trouble agreeing how the real property would be divided. Christensen testified that other joint venture assets were also divided, with each receiving what came with their parcel, except on the Reary Place as explained hereafter. Abbott testified to the contrary, claiming that all personal property, hay,

livestock, etc., were his.

B. TERMINATION DATE: Despite a conflict of testimony, the trial court adopted November, 1974 as the termination date, that being the last month Christensen received a monthly draw of $500.00. (See Finding of Fact #2, Record, Pg. 153, Case No. 5799).

C. REAL PROPERTY TO ABBOTT: Under the agreement reached by the parties, Abbott received by contract or otherwise:

1. Reary Place: All oil, gas and mineral rights connected with this parcel, plus one-half (1/2) of the gravel bed;

2. Bleazard Place: All interest of the parties;

3. Taylor Place: All interest of the parties;

4. Whitehead Place: All interest of the parties.

D. REAL PROPERTY TO CHRISTENSEN: Under the agreement reached by the parties, Christensen received by contract or otherwise:

1. Reary Place: All interest, except for the oil, gas and mineral rights, and one-half (1/2) of the gravel bed; [Exhibit #14.]

2. Birch #1 and #2: All interest; [Exhibit #17.]

3. Lindsay Place: All interest. [Exhibit #26.]

E. OTHER PROPERTY: Each party initially retained certain personal property, including farm machinery, livestock, horses, etc., that they either had, or, that went with the place they received, or, which they had agreed upon between them.

III. PERIOD AFTER TERMINATION:

A. FIRST YEAR - 1975.

1. Abbott's Cattle. During the first six (6) months of 1975,

Christensen continued to "run", care for, etc., Abbott's "mother cows", feeding them hay he had purchased from third parties or which had been raised on the property he received or "purchased" under the distribution. Christensen claimed the right to be reimbursed for this hay and effort. Abbott claimed Christensen was to feed the cattle as part of the termination agreement. Abbott took possession of his "mother cows" by August of 1975.

2. 1973 Calf Crop: Early in 1975, the fifty-eight (58) head of cows that had been the 1973 "hold-over" calf crop, were divided, each receiving half. Abbott made no demand at the time for the rest.

3. Water on Reary Place: During 1975, Abbott made no claim to the 424 shares of water from the Reary Place, and Christensen used them as he had since 1971.

4. Lindsay Place Livestock: Christensen personally retained, used, cared for and sold livestock acquired with the Lindsay Place, and Abbott made no protests.

5. Property Division: Each party operated his own ranch property throughout 1975. Abbott failed to set up of any of the escrows called for on pgs. 1 and 2 of Exhibits #14 and #26. (Also See Abbott's Answer, Record, pg 13, Paragraph 8, Case No. 6169.)

6. Miscellaneous Ranch Property: Christensen had possession and use of a registered quarter horse mare that he considered to be his share of the "profits" from horses. In 1974 Christensen paid a $100.00 "breed fee", receiving a colt in 1975, and in 1975 paid another "breed fee" for another colt.

7. Joint Venture Debt: During early 1975, Christensen

received statements for unpaid expenses incurred by the ranch prior to termination, which he gave to Abbott. When Abbott refused to pay them, Christensen personally paid the same. All of this information was furnished to, and considered by, the special master.

B. LITIGATION BEGINS - 1976:

1. 1973 Calf Crop: While the calving was going on, Abbott still made no demand or suggestion that he considered these to be "his" cows. However, other business arrangements between Abbott and Christensen's father, Paul Christensen also terminated in April of 1976. On June 11, Abbott filed Case No. 5799, claiming that Christensen was wrongfully withholding Abbott's cattle and replevying the same.

2. Reary Place and water: Christensen again had the full use of the property and all the water originally acquired with the Reary Place. In January Christensen suggested that Abbott should enter into an Escrow Agreement, and deposit the necessary papers (see Exhibit #87), but Abbott made no attempt to do so as required in Exhibit #14. In November and December Christensen made the same request of Abbott. [See Exhibits #88 and #89].

3. Lindsay Place: Christensen continued exclusive occupancy of the premises and possession of all the water, livestock and other personal property originally acquired by the parties in connection with said property. On June 11, Abbott commenced Case No. 5800, declaring Christensen had never paid the $29,000.00 down payment provided for in Exhibit #26. This was the first demand Abbott made upon Christensen for the $29,000.00.

4. Christensen's Answer and Counterclaim: Christensen responded to both actions by: denying the same; requesting a full accounting; requesting the appointment of a Receiver; moving that the two actions be consolidated; etc. Abbott denied there was ever a partnership (see Abbott's deposition Pg. 35, lines 15-22, Record, Pg. 62, Case No. 5799), and resisted the appointment of a Receiver, the consolidation of the cases, etc.

5. Partnership Horses: Without notice to Christensen or any court order, Abbott took the registered mare and her yearling colt. The mare foaled after Abbott removed her.

C. LITIGATION CONTINUES AND EXPANDS - 1977:

Without notice or prior warning to Christensen, Abbott directed the officers of Farnsworth Cananl & Reservoir Company to remove the 424 shares of water from the Reary Place. Christensen commenced Case No. 6169 and sought a Restraining Order. By reason of disqualification of Judges, reassignments, etc., no order was entered in 1977, and Abbott used the Reary water during 1977. In Paragraph No. 4 of Abbott's Answer, he alleges that he never intended "to include any water shares in the sale", (Record, Pgs. 12 and 13, Case No. 6169), and that he had not entered into the escrow agreement, etc. (Paragraph No. 8, Record, Pg. 13, Case No. 6169).

As a result of the removal of the water during the 1977 irrigation season, the pastures, hay fields, springs, wells, etc., on the Reary Place dried up; etc. As a result, Christensen sustained a substantial monetary loss.

D. 1978 - 1980: WATER RETURNED, TRIAL, ETC.:

Christensen obtained the re-delivery of the water to the Reary place, and the accounting, discovery, etc., proceeded until the trial was held.

ARGUMENT

GENERAL STATEMENT

Christensen concurs in the general statement of the law as indicated in Point 1 of Appellant's Brief, by underscoring several of the key points.

1. The review of law and equity by the appellate court is in the light most favorable to the findings and judgment of the trial court.

2. That the finding of the trial court, based on conflicting evidence, will not be set aside unless it manifestly appears that the court misapplied proven facts or made findings clearly against the weight of the evidence, Olinero v. Elganti, 61 U. 475 at 479, 214 P. 313 (1923); Ream v. Fitzen, 581 P. 2nd. 145, 147, (1978.)

These standards for appellate review were carefully reviewed in Hatch v. Bastain, Utah, 567 P.2d 1100 (1977), and this Court concluded:

> Even though we may review the evidence [in an equity case], the proposition is well grounded in our law, that due to the advantaged position of the trial court, we indulge considerable difference to his findings and do not interfere with them unless the evidence so clearly preponderates against them that this court is convinced that a manifest injustice has been done. (Emphasis added.)

Based on such standards for review, Christensen believes that the court will not set aside those matters appealed from by Abbott, but will grant Christensen relief from the certain portions of the

findings made by the trial court.

POINT I

IN GENERAL, THE SPECIAL MASTER DID HIS JOB PROPERLY, AND AS DIRECTED BY THE TRIAL COURT

While both parties felt that the special master had omitted items that they were concerned about, Abbott was not heard to protest any of the workings or activities of the special master, until after the trial. While Abbott may "nit pick" that the special master did not follow the "stipulation", what should be referred to is the Order, which provides:

> That Sidney Gilbert be and is hereby appointed as a special master in this matter to review and audit all documents which he shall determine is necessary, so as to fully reflect the joint operations of the parties . . . (emphasis added) Record, Pg. 64, Case No. 5799.

With that authority, and the court's continuing jurisdiction to direct the special master, the work and report of the special master is proper. One of the functions of a special master in this type of situation, is to "sift" through an unbelievable amount of records, so that the court can reach the ultimate decision it must make. As a matter of law, the court made a determination as to the terms of the partnership or joint venture arrangement, which the special master utilized to complete his report. (Finding of Fact No. 2, Record, Pgs. 153-154, Case No. 5799). Abbott does not attack this finding by the court as not being the agreement of the parties. Rather, Abbott attempts to have the trial court's finding that only Abbott was to contribute capital, be ignored because he claims such an arrangement to be inequitable. Surely that is not

the function of either the trial or appellate court. The trial court's function was to determine, from the facts, what the parties had agreed to. Once the court made the finding that Abbott had the exclusive responsibility for making the capital contributions to the joint venture, then any expenses connected with his making a capital contribution, including interest, loan service fees, etc., were his obligation and not expenses to be charged against the partnership, as far as the accounting is concerned. Likewise, any contribution by Christensen would be in a different category. Thus, the complained of report and findings by the special master are correct, inasmuch as they conform to the findings made by the trial court. On appeal, Abbott might properly have attacked the court's finding as being against the weight of the evidence, etc., but not on the basis that such a term of an agreement was not wise.

POINT II

PURCHASE OF ZANE CHRISTENSEN PROPERTY BY ABBOTT AND CHRISTENSEN WAS NEVER COMPLETED AND WAS NOT INTENDED AS ASSET OF THE VENTURE, TO BE DIVIDED

The Trial Court correctly and specifically found:

> 5. That the Zane Christensen Transaction was not a matter involved in any agreement which is the subject of litigation in this case. The evidence is insufficient to find any agreement as between the parties with reference thereto other than as setforth in the contract itself. (Record, Pg. 195, Case No. 5799).

Utilizing the standard for appellate review, established on pages 9 and 10 of Abbott's brief, Christensen would urge that none of Abbott's points or arguments would suggest that the trial court "misapplied the facts, or made Findings clearly against the weight

of the evidence." Nevertheless, Christensen responds to the points raised by Abbott.

As indicated by Exhibit #79, which is the contract to purchase the Zane Christensen property by Abbott and Christensen, there was to be a $200,000.00 down payment. Abbott elected not to pay the full down payment. Instead, $50,000.00 was paid from the Ranch Account, and a $150,000.00 promissory note was given. On November 20, 1974, Zane forfeited their interest as buyers. (Exhibit #20). Inasmuch as that occurred, Abbott and Christensen did not have a viable or meaningful contract which either of them could pursue. In fact, Zane Christensen was entitled to seek specific performance from them for the $150,000.00 due on the Promissory Note, but he did not. Apparently Zane treated the $50,000.00 paid to him more like "earnest money", which the parties forfeited by their failure to perform.

On page 13 of his brief, Abbott underscores a "general rule applicable to dissolution in the case of a joint venture . . . in the absence of an express agreement to the contrary, the person advancing capital is entitled to its return before there is a division of income or profit." (Emphasis added) (46 Am. Jur. 2d 56). Christensen agrees with that general principle, especially the underscored phrase, because it clearly points out that the parties can contract or agree contrary to the general rule. That is exactly what happened in the Abbott - Christensen contract, a fact expressly found by the trial court.

While Abbott claimed that Christensen contracted to purchase the Zane Christensen property from Abbott, Christensen denied such

a contract, alleging: the proferred one was fraudulent; he ha never signed a contract; and if in fact the proferred contract ha his signature, Abbott had substituted the signature page fro another contract. Once Christensen denied the contract, or t having agreed to purchase the property, Abbott never re-opened th subject.

Again the thrust of the argument raised by Abbott, in Point III, Pg. 17 of his brief, is that the court should not only require the special master to redo the accounting, but that the court should ignore the terms of the agreement and rewrite the agreement more favorable to Abbott. Such is not the purpose of the courts. Abbott's claim on the Zane Christensen property is without merit.

POINT III

FROM THE BEGINNING, THE PARTNERSHIP OR JOINT VENTURE WAS AN EXPANDING SITUATION

The original intention of the parties was to only split the profits from the sale of calves, since calves were the only thing they originally intended to "venture". However, as the areas of involvement expanded, so did the areas making a profit. Abbott acknowledged the same when he said:

> "These things changed from time to time as our situation changed." (Deposition of Abbott, Pg. 6, lines 5 and 6, Record, Pg. 62, Case No. 5799.)

Realizing there would be very few calves to sell the first year, the venture purchased 100+ head of Winterton calves. Abbott has never accounted to Christensen for these calves, and the trial court did not require the special master to consider them. That

will be discussed hereafter. Thereafter, the parties acquired other livestock, real estate, etc., all of which meant more work and responsibility for Christensen. With each new acquisition Christensen could have insisted on the terms of the original agreement by only taking care of "mother cows." However, the joint venture was mutually expanded to divide profits from all efforts, while Abbott remained responsible for contributing the necessary capital. The trial court was correct in directing the special master to include all of the items that were included. The error is not in including too many items, but in not including enough items, as indicated hereafter.

Abbott simply has not met the appellant's burden to obtain a reversal, for his objection to the special master having made certain Findings as being contrary to the stipulation, is negated by the terms of the "Order" appointing the special master and those findings are supported by the preponderance of the evidence, etc.

POINT IV

LOSSES OF THE JOINT OPERATION BELONG TO ABBOTT.

The terms of the joint venture were clearly found by the trial court. (Finding of Fact No. 2, Record, Pg. 154, Case No. 5799). Since Abbott had the duty to provide the capital, and to guarantee Christensen a base amount, then the only logical conclusion the court could reach, was that the parties had agreed that the losses, if any, would be Abbott's. For it to be otherwise would mean Christensen only had a monthly draw, and not a guarantee. Further,

the Finding and Conclusion reached by the trial court supports that principle of law that parties can contract to do anything that is not illegal, as Abbott indicates in Point V, Pg. 21 of his brief:

> "A joint venture should remain joint whether it results in a gain or in a loss, unless the parties contract otherwise. (Emphasis added). Producers Livestock Marketing v. Christensen, Utah, 588 P.2d 156, [1978], at page 158.

In all the documents and materials produced by Abbott, not once did he produce, as was requested, partnership tax returns showing the profits and losses, tax credits, etc. It is to be presumed that Abbott accepted the full benefit of the partnership losses for tax benefits, but apparently is unwilling to give Christensen the benefits of the profits.

POINT V

THE REPLEVIED COWS WERE CHRISTENSEN'S

When the property was divided between the parties, each received half of the "grown up" 1973 calves. However, Abbott has developed a unique "logic", which, is to the effect that inasmuch as Christensen was not to own Abbott's "mother cows", there was this sudden and mystical transformation of ownership. With logic suitable for a fantasy, Abbott claims that since Christensen delayed disposing of his interest until, by the magic of nature, they had become "mother cows", that Christensen had lost all ownership in them, and Abbott was the benefactor of this wonderous event of nature. Abbott's share of the 1973 calf crop doubled, while Christensen's simply dissappeared. While this may be an overstatement of Abbott's position, it is the logic Abbott is

advocating. Christensen would suggest it doesn't really matter that these calves became mother cows, that as the profit from the 1973 calf crop, Christensen owned half of them.

Abbott's arguments on Page 23 of his brief are actually inconsistent. The brief refers to page 88 of the Transcript where Abbott testified that all of the 1973 calves belonged to him because they had matured to "mother cows". Then in a sweep of reasoning that would "bound tall buildings" the brief refers to page 89 of the Transcript where Abbott testifies that he gave Christensen credit for the 1973 calf crop at termination. Why would Abbott give Christensen credit at termination if Abbott truly believed that the calves were Abbott's because of their change into mother cows? Although requested, Abbott failed to indicate in any manner or form, i.e., how or for what, Christensen received credit for his share of the calves. The special master was unable to find any record of any such credit, so the court ordered Abbott to pay Christensen the value of those replevied "grown up" calves.

POINT VI

VALUE OF THE DISTRIBUTED PROPERTY

Abbott spends a considerable amount of his brief, starting on page 24, under Point VI, concerning his after-the-fact valuation of the properties. However, his valuations are so preposterous as to not be believable; were not founded in any written nor verbal agreement between the parties; were ignored by the trial court; and "fly" in the face of the fact that the parties agreed between themselves, at least on the property Christensen received, as to

the value they placed on the property, by reducing the same to "fully integrated contracts."

Judge Bullock tried to make that point at the trial in this exchange:

> THE COURT: What do you claim for the value?
>
> MR HURD: It's simply, if your Honor please, to show what these respective parties got out of this property, out of this endeavor.
>
> THE COURT: I don't know whether -- Maybe it's supposed to show that there was some kind of an equitable division. But I don't know that that makes any difference. Either there was a division or there wasn't, or an an agreement with respect to it, equitable or inequitable. And I think it might be important if I had to make an agreement between the parties, but I can't do that as a matter of law. You know that.
>
> MR MANGAN: Correct.
>
> MR. HURD: Well, it's our position that the agreement was made between the parties.
>
> THE COURT: That's right. So what difference is it going to make, unless you are going to try to set it aside on the grounds that it was inconsconsionable [sic unconsconionable?], or something of that nature, which I haven't heard anybody say?
>
> (Transcript, pg. 515, lines 1 through 21.) Emphasis added.

The trial court thus dismissed further discussion of the subject. However, to illustrate the lack of believability of Abbott's valuations, Abbott testified that in the Zane Christensen contract, in which Zane had forfeited their buyers interest some six (6) years earlier, that the parties still had an equity of $172,000.00 in the land, which equity Christensen was the benefactor of. (See Exhibit #81 and Table II, Page 25 of Abbott's Brief.) While that amount is impressive, the logic or reasoning behind it is very difficult to swallow. The same is true with Abbott's valuations

the Birch places, the Reary place, etc. The fact is, as the trial court indicated, that Christensen and Abbott reached a specific agreement between them, both as to the division of the property and to the valuation of the Reary and Lindsay places, by executing Exhibits #14 and #25. Further, Abbott's self-serving schedules or tables fail to reflect all matters which he testified to. For example, he admits in Table I, Page 24, that Christensen had an equity in the Lindsay place of at least $30,824.00. Yet at the same time he testified in Case No. 5800 that Christensen had not paid the down payment of the $29,000.00. Unless Christensen had made the down payment, then he had no equity in the Lindsay Place. However, when you consider the purchase price as $100,000.00, and deduct the unpaid balance due to Lindsay of $69,176.00, there is an equity of $30,824.00 which Abbott admits Christensen was to receive. However, if Abbott prevails on his claim that Christensen was to pay Abbott $29,000.00 in addition, then Christensen received only $1,824.00 in equity, and not the $30,824.00 that Abbott acknowledged that Christensen received. Perhaps these figures help to serve the old addage that "Figures don't lie!" or is it that "Liars don't figure?"

Inadvertently, or otherwise, Abbott in his attempt to inflate the value of the equities distributed to Christensen, has admitted that Christensen does not owe the $29,000.00. While the matter of the down payment on the Lindsay place will be covered again hereafter, Christensen does assert that the above is further evidence of the need for partial reversal of that part of the Judgment by the trial court.

POINT VII

THE AWARD TO CHRISTENSEN FOR THE CARE OF ABBOTT'S COWS, WAS JUST AND EQUITABLE

There is no dispute that Christensen cared for and fed Abbott's cattle after the termination. Once the joint venture was terminated, there was no justification, consideration, or reason for Christensen to continue to feed or care for Abbott's cattle without Abbott compensating Christensen accordingly. While Abbott testifed that Christensen agreed to do this act as part of the termination, Christensen denied that claim, and Abbott had no evidence of any consideration given by Abbott to Christensen in exchange for this service, etc. Contrary to Abbott's declaration that the settlement was "generous" on the part of Abbott toward Christensen, there is no evidence to support the same. Abbott argues that inasmuch as Christensen fed Abbott's cattle hay that had been raised in 1974 on the joint venture property, that Abbott was entitled to that hay without cost. Abbott seems to ignore the fact that all the hay that the joint venture raised on the property he kept, i.e., Bleazard and Whitehead, was considered "his" hay and that he had and used it exclusively. Yet Abbott disapproves of the court's conclusion that the hay raised on the places that Christensen received was Christensen's exclusive property. Once the parties had terminated their joint venture, and the properties were divided, Christensen had no further claim to anything produced off of those properties received by Abbott and vice versa. Because Christensen elected to feed Abbott's cattle hay he acquired in the

termination, rather than to buy other hay, is no defense to Abbott's obligation to pay Christensen the reasonable value of the hay. If the parties had really intended for Abbott to retain all of the hay at termination, then while Abbott was preparing and typing all of the contracts, he should have so provided.

The court and the special master had ample evidence upon which they could determine or assess the value of the feed and feeding of Abbott's cattle. Not only did Christensen testify, but Fausett, a well known rancher in the area, who annually is responsible for feeding thousands of cattle in similiar circumstances and in herds larger and smaller than that of Abbott's, also testified. Fausett's expert opinion considered the feed given, the location of the herd, and the other circumstances that were involved. The court used that opinion in reaching its conclusion. Abbott makes no argument that reasonable men couldn't reach the same opinion; or that the court's finding was against the weight of the evidence; or that the Court's Findings met that criteria necessary for reversal.

Whether Abbott likes, the trial court made an express finding of the ownership of the hay Christensen fed, and Abbott is not entitled to insist upon a credit. Further, Christensen's testimony is being miscontrued by Abbott, wherein he insists that Christensen only anticipated being paid $500.00 per month for feeding Abbott's cattle. Previously Christensen had been guaranteed $500.00 a month, plus a place to live, plus beef, plus one-half (1/2) of the profits, etc. Christensen anticipated that he would be compensated in some similar manner for feeding Abbott's cattle, after the joint venture ended, and not that he would merely receive $500.00 per

month. The ruling of the trial court was correct and supported by the preponderance of the evidence.

POINT VIII

CHRISTENSEN IS ENTITLED TO THE 424 SHARES OF FARNSWORTH IRRIGATION CANAL WATER STOCK.

In 1971, the Reary Place was purchased for $52,000.00, which included 240 acres of land, 424 shares of water, 30 acres of mineral rights and farm equipment. Christensen agreed to pay Abbott the same price for the Reary Place that Abbott had paid, plus the interest Abbott had paid. As further compensation, Abbott retained all mineral rights, and half interest in a gravel pit. Abbott typed and prepared the contract, Exhibit #14. Intentional or unintentional, the 424 shares of water were omitted from the term "PROPERTY PURCHASED". Thereafter the paragraph entitled "ABSTRACT OF TITLE, WARRANTY DEED, ETC." (page 2) specifically specifies a water certificate would be included. In the paragraph entitled "POSSESSION, TIME OF ESSENCE, GRACE & DEFAULT:" the contract requires Christensen "to pay the taxes or water assessments on the said property," and the paragraph entitled "TAXES:" requires Christensen to "pay all taxes and assessments thereafter. . ." It was established that Abbott considered Christensen a "wizard" with water and that Christensen kept the Reary Place well irrigated. If the irrigation water was removed from the Reary Place, it would loose all farmable value, which for a farm would be a "waste." In the contract, under the paragraph entitled "COVENANTS:" Abbott required Christensen to covenant "not

commit any waste on said premises or permit any waste to be committed . . . ." Without any water, this covenant would place Christensen in an untenable position of not being able to avoid causing "waste" to the place.

The 424 shares of water remained with the Reary place for the 1975 and 1976 seasons. Abbott made no demand or indication that he intended to transfer or use the water anywhere else. No escrow was signed, and no water certificate was escrowed. In January, 1976, Christensen suggested to Abbott that an escrow be entered into (see Exhibit #87), but Abbott did not reply. Then in June, litigation arose in form of a replevy of the cattle and for the $29,000.00 down payment, and Christensen demanded an accounting. In November and December, 1976, Christensen again requested Abbott to enter into escrow and to escrow the necessary documents, (see Exhibits #88 and #89), but Abbott refused by not responding. In April 1977, Abbott removed the 424 shares of water off the Reary place and Christensen commenced Case 6169. Abbott responded by alleging that "no water shares" were intended to be included with the Reary Place. [See Abbott's Answer, paragraph 4, Record, Pgs. 12 and 13, Case No. 6169.]

During 1977, Abbott used the 424 shares on his property. In 1978, Christensen had the water returned to the Reary Place where it has remained. On February 20, 1979, Abbott and his wife, unilaterally executed, an Escrow Agreement with First Security Bank of Utah, N.A. (See Exhibit #44). Rather than deliver a "water certificate" for 424 shares of Farnsworth Irrigation and Canal Co., Abbott delivered a "Bill of Sale" for 30 shares in the same

company. Abbott has yet to tender a water certificate into escrow. Why a Bill of Sale for only 30 shares was tendered is a complete mystery, especially since in his Answer Abbott claims that no water was to be included. At the trial and in his brief, Abbott stresses that Christensen allegedly had other water shares that he could call upon, including 1964 shares from the forfeited property of Zane Christensen. This logic by Abbott "boggles" the mind of reasonable men.

In a land where water is very limited, and thus very valuable, no one buys farmland without purchasing the water shares appurtenant to or used with the land, for to do such would render the property almost without value. Indeed, it was Christensen's testimony that he would not have purchased the ranch if it had not been expressly agreed that the 424 shares were included in the purchase. These facts are driven home by the events which occurred in 1977, when Abbott removed the water. Not only did the crops and pastures die, but the springs dried up which provided culinary water for the house. There wasn't even enough water in the wells to flush the toilet. That is why Abbott was able to acquire the 160 acre Taylor Place for $16,000.00, and why it is ridiculous to assume that without a full water right, the Reary place would not be selling for over $56,000.00. If, as Abbott urges, Christensen was to remove the water that he theoretically had on the other places, then those locations would have been reduced in value to dry land ranches and could not have had the "high" value that is ascribed to them by Abbott. If Christensen did not or could not move other water to the Reary Place, as is urged by Abbott, then

the Reary Place was of very little value.

Title 73-1-11 of the Utah Code Annotated, 1953, as amended, provides:

> .... a right to the use of water appurtenant to land shall pass to the grantee of such land, unless expressly reserved by the Grantor. (emphasis added)

Under this section, the Utah courts have held that a deed to land in statutory form, conveys whatever right the grantor has to the water appurtenant to the land, unless the grantor expressly reserves that appurtenant water. Bower v. Prestwich, 578 P.2d, 1283 (1978); Roberts v. Roberts, 584 P.2d 378 (1978). Cortella v. Salt Lake City, 93 Utah 236, 72 P.2d 630 (1938). The courts have defined water appurtenant to a tract of land as that amount which was beneficially used upon it before and at the time of conveyance. Stevens v. Burton, 546 P.2d 240 (Utah, 1976). Therefore, it is well settled in this jurisdiction that a deed or a contract, which does not contain an express reservation of water, conveys whatever rights the grantor had at the time of the conveyance. There is no dispute that historically the 424 shares of water had been used on the Reary place; that Abbott acquired that number of shares in 1971 when he contracted to purchase the same from Reary; that Abbott had mortgaged the 424 shares, with the Reary property to Equitable Life Assurance Co.; and that Christensen used all 424 shares from 1971 through 1976, on the Reary place. In Exhibit #14, any express reservation by Abbott of the water rights is conspicuously absent, while he expressly retained all of the mineral rights and one-half (1/2) of the gravel and fill dirt. Surely, if Abbott had intended to reserve the water rights, he would have expressly reserved them

as he did the mineral rights. Indeed, the inclusion of the term "water certificate" as a doucment to be escrowed, coupled with the requirement that Christensen was to pay all water assessments, gives a clear indication that the parties intended water rights to pass with land.

As indicated above, Abbott's Answer claimed that since no water was described in "Property Sold," that no water was meant to be sold, despite references to water certificate, etc. This claim not only makes the entire contract confusing and/or uncertain, but conflicts with long established principles of contract law:

> An interpretation of an instrument which gives reasonable and effective meaning to all portions thereof is preferred to an interpretation which leaves part of the working of the instrument to no effect. Tyson v. Tyson, 61 Ariz. 329, 149 P.2d 674 (1944). Kinter v. Wolf, 102 Ariz. 164, 426 P.2d 798 (1967). (Emphasis added.)

> In interpreting plans, specifications and provisions which formed part of contract, the court must reconcile provisions, if reasonably possible, so as to give effect to all and to construe complete contract to carry out its dominant purpose; and if two interpretations were possible, one of which would lead to confusion, uncertainty or elimination of one of essential parts of the contract and one which would harmonize all provisions of the writings and make the contract complete, fair and usual, the latter interpretation would be preferred. Vance v. Arnold, 201 P.2d 475, 114 Utah 463 (1949). (Emphasis added.)

Abbott's interpretation of Exhibit #14 is such as to annul other plain parts thereof. The trial court's interpretation reconciles the terms of the contract, and carries out its dominant purpose. This court has never favored the result urged by Abbott. McBain v. Pratt, 514 P.2d 823, Utah (1973); 65 A.L.R. 3d 621; Tyson, Vance op cit.

If the terms of the contract are doubtful or ambiguous, since

Abbott personally prepared the contract (Exhibit #14) and presented it to Christensen, then:

> Doubtful and ambiguous terms in the contract should be interpreted against the party who has chosen such terms . . Bryant v. Deseret News Pub. Co., 120 Utah 241, 233 P.2d 355 (1951).

Abbott's construction is also unreasonable since to sell the land without the water would render the property almost without value. The following contract principle is applicable.

> Where one interpretation would make a contract unreasonable and another construction equally consistent with the language would make it reasonable, the latter construction is the one which must be adopted. Cohn v. Cohn, 20 Cal. 2d 65, 123 P.2d 833 (1942).

Christensen having farmed and irrigated the place from 1971 through 1974, would not reasonably be believed in November 1974, to have paid Abbott more for the land without water and mineral rights than Abbott paid for it with the water and mineral rights. Yet that is what Abbott would have the court believe.

Christensen recognizes that not all water that is beneficially used upon land is conclusively presumed to be appurtenant to the land so as to pass in the absence of an express reservation by the grantor. Title 73-1-10, U.C.A., 1953 as amended, provides that:

> Water rights . . . shall be transferred by deed substantially in the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case the water shall not be deemed to be appurtenant to the land.

While this statute appears to make water represented by water stock to not be appurtenant to land, this Court, in interpreting the language of the statute, ruled that the effect of this statute was:

> . . . to establish a rebuttable presumption that a water

> right represented by shares of stock in a corporation did not pass to the grantee as an appurtenance to the land upon which the water right was used, but that the grantee could overcome such presumption if he could show by clear and convincing evidence that said water right was in fact appurtenant and that the grantor intended to transfer the water right with the land, even though no express mention of any water right was made in the deed. Brimm v. Cache Valley Banking Co., 2 Utah 2d 93, 269 P.2d 859. (Emphasis added).

In the Brimm case supra, the water used upon the land was represented by water shares in an irrigation company. The land only, passed from the intestate owner of both the land and irrigation stock, through various mesne convenances without specifically including the water shares in the transfer deeds. The appellant, as the intestate's heir, claimed that since the water shares were not included in the deeds of transfer that under the statute they were legally severed from the land and were thus vested in the estate of the intestate. Respondent claimed the water shares were an appurtenance to the land and passed with it by mesne conveyance. Respondent's claim was supported by the historical use of the water upon the property and the fact that the land was worthless or of relatively little value without the water. The court held that:

> . . . whether the water right is an appurtenant to the stockholder's land is a question of fact in each case, as is also whether on a sale of the land the water right passes as an appurtenance . . . Brimm, supra, at 862. (emphasis added).

When considering its historical use, the court gave great weight to the fact that:

> It was undisputed that a water right represented by stock . . . in an irrigation company was [historically] used upon the land and that the land was of little value without the right. Brimm, supra.

In determining the intent surrounding a conveyance of land and water used upon the land the court stated:

> . . . in the absence of any separate sale of the certificate or of any other evidence of any express intention to make a severance, a sale of the land on which the water is used will carry the water right and a right to the certificate as an appurtenance. Brimm, supra. (emphasis added).

Thus a conveyance which did not contain an express reservation or severence of the water, conveyed whatever appurtenant water rights the grantor had at the time of the conveyance. In Brimm, the court ruled that: 1) the historical use of the water shares upon the land; 2) the worthlessness or little value of the property without the water; and, 3) the absence of any express intention to reserve or to separately sell the water shares, clearly and convincingly overcame the rebuttable presumption of Section 73-1-10. This Court held that the water stock was in fact appurtenant to the land and passed with the land in accordance with Section 73-1-11, and awarded the owner of the real property the title to the water shares. Likewise, in Abbott v. Christensen, the water shares, were found by the trial court to be appurtenant to the land because: 1) the 424 shares have historically been used with the land; 2) the land is worthless or of little value without the water; and, 3) there is an absence of any express intention on the part of Abbott to reserve or separately sell the water shares. Furthermore, the reasonable construction of the entire contract (Exhibit #14) would indicate an express intent for the water shares to go with the land as part of the entire transaction, and not to be retained by Abbott. In each case, whether the water right is appurtenant to the land and was intended to pass on the sale, is a

question of fact. Brimm supra.

From the preponderance of the evidence and its privileged position, the trial court found the necessary standards for overcoming the presumption that water represented by shares do not pass with the land. When one considers the totality of the situation, who the author of the contract was, and the other express language in that contract, it is more believable to presume that Abbott in typing the contract inadvertantly omitted reference to the 424 shares, than no intent to include water with the sale. Christensen urges that the trial court's Finding was correct, and should be affirmed.

POINT IX

THE LINDSAY CONTRACT IS ONE OF THE "FULLY INTEGRATED" CONTRACTS OF THE PARTIES

Abbott's brief makes much of the fact that the court in its Finding Number 6, determined that the contracts (Exhibits #14 and #26) were "fully intergrated." Christensen would respond by suggesting that said term has a variety of meanings. However, as Christensen understands the term, parol evidence may be used even with "fully integrated" contracts, to clarify an ambiguity, but not to vary the terms of the contract. It is most interesting that Abbott would insist in connection with the Reary place, (Exhibit #14), that no parol evidence is necessary since the contract is "fully integrated," even though it is clear that it fails to specify the number of shares the water certificate will be for. However, on the Lindsay contract, (Exibit #26) Abbott wishes to use

parol evidence to vary the written terms of the contract to establish that Christensen never paid the $29,000.00 down payment. The court allowed Abbott to use parol evidence to "explain" that alleged non-receipt of the down payment. This is most perplexing to Christensen since it was his understanding in the winding of the affairs of the joint venture, that the $29,000.00 down payment, as the contract recites, had been paid. There is nothing in the contract which is confusing, ambiguous, or such as to lead one to need parol evidence to establish anything to the contrary. It was signed by the parties including Abbott and delivered to Christensen, which delivery negated the necessity of any further receipts being issued. For nearly two (2) years Abbott seemed to be of the same opinion, since he made no demands upon Christensen for money, etc., that is, until this litigation was commenced. It is interesting to note that Abbott tactically admits Christensen's payment of the $29,000.00 in Table I on Pg. 24 of his Brief where he represents that at the time of the division of the properties, Christensen had an equity in the Lindsay Ranch in the amount of at least $30,824.00. This point was discussed in Point VI above. Without rehashing the same arguments, suffice it to say, if Christensen had not made the down payment, in some form to Abbott, then why would Abbott admit that Christensen had a $30,824.00 equity in the property? Conversely, if Abbott was still to receive $29,000.00 from Christensen, then why doesn't Abbott list that in his Exhibit #81, where he lists all that he was to receive from the joint venture?

Based on: the clear terms of Exhibit #26; the actions of

Abbott for two (2) years after Exhibit #26 was executed; Abbott's admissions against interest; and, in the interest of justice, Christensen respectively requests the court to direct the trial court to set aside the finding that Christensen is obligated to pay said $29,000.00 to Abbott, in any form.

POINT X

THE TRIAL COURT ERRED IN NOT GIVING CHRISTENSEN CREDIT FOR THE $35,000.00 CONTRIBUTED FOR THE BLEAZARD PLACE, AND THE $45,000.00 HE HAD TO REPAY TO ZIONS BANK THAT WAS BORROWED FOR RANCH EXPENSES

As indicated in the statement of facts, at the time the Bleazard place was acquired, Abbott did not have the financial means to "swing" the deal. Christensen made available $35,000.00 in the form of his home and mineral rights. Those contributions were clearly established. In addition, Christensen as co-signer of the $90,000.00 note at Zions First National Bank, the proceeds of which were deposited to the Ranch Account, had to assume one-half or $45,000.00 of the same when the joint venture ended. Abbott insisted on that result in his letter to Zions First National Bank (see Exhibit #32, page 2). The bank officals and Christensen testified that the money was borrowed for "ranch expenses". The notes of Zions First National Bank's loan officer on the date the application was made on May 17, 1974, indicates that the loan was "for operating expense until sell of calves in fall." (See Exhibit #32, pg. 9.) Abbott testified the money was borrowed for Christensen's father, Paul Christensen, to use in a venture known as "Blue Mountain." That venture was not part of this joint

venture; this Christensen was not a party to that proceeding; and, that proceeding has been litigated, appealed, remanded, re-litigated, and now back before this court for further consideration. In no manner or form, is the $45,000.00 obligation assumed by this Christensen, any part of that litigation. This trial court held that the Blue Mountain venture would not be included in this litigation, and with that conclusion, this Christensen heartily agreed. However, this Christensen could not understand the failure of this trial court to give this Christensen credit for the $45,000.00 he contributed to this joint venture, for "ranch expenses", regardless of where Abbott spent the same. Abbott and Christensen represented to Zions First National Bank that the loan would be repaid from "sale of calves in the fall." (See Exhibit #32, pg. 9). That was not done, and each party repaid $45,000.00 to the bank. However, under the terms of the agreement as expressly found by the trial court, Christensen should not have assumed any part of that note. Why then is he forced to, and without credit?

While the reality and actuality of the contributions made by Christensen are well established, credit for the same cannot be found in any of the accountings by the court or the special master. It seems unconscionable that the court would fail to give Christensen credit for this total of $80,000.00 in contributions, while requiring him to pay $29,000.00 to Abbott. Such a result is unconscionable and adds insult to injury. The net result is that Christensen is judicially required to contribute $109,000.00 to Abbott, which Christensen had no obligation to make and for which

he receives nothing! Christensen would respectively request the court to over-rule the trial court by finding that Christensen is entitled to a credit for both the $35,000.00 and the $45,0000.00, in his claims against Abbott, and to direct the special master to adjust his report and accounting accordingly.

POINT XI

THE TRIAL COURT NEGLECTED TO GIVE CHRISTENSEN CREDIT FOR ALL GAINS REALIZED BY THE PARTNERSHIP

Christensen acquired for the joint venture, livestock, realty, personal property, etc., which were sold at an enhanced value. The first of these were the Winterton calves. While Abbott denied that Christensen was to share in any of the profits, it does not seem logical or consistent to believe that that would be the intent of the parties. Under the original agreement, Christensen was only going to receive one-half (1/2) the profit from the calf crop, but that is because that was initially all the parties were going to joint venture. When that initial agreement was expanded, Christensen was entitled to the benefit of the expansion. It is interesting to note that Abbott wants to have a full accounting of all "losses" that might have occurred in the partnership arrangement, but he is unwilling to make an accounting as to all of the "profits" that the partnership made. This is further evidence of the problems the parties had between them. What Abbott suggests is just another way of saying "what's mine is mine, and what's yours is mine too!"

Abbott's conduct towards Christensen is entirely contrary to

that standard demanded of him as a fiduciary in a partnership. U.C.A. 48-1-18 (1953). In such a relationship, each partner must act in the highest good faith towards the co-partner in the conduct of the partnership, and may not obtain any advantage over his co-partner in partnership affairs by the slightest misrepresentation or concealment. Vai v. Bank of America National Trust and Savings Assoc., 56 Cal. 2d 329, 15 Cal. Rptr. 71, 364 P.2d 247 (1961). This good faith and fair dealing require that neither party to the division of profits be permitted to take unfair advantage or enjoy greater rights than the terms of the agreement call for. One of them may not obtain undue profit, and one entrusted with another's rights and interests is charged with a duty to guard such rights with the utmost good faith. Nelson v. Abraham, 29 Cal. 2d 745, 177 P.2d 931 (1947).

In particular, Christensen is aggrieved by the failure to properly divide the horses that Christensen has purchased with partnership profits. Christensen bought seven (7) horses through the ranch account, of which five (5) were sold for enough to completely pay the purchase price of all the horses and since all other expenses were then paid, Abbott claimed one horse and Christensen claimed a mare. From 1974 until in 1976-1977, Christensen retained this mare, had her bred twice, personally paying both breed fees. In 1976, the mare had a yearling colt and was again pregnant. Abbott removed said mare and colt from Christensen's land, without Christensen's knowledge or approval. The court indicating that it had had more important things on its mind, admitted that it had not made notes on the mare, so for lack

of evidence, allowed Abbott to retain the mare, and both of her colts, without even having to pay the breeding fees. That not only effectively denied Christensen the beneifit of the "profit" of this horse transaction, but it cost him a few hundred bucks to boot. Such a result is contrary to the agreement of the parties, and to equity.

Likewise, the same kind of result is allowed by reason of the failure of the trial court's refusal to require Abbott to account to Christensen for one-half (1/2) of the profits derived from the Winterton heifers. What the court has done, is to allow the parties to expand the scope of their joint venture, but to judicially limit the extent of the "profits" that were to be divided. Thus the parties could agree that Christensen's duties and responsibilities could be expanded, but judicially Christensen is esstopped from being compensated for the same.

POINT XII

CHRISTENSEN IS ENTITLED TO AWARD OF A REASONABLE ATTORNEY'S FEE AND COSTS

Abbott's removal of the irrigation water from the "Reary Place" was a violation of Exhibit #14 and Christensen should have at least been awarded a reasonable attorney's fee for that portion of his attorney's time spent in having the same restored to the Reary place. The Finding by the Trial Court that the 424 shares of water were to go with the Reary place, made Christensen in Case No. 6169, the "prevailing party", and established that litigation as being necessary. Under the trial court's ruling, Christensen was also

the "prevailing party" for the replevied cows, while Abbott was on the down payment. However, when the entire account was made, Abbott still owed Christensen a net of $47,663.79. In substance, that made Christensen the "prevailing party" in all the actions. As the prevailing party, Christensen should be given the benefit of the bargained for remedy of a reasonable attorneys fee "in the event of default or failure of either of the parties hereto in the performance of the covenants herein in this contract imposed upon either of said parties . . ."

Not only were the water shares involved, but the necessity of getting Abbott to escrow was involved. Despite 3 letters requesting the same in 1976, Abbott refused to do so. After two years of litigation, Abbott made a partial attempt to comply with the terms of the contract by escrowing a Bill of Sale for 30 shares, but did not deposit a water certificate or any document assigning the proper number of shares, etc. Reasonable people should conclude that it was necessary for Christensen to bring Case No. 6169, and to counter sue, in order to secure Abbott's performance. Christensen should have been awarded his attorney's fees and all of his costs, as is also provided for in said contract. In fact, the totality of Abbott's claims and defenses appear to suggest a lack of good faith, and justification for the award of an attorney's fee, at least on appeal, under 78-27-56, U.C.A., (1953 as amended).

In determining what is a reasonable attorney's fee, the court must consider the time and effort expended, the complexity of the case, etc. In that regard, in order to even secure the temporary

return of the water during the pendency of this action, numerous hours of work were required; at least two (2) appearances, and thus travel from Roosevelt to appear before the court in Provo were required; as well as the preparation of pleadings, discovery, posting of undertakings, research, briefing, trial preparation, etc. At the trial, counsel for Christensen proferred that he had then spent over 450 hours on the three cases, and that he attributed at least 150 to case no. 6169, and that a fair and reasonable rate of compensation for his time would be $60.00 per hour. No evidence was proferred by Abbott to the contrary. Considering all factors, $9,000.00 would not have been an unreasonable sum for the court to award up to the trial for each case, and an additional reasonable amount should also be awarded on appeal. Christensen requests this court to remand the matter for the award of a reasonable attorney's fee, both for the original trial and on appeal, under the terms of the contract, and Title 78-27-56, U.C.A.

CONCLUSION

Christensen hereby requests the court to affirm the matters appealed from by Abbott herein, and to remand the matters to the trial court, with the following directions:

1. To direct the trial court to hold that the $29,000.00 down payment on the Lindsay place has been paid;

2. Christensen is entitled to receive a credit for the $35,000.00 in property that he contributed for Abbott on the Bleazard place, plus $45,000.00 in credit for the portion of the

Ranch Expense loan that he assumed at Zions Bank at the time the joint venture terminated;

3. Christensen receive a full accounting and benefit of one-half (1/2) of the Winterton calves, plus the return of the mare and her two colts; and

4. Christensen as the "prevailing party" be awarded a reasonable attorney's fee and his costs, both for the original actions and on appeal.

Respectively submitted this 27th day of April, 1982.

George E. Mangan

George E. Mangan
Attorney for Christensen

CERTIFICATE OF MAILING

I certify that on the ____ day of April, 1982, I mailed two (2) true and correct copies of the foregoing brief, postage prepaid to, Wallace D. Hurd, 9 Exchange Place, Suite 520, Salt Lake City, UT 84111.

Gwen Graves

Secretary