

1982

Paul Christensen v. Weldon S. Abbott : Brief of Respondent

Utah Supreme Court

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Wallace D. Hurd; Attorney for Appellant;

George E. Mangan; Attorney for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL CHRISTENSEN, :

Plaintiff-Respondent :

vs. :

Case No. 18115

WELDON S. ABBOTT, :

Defendant-Appellant. :

RESPONDENT'S BRIEF

APPEAL FROM JUDGMENT
of the
FOURTH JUDICIAL DISTRICT COURT
DUCHESNE COUNTY, STATE OF UTAH

The Honorable Allen B. Sorensen, Judge

George E. Mangan
P.O. Box 219
Roosevelt, Utah 84066-0219

Attorney for Respondent

Wallace D. Hurd
9 Exchange Place, Suite 520
Salt Lake City, Utah 84111

Attorney for Appellant

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Attorney for Respondent

Wallace D. Hurd
9 Exchange Place, Suite 520
Salt Lake City, Utah 84111

Attorney for Appellant

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WELDON S. ABBOTT, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

NATURE OF THE CASE

Prior to 1976, the parties were joint venturers in a project known as "Blue Mountain." In addition to the Blue Mountain venture, plaintiff-respondent, hereafter Christensen, sold 200 head of Black Angus cattle to the defendant-appellant, hereafter Abbott, and received in payment thereof, a \$111,000.00 promissory note (Exhibit No. P-1). In April 1976, the parties terminated the Blue Mountain venture by a written agreement (Exhibit No. P-4). Thereafter, Christensen made demand upon Abbott for payment of the promissory note, which Abbott refused, and the result was this litigation. Abbott's defense was that the note was discharged by accord and satisfaction. Christensen also claimed

an agistor's lien, or payment on the basis of quantum meruit, i.e., the reasonable value of the services rendered for the care and feeding of Abbott's cattle. The trial court found there was accord and satisfaction as to both the Blue Mountain venture and the \$111,000.00 note, even though the written agreement, Exhibit No. P-4, made no provision or mention of the promissory note. On appeal, the majority of this court sustained the finding of the trial court on the issue of accord and satisfaction as to the promissory note, but unanimously remanded the matter to the trial court, "for the limited purpose of a determination by the court regarding Christensen's claimed agistor's lien for the time period from April 28, 1976 to April 19, 1977." (Christensen v. Abbott, (1979), 595 P.2d 900).

DISPOSITION IN LOWER COURT

On July 16, 1980, a "hearing" was held on the limited issue of the reasonable value of the feed and care rendered for the 200 head of Black Angus cattle, from and after April 28 of 1976, to April 19, 1977. At the conclusion of the hearing, the trial court requested both parties to analyze all of the evidence and submit a memorandum to the court concerning the same. Christensen's analysis is found on pages 110-121 of the Record. Abbott's analysis is found on pages 103-107 of the Record. The

trial court adopted Abbott's analysis of the testimony of Abbott's witness, Bleazard, as to the value of feeding the cattle. Abbott appealed from that decision. Christensen cross-appealed on the basis that the relief granted by the lower court was inadequate, insufficient and based on incompetent evidence, etc.

EXPLANATION ON REFERENCES

Inasmuch as there is a transcript for the original trial and another transcript for the hearing on July 16, 1980, to avoid confusion in this brief, the transcript of the first proceedings will be referred to as T-1, and the second transcript as T-2, followed by P. for page, then an L. for the referenced lines, and finally the line numbers. Reference to the official court file, containing the pleadings, etc., will be to the Record and designated as R., followed by P. and then the designation of the page being referred to.

RELIEF SOUGHT ON APPEAL

Christensen seeks the following relief on appeal:

1. Affirmance of the finding by the lower court that Christensen is entitled to compensation for the reasonable value of the care and feeding of Abbott's cattle.

2. Judgment that the lower court erred in relying on the evidence it used to determine the reasonable value of the care and feed of Abbott's cattle.

3. Compensation for Christensen's cow that was sold in 1976 with Abbott's cattle that were "suspect" of having "Bangs" disease.

4. For attorney fees on appeal and costs.

STATEMENT OF FACTS

In his Statement of Facts, Abbott for the first time, clearly acknowledges that the Blue Mountain venture and the purchase of the black Angus cattle were two (2) separate business transactions, only related in that the same parties were involved. In March 1974, Christensen had 200 head of Black Angus cattle, which he sold to Abbott for \$111,000.00, and received the promissory note, Exhibit No. P-1, as payment thereof. In April 1974, the parties acquired "Blue Mountain," which venture was settled by accord and satisfaction, as is indicated by Exhibit No. P-4. The trial court found that Exhibit No. P-4, was not only accord and satisfaction for the business deal known as "Blue Mountain," but that it was accord and satisfaction for the \$111,000.00 note. Despite the vigorous dissent of Chief Justice Hall, the majority of this court affirmed the decision of the trial court. However, this court apparently unanimously found that said accord and satisfaction did not extend after April 28,

1976, to any future feeding of Abbott's cattle by Christensen. This court noted that Christensen's claim to be compensated for the feed and care of Abbott's cattle, in the form of an agistor's lien, was not properly considered by the trial court, even though "Christensen had put this question in issue both in the pleadings and at trial." This court remanded the matter for that limited purpose.

Christensen relied on and adopted the evidence he had produced at the first trial, i.e., the testimony of Grant Gerber, a local, well-known appraiser, etc., (T-1, P. 5-29), and his own testimony (T-1, P. 85-137). In addition, at the new trial or hearing, not knowing for sure the direction the trial court would take, he also produced John E. Fausett, a well known cattle feeder in the Uintah Basin, who testified as to the reasonable value of feeding the cattle for the period in question. (T-2, P. 12-30). Abbott introduced no evidence at the first trial as to the reasonable value of the services that Christensen performed, but at the new trial he relied on his limited experience (T-2, P. 60-78), and the testimony of Grant Bleazard, a local rancher, with a little more experience, at least in taking care of his own herd. (T-2, P. 31-59). Grant Bleazard had fed his own cattle herd of up to 100 head, but his experience of feeding or caring for the cattle of others, was apparently limited to one occasion, and then for only 12 or 15 head. (T-2, P. 50, lines 7-13). In

addition, Bleazard gave no testimony as to the value of the summer feed, apparently on the assumption that Abbott's cattle were "ranged" on land belonging to Abbott, to-wit: the Blue Mountain property (T-2, P. 57, lines 25-28), which information was incorrect, inasmuch as said cattle were on Christensen's property at all times from April 28, 1976, to April 19, 1977. (T-1, P. 108, lines 5-18; and P. 114, lines 12-19.) In fact, since none of Abbott's cattle were on Blue Mountain, Abbott leased Blue Mountain to John E. Fausett for \$30,000.00 for the 1976 summer season. (T-2, P. 87, lines 14-23).

On July 23, 1976, this action was commenced, at which time Christensen was feeding, herding, etc., Abbott's cattle, which service Christensen continued to perform, until April 19, 1977, when, by stipulation of the parties, and without prejudice to their respective rights, the cattle were turned over to Abbott. This court noted in its opinion of May 11, 1979, that: "The record indicates no demand by Abbott after the date of the settlement for his cattle which Christensen was feeding." That was the status of the record at that time. In fact, in March of 1976, Abbott still openly claimed that he had never intended to purchase the 200 Black Angus cattle and that Christensen "knew that", etc. Thus, up to at least March 1976, at least inferentially, Abbott did not even consider the black cattle to be his. (See Abbott's Answer to Request No. 20, R., P. 29).

However, at the hearing on remand, Abbott's testimony was suddenly replete with alleged demands he had made for the delivery of "his cattle," both prior to March 1976, and thereafter.

Despite the above finding by this court and the state of the record from the first trial, the trial court, upon remand, allowed Abbott to testify freely as to the "demands" he allegedly had made. The trial court in its Memorandum Decision, (R., P. 97-98), concluded that Abbott had made numerous demands for the return of "his" cattle and enumerated some of those occasions. Abbott's attorney, in his letter to the court of August 4, 1980, (R., P. 103), refers the court to several demands that Abbott allegedly made between December, 1975, through February, 1975, for the return of "his" cattle. By so doing, plaintiff was ignoring his own admission (R., P. 29), that until March 1976, he was not considering the 200 head of Black Angus to be his. On March 19, 1976, Abbott's attorney acknowledged in a letter to Christensen's attorney, Exhibit No. P-37, in substance and effect, that Abbott did not consider that he had ever purchased the 200 head of Black Angus. How then, between December 15, 1975, and February 16, 1976, could Abbott intended to have had the 200 Black Angus to be counted as his cattle and demanding their return to him, when he wouldn't even acknowledge that they were his? Christensen believes that these "demands" by Abbott

are like several other matters that Abbott testified to, namely figments of an active imagination.

Whether Abbott made any or all of these alleged demands was sharply contested by Christensen. However, as with most of the contested issues, the trial court resolved that dispute in favor of Abbott. Nevertheless, and as a matter of law, and probably because of the opinion of this court, the trial court concluded that, "on the other hand, the right to possession of the cattle was in dispute, the subject of litigation, and the plaintiff's claim to possession was not sufficiently capricious as to show bad faith, witness the lack of unanimity in the decision of the appellate court." (Memorandum Decision, R., P. 97-98, at P. 98). The trial court further concluded that because "the cattle were in fact fed by plaintiff and at his expense . . . To allow the defendant the benefit of such costs would constitute unjust enrichment, and the court so finds."

Abbott's analysis of the testimony of Abbott and his witness, Grant Bleazard, largely ignored the pertinent and relevant evidence introduced by plaintiff at the original trial and the express finding made by this court in its opinion, i.e., that plaintiff had pled and produced undisputed evidence of approximately \$60,000.00 in value for the feed, care, etc., of Abbott's cattle. The trial court accepted the exact dollar amount that Abbott had arrived at in his analysis as being the

value of the feed, etc., furnished by Christensen, without apparently considering the gaps, inconsistencies, etc., that the same contained. Abbott then objected to the trial court's reliance on his own witness, on the basis that the testimony allegedly would allow Christensen a profit (R., P. 123).

ARGUMENT

Point I

CHRISTENSEN IS ENTITLED TO THE REASONABLE VALUE OF THE CARE AND FEED FURNISHED TO ABBOTT'S CATTLE

A. PAST CONDUCT OF PARTIES:

Abbott's brief spends a great deal of time discussing the joint venture of the parties prior to its termination in April of 1976. Abbott does so, even though this court has held that Exhibit No. P-4, i.e., the accord and satisfaction, terminated the business relationship of the parties. As admitted by Abbott in his brief, the Black Angus cattle were a separate business item from the Blue Mountain venture. Nevertheless, if, as Abbott continues to urge, Christensen's only compensation for furnishing the feed and care for the cattle was half of the calf crop, then once the joint venture ended, since Abbott acknowledged receiving and disposing of all of the calves, there was nothing left for Christensen to share. Surely, Christensen was entitled to

something rather than the nothing Abbott urges. The simple fact is that as a matter of law, Christensen was and is entitled to be compensated for the reasonable value of any good that he bestowed upon Abbott's cattle by reason of his care for them. The vigorous dissent of Justice Hall, attached to the majority opinion of this court, is a good example of how reasonable men may differ as to what the accord and satisfaction between Abbott and Christensen was to cover. Surely Christensen, as a simple rancher, could have "reasonably" concluded or believed that Exhibit No. P-4 only terminated the Blue Mountain venture, and did not terminate his right to be compensated for the feed and care of the Black Angus cattle, past, present and/or future. Christensen did not believe or understand that the accord and satisfaction extended to the Black Angus cattle, and he was both candid and truthful with the court when he so testified. (T-1, P. 224, L. 3-11). While there may have been a sharing of the calf crops prior to November of 1975, there has been no sharing of the calf crop since then. As a result of Abbott receiving and disposing of the entire 1976 and 1977 calf crops, as well as the cows, then the only measure for compensating Christensen for his services is the reasonable value of the same.

B. CLAIM FOR AGISTOR'S LIEN:

On the first appeal, this court noted that "Christensen produced evidence at trial that he had expended approximately

\$60,000.00 during that period (sic., from April 28, 1976, until April 19, 1977), for the care of Abbott's cattle and claimed an agistor's lien to that extent". An agistor's lien is defined in Title 38-2-1, U.C.A., 1953, and for it to be beneficial to Christensen, it was necessary for Christensen to retain the cattle in his possession until the lien was satisfied. If Christensen had allowed the cattle to have gone to Abbott without making other arrangements, Christensen may have found himself in the position of having waived his statutory lien against the cattle as provided under Title 38-2-1, U.C.A., 1953. Contrary to Abbott's argument, Christensen was not holding the cattle for "ransom", he was merely exercising his rights, hoping he would be compensated for the reasonable value of the services that he had rendered.

C. NATURE OF CHRISTENSEN'S CONDUCT:

Abbott's citation of 27 Am. Jur. 2nd, page 666, Equity, § 136, has absolutely no relationship to the facts of this particular case. The trial court expressly found that Christensen's conduct was not sufficiently "capricious" to be in bad faith. (R., P. 98). Thus, Christensen could not have been acting in a deceitful, fraudulent, misleading, dishonest, etc., manner in his conduct with Abbott. To urge that Christensen was deceitful, etc., would be tantamount to suggesting that Chief Justice Hall, by having filed his dissent to the majority

opinion, was being "dishonest, deceitful, etc." Simply because both the trial court, and the majority of this court on appeal, found that the legal significance of the document dated April 28, 1976, was an accord and satisfaction as to all matters between the parties up to that date, is not tantamount to a finding of "unclean hands", on the part of Christensen. Without a finding of "unclean hands," Abbott's reference to Jacobsen v. Jacobsen, (1976), 557 P.2nd 156, is neither relevant nor pertinent to a discussion of the facts in this case.

Likewise, in light of the above referenced finding by the trial court, there can certainly be no finding of any fraud or deceit on the part of Christensen, or that he was not acting in "good conscience". The simple fact of the matter is that Christensen, in good conscience, did not feel or understand that he had reached an accord and satisfaction, which opinion Chief Justice Hall shared in his dissent. Because there was an express finding of a lack of "bad faith" by Christensen, Abbott's reference to Pacific Metals Co. v. Tracy Collins Bank & Trust Co., (1968), 21 Utah 2d 400, 446 P.2nd 303, can be of little, if any comfort to Abbott.

D. NATURE OF CHRISTENSEN'S SERVICE:

From at least April 28, 1976 to April 19, 1976, the facts reveal that Christensen was discharging for Abbott, an obligation that Abbott as their owner would ordinarily have to discharge,

i.e., furnishing feed, veterinary care, calving, etc., and in general, fully servicing and maintaining 200 head of cattle. Christensen's service has a value that can or should be easily ascertained by normal standards of evidence, which reasonable men should be able to agree upon. In fact, the parties were able to stipulate as to the length of time the cattle were cared for by Christensen, i.e., from April 28, 1976 to April 19, 1977; the number of cattle that were cared for, i.e., 200 head from April 28, until October 25, 1976, and 185 head from October 26, 1976, until April 19, 1977, (T-2, P. 10, L. 18-25), and 21 head of "short calves" from October 26, 1976, to March 10, 1977, (T-2, P. 11, L. 7-24); and that there are two (2) feeding seasons, i.e., winter and summer, although the exact times that those seasons included were not the same. The parties further agreed, that if Christensen was entitled to anything, it was the "reasonable value" of taking care of Abbott's cows. (T-2, P. 6, L. 26, through P. 7, L. 1). Thus, neither the length of time of Christensen's care of Abbott's cattle nor the number of cattle being cared for or in dispute. What is in dispute, and was apparently missed by Abbott in his evidence and brief, is the reasonable value either per day or by the year, of Christensen's caring for the cattle. The subject of what is a "reasonable value" for these services will be discussed hereafter. The first point that must be considered is whether Christensen is entitled

to be compensated for the value of the goods or services that he bestowed upon Abbott by reason of his caring for and feeding Abbott's cattle, for almost one (1) year.

E. ABBOTT'S DEMAND FOR HIS CATTLE:

As indicated above, let it be assumed, for the sake of argument, that Abbott timely demanded the return of his cattle. Nevertheless, because the court expressly found that under all of the circumstances, there was no "bad faith" in Christensen's conduct. Christensen testified that prior to April 1976, Abbott never demanded the 200 head of Black Angus, and that all of Abbott's demands for his cattle were with reference to the cattle acquired with the Blue Mountain venture. It was not until after Christensen had made demand upon Abbott to pay the \$111,000.00 promissory note and Abbott and his attorney, (see Exhibit No. P-37), had, in March 1976, expressly denied any obligation by Abbott to pay the same, that Abbott even discussed the Black Angus cattle. Abbott claimed in March 1976, that the parties had never intended the note, and hence the sale, to be effective. If that were the case, then Abbott would have had to have considered the 200 head of cattle to still be Christensen's. If that was the case, Abbott would not be demanding their delivery. It strains creditability for the trial court to elect to believe Abbott's "after the fact" construction of what his demand for "his cattle" meant, especially when that construction flies in

the face of Abbott's own admission (R., P. 20) and the representation of his attorney. (Exhibit No. P-37, Received at 2nd Hearing.) Nevertheless, from his point of view, Christensen was acting in "good faith". The trial court correctly concluded that Christensen was entitled to be compensated for the reasonable cost or value of the good bestowed upon Abbott. Despite the difference of opinion between the parties as to who owed what, or what Abbott should have paid Christensen, or what their termination agreement meant, etc., Christensen reasonably should not have turned those cattle over to Abbott, without a clear agreement between them as to Christensen's rights. That principle remains true, even though Abbott may have made demands for the delivery of his cattle.

As a matter of justice and equity, Christensen is entitled to the reasonable value of the care and feed that he bestowed upon Abbott's cattle from April of 1976 through April of 1977.

Point II

CHRISTENSEN IS ENTITLED TO COMPENSATION ON THE PRINCIPLE OF QUANTUM MERUIT OR UNJUST ENRICHMENT

A. DISCUSSION ON QUANTUM MERUIT:

"Quantum Meruit" literally means "as much as he deserved." It refers to a class of obligations imposed by law irregardless to the intention or the assent of the parties bound, for reasons

dictated by reason and justice. The basis of recovery on quantum meruit is that a party has received from another a benefit which it is unjust for him to retain without paying therefor. One who receives a benefit at the expense of another should compensate the latter to the extent of a reasonable value of the benefit received. This court was explicit in holding:

. . . where one party performs work for another who accepts its benefits, the law implies that reasonable compensation will be paid . . . and if the recipient of service is otherwise relieved of this obligation, the burden of proof is on him to so show. (emphasis added). Richard v. Lake Hills, 15 Utah 2d 150, 389 P.2d 66 (1964).

Since Christensen rendered herding and feeding services, directly benefiting Abbott, a presumption of law arises that binds Abbott to pay the reasonable worth of those services irregardless of Abbott's intent. Abbott must bear the burden of proof that he should not pay for the benefits received from Christensen's care and feeding of the cattle. Abbott can only sustain this burden under the following test:

Under all evidence, circumstances were such that plaintiff could reasonably assume that he was to be paid and that the defendant should have reasonably expected to pay for such services. (emphasis added). McCollum v. Clothier, 121 Utah 311, 241 P.2d 468 (1952).

Prior to April 28, 1976, Abbott claimed to have had made demand upon Christensen for the return of "cattle," but in substance and effect, he had denied ownership of the black cows, when he alleged that the promissory note (Exhibit No. P-1), was

never to have been effective. Christensen demanded payment for the black cows but refused to relinquish their possession until Abbott paid for them and for their care, feed, etc., i.e., an agistor's lien. Abbott denied that any lien was owing and Christensen retained their possession in order to protect his lien claim. (U.C.A. 38-2-1, 1953, as amended.)

B. EXTENT OF PARTIES ACCORD AND SATISFACTION:

This court in its first opinion, found that the parties reached an accord and satisfaction as to all matters up to April 28, 1976. Neither this court nor the trial court found that the parties had also reached an agreement regarding their intentions about the future care and feeding of the 200 head of cattle. Abbott claims to have made at least three (3) demands upon Christensen after April 28, 1976, for delivery of the cattle, the first being May 6, 1976. Despite Christensen's request to be paid, Abbott continued to deny owing any debt or obligation to Christensen. In July, 1976, Christensen initiated suit against Abbott. By reason of the prior appeal, as indicated above, the major issue for the trial court to determine was what amount would reasonably compensate Christensen for his care and feeding of Abbott's cattle, from and after April 28, 1976.

C. SERVICES RENDERED BY CHRISTENSEN:

Both parties must have realized that the resolution of the question of possession and the alleged lien would not be resolved

quickly and that the cattle would need to be cared for until that time. Surely, Abbott would have expected and could have insisted that Christensen care for Abbott's cattle in Christensen's possession. (Certainly, there is no evidence or testimony to the contrary.) At the trial, Abbott testified that the cattle were his. If that is the case, then logically Abbott should have wanted his investment protected. Indeed, Christensen testified that he: cared for; fed; pregnancy tested; furnished bull service; treated for "bangs," etc., Abbott's cows, all of which protected and preserved Abbott's "windfall" investment, and inured to Abbott's benefit.

D. REASONABLE EXPECTATION OF COMPENSATION:

As pled in his complaint against Abbott, Christensen expected to be reasonably compensated for his labor and expenses. Christensen spent tens of thousands of dollars for feed, etc., in caring for Abbott's cattle. Surely, the furnishing and feeding of cattle, is the kind of service which is ordinarily subject to remuneration. Western Asphalt Co. v. Valle, 25 Wash. 2d 428, 171 P.2d 159 (1946). In fact, these services had been the very basis of their prior dealings and had been performed by Christensen at Abbott's request. (T-1, P. 50, L. 13-15; P. 56, L. 1-7). Abbott knew that Christensen was not gratuitously caring for his cattle, and openly acknowledged that Christensen was regularly making demands that he be paid for what he was doing. In fact,

Christensen's demand for remuneration and Abbott's refusal to pay was clearly plead as one of the reasons for this litigation. If Christensen had not fed and herded the cattle, someone else would have had to, and that someone was surely Abbott or one of his employees. Abbott's protestation of having to pay Christensen is without merit and irrelevant under the circumstances. After the acknowledged termination of their business venture, how could Abbott reasonably have expected to escape paying for Christensen's continuing services? Abbott received all proceeds from the sale of the calf crops for 1976 and 1977, as well as the sale of the cattle in 1977. Thus, all of Christensen's labor and expenses on the cattle inured directly to Abbott's benefit, and at a substantial detriment to Christensen.

E. DID CHRISTENSEN WRONGFULLY REFUSE TO DELIVER ABBOTT'S CATTLE:

The sole basis claimed by Abbott for refusing to honor Christensen's claim for compensation rests on Abbott's claim that Christensen "wrongfully refused" to make delivery of the cattle and, therefore, Christensen is not entitled to any compensation for their care and feeding. Abbott's claims or statement are purely conclusionary and actually impute some criminal or actionable tort activity to Christensen. The trial court was not asked, nor did it attempt to find any wrongful conduct by either party. This court flatly stated, that "although Abbott asserts

on appeal that Christensen 'wrongfully refused' to deliver the cattle to him after April 28, 1976, there appears to be a question of fact as to the parties' intentions regarding the feeding and care of the cattle after the settlement." This court then remanded the case for the "limited purpose of a determination by the trial court regarding Christensen's claimed agistor's lien" or for compensation, and not to try Christensen's conduct, as now urged by Abbott.

Until either this court or the trial court had ruled there was an accord and satisfaction between the parties, there was a bona fide dispute between the parties as to their relative rights and claims. However, that finding of accord and satisfaction was only to past dealings. Surely that accord and satisfaction is not sufficient consideration to satisfy future benefits conferred upon Abbott by Christensen while the parties were awaiting the court's decision as to what was the legal effect of their past conduct and/or agreements. Since there has been an express finding by the trial court that there was "no bad faith", and hence no wrongful conduct by Christensen, but merely of a dispute as to the "parties intentions", then the sole basis for Abbott refusing to compensate Christensen, i.e., "wrongfully refusing" to deliver Abbott his cattle, simply becomes non-existent. The following language would seem to be applicable to a just resolution of this matter:

. . . there is a presumption of law which arises from the proof of services rendered that the person enjoying the benefit of the same is bound to pay what they are reasonably worth. Mendoza v. Gomes, 143 Cal. App 2d 172, 299 P.2d 707 (1956).

The purpose of quantum meruit is to prevent unjust enrichment at the expense of another. Schroeder v. Schaefer, 258 Or. 444, 483 P.2d 818 (1971).

Unless otherwise agreed, payment will become due as work is done or at least within a reasonable time thereafter and if the recipient of the service is otherwise relieved of this obligation the burden of proof is on him to so show. (Emphasis added.) Richards, op cit. pg. 67.

F. ABBOTT'S BURDEN OF PROOF OR PERSUASION:

Christensen respectfully asserts that Abbott failed to bear his burden of proof, i.e., that he is relieved from having to pay for Christensen's service, or, that Christensen's claims for payment are unreasonable. Once Christensen established a prima facia case for reimbursement, i.e., the bestowal of a service that either benefitted Abbott, or relieved Abbott of an obligation, and that the amount claimed was reasonable, then the burden became Abbott's to show that he was legally "relieved" of that obligation, or that the amount claimed was excessive or unreasonable, etc. Abbott's apparent defense or rebuttal to the reasonableness of the amounts urged by Christensen, was to urge that the testimony of another rancher, who had never had over 100 cows of his own or anyone else, to feed, care for, etc., was in a better position to testify as to what would be the reasonable value of the care and feed of 200 head should be, or that the

other rancher could feed and care for 200 head of cows for less than the amount claimed by Christensen. Christensen would urge that such a procedure is actually "begging the question." Such testimony is not evidence of the reasonableness or unreasonableness of Christensen's claims, or that Christensen did not furnish what he said he had furnished, or that the costs were unfair, etc.

G. CHRISTENSEN'S CLAIM IS REASONABLE:

Christensen again requests that he be compensated for the reasonable value of the care and feeding of Abbott's cattle from April 28, 1976 to April 19, 1977. Such expenses and efforts were at a complete detriment to Christensen and were a direct benefit to Abbott. By taking care of Abbott's cattle, Christensen was unable to have that same number of his own cattle to herd, etc., and thus realize a profit from the same. The hay he fed Abbott's cattle either had to be purchased from another party, or he had to raise, either of which was money out of his pocket. The same with the pellets, salt, vet care, etc., that Christensen furnished those cattle. Even though there was an actual death loss between March 1974, when they were purchased, and April 17, 1977, when they were delivered to Abbott, which loss is usually between 8% and 10%, i.e. 16 to 20 cows, Christensen acted as an insurer for Abbott, and delivered or accounted for all of the 200 Black Angus to Abbott. All of this was done at Christensen's

detriment and to Abbott's benefit. It would be unjust and inequitable for any court to refuse Christensen a reasonable and just compensation. The amount claimed by Christensen is reasonable, and should be paid to Christensen, by Abbott, to prevent further injustice to Christensen.

Point III

THE TRIAL COURT ERRED IN COMPUTING THE AMOUNT OF THE JUDGMENT

Christensen can agree with Abbott on one point on appeal, namely that is that the trial court did err in the figure or amount that it used in determining the amount of the judgment Christensen was entitled to, but for entirely different reasons than those advanced by Abbott. Christensen is stymied and at a loss to understand Abbott's objections to the findings by the trial court, inasmuch as the trial court adopted Abbott's analysis of his "expert" witness's testimony as to the total value of the feed, care, etc., of a "range" cow during the time in question. (R., P. 103-105). As indicated in the above Statement of Facts, each party submitted their own analysis of the testimony of the witnesses concerning the value of the feed, care, etc., of said cattle.

A. IDENTIFICATION OF CHRISTENSEN'S WITNESSES:

The following individuals, with their background and

qualifications enumerated, testified for Christensen.

Grant Gerber - who had previously qualified in court as an "expert" appraiser, and who was experienced as: an active rancher; a livestock feeder; a real estate broker; past chairman of the Feeding and Marketing Committee for the Utah State Cattleman's Association; past member of the National Cattlemen's Association Feeding and Marketing Committee: etc., (T-1, P. 6; P. 7, lines 25-30).

Paul Christensen - the plaintiff herein, a lifetime rancher and the person who furnished the feed, fed the cattle, calved them, etc. (T-1, P. 112, L. 16-17). and,

John E. Fausett - who had: been involved in ranching all of his life and who was and is directly responsible for feeding thousands of head of cattle, in herds from 100 to several thousand, on a year around basis (T-2, pg. 13). Even Abbott's attorney acknowledged that Fausett was "undoubtedly an expert .." (T-2, P.19, L. 1)

B. SUMMARY OF TESTIMONY OF CHRISTENSEN'S WITNESSES:

A summary of the testimony of Christensen's witnesses is as follows:

<u>Name</u>	<u>Value</u>	<u>Reference</u>
<u>Gerber</u>		
Labor (year around)	\$600/mo.	T-1, P. 16, L.21
Pasture (summer)	\$7/head/mo.	T-1, P.13, L.12+
Hay, cost per ton	\$50/ton	T-1, P.13, L.20
Feed cows 20#/day for 180 days = 1.8 tons per cow = \$75 per cow		
Protein cost per 100 pounds	\$8/100	T-1, P.13, L.29+
Feed at 1#/cow/day for 100 days for calf milk		
Average <u>feed</u> cost per cow for year (summ & wint)	\$127.30	T-1, P.15, L.3+
Average <u>labor</u> cost per cow for the year	\$ 69.90	T-1, P.15, L.3+
Total feed & labor/cow/year	\$197.20	

An excellent summarization of Gerber's testimony is found in T-1, P. 22, lines 4-18, which is as follows:

Q. Based on your experience, what would you feel would be the reasonable market value in this area for the care an animal on a year around basis?

A. "In my experience, if they do it any cheaper than this [sic. i.e., 197.20 per year, see T-1, pg. 22, lines 22-25], they are loosing money . . ."

Q. In your opinion this is the very bottom dollar that the market would allow for this type of service?

A. I have kept every figure, and I am knowledgeable about every figure in here, enough to spend my own money that way. Yes, I would say, that is the bottom dollar. (emphasis added.)

Gerber did not testify as to the costs of the veterinarian, bull service, the special care for the "short calves," etc. The sum of \$197.20 was just for feeding and caring for the cows. Based on Gerber's "bottom-dollar", without considering the extras that were required and given, the minimum or "bottom dollar" amount Christensen would be entitled to, is \$39,440.00.

Christensen

Reasonable value of:

Labor - \$.15/head/day

T-1, P. 112, L. 10-29

Feed - \$.65 head/day

T-1, P. 112, L. 10-29

Summer pasture - \$8 per head
with calf, per month

T-1, P. 113, L. 4-5

Actual feed & labor for:

1976	\$36,604.00	T-1,P.113,L.12-15 Exs. No. P.30,31 & 32
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Special feeding for 21 small or "short" calves, from 11-1-76 to 3-15-77, 135 days x \$8.00 per day = \$ 1,080.00	T-1,P.114,L.26-28 T-1,P.115,L.14-18
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1977 (109 days)	\$17510.09	T-1,P.118,L.14+
Amount of feed		T-1,P.115,L.22+

Hay - Cost = \$65.00 ton or a cost of \$0.0325/lb.	T-1,P.116,L.19-24
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Hay fed at 15+ lbs per cow per day = 2775 lbs per day x \$0.0325 x 109 = \$ 9830.44	T-1,P.116,L.8+
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Protein pellets fed at 2-1/2 lbs./day/cow	T-1,P.116,L.1-10 & L.29
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Cost of pellets = \$145/ton - 185 cows x 109 days x 2.5# = 25.206 tons x \$145 = \$ 3654.90	T-1,P.116,L.30 T-1,P.117,L.1
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Aggregate of 1977 feed \$17510.09	T-1,P.118,L.14+
Labor at \$.15/day/cow = \$27.75/day x 109 = \$ 3270.00	T-1,P.112,L.10+

Misc., i.e., vet, etc. \$ 4254.31	T-1,P.117,L.22+
TOTAL for 1976 & 77	\$58,448.40

By way of analysis, the aggregate of Christensen's claim for feed, labor, etc., is entirely in line with Mr. Gerbers testimony, when such additional factors as the care of the "short" calves, the extra feed, etc., are included, all of which are items that Mr. Gerber did not have before him in order to make his analysis. Further, as stressed above, Gerber was testifying as to what would be the bottom line amount, and not what the actual expenses might be.

Fausett - (July 1980 hearing)

2 feeding seasons:

Summer - May 15 to November 1

Winter - November 1 to May 15

T-2, P.16, L.1

Value of Feed

Summer - pasture at the rate of
\$.3288/head/day (labor & feed)

T-2, P.16, L.3

Vet bill - an extra charge

T-2, P.17, L.6-10

Average vet bill - \$1.34/cow

T-2, P.17, L.10 - 20

Parasite control - \$.32/ cow

T-2, P.17, L.22 - 23

Bull service at \$10.00/ cow

T-2, P.19, L.10 - 30

Extra service for Bangs cattle

T-2, P.18, L.17 - 20

Winter feed - (approx \$.60/day)
(must use actual cost of feed)

T-2, P.23, L.6 - 11

Hay - 15#/cow/day at \$65/ ton

T-2, P.22, L.23 - 26

Pellets: feed 2-3#/cow/day
cost of pellets - \$8/100

Labor - \$20.00/day

T-2, P.23, L.16 - 18

Vehicle - \$10.00/day

T-2, P.23, L.16 - 18

Special Care for 21 "short" calves
from 11-1-76 to 3-15-77, at the
rate of - \$.52/ head/ day

T-2, P.26, L.17 -30

An analysis of Fausett's testimony as to value of feed and service furnished by Christensen, for each of the time periods and for the number of cows involved each time, is indicated hereafter. It is to be noted and underscored, that Fausett qualified his testimony as to what the reasonable value of the feed would be, to indicate that it should not be less than what Christensen paid for the same. There was no limitations or restrictions paid on the reasonable value of the labor, etc.

1. April 28 to May 15, 1976 = 17 days for 200 cows

Feed - 17 x \$.60 x 200 =	\$ 2,040.00	
Labor - 17 x \$20 =	340.00	
Vehicle - 17 x \$10 =	\$ 170.00	
Sub total	\$ 2,550.00	\$ 2,550.00

2. May 15 to Nov 1, 1976 = 169 days for 200 cows*

Feed - 169 x \$.3288 x 200 =	\$11,113.44	
*less 15 x 5 x \$.3288 =	\$ 24.66	
Net feed value	\$11,088.78	
Vet services \$1.34 x 200 =	\$ 268.00	
Parasite control	\$ 64.00	
Bull service	\$ 2,000.00	
Labor - 169 x \$20 =	\$ 3,380.00	
Vehicle - 169 x \$10 =	\$ 1,690.00	
Sub total	\$18,490.78	\$18,490.78

3. Nov 1, 1976 to Ap 19, 1977 = 170 days for 185 cows

Feed - \$.60 x 185 x 170 =	\$18,870.00	
Labor - \$20.00 x 170 =	\$ 3,400.00	
Vehicle - \$10.00 x 170 =	\$ 1,700.00	
Sub total	\$23,970.00	\$23,970.00

4. 135 days of care for "short" calves - \$.52 x 21 x 135 =

	\$ 1,474.20	\$ 1,474.20
TOTAL		\$46,484.98

Thus even without the exact figures, and having to rely on approximations, Fausett's testimony is in harmony with both Christensen's and Gerber's. All three of these witnesses were in a position where they could state an opinion that was based either on actual knowledge or education, or both, as to what the reasonable market value was for the type of service, etc., Christensen performed for Abbott.

C. ABBOTT'S WITNESSES AND TESTIMONY:

Abbott's personal testimony offers

information as to his opinion as to the reasonable value of the feed and care Christensen gave his cattle. (T-2, P. 60 through P. 82). However, Mr. Bleazard did offer his opinion based on his experience of feeding up to 100 head of his own cattle, (T-2, P. 49, L. 2+), and on one occasion, 12 to 15 head for another person (Dr. Abbott's son). Bleazard admittedly had never been involved in any operation similar to what Christensen had performed for Abbott, or like that which Fausett regularly did for others. An analysis of his testimony is as follows:

Bleazard:

2 feeding seasons T-2, P. 33, L. 18-19

Winter - Dec. thru April 30 T-2, P. 36, L. 9-17

Hay - 15#/cow/day for 151 days¹ T-2, P. 38, L. 3-16

No pellets - (too expensive)² T-2, P. 36, L. 21-24

(¹Claimed only \$45/ ton as cost of hay, but paid \$50/ ton in 76-77. Also, claimed 1 ton per cow for winter, but 15# x 151 days = 2265#, or, 1 1/4 ton of hay.)

(²Cows were also to eat willows, sage brush, and have access to water, but no value was assigned to this)

T-2, P. 38, L. 8 - 11

Labor - 1 man 1 1/2 hour per day T-2, P. 37, L. 3-10.

Summer - May 1 thru November 30

Feed - No value - Testified that cattle were on Abbott's ranch T-2, P. 57, L. 21 -28

Labor - 1 man 2 times a month to look at herd and give salt.³

T-2, P. 39, L. 13-26.

Pay - \$40.00 per day.

T-2-, P. 40, L. 17-30+

³based on assumption that cattle were on open range of Abbott's. No value assigned to necessary horse,

transportaion, salt, etc.

D. ANALYSIS OF BLEAZARD'S TESTIMONY:

It seems clear from the transcript (T-2) that Bleazard has very little background or basis to rely upon for his testimony. Because of his limited experience, and the admission by Abbott's attorney that Bleazard is unclear as to his testimony, (R., P.104), it would seem to have been "patent error" for the trial court to resolve any issues in conflict between the witnesses, in favor of Bleazard. In weighing the testimony of the witnesses, these facts should be remembered: 1.) Bleazard acknowledged that he never saw these cattle in 1976, and did not even know where they had grazed. (T-2, P. 54, L. 16-26); 2.) He assigned no value for the summer feed, because he claimed they were grazing on Abbott's "Blue Mountain." (T-2, P. 57, L. 21-28); 3.) Bleazard did not know Abbott had the "Blue Mountain" summer feed leased to Fausett for \$30,000.00. (T-2, P. 87, L. 18-20); 4.) Bleazard did not know that at all times relevant herein, Christensen kept Abbott's cattle on his land or on land that he leased for the purpose of pasturing Abbott's cattle; 5.) As Abbott's attorney noted in his analysis of Bleazard's testimony, that Bleazard was "unclear" as to his testimony on summer feed. (R., P. 104); 6.) Bleazard had never handled this many cows, for this length of time, either for himself or for others; 7.)

Bleazard acknowledged that during the winter, that in addition to the hay they were fed, that the cows would need to be in a field where they could "brouse on willows and sagebrush, and things like that, and have access to a water hole." (T-2, P.38, L.8-11), yet Bleazard failed to assign any value to the same; 8.) In short, Bleazard only covered some of the "highlights" of a feeding operation, but little more.

E. INADEQUACIES OF BLEAZARD'S TESTIMONY:

When Abbott submitted his analysis of the testimony, and arrived at the ridiculous price of \$122.53 per head for the feed and care of the cattle, he had to attempt to rehabilitate Bleazard's testimony by adopting Christensen's testimony that \$8.00 per head per month was a reasonable sum to charge for the summer pasture of the cattle. This is the only time that Abbott recognizes that Christensen's charges are reasonable. However, he neglects to assign anything for labor, vehicles, horses, salt, vet care, etc., etc., all of which the court must consider to be fair with Christensen. It is interesting to note that Abbott's analysis of Bleazard's testimony, Abbott used the figure of \$45.00 per ton as the cost of hay. However, that was what Bleazard had paid the previous year, and Bleazard grudgingly had to admit that he had paid \$50.00 per ton for hay during the 1976-77 winter, (T-2, P.45, L.21-27; Exhibit No. 38; and T-2, P. 47, L.19), for "undelivered" hay, that meant Bleazard had to have a

vehicle and trailer to travel some 6 to 13 miles in order to load and take the feed to his own cattle. Neither of these additional expenses are even considered by Abbott. At \$5.00 more per ton for hay, multiplied by the 319.5 tons of hay that Abbott acknowledges that Christensen had to have fed, (R., P. 104), then Christensen had at least \$1597.50 more in expenses that the court should have considered. However, since Christensen in fact paid \$65.00 per ton for the hay he fed, which fact Abbott never disputed, then based on Abbott's figure of 319.5 tons, Christensen had at least \$6,390.00 in expenses that the court ignored. When that figure is divided by the 200 head of cattle, that would mean an additional \$31.95 for Christensen. With so many loops, gaps, and misunderstanding in Bleazard's testimony, it is difficult to understand why the trial court would base its decision or resolve disputes on the same.

F. COMPARISON OF GERBER AND FAUSETT TO CHRISTENSEN'S TESTIMONY:

When you consider the background and experience of both Gerber and Fausett, the conclusion is unescapable, that they knew what they were testifying about. When Gerber and Fausett's testimony is analyzed with that of Christensen, the correctness of Christensen's testimony and his requests for compensation are even more meaningful. Christensen urges the court to find, based on Fausett's, Gerber's and his own testimony, that the reasonable

value of the feed and care furnished by Christensen to Abbott, for the care of the Black Angus, from April 28, 1976 to April 19, 1977, to be \$58,448.40, which is the aggregate of the sums testified to by Mr. Christensen as being his actual cost for feed, etc., plus a reasonable sum for his labor, etc.

G. ANALYSIS OF BURDEN OF PERSUASION:

Christensen would further suggest, that inasmuch as he established at the first trial the sum of \$58,448.80 to be a fair and reasonable sum to be awarded to him for having furnished all the care, feed and control over Abbott's 200 head of cattle for nearly one (1) year, and without any death loss for over three (3) years, that either impliedly or as a matter of law, the burden of persuasion shifted from Christensen to Abbott to establish that the sum claimed by Christensen was not reasonable. (See Richard v. Lake Hills op. cit.) If Christensen's position is correct, then for what purpose was the new hearing, or the testimony of Bleazard offered? If Bleazard's testimony was given for the purpose of attempting to establish that Christensen's charges were unreasonable or unfair, did his testimony achieve that result? Would reasonable men, upon hearing or reading Bleazard's testimony have concluded that it was persuasive, by any standard of evidence, to discredit Christensen's well documented claims? Was Abbott able to establish that he was relieved of his obligation to pay Christensen as a result of this

testimony?

In light of the decision of this court in 1979, and Christensen's understanding of status of the law in this state, unless Abbott has met or carried his burden of persusaion, then Christensen is entitled to judgment for the sums he established he was reasonably entitled to. The trial court erred when it acknowledged that it had only considered the testimony of Grant Bleazard and John Fausett, with no apparent regard for the other testimony introduced at the first trial, all of which was clearly brought to the attention of the trial court. The trial court states:

"A sharp conflict exists between the testimony of the witness Fausett and the witness Blazzard. (sic) The court finds that the testimony of the witness Blazzard (sic) is the more believable and persuasive. It therefore adopts the analysis of costs as set out in the fourth paragraph on page 2 of defense counsel's letter dated August 4, 1980, and finds that the reasonable cost of feeding the cattle for the period covered was \$122.53 per cow." (R., P.104).

H. WHAT TESTIMONY SHOULD HAVE BEEN CONSIDERED:

Christensen carefully inquired of the court before the hearing began as to whether the court was "re-opening" the case, receiving new evidence, would consider the original testimony from the first trial, or what? (See T-2, pg. 7, lines 12-29; pg. 8, line 12-25; pg. 12, lines 3-16; pg. 93, lines 24-30; pg. 94, lines 8-21;) after being assured that all of the evidence from both hearings would be considered, if cited to the court,

Christensen proceeded, and agreed to furnish the court with the same. (see R., pg. 114+). However, in its decision, the court obviously only considered the testimony of Fausett and Bleazard, (R., pg. 97-98, at pg. 98) and resolved all conflicts in favor of Bleazard, who by his own admission scarcely knew what he was talking about, as noted above. Christensen realizes that: the court may believe one witness as against many, or many against one; the trial judge, in observing the demeanor, etc., of witnesses is in a better position to judge their credibility than is an appellate court, etc. However, when it is clear from the transcript that the witness really doesn't know what he is talking about, the appellate court can and should so find and reverse the trial court.

In view of all the evidence, Christensen would urge this court to find that reasonable men would not agree with the decision of the trial court because it is, arbitrary, capricious, and based on incompetent evidence. Why should Christensen be further penalized for having made his record at the first trial while Abbott, who chose to ignore the pleadings and the evidence, is rewarded on the rehearing by the court adopting his witnesses' testimony, even when Abbott's counsel admits it "is not clear," at least in part, (R., pg. 104) and completely ignores the earlier record? Once the court concluded that Christensen did not act in "bad faith," it should have awarded Christensen the

full sum he proved at the first trial. As a matter of equity, this court should remand this matter again with directions to enter Judgment in favor of Christensen in the sum of \$58,448.80, plus accrued interest, etc., for the care, feed, etc. of Abbott's cattle.

POINT IV

CHRISTENSEN IS ENTITLED TO THE PROCEEDS FROM THE SALE OF HIS COW

In the fall of 1976, the cattle Christensen was herding, both his and Abbotts, were found to be "exposed" to "bangs" disease. By law, those cattle that were "suspect" had to be disposed of, which fact all of the parties acknowledged. When Christensen sold the 15 head of Abbott's black angus, he included or sold one of his "bally faced" cows. The entire proceeds from the sale of all of the cows, including Christensen's, was included in one check. By stipulation, all of the money from that sale was escrowed at Zions Bank, in an interest bearing account. Without objection or rebuttal from Abbott, Christensen testified to this at the trial. (See T-1. Pg. 110, lines 15-24). The receipt for the sale of the cattle show that Christensen's cow sold for \$245.81. Subsequently, Abbott was authorized to receive the funds escrowed at the bank, at which time he retained Christensen's share for the one cow, which was \$245.81.

Christensen drew this fact to this court's attention in the first appeal, (see Appellant's Reply Brief, pg. 41-42.). Abbott has never denied nor refuted Christensen's claim or right to that money. Christensen is entitled to be paid the \$245.81, plus interest that sum has generated, from October 26, 1976, to present. For the court to require Abbott to do anything less, would be unconscionable, and a total denial of justice.

POINT V

AWARD OF ATTORNEY'S FEES , COSTS, ETC.

Both as the prevailing party and pursuant to the provisions of Title 78-27-56, U.C.A., (1953) annotated, Christensen respectively requests the court to direct the trial court to determine the amount that would be a reasonable attorney's fee for having to respond to Abbott's appeal herein. Christensen believes that the sum and substance of Abbott's appeal is without merit, and is merely made as a delay to the administration of justice.

SUMMARY

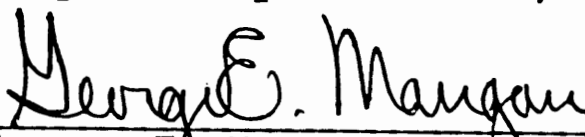
By way of Summary, Christensen urges that the trial court was correct in concluding that he was entitled to the reasonable value of the care and feed he furnished to Abbott's cattle, and that to deny Christensen recovery would constitute unjust

enrichment to Abbott. In the interest of justice and equity, Christensen would urge that the trial court's judgment be amended so as to fully compensate Christensen for the reasonable value of the feed and care he furnished Abbott's cattle, namely in the sum of \$58,448.40, plus interest from and after April 19, 1977, until paid. In no event should the award to Christensen be less than the actual costs of the feed or its value. By awarding Christensen only \$122.53 per cow, the trial court's decision, in fact, requires Christensen to subsidize Abbott's feed bill, and to perform all of the services for free.

In addition, Christensen is entitled to the \$245.81, plus interest, derived from the sale of one of his cows when Abbott's "cattle" with "bangs" were sold.

Finally Christensen should be awarded a reasonable attorney's fee and his costs on appeal.

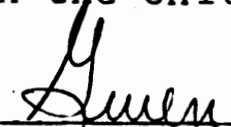
Respectfully Submitted,



George E. Mangan
Attorney for Respondent

CERTIFICATE OF MAILING

I do hereby certify that on the 23rd day of June, 1982, I mailed a true and correct copy of the foregoing BRIEF OF RESPONDENT, postage prepaid, to Wallace D. Hurd, Attorney for appellant, 9 Exchange Place, Suite 520, Salt Lake City, Utah 84111, by depositing the same in the United States Post Office at Roosevelt, Utah.



Secretary