

2001

# Zions First National Bank v. First Security Bank of Utah : Petition for Rehearing

Utah Supreme Court

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DEC 6 1975

IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

ZIONS FIRST NATIONAL BANK,  
a corporation,

Plaintiff and Respondent,

vs.

FIRST SECURITY BANK OF UTAH,  
N.A.,

Defendant and Appellant,

vs.

DON ALLEN, dba MOUNT NEBO CATTLE  
COMPANY,

Intervenor, Respondent  
and Cross-Appellant,

vs.

J.B.J. FEEDYARDS, INC., a corpora-  
tion; JOSEPH FORD & SONS, a  
partnership; JAMES K. FORD, WILLIAM  
FORD and WILLIAM G. BOSWELL,

Involuntary Defendants.

Case No. 13725

PETITION FOR REHEARING

**FILED**  
MAY 5 - 1975

Clerk, Supreme Court, Utah

Pursuant to Rule 76(e), Utah Rules of Civil Procedure,  
Appellant FIRST SECURITY BANK OF UTAH, N.A. respectfully petitions  
the Court to grant a rehearing in the above-entitled matter. The  
grounds for such rehearing are argued more fully in the attached  
Brief in Support of Petition for Rehearing, but may be summarized  
as follows:

The Court erred in concluding that the trial court's findings were supported by substantial evidence with respect to:

(a) The finding that 272 animals which had been attached by FIRST SECURITY BANK belonged to intervenor;

(b) The finding that the cattle in question were received by Mr. GARTH BOSWELL as agent for the intervenor; and

(c) The finding that ownership of the animals in question did not pass to J.B.J. FEEDYARDS.

DATED this 2nd day of May, 1975.

RAY, QUINNEY & NEBEKER  
400 Deseret Building  
Salt Lake City, UT 84111

By 

Don B. Allen

Attorneys for Defendant-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK,	)	
	)	
Plaintiff-Respondent)	)	
	)	
vs.	)	Case No. 13725
	)	
FIRST SECURITY BANK OF UTAH,	)	BRIEF OF APPELLANT IN SUPPORT
N.A.,	)	<u>OF PETITION FOR REHEARING</u>
	)	
Defendant-Appellant,	)	
	)	
et al.	)	
	)	

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vs.

J.B.J. FEEDYARDS, INC., a corpora-  
tion: JOSEPH FORD & SONS, a  
partnership; JAMES K. FORD, WILLIAM  
FORD and WILLIAM G. BOSWELL,

Involuntary Defendants.

Case No. 13725

BRIEF OF APPELLANT IN SUPPORT  
OF PETITION FOR REHEARING

NATURE OF THE CASE

This case represented a dispute regarding ownership of approximately 275 head of cattle or proceeds thereof. Ownership

was claimed by intervenor DON ALLEN, subject to a security interest in favor of ZIONS FIRST NATIONAL BANK. Ownership was also claimed by J.B.J. FEEDYARDS, INC., subject to a security interest in favor of FIRST SECURITY BANK OF UTAH, N.A.

#### DISPOSITION IN THE LOWER COURT

The lower court granted judgment in favor of intervenor and respondent ZIONS BANK, except for a counterclaim not in issue here. This Court affirmed the lower court's findings in an opinion filed April 15, 1975.

#### RELIEF SOUGHT IN REHEARING

FIRST SECURITY BANK OF UTAH, N.A. (designated as Appellant herein) seeks a rehearing for the purpose of demonstrating to the Court that the record does not contain substantial evidence supporting the lower court's findings on key issues, and consequently the judgment below should be reversed.

#### STATEMENT OF THE FACTS

The parties have set forth facts in great detail in their prior briefs and a repetition thereof is not necessary here. The only facts of particular import to this Petition for Rehearing will be argued below.

ARGUMENT

I. THE COURT ERRED IN CONCLUDING THAT THE TRIAL COURT'S FINDINGS ON KEY ISSUES WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. INTERVENOR DID NOT DEMONSTRATE THAT THE PARTICULAR CATTLE IN ISSUE WERE UNDER HIS OWNERSHIP.

Appellant can here focus on certain facts in the record or the absence of other material facts without lengthy argument. Appellant strongly urges that the Court reconsider its prior opinion by recognizing that intervenor did not present any material evidence in supporting the lower court finding that the specific animals in question here remained under his ownership. The only direct testimony of Intervenor on the question consisted of his identification of certain brands and a few animals which he recognized as coming from some neighbors in Montana (Tr. 520, 1.2 and 521, 1. 22). This is so patently an unreliable conclusion because nearly all of the cattle which had been purchased by J.B.J. FEEDYARDS had come from intervenor's purchases in Montana, and totaled approximately 3,200 head between April, 1972 and January, 1973 (Exh. 74 and Tr. 759). It is only logical that some of the cattle remaining at the time of the dispute herein arose were cattle bearing brands recognized by intervenor. Yet, he admitted that during 1972 he sold some 20,000 or 25,000 cattle and that he could not identify specific brands or specific cattle as having been shipped before or after January 1, 1973 (Tr. 509, 1.11 and 510, 1.19). This is very



critical! If intervenor could not identify the cattle in question as having been shipped after January 1, 1973 for his MOUNT NEBO cattle operation, then the cattle must of necessity have been cattle which were shipped earlier for J.B.J. FEEDYARDS. Intervenor did not introduce one shred of documentary evidence by which he could trace the 275 attached cattle here under consideration to any shipments he made for his own account. Appellant respectfully urges that the total lack of evidence demonstrating that intervenor could relate his own shipment to the cattle sold by the parties pending this action requires that intervenor's case fall.

Appellant had some affirmative evidence before the Court which, in any event, completely dispelled any notion that the attached cattle were those of intervenor. The Court must review again the impact of Exhibit 86 (received Tr. 864, 1.5). That exhibit is the sum total of all records produced in discovery proceedings by intervenor and respondent relating to shipment by intervenor for his MOUNT NEBO CATTLE COMPANY operation after January 1, 1973. Hoping to render unnecessary the painstaking comparison by the Court, Appellant and its counsel made a meticulous comparison of the brands from the cattle admittedly shipped by intervenor against brands on the attached cattle here in dispute (shown on Exhibit 11). Out of 267 head of cattle attached, only 12 animals had brands from Montana which duplicated any brands taken from

intervenor's animals shown on Exhibit 86. In the face of such evidence, we submit that the Court cannot believe the findings of the lower court supported by substantial evidence. The 12 animals which do have similar brands are described on pages 59 and 60 of Appellant's original brief and that description will not be repeated here. But we must emphasize that such evidence is uncontroverted and results in the inescapable conclusion that not more than 12 attached animals could have belonged to intervenor (and those were not necessarily his, in view of the many Montana-originated shipments for J.B.J. which preceded the attachment). Speaking boldly, but respectfully, we defy counsel for intervenor or respondent to point to any other credible documentary evidence in the record which would overcome the conclusion above stated which we described as inescapable, and which would require reversal of this judgment.

B. THE CATTLE IN QUESTION WERE NOT RECEIVED BY MR. BOSWELL AS AGENT FOR INTERVENOR.

Among the attached cattle the only animals which could possibly have been received by Mr. BOSWELL as agent for intervenor were 74 head representing the much-disputed shipments of December 15, 1972 and December 20, 1972. All other animals in question were received by J.B.J. prior to those dates and, except for shipments of November 29 and December 12, were paid for! Mr. BOSWELL was at all times prior to January 1, 1973 an officer and agent

for J.B.J., and intervenor doesn't even claim that BOSWELL acted for intervenor prior to mid-December, 1972. Yet Boswell's own list of J.B.J. animals included the December 15 and 20 shipments as J.B.J. animals (Exhibit 33 and Tr. 424, 1.28). The record contains no evidence whatever that any of the other animals were received by BOSWELL as agent for intervenor, and even the December 15 and 20 shipments are highly questionable. It is clear that the loads were purchased by intervenor or his order buyers in Montana for sale to J.B.J. and were shipped to J.B.J. pursuant to standing orders (Tr. 471, 1.21 and 499, 1.1). It was thought that new financing for J.B.J. was pproved at the request of BOSWELL (Tr. 499, 1.25, et seq.), and that the cattle would be paid for by J.B.J. (Tr. 500, 1.18). Clearly BOSWELL was acting for J.B.J. at those times and just as clearly, BOSWELL was acting for intervenor after January 1, 1973 for the cattle specifically consigned by MOUNT NEBO (Exhibit 86), but none of the cattle attached and under review here were traceable to any of those MOUNT NEBO shipments.

C. TITLE TO THE CATTLE PASSED TO J.B.J. FEEDYARDS.

In approaching the oral testimony contained on the record, it has never been necessary to attack the credibility of intervenor; (his other chief witness, BOSWELL, was caught in a number of discrepancies, but even his best testimony was not fully supportive

of intervenor's position). Mr. ALLEN was forthright and, when he didn't know he said so, and when he was unsure, he admitted so. His more positive statements were helpful to Appellant. Of critical importance to the issue of passage of title is Mr. ALLEN's testimony regarding the effect of the "market clearances" from Montana as "bills of sale". He was unequivocal in describing Exhibits 39 and 40, for example, which detailed the December 15 and 20 shipments totaling 74 head, as "bills of sale" (Tr. 556, 1.20 and 557, 1.20). The standard practice in Montana was to consider those documents as evidence of ownership of cattle (Tr. 530, 1.30). Thus the 74 head mentioned in the December shipments should be construed as owned by J.B.J. pursuant to the bills of sale, especially since Mr. ALLEN admitted that Exhibit 33, BOSWELL's schedule of J.B.J. cattle, represented all of the cattle purchases of J.B.J. through December 20, 1972 (Tr. 504 and 505), irrespective of the nonpayment of four loads which were billed to J.B.J. (Tr. 506, 11.8 and 15).

As to other loads of cattle designated for and shipped to J.B.J., Exhibits 31 and 32 represent further livestock market clearances which must operate as bills of sale. These documents further reflect the pattern of dealing by which bills of sale were used in connection with shipments of cattle to J.B.J., including, we submit, those under consideration here, thus passing title even before payment for the shipments was made or demanded.

In other parts of the record, intervenor testified that when cattle shipments were initiated by him from Montana to J.B.J., a draft drawn on one of the banks for J.B.J. was frequently (but not always) made out and forwarded for collection. The actual shipment time for the cattle was 18-30 hours to Goshen, Utah, but the drafts required eight or ten days for clearance (DON ALLEN deposition pages 103, 105). In making such drafts on FIRST SECURITY, he knew of FIRST SECURITY's lien on the cattle (DON ALLEN deposition, page 134). These facts are typical of the dealings described throughout all of the record by which the cattle arrived long before any payment was expected. Thus, any claim of "C.O.D." shipments is entirely unwarranted. Title passed to J.B.J. simply, in accordance with business practices, and as a matter of law.

The foregoing considerations, coupled with the additional fact that nowhere in the record does intervenor claim he reserved an express security interest in the shipped cattle pursuant to Section 70A-9-203 or 70A-2-705, Utah Code Annotated 1953, as amended, combine to demonstrate why this court should hold that no substantial evidence appears for the conclusion of the lower court that title did not pass from DON ALLEN to J.B.J. On the contrary, we submit affirmatively that the substantial evidence denotes the passage of title to J.B.J. on all shipments. How can intervenor deny the effect of the bills of sale to J.B.J. which he or his order buyers caused to be submitted in connection with each shipment from Montana to J.B.J.? He cannot and did not so deny, according to the record

before this Court.

II. THE SUPREME COURT HAS CLEAR POWER TO DISTURB FINDINGS OF THE LOWER COURT WHERE SUBSTANTIAL EVIDENCE DOES NOT REASONABLY AND CLEARLY SUPPORT SUCH FINDINGS.

It is unnecessary to engaged in semantical argument about the difference between "substantial" evidence and "weight" of the evidence. We have attempted to demonstrate why the Court should conclude that the key findings of the lower court were not supported by the record. The legal proposition here is well accepted. The Court has always recognized its inherent power to reverse and set aside a lower court judgment where the findings are insufficient or unsupported by the evidence, whether the case was tried to a judge alone (Utah Assn. of Credit Men v. Home Fire Ins. Co., 36 U. 20, 102 P. 631 (1909)), or even to a jury (Seybold v. Union Pacific Railroad Co., 121 U. 61, 239 P.2d 174 (1951)).

CONCLUSION

Appellant petitions the Court to grant a rehearing in the above-entitled case. The bulk of the record (and even of Appellant's first brief) perhaps obscured certain key issues and the facts supporting or not supporting certain findings. It is respectfully submitted that a rehearing should result in alteration of the Court's opinion when another, sharper focus on such key facts is allowed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER

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