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Zions First National Bank v. First Security Bank of
Utah N.A. v. Don Allen, Mount Nebo Cattle
Company v. J.B. J. Feedyards, Inc., Joseph Ford &
Sons, James K. Ford, William Ford, William G.
Boswell : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT RECEIVED
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STATE OF UTAH DEC 5 1975

ZIONS FIRST NATIONAL BANK, a corporation,
Plaintiff-Respondent,
vs.
FIRST SECURITY BANK OF UTAH, N.A.,
a corporation,
Defendant-Appellant,
vs.
DON ALLEN, d/b/a MOUNT NEBO CATTLE
COMPANY,
Intervenor,
vs.
J. B. J. FEEDYARDS, INC., a corporation;
JOSEPH FORD & SONS, a partnership;
JAMES K. FORD, WILLIAM FORD and
WILLIAM G. BOSWELL,
Involuntary Defendants.

BRIGHAM YOUNG UNIVERSITY,
Reuben Clark Law School

Case No.
13725

FILED
NOV 21 1974

BRIEF OF APPELLANT

Appeal from the Judgment of the Fourth District Court
for Utah County
Honorable George E. Ballif, Presiding

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TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF THE FACTS	3
ARGUMENT	10
I. THE OWNERSHIP OF J. B. J. FEED- YARDS, INC. EXTENDED TO, AND THE SECURITY INTEREST OF FIRST SE- CURITY BANK ATTACHED TO AND WAS PERFECTED IN, THE ANIMALS IN DIS- PUTE AS CATTLE ORIGINALLY HELD BY J. B. J. OR SUBSTITUTIONS, RE- PLACEMENTS, ADDITIONS OR PRO- CEEDS THEREOF	10
A. THE TRIAL COURT ERRED IN CER- TAIN FINDINGS AND CONCLU- SIONS PERTAINING TO TITLE AND SECURITY INTERESTS	10
B. APPLICABLE LAW EXTENDS AP- PELLANT'S SECURITY INTERESTS BOTH TO EXISTING AND AFTER- ACQUIRED PROPERTY AS COLLAT- ERAL FOR BOTH PRESENT AND FUTURE ADVANCES	13
C. TITLE TO CATTLE DELIVERED TO THE PROPERTIES OF J. B. J. FEED- YARDS, INC. PASSED TO J. B. J. AND BECAME IMMEDIATELY SUB- JECT TO THE LIEN OF APPELLANT	27

TABLE OF CONTENTS—Continued

	Page
D. THE COURT ERRED IN DETERMINING THAT INTERVENOR ALLEN EXPRESSLY RESERVED A SECURITY INTEREST IN CATTLE SOLD ..	37
II. USE OF THE "V5" BRAND CREATES ONLY A REBUTTABLE PRESUMPTION OF OWNERSHIP	39
III. THE SECURITY AGREEMENT HELD BY ZIONS WAS EITHER INVALID OR DID NOT ATTACH TO THE ANIMALS IN QUESTION OR BOTH	47
IV. INTERVENOR AND RESPONDENT FAILED TO SUSTAIN THEIR BURDEN OF PROOF WITH REGARD TO TITLE TO THE ANIMALS	51
CONCLUSION	61

AUTHORITIES CITED

STATUTES

Utah Code Annotated, 1953, as amended	
§4-13-1, et seq.	25
§4-13-11	40, 41
§70A-2-401	28, 35
§70A-2-702	39
§70A-2-703	40
§70A-2-705	40
§70A-9-108	18, 19
§70A-9-109	20

TABLE OF CONTENTS—Continued

	Page
§70A-9-113	39
§70A-9-203	38
§70A-9-204	19, 20
§70A-9-205	23
§70A-9-303	21
§70A-9-306	22, 24
§70A-9-307	23, 24
§70A-9-312	17
§70A-9-402	49, 50

CASES

<p>Baker Production Credit Assn. v. Long Creek Meat Co., Inc., et al. and First State Bank of Oregon, (Sept. 1973, Ore. Sup. Ct.), 513 P. 2d 1129</p>	24
<p>Burlington Nat'l Bank v. Strauss, 50 Wis. 2d 270, 184 N. W. 2d 122 (1971)</p>	24
<p>First Nat'l Bank of Elkhart County v. Smoker, (Ind. C. C. A. 1972), 286 N. E. 2d 203</p>	30
<p>Matthew R. Leichter, individually and d/b under the trade name and style of Landman Dry Cleaners, Bankrupt, (C. C. A. 2d Cir. 1972, 471 F. 2d 785)</p>	51
<p>North Platte State Bank v. Production Credit Assn. of North Platte, 189 Neb. 44, 200 N. W. 2d 1 (1972)</p>	29
<p>Pugh v. Stratton, 22 Ut. 2d 190, 450 P. 2d 463 (1969)</p>	25

TABLE OF CONTENTS—Continued

	Page
Walker Bank v. Burrows, et al., 29 Ut. 2d 218, 507 P. 2d 384 (1973)	26
Wilson, et al. v. Burrows, et al., 27 Ut. 2d 436 497 P. 2d 240 (1972)	25
MISCELLANEOUS	
Black's Law Dictionary	41

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

ZIONS FIRST NATIONAL BANK,
Plaintiff-Respondent,

vs.

FIRST SECURITY BANK OF UTAH,
N. A.,

Defendant-Appellant,

et al.

} Case No.
13725

BRIEF OF APPELLANT

NATURE OF THE CASE

This case involves a dispute regarding ownership of certain cattle or proceeds thereof, the cattle having been sold pending determination by the Court. Ownership is claimed by involuntary defendant J. B. J. FEED-YARDS, INC., subject to a security interest in favor of defendant-appellant FIRST SECURITY BANK OF UTAH, N. A. Ownership is also claimed by intervenor-appellant DON ALLEN, subject to a security interest in favor of plaintiff-respondent ZIONS FIRST NATIONAL BANK. A counterclaim of appellant for costs of feeding the disputed animals is operative against respondent if respondent prevails.

DISPOSITION IN THE LOWER COURT

Trial was held before The Honorable George E. Ballif, District Judge, in the Fourth Judicial District, Utah County. Judgment was granted in favor of intervenor-appellant, subject to the security interest of plaintiff-respondent, except for a counterclaim of defendant-appellant FIRST SECURITY BANK OF UTAH, N. A. for the costs of feeding the subject animals prior to their sale. Trial was held without a jury.

RELIEF SOUGHT ON APPEAL

Defendant-appellant FIRST SECURITY BANK OF UTAH, N. A. seeks reversal of the judgment granting title to the subject animals to intervenor and respondent. Although appellant desires confirmation of the validity of its counterclaim for feed costs, if the judgment is reversed, the counterclaim becomes moot because appellant is agreeable to absorbing the costs of feeding the animals which this Court will then determine to be under appellant's valid security interest. In such event,, appellant also seeks an order compelling restoration to appellant of funds representing certain proceeds of sale which were received by respondent from the Clerk of the Court. Intervenor-appellant seeks reversal of the award on the counterclaim pursuant to a cross-appeal, but desires affirmance of the Court's judgment otherwise.

STATEMENT OF THE FACTS

Abundant reference to the facts as reflected in the

record will be necessary, both in this statement and in the argument. The transcript of the trial will be referred to by page number and, where appropriate, line number, in the form "Tr. 1.". The pleadings and other documents in the balance of the record will be referred to in the form, " R.". Exhibits will be described according to their respective sequential numbers, with an attempt to indicate to the Court, where appropriate, Exhibits of such materiality as to deserve detailed review by the Court.

Concerning identification of the parties, defendant FIRST SECURITY BANK OF UTAH, N. A. will be termed "appellant" or sometimes "FIRST SECURITY" and plaintiff ZIONS FIRST NATIONAL BANK will be termed "respondent" or sometimes "ZIONS". Intervenor DON ALLEN will be referred to as "intervenor" notwithstanding that said intervenor is a respondent with respect to FIRST SECURITY'S appeal and is in the status of an appellant with regard to his own cross-appeal. The so-called "involuntary defendants" will be designated by name or the use of said title where appropriate, with the most frequent reference to involuntary defendant J. B. J. FEEDYARDS, INC., sometimes called "J. B. J." for convenience. The involuntary defendants have no appeal or cross-appeal pending.

The rather complex and intriguing drama to be reviewed by the Court began to unfold in approximately April, 1972, when various members of the FORD family, involuntary defendants, together with WILLIAM

GARTH BOSWELL, commenced a business of purchasing and selling cattle through a corporation known as J. B. J. FEEDYARDS, INC., of which BOSWELL was 50% owner and a vice president and director (Tr. 300 1. 2). The principal business of J. B. J. was centered in feed lots and corrals owned by J. B. J. in Goshen, Utah. The business was to be financed partly by investment of the respective parties, but more substantially through loans from the Payson, Utah Office of appellant FIRST SECURITY BANK OF UTAH, N. A. The following obligations to appellant were incurred by J. B. J.

Description	Principal Amount	Reference
Promissory Note of April 20, 1972	\$126,200.00	Exhibit 49
Promissory Note of June 7, 1972	\$ 39,000.00	Exhibit 50
Promissory Note of July 12, 1972	\$ 53,000.00	Exhibit 51
Overdrafts in various amounts		

The initial advance of \$126,200.00 was for the purpose of purchasing cattle to go on a feeding program of J. B. J. (Tr. 706), the next advance of \$39,000.00 was for the purpose of paying for part of the overcost of the feeder program and to finance purchase of bulls and other cattle (Tr. 707) and the advance of \$53,000.00 financed an increased number of bulls in the bull program (Tr.

708). J. B. J. provided for the benefit of appellant a security agreement covering all of the animals together with substitutions, replacements, additions and proceeds thereof (Exh. 53, Tr. 710). Financing statements covering the collateral were duly filed with the Utah Secretary of State between April 20 and April 27, 1972 (Exhs. 54, 55 and 56, Tr. 713-715). On April 12, 1973, after the dispute herein described had become very ripe, an additional financing statement was filed for the purpose of confirming the security interest in the animals here in dispute (Exh. 57, Tr. 717). The obligations of J. B. J. to appellant were guaranteed by WILLIAM G. BOSWELL, JAMES K. FORD, WILLIAM FORD and JOSEPH FORD & SONS, a partnership (Exh. 52, Tr. 709). Additional security documents and other agreements of various kinds pertaining to the J. B. J. financing were also taken, including a security agreement on crops (Exh. 58), a real estate mortgage (Exh. 59), various pledge, collateral and subordination agreements (Exhs. 60 through 67) and basic corporate authorization resolutions (Exhs. 68 and 69). The overdraft obligations arose during the course of business in which cattle were in transit either for purchase or for sale, requiring some "float" in the cash flow of J. B. J.

MR. BOSWELL was primarily responsible for purchasing and selling the animals beginning in April, 1972. No purchases for J. B. J. were made later than January 25, 1973 (Tr. 300 1. 12). Many of the cattle, particularly the bulls, were purchased from intervenor DON ALLEN,

who was doing business in Montana and whose principal Utah customer was J. B. J. (Tr. 496 1. 28). During the period April, 1972 to January, 1973, J. B. J. purchased approximately 3,175 head of cattle and sold or lost approximately 3,203.5 head which can be accounted for (Exh. 74, Tr. 759). The latter figure includes the cattle in dispute in this action, which were sold between February and September, 1973 pursuant to a much disputed stipulation and agreement (Exh. 93) and have been meticulously accounted for (Exh. 11). Exhibits 11, 53, 74 and 93 are critical to this action and deserve careful review by this Court.

Various problems arose in the conduct of the business of J. B. J. which gave FIRST SECURITY considerable apprehension, including a growing concern over the frequent overdrafts and the lack of accounting information from J. B. J. (Tr. 733). Consequently, FIRST SECURITY'S principal representative in this matter, Mr. Roy Broadbent, made demand on October 6, 1972 for payment of the overdraft and liquidation of the bull program (Exh. 70, Tr. 736). Thereafter, Mr. Broadbent made an inspection of the J. B. J. cattle on December 6, 1972 and determined that only 584 head were present, when the total should have been approximately 819 (Tr. 733). Earlier inspections had indicated the correct number of animals (Tr. 731). Most of the cattle belonging to J. B. J. and held for more than a few days had been branded with the J. B. J. brand "(-)" (Tr. 837). Also, most of J. B. J. purchases and sales had been

handled through checks or drafts drawn or payable either at FIRST SECURITY or ZIONS, with proceeds of sales represented by deposits to J. B. J.'s accounts at one of those two banks (Exh. 74).

During the middle of December, 1972, some of the checks or drafts of J. B. J. were being returned unpaid, as a result of which MR. BOSWELL was seeking new financing for J. B. J. Two shipments of cattle designated for purchase by J. B. J., totaling 74 head and shipped in two segments on December 15 and December 20, 1972, were shipped by intervenor DON ALLEN in anticipation that the new financing could pay for them (Tr. 500 1. 4). When it appeared that payment would not be made to intervenor, MR. BOSWELL branded those animals with a "V5", an unregistered brand, but kept the animals in the feed lots maintained by J. B. J. at Goshen, Utah (Tr. 382). These animals are among those in dispute.

On January 1, 1973, intervenor DON ALLEN, together with his wife, met with MR. BOSWELL and Mr. Wallace Gardner at the Spanish Fork Office of ZIONS FIRST NATIONAL BANK and formed a new cattle trading company to be named MOUNT NEBO CATTLE COMPANY (Tr. 472 1. 23). At the same time, a loan in the amount of \$50,000.00 was obtained from ZIONS to help finance the MOUNT NEBO CATTLE business (Tr. 476, 561). Thereafter, cattle purchases were made in the name of MOUNT NEBO CATTLE COMPANY and copies of invoices reflecting the same were received

at ZIONS beginning late January, 1973 (Tr. 573 1. 6). MR. BOSWELL was employed as a commission agent for MOUNT NEBO on January 1, 1973, confirmed in writing on February 14, 1973 (Exh. 24, Tr. 333 1. 14). Since MOUNT NEBO CATTLE COMPANY had no Utah facilities of its own, MR. BOSWELL used the same feed lots in Goshen, Utah as were used to feed and corral animals belonging to J. B. J. MR. BOSWELL paid for recording of the "V5" brand with the appropriate state office and began using that brand on the MOUNT NEBO animals (Tr. 369, 371).

By January 25, 1973, the FORDS and Mr. Broadbent of FIRST SECURITY had become increasingly concerned about the security and identity of J. B. J.'s animals in the Goshen yards. On that date, approximately 167 animals were taken from the J. B. J. yards to a nearby property owned by the FORDS (Tr. 185). After further discussion and investigation, the FORDS and FIRST SECURITY believed that the remaining animals at the J. B. J. yards in Goshen were part of the J. B. J. animals, subject to the FIRST SECURITY lien. Thereafter, FIRST SECURITY instituted a lawsuit against J. B. J. and the guarantors, Civil No. 38191, Fourth Judicial District, Utah County, and on February 7, 1973 a Writ of Attachment was issued pursuant to which an additional 267 head of animals were taken by the sheriff from the Goshen yards of J. B. J. and quartered temporarily at the Lazy S Cattle Ranch in Elberta, Utah (Tr. 202, Exh. 23). During subsequent

hearings on motions to quash the Writ, the intervenor DON ALLEN appeared and asserted a claim to the animals. Counsel for the parties thereafter stipulated that the cattle should be sold and the proceeds held for disposition by the Court (Exh. 93). The 267 head thus attached, with adjustments for deaths, new births and other claims are the animals here in dispute. The writ of attachment in the other action was dissolved after some of the attached animals were sold by MR. BOSWELL as agent for MR. ALLEN. Following disputes concerning affectiveness of the stipulation, FIRST SECURITY arranged the remaining sales and all proceeds were accounted for (Exh. 11).

The lawsuit from which this appeal arises was commenced by ZIONS after the stipulation in the prior action was entered into, the claim of ZIONS not having been asserted previously. Motions to consolidate were denied by the respective judges handling both cases and this case proceeded to trial solely on the issue of title to the animals and security interests applicable thereto and FIRST SECURITY's counterclaim for costs of feeding the animals. No issues pertaining to damages from the attachment or otherwise were reserved or tried in the lower court in this action, but remain in the other action for subsequent trial unless this Court renders most of such claims moot.

On the morning of the 8th day following entry of judgment herein and within an hour before the notice of appeal and supersedeas bond were filed with the lower

Court, counsel for intervenor obtained an order requiring the Clerk of Court to turn over that portion of the proceeds of sale which had been deposited with the Clerk, amounting to \$34,127.18. Counsel for appellant agreed not to contest such highly irregular procedure on the gentlemen's understanding, not made part of the record, that such funds would be paid to and applied by ZIONS toward the note of intervenor and that ZIONS would restore the funds for the benefit of appellant if this Court should reverse the existing judgment.

ARGUMENT

I. THE OWNERSHIP OF J. B. J. FEEDYARDS, INC. EXTENDED TO, AND THE SECURITY INTEREST OF FIRST SECURITY BANK ATTACHED TO AND WAS PERFECTED IN THE ANIMALS IN DISPUTE AS CATTLE ORIGINALLY HELD BY J. B. J. OR SUBSTITUTIONS, REPLACEMENTS, ADDITIONS OR PROCEEDS THEREOF.

(A) THE TRIAL COURT ERRED IN CERTAIN FINDINGS AND CONCLUSIONS PERTAINING TO TITLE AND SECURITY INTERESTS.

Appellant believes it helpful to the Court to designate those portions of the Findings, Conclusions and Judgment which appellant deems materially erroneous. Arguments in support of appellant's position are con-

tained under the subsequent sub-headings. Appellant expressly submits that the following were erroneous:

Findings of Fact (R. 450):

1. The finding that the security agreements of appellant were a "purchase money mortgage for purchasing approximately 600 head of feeder cattle," as contrasted to the language of the security agreements and the business practices of the parties which provide broader security interests, covering more than just the feeder cattle;

2. The last statement regarding the "bull program" as a rapid turnover program necessitating a 30 day sale, which is substantially correct, but does not take cognizance of many exceptions in which bulls were retained for a longer period;

* * *

6. The findings that the practice by which intervenor sold animals to J. B. J. was on a "C. O. D." basis, and that intervenor ALLEN "expressly retained title to said cattle until he was paid for them by J. B. J. FEEDYARDS, INC.";

7. The misleading statement which suggests that the inability of J. B. J. FEEDYARDS, INC. to pay intervenor in November and December, 1972 was solely the result of termination of the financing arrangements with FIRST SECURITY BANK, and the characterization of any shipment as "C. O. D.";

8. The critical findings that the December 15 and

December 20, 1972 loads were "rejected" by J. B. J., that intervenor ALLEN directed MR. BOSWELL to brand the animals "V5" or to hold the loads for intervenor, and that BOSWELL received said two loads of animals for intervenor ALLEN and not for J. B. J.;

* * *

11. The suggestion that intervenor ALLEN did not ship cattle in January, 1973 for the account of J. B. J. FEEDYARDS, INC. as distinguished from MOUNT NEBO CATTLE COMPANY, and that the loads of December 15 and December 20, 1972 were part of the MOUNT NEBO cattle;

12. The finding which incorrectly characterizes the financing statement of ZIONS and what it shows regarding MOUNT NEBO CATTLE COMPANY and DON ALLEN and his wife (Compare Exh. 1);

13. The declaration that J. B. J. FEEDYARDS, INC. did not "give value" for the cattle, and that only the animals branded "(-)" belong to J. B. J. FEEDYARDS, INC.;

* * *

20. The finding that the animals described therein were recognized by intervenor as animals "belonging to him," and the implications of ownership by such purported recognition.

Conclusions (R. 460)

1. The conclusion that intervenor established his

ownership of the animals set forth in Findings 15, 16, 18, 19, 20, 21 and 22, thus rendering erroneous the further conclusion as to intervenor's right to deposited monies;

2. The conclusion that defendant FIRST SECURITY BANK failed to establish any interest in the animals or proceeds designated in Findings 15, 16, 18, 19, 20, 21 and 22;

3. The conclusion that intervenor had rights in the animals set forth in Conclusion No. 1, and that plaintiff ZIONS BANK had a security interest therein.

* * *

Judgment (R. 470)

Without enumerating again the various paragraph numbers, the Court will understand that appellant believes the judgment to be incorrect on the same grounds and for the same reasons as designated above in references to the Findings and Conclusions.

(B) APPLICABLE LAW EXTENDS APPELLANT'S SECURITY INTERESTS BOTH TO EXISTING AND AFTER-ACQUIRED PROPERTY AS COLLATERAL FOR BOTH PRESENT AND FUTURE ADVANCES.

The law applicable is derived primarily from the Secured Transactions portion of the Uniform Commercial

Code, found in Chapter 9 of Title 70A. (Unless otherwise expressly shown, all statutory references herein shall be to Utah Code Annotated, 1953, as amended). Several features of commercial law representing forward-looking legal concepts made certain by the Uniform Commercial Code include the attachment of a security interest (lien) to after-acquired property and the validity of a security interest as collateral for future advances. In addition, certain rules pertaining to passage of title were also made more definite, as argued hereinafter. Those critical legal concepts, as applied to the facts in the record, compel new findings and conclusions in favor of appellant.

The basic security document relied on by appellant is the Security Agreement (Farm Products Chattel Mortgage) shown as Exhibit 53. That Security Agreement was signed by all involuntary defendants, including the corporate signature of J. B. J. FEEDYARDS, INC. The agreement covered various crops, feed and real property in addition to cattle. The relevant portions pertaining to cattle are:

“ . . . (Debtor) grants to **FIRST SECURITY BANK OF UTAH, NATIONAL ASSOCIATION**, Payson, Utah (“Bank”) a security interest in the following described collateral and products and proceeds thereof:

(a) **LIVESTOCK AND OTHER CHATTLES**; (Also describe the general location thereof) This is a purchase money mort-

gage for purchasing approximately 600 head of feeder cattle and five months of summer grazing on the ground of King Creek Grazing Association, Bancroft, Idaho, plus feeds, supplements (sic), etc. Specific description will be reported by photo copies attached to this mortgage of purchase drafts, sales slips, or other purchase evidence, but the cattle will be mainly described in the following three groups:

1. 200 head of Holstein feeder steers, approximately 600 lbs. when bought.
2. 200 head of choice quality Hereford Angus and mixed beef heifers, about 600 lbs. when bought.
3. 200 head of choice quality Hereford Angus and mixed beef steers, about 600 lbs. when bought.

Together with any additions, replacements, or substitutions during the life of this mortgage."

* * *

"The distinguishing brands or marks on any livestock described are:

[(-) on right side]

"The security interest shall extend to all generations of increase of the above described collateral and all additions and accessions thereto, together with all additional property of similar nature or any interest therein now owned or hereafter acquired by Debtor, whether or not enumerated and whether branded or unbranded with the marks indicated and

whether or not said brands or marks are in the position or location shown above."

* * *

"2. OBLIGATIONS SECURED:

The security interest herein granted is given to secure the payment and performance of the following described obligations:

Principal Amount	Date of Notes	Terms of Payment
\$126,200.00	4/20/72	Payable on or before ten months from date.

(b) **OTHER OBLIGATIONS:** To secure payment of all principal and interest of such other advances as Bank, in its sole discretion, may make to Debtor up to an aggregate outstanding balance at any one time of \$....., or if no sum is designated a maximum of **THREE TIMES** the original advance by Bank in connection with this agreement; provided, however, that the making of any further loans, advances or expenditures shall be optional with Bank, and nothing herein shall be construed to obligate Bank for any such purposes; to secure payment of all other obligations of Debtor to Bank or assignee of Bank however evidenced, created or arising, whether absolute or contingent, whether contracted directly or indirectly, and whether or not due; and all modifications or renewals of any obligations secured hereby." (emphasis supplied)

Appellant must here observe that the basic legal

effect of the security agreement is not here in issue. The question for this Court to determine from the evidence is whether or not the concept of extending a security interest to additions, replacements or substitutions of the designated cattle carries the security interest of FIRST SECURITY to the ~~200~~²⁶⁷ head of cattle here at issue. The basic proposition is: if the cattle in dispute can be shown to represent cattle belonging to J. B. J., whenever purchased subsequent to April 20, 1972, then the security interest of FIRST SECURITY under Exhibit 51 automatically and as a matter of law extends to all such cattle. A further basic proposition is that all such cattle secure not only the original promissory note of \$126,200.00, but also any additional advances made by the BANK to or for the benefit of J. B. J., and that such other obligations secured include the two additional promissory notes and the overdraft designated in the Statement of Facts above.

Appellant must further observe preliminarily that the issues here do not involve conflicting security interests in the same collateral determined from priorities of filing or otherwise under §70A-9-312. If J. B. J. and FIRST SECURITY can sustain their claim to the cattle in issue by reason of the additions, replacements, substitutions and proceeds concept, then the cattle do not belong to intervenor and are not subject to any security interest held by ZIONS. Conversely, if the lower court were correct in its determinations, then FIRST SECURITY would have no interest in the cattle at issue. The contest, there-

fore, is not based on whether FIRST SECURITY or ZIONS effected a financing statement filing first, but rather which bank has any claim at all in the subject animals. The same debtor has not granted security interests in the same collateral to more than one secured party. Rather, the Court determines which debtor owned the cattle and therefore which bank had a security interest therein.

The evidence is uncontroverted that FIRST SECURITY advanced to or for the benefit of J. B. J. sums totaling \$218,200.00 on three promissory notes (Exhs. 49, 50 and 51), together with overdrafts in varying amounts and standing at \$14,688.44 just prior to the payments of the overdrafts. The promissory notes had on January 21, 1974, the first date of trial, an aggregate balance of principal and accrued interest of \$116,700.53 (Tr. 877-879). Those advances constituted *new value* secured by cattle then existing or thereafter acquired. Additional purchases were made by J. B. J. in the ordinary course of business and all of the cattle purchased thus came under the "floating lien" held by FIRST SECURITY attaching to all cattle held or subsequently acquired by J. B. J.

The rather steady stream of purchases and sales by or for the account of J. B. J. is graphically illustrated in Exhibit 74. Based on the regular books of account together with other documents supporting that exhibit, it is evident that J. B. J. purchased a total of 3,175 head for a total of \$1,234,319.75. Those facts render operable the provisions of §70A-9-108:

“Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.”

The security interest of FIRST SECURITY attached to the cattle and became immediately perfected because (1) the BANK had given value (cash advances from the promissory notes and overdrafts; (2) a security agreement existed indicating that the security interest would attach to subsequently acquired cattle; and (3) J. B. J., as debtor, obtained rights to the collateral as soon at the various loads of cattle were loaded at the seller's place of shipment and designated for J. B. J., or at the very least, when the cattle were received at the feed lot of J. B. J. in Goshen, Utah.

The agreement between FIRST SECURITY and J. B. J. contemplating expressly that after-acquired cattle would be covered also declared that such cattle would secure future advances whether or not such advances were made pursuant to a commitment. The operation of §70A-9-204 is clearly effective in this case:

“(1) A security interest cannot attach until there is agreement . . . that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.”

* * *

“(3) Except as provided in subsection (4) a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement.”

* * *

“(5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.”

Because the cattle or products thereof (including newborn) were held by J. B. J. as a debtor engaged in raising, fattening, grazing or other farming operations, the cattle are deemed “farm products” under the provisions of §70A-9-109:

“(3) ‘farm products’ if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products, they are neither equipment nor inventory;”

Appellant here submits that it met by convincing and preponderant evidence its burden of proof in tracing animals of J. B. J. through their various purchases and sales, including the animals in dispute, which are summarized as item 6 on the sales column of Exhibit 74. The specific sales thereof are further detailed in Exhibit 11. Those exhibits convincingly demonstrate the operation of the substitutions, replacements, additions and proceeds concept. The concept is further supported by the fundamental rule under the Uniform Commercial Code that the security interest "attached", meaning that all J. B. J.'s interests in the continuing stream of cattle purchases became subject to the lien of FIRST SECURITY, and contemporaneously, the lien or security interest became "perfected" by reason of the prior filing of the financing statement with the Secretary of State, rendering the security interest invulnerable to any other creditors or purchasers of J. B. J. §70A-9-303(1) declares:

"A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. * * * If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."

The animals falling within the terms "substitutions," "replacements" or "additions" fall under the security agreement irrespective of whether any of the animals are actually sold. The evidence here amply demonstrates that the animals of J. B. J. were sold in the ordinary course of

business up through February 8, 1973 and were thereafter sold in order to obtain the money to be held pending determination of ownership by the Court. The actual sale of animals, as distinguished from purchases or products (newborn) brings into operation the additional concept of "proceeds". When J. B. J. cattle were sold, the money received in payment thereof, or any accounts receivable arising for future payment, or any cattle purchased with the money derived from sales, would constitute "cash" or "noncash" proceeds in which appellant's security interest would continue on a perfected basis. The legal effect occurs both by reason of the security agreement provisions cited above as well as the following operative provisions of §70A-9-306:

"(1) 'Proceeds' includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are 'cash proceeds.' All other proceeds are 'noncash proceeds.'

"(2) Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in a security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

"(3) The security interest in proceeds

is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

(a) a filed financial statement covering the original collateral also covers proceeds;

* * *

The "proceeds" concept harmonizes well with the previously expressed notions pertaining to after-acquired property through substitutions, replacements and additions. The right to follow the proceeds is further confirmed by §70A-9-307(1) which denies a purchaser any bona fide purchaser position and makes him subject to the lien:

A buyer in ordinary course of business (subsection (9) of § 70A-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."

It is further observed that the Uniform Commercial Code is specifically designed to permit the "floating lien" on inventory such as the cattle inventory demonstrated in this case, and that the security interest is not lost, either by the abundant purchase and sale transactions or by the intermingling or commingling of cash or non-cash proceeds arising from sales. §70A-9-205 states in pertinent part:

"A security interest is not invalid or

fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts, contracts rights or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. * * *

The right of the bank to follow through the "proceeds" of cattle on which it has a security interest is demonstrated in *Baker Production Credit Assn. v. Long Creek Meat Co., Inc., et al.*, and *First State Bank of Oregon* (Sept. 1973 Ore. Sup. Ct.) 513 P.2d 1129. The Court upheld the claim of the cattle feeder's financier (in the position of FIRST SECURITY here) for proceeds as against the financier of the slaughter house, stating with reference to the equivalent of 70A-9-306 and 70A-9-307(1):

The code, as to farm products, allows the security interest to follow the collateral through a succession of purchases. See *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 688, 186 NW2d 99 (1971). (*supra*, at 1132)

In *Burlington Nat'l Bank v. Strauss*, 50 Wis.2d 270, 184 NW2d 122 (1971), the Court expressly declared that the financing bank did not waive its security interest in cattle by allowing its borrower to sell, commingle and otherwise dispose of cattle. Moreover, the Court upheld the rights of the bank to cattle obtained through an after-

acquired property clause under its prior perfected security interest, as against the claims of the seller, Strauss, who had not filed:

We think Strauss did not perfect his security interest by filing the collateral sales notes and is not entitled to the priority protection of § 409.312(4), Stats., against the after-acquired clause of the bank's security instrument. To perfect a purchase money security interest, § 409.302(1), Stats., requires the filing of a financing statement. (184 NW2d, 125, 126)

This Court has previously determined that the provisions of the Uniform Commercial Code (Title 70A), Chapter 9, Secured Transactions, prevail over the Livestock Brand and Anti-Theft Act, § 4-13-1, et seq., in establishing the procedures for perfecting a security interest in livestock. Thus, a perfected security interest of a bank which financed the cattle purchase prevailed over the asserted rights under the branding statutes of a conditional vendor. *Wilson, et al. v. Burrows, et al.*, 27 Ut.2d 436, 497 P.2d 240 (1972). That case is also helpful in that it effectively overrules *Pugh v. Stratton*, 22 Ut.2d 190, 450 P.2d 463 (1969), which had relied on a misinterpretation of when the title passes to the buyer as the basis for reaching a contrary result. It was made clear in the *Wilson* case that *if the purchaser obtained rights in the collateral through a contract and possession, and the purchaser's bank has a prior perfected security interest, title passes and the lien attaches to cut off the rights of the vendor.* That is pre-

cisely the case at bar, for intervenor's rights in the cattle were terminated when the shipments were segregated for and shipped to J. B. J. pursuant to agreement. The problems of the *Wilson* case obtained a further legal dimension, for in a subsequent appeal involving most of the same parties and a related transaction, the Court expressly determined that since the cattle vendors did not file a financing statement or otherwise perfect a security interest, the vendors lost all rights to the cattle, title passed to the purchaser and the purchaser's bank had an enforceable security interest. *Walker Bank v. Burrows, et al.*, 29 Ut.2d 218, 507 P.2d 384 (1973). Questions of passage of title are discussed more fully under the next sub-heading.

In summary of the foregoing arguments, we urge the Court's consideration of the following:

(a) The cattle here at issue, not being thoroughbreds requiring genealogical records, cannot be traced individually, but must be considered in groups delineated by the various shipments of purchases and sales of which J. B. J. and DON ALLEN had record.

(b) The most definitive evidence before the Court is summarized in Exhibit 74 and explained by the testimony of Roy Broadbent (Tr. 759-831) and the supporting exhibits (Exh. 75-84). The recapitulation of Exhibit 74 draws together all of the documentary records of J. B. J. and DON ALLEN together with certain testimony and demonstrates the results of the entire history of J. B. J.'s business. The animals in dispute are included within that tracing of animals to J. B. J. and the security interest of

FIRST SECURITY. A slight discrepancy of 28.5 head appears in balancing purchases against sales, not a surprising figure (less than 1% error) in view of the imperfect records of J. B. J. and DON ALLEN and the total volume of around 3,200 head.

(c) As to most of the animals, no legal issue of passage of title exists, thus enhancing the credibility of exhibit 74.

(d) With minor possible and arguable exceptions, no evidence whatever appears in the record which would trace the animals described in Exhibit 74, including the 267 head in dispute, to any ownership of intervenor or to any security interest of ZIONS.

(C) TITLE TO CATTLE DELIVERED TO
THE PROPERTIES OF J. B. J. FEED-
YARDS, INC. PASSED TO J. B. J. AND
BECAME IMMEDIATELY SUBJECT
TO THE LIEN OF APPELLANT.

The question of passage of title is critical for this Court to determine. Intervenor in this proceeding attempts to claim cattle which were delivered to J. B. J., accepted by J. B. J., put in the feed lots by J. B. J., intermingled with other cattle of J. B. J. J. B. J. and FIRST SECURITY assert that the facts evidence a complete passage of title to J. B. J. and attachment of the FIRST SECURITY lien. The Court here deals with the legal questions by which the secured transactions chapter of the Uniform Commercial Code, where the metaphysical concept of

“title” is immaterial, must be superimposed on the sales chapter, where title does become important. Hence, FIRST SECURITY could have had a security interest in cattle of J. B. J. irrespective of whether J. B. J. had clear “title” or some other kind of interest in the collateral so far as the secured transactions chapter is concerned. Fortunately, however, the evidence in the record amply demonstrates the fact that title in the cattle did exist in J. B. J. and the attachment of the security interest of appellant becomes more clearly effective for that reason. In construing the effect of title, the Court must rely on provisions of §70A-2-401, quoted in relevant part as follows:

“(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract § 70A-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the

goods, despite any reservation of a security interest and even though a document of title is . . .”

The *Wilson* and *Walker Bank* cases, *supra*, are consistent with the statutory provisions governing passage of title and are supportive of appellant’s factual and legal arguments. Those cases represent this Court’s most definitive pronouncements on the subject. A very persuasive case from another state in point here is *North Platte State Bank v. Production Credit Association of North Platte*, 189 Neb. 44, 200 NW2d 1 (1972). The Court sustained the validity of a security interest of the PCA, with future advances and after-acquired property, as against a bank which had advanced money to the same farmer (Tucker) for purchase of specific animals on which it attempted to take a security interest. Tucker had received the animals from the seller some 45 days earlier, had not paid the seller, but title had passed to Tucker nevertheless and the cattle had immediately come under the security interest of PCA. The following excerpts are relevant to the factual and legal considerations at bar:

Whatever the parties may have thought, the provisions of the Uniform Commercial Code govern, and it is clear that title to the cows actually passed to Tucker when they reached his ranch and he received the actual physical possession of them.
(*Supra* at p. 5).

* * *

Another bank with a prior perfected security interest

prevailed over a seller because of passage of title to the bank's customer (buyer) and immediate attachment of the security interest, with resulting loss of any legitimate claim of the buyer, in *First National Bank of Elkhart County v. Smoker* (Ind. C.C.A. 1972) 286 NE2d 203. Smoker was in essentially the same position as intervenor DON ALLEN here and the bank was equivalent to FIRST SECURITY. In reversing a trial court decision in favor of Smoker, the Court engaged in a detailed discussion of the rationale underlying the Uniform Commercial Code provisions quoted above and then concluded:

Pursuant to the above cited provisions, we hold, as a matter of law, that Smoker retained only a purchase money security interest in the eighty-five head of cattle upon the delivery of such cattle to Whisler under an oral contract for sale. To have effectively reserved his rights, Smoker would have had to proceed under Article 9, § 19-9-101 et seq., concerning secured transactions, specifically I.C. 1971, 26-1-9-312(3); Ind. Ann.St. § 19-9-312(3). Since Smoker failed to perfect his security interest in the inventory of Whisler, his rights in the eighty-five head of cattle or the proceeds thereof are subordinated to the rights of the Bank, which had a prior perfected security interest, § 19-9-312(5), and *this is true regardless of whether Smoker, by explicit agreement, retained title to the goods.* In *Herington Livestock Auction Company v. Verschoor*, Iowa, 179 NW2d 491, 495 (1970), it was stated:

“Thus for any purposes controlled by explicit agreement between the parties or by provisions of the Act which make passage of title a material factor, intent of the parties is relevant. But for purposes of determination of when an interest becomes a security interest, the prior metaphysical concept of title has been abandoned and analysis of the steps taken by the parties is substituted.” (emphasis supplied) (*Supra*, at 213)

The facts here at issue couldn't have been better tailored to fit within the concepts of the above cases. Having in mind the principles of law thus established, we turn to the specific factual points which this court must review. The passage of title question has focused in the evidence most expressly around those animals contained in the loads dated December 15, 1972 (40 head) and December 20, 1972 (34 head). The legal principles apply, however, to support the claims of J. B. J. and FIRST SECURITY to substantially all of the animals listed in the purchases column of Exhibit 74, Items 5 through 15. No substantial disagreement exists with regard to the purchases listed in Items 1 through 4. The method of operation which applies to all of the questioned purchases can be most easily seen with reference to the December 15 and December 20 loads and discussion will continue with those reference points. The Court will find instructive the summary of J. B. J. FEEDYARDS, INC. cattle purchases shown as Exhibit 33. This document was prepared by MR. BOSWELL, beginning around January, 1973 and continuing for several months (Tr. 424 1. 28). It is ex-

tremely significant that Exhibit 33 contains the December 15 and December 20 loads in issue as the final shipments on MR. BOSWELL's list. On that exhibit, he noted that the prior two shipments of November 29 (32 head) and December 12 (33 head) had not been paid for because the checks bounced. Although those two loads are not expressly in issue as to title, appellant believes them significant for the reason that an account receivable was created between DON ALLEN and J. B. J. by reason of failure to pay for the November 29 and December 12 loads, placing those loads in exactly the same position as the next two loads of December 15 and December 20. The fact that such animals were not paid for is not relevant with regard to passage of title, for an obligation to pay arising through practice of the parties and actual shipment of animals invoiced to J. B. J. gives rise to the obligation to pay, but does not deprive the purchaser, J. B. J., of the right to dominion over the animals. Although approximately one year after preparing Exhibit 33 MR. BOSWELL claimed that the loads dated December 15 and December 20 were not accepted by J. B. J. (Tr. 425 1. 2), the Court can rely more fully on the initial declaration of MR. BOSWELL in preparation of Exh. 33 that those two loads were part of the J. B. J. purchases.

The December 15 load is further supported by the market clearances and inspection certificates from Montana contained in Exhibit 39, the five pages of which total the 40 head usually described as the December 15 shipment. Those documents clearly show "J. B. J. FEED-LOT" in Goshen, Utah as the purchaser. A similar demon-

stration is seen from Exhibit 40, which pertains to the 34 head contained in the so-called December 20 shipment. The livestock market clearances and inspection certificates together with the trucking invoice shown as part of that exhibit evidence "J. B. J. FEEDLOT" or J. B. J. FEEDERS" as purchaser in Goshen, Utah. Intervenor ALLEN consistently described the market clearance certificates as "bills of sale" (Tr. 556 1. 20 and 557 1. 20) and indicated according to the practice in Montana that these documents were used as evidence of ownership for the cattle (Tr. 530 1. 30). The presumption naturally arises that a sale had taken place from DON ALLEN to J. B. J. MR. ALLEN also indicated that he was familiar with Exhibit 33 and that such schedule represented all of the cattle purchases of J. B. J. through December 20, 1972 (Tr. 504 and 505). Up through December 20, he had sold four loads to J. B. J. for which he was unpaid, but the shipments had been billed to J. B. J. (Tr. 506 11. 8 and 15).

As the story concerning those two infamous loads is further pieced together, it appears that MR. BOSWELL flew to Montana on December 12 and 13, prior to the shipment of the December 15 and December 20 loads (Tr. 459 1. 11). In the meantime, MR. ALLEN was preparing the December 15 load for shipment to J. B. J. (Tr. 468 1. 15). MR. BOSWELL indicated during discussions while in Montana that J. B. J. would be unable to pay for the cattle. Accordingly, MR. ALLEN told MR. BOSWELL to mark the cattle or in some way keep them separate from his cattle and that he would come down later and do

something with the livestock, Tr. 469 1. 23). The December 20 load was purchased in Montana, not by MR. ALLEN personally, but by order buyers who were employed by him for the purpose of rounding up cattle in the various cattle markets in Montana, Tr. 471 1. 21). These order buyers were working for MR. ALLEN in connection with purchase of cattle expressly for shipment to J. B. J., on the basis of one to two loads per week (Tr. 499 1. 1). During the discussions between MR. BOSWELL and MR. ALLEN while MR. BOSWELL was in Montana, MR. ALLEN indicated he had another load of cattle for J. B. J. and shipped in anticipation that J. B. J. could handle them with new financing, which MR. BOSWELL was trying to obtain from Producers Livestock in Salt Lake (Tr. 499 1. 25 through 500 1. 14). Those cattle were shipped with the expectation that they would be purchased by J. B. J. (Tr. 500 1. 18).

After the two loads arrived in Goshen, Utah within a day or two following the December 15 and December 20 shipments dates, respectively, MR. BOSWELL caused the "V5" brand to be placed on those 74 animals (Tr. 383 1. 4). Although the loads were shipped prior to the decision that J. B. J. could not pay for them, MR. BOSWELL thereafter attempted to say that the two loads were "turned down" or "rejected" (Tr. 384 1. 5 and 443 1. 19). Appellant strongly submits that the testimony of MR. BOSWELL and his actions cannot properly be construed by the Court as giving any rise to an inference of retention of title in those 74 animals by intervenor ALLEN. At the

time of the subject transactions, MR. BOSWELL was a vice president and a director of J. B. J. and never did cease being an agent for J. B. J. (Tr. 460 1. 4). The "V5" brand was an "open" brand, not designated for the use of anyone, but having years earlier been used by MR. BOSWELL's family, the Okelberry family (Tr. 382 1. 10 and 383 1. 26). MR. ALLEN knew nothing about the "V5" brand and did not expressly request use of that brand until the meeting on January 1, 1973 when MOUNT NEBO CATTLE COMPANY was organized (Tr. 472 1. 23 and 475 1. 8 and 508 1. 24). As of January 1, MOUNT NEBO CATTLE COMPANY did not own a brand (Tr. 474 1. 27). At the time the December 15 and December 20 shipments were made, MR. ALLEN was lead to believe by MR. BOSWELL that BOSWELL was buying out his partners in J. B. J. (Tr. 523 1. 4), knew that FIRST SECURITY had a lien on the cattle (Tr. 524 1. 14), but his willingness to send those shipments down were partly in reliance on the refinancing at Producer's Livestock with MR. BOSWELL in control of J. B. J. (Tr. 549 1. 20).

Without belaboring those shipments any further, we believe the facts above recited expressly place the December 15 and December 20 shipments under the provisions of § 70A-2-401 quoted earlier. The express segregation by intervenor ALLEN or his agents of the animals at the point of shipment for the purpose of selling to J. B. J., with bills of sale to J. B. J., together with actual shipment and receipt of animals in the J. B. J. yards at Goshen,

Utah, all combine to declare unequivocally that the title passed to J. B. J.

Moving briefly to other sales made by DON ALLEN to J. B. J. which were questioned at trial by plaintiff and intervenor, the Court can refer easily to the documents summarized on Exhibit 74, beginning with Item 5 in the purchases column. Without repeating all of the information contained on the exhibit, appellant emphasizes that each of the entries was supported by further documentary evidence which is reliable. Items 5, 6, 7 and 8 of the purchases column are supported by Exhibits 75 through 78. The 29 head shown as Item 9 on September 20, 1972 is supported by Exhibit 79. The 32 and 33 head, respectively shown as Items 10 and 11 on the purchases column of Exhibit 74 are the loads which were included on MR. BOSWELL's summary of J. B. J. purchases, Exhibit 33, and indicated as not paid for. These items are further supported by Exhibits 80 and 81, respectively. The December 14 purchase of five head shown as Item 12 in the purchases column is further supported by a deposit slip made part of Exhibit 80. We have already discussed Items 13 and 14 of purchases on Exhibit 74, the December 15 and December 20 loads. The supporting documents, Exhibits 75 through 82, are records which were taken either from J. B. J. or from intervenor ALLEN and which form sound basis for including those items as J. B. J. purchases. Invoices, market clearances and deposit slips which clearly indicate the sale of animals can be relied upon. The supplemental records consisting of the invoices, desposit

slips and market clearances above referred to were not recorded in the bank accounts of J. B. J., but nevertheless come from appropriate and ordinary business records. Admittedly, some effort was made by witness GILBERT, called by opposing parties, to show certain duplications in the purchases column of Exhibit 74. Appellant here submits that the dates, weights, number of animals and other particulars on documents referred to by MR. GILBERT were sufficiently different to raise the presumption that his documents reflected other transactions. He consistently admitted that the records of J. B. J. were incomplete, that he had to get a lot of information orally from MR. BOSWELL, and that transactions existed pertaining to the business of J. B. J. which were not reflected in the bank accounts (Tr. 963 1. 27, 964 1. 25, 966 1. 29 972 1. 22, 998 1. 29 and 1003 1. 12).

D. THE COURT ERRED IN DETERMINING THAT INTERVENOR ALLEN EXPRESSLY RESERVED A SECURITY INTEREST IN CATTLE SOLD.

Two of the more glaring errors in the Findings of Fact are the statements in Finding No. 6 that cattle were shipped on a C.O.D. basis and that MR. ALLEN expressly retained title to the cattle. Such findings are wholly contrary to all of the reliable evidence. The record contains not one shred of evidence that any of the shipments from intervenor ALLEN to J. B. J. required cash on delivery at the time the shipments were received in Goshen,

Utah or elsewhere. There is some testimony of the "C.O.D. basis", but the simple statement is not supported by other evidence and is wholly contrary to the remaining evidence. As rather pointed examples, the two loads shipped November 29 and December 12, 1972, not disputed as J. B. J. animals, were not paid for, according to MR. BOSWELL (Tr. 427 1. 19). The whole pattern of dealing as explained generally by all of the witnesses consisted of J. B. J.'s ordering and receiving loads of cattle from DON ALLEN and others, sometimes pursuant to specific order and sometimes on a regular basis pursuant to practice. Upon receipt of the invoices, payment was made by check or draft.

Two alternative methods appear in the Uniform Commercial Code for reservation of a security interest by a seller. Under § 70A-9-203, a security interest is not enforceable against the debtor unless the collateral is in the possession of the secured party or the debtor has signed a security agreement which contains a description of the collateral and the intent to grant a security interest. Evidently, intervenor ALLEN made no attempt in any transaction whatever to obtain a written security agreement. Also, he did not attempt to maintain possession of the collateral, but rather shipped it for the purpose of selling the same to J. B. J. An alternative method of maintaining a security interest arises under the sales chapter of the Uniform Commercial Code. The sales would ordinarily be subject to the secured transactions chapter requiring the formalities immediately above mentioned, except

under certain conditions. Section 70A-9-113 reads as follows:

“A security interest arising solely under the chapter on Sales (chapter 2) is subject to the provisions of this chapter except that to the extent that and so long as the *debtor does not* have or does not lawfully *obtain possession of the goods*

(a) No security agreement is necessary to make the security interest enforceable; and

(b) no filing is required to protect the security interest; and

(c) the rights of the secured party on default by the debtor are governed by the chapter on Sales (chapter 2).” (emphasis added)

Under the facts contained in this record the security interest under the Sales Chapter could not arise because the debtor, J. B. J. had lawful possession of the goods. The exclusions to the formalities cannot apply in such event, thus rendering it necessary for intervenor ALLEN to have a security agreement and to perfect the same by filing a financing statement in order to preserve his security interest.

Construction and application of § 70A-9-113 is further confirmed by reference to the Sales Chapter. The unpaid seller's remedies include the right to reclaim goods upon demand made within ten days after the buyer receives the goods while insolvent (§ 70A-2-702), the right to with-

hold delivery of the goods (§ 70A-2-703), and the right to stop delivery while in transit (§ 70A-2-705). Since the evidence, or lack of evidence, if the Court pleases, demonstrates that intervenor ALLEN failed to comply with any of the formalities necessary for reservation of the seller's security interest, title to the cattle passed to J. B. J. for the purchases in dispute when the animals were segregated by DON ALLEN or his agents and identified to the contract for shipment to J. B. J. or at the very latest, when the cattle were delivered, unloaded and received by agents of J. B. J. (See references above to MR. ALLEN's testimony confirming that the market clearance certificates represented bills of sale).

II. USE OF THE "V5" BRAND CREATES ONLY A REBUTTABLE PRESUMPTION OF OWNERSHIP.

Throughout the trial and argument in the lower court, intervenor and respondent consistently relied on presence of the "V5" brand on certain animals as evidence of ownership. The question comes into sharp focus with reference to the 74 head of cattle comprising the December 15 and December 20 loads discussed above, all of which animals were branded "V5" shortly after arrival, but before anyone other than J. B. J. claimed ownership of the animals. Based both on the law and the facts, appellant submits that use of the "V5" brand created, at best a rebuttable presumption of ownership.

Section 4-13-11 reads as follows:

“The certified copy of recordation thus secured in the foregoing section shall be prima facie evidence of the ownership of such animals or animals by the party whose brand and mark it might be and shall be taken as evidence of ownership in all courts of law or equity or in any criminal proceedings when the title to the animals is involved or property to be proved.”

The key legal concept is the term “prima facie.” In Black’s Law Dictionary prima facie is defined:

At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

Prima facie evidence is defined:

Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party’s claim or defense, and which if not rebutted or contradicted, will remain sufficient.

The record is repleat with facts which serve to rebut any presumption of ownership of cattle branded “V5”. One of intervenor’s principal witnesses on the question of branding and ownership was a Utah State Brand Inspector, Myles Roach. Brief reference may be made to Exhibit 5, constituting Mr. Roach’s brand certificate book,

and certificates numbered 11157, 11182, 11184 and 11186 contained therein. Each of those certificates showed MOUNT NEBO CATTLE COMPANY as owner of the cattle inspected. Most of the animals on those certificates were branded "V5", but at least three animals had either no brand or unknown brands. Mr. Roach was very candid in stating that he merely identified the last brand as the evidence of ownership when more than one brand existed and also admitted lack of actual knowledge regarding origin of the animals before inspection (Tr. 80 and 81). With respect to the no brand animal, Mr. Roach didn't know the ownership, but relied on BOSWELL'S request for inspection as evidence of MOUNT NEBO ownership (Tr. 84 1. 6). Mr. Roach made no inspection for other brands, had no knowledge of the origin of the animals and used MOUNT NEBO as owner merely on the basis of the "V5" brand (Tr. 87 1. 5). The same kind of testimony applied to Exhibit 6, particularly certificate 11212 therein, Exhibit 7, certificates numbered 11261 and 11262, and Exhibit 8, particularly certificates 11371 and 11377 (Tr. 99-104).

A particularly interesting and telling circumstance is shown by the testimony referring to certificate 11377 in Exhibit 8. Although MOUNT NEBO CATTLE COMPANY is shown as owner at the top of the page, the certificate was signed by FIRST SECURITY, through Roy Broadbent, as owner at the time of inspection. Also in Exhibit 8 is certificate 11399, which shows FIRST SECURITY as owner in both places, even though the

cattle are branded "V5". The name FIRST SECURITY was entered thereon at the request of Mr. Broadbent and Mr. Reith accepted such request as evidence of ownership (Tr. 55 l. 14 and 56 l. 29). Those animals also had foreign brands in addition to the "V5", which were not identified and which carried no implication of ownership, the inspector again relying solely on the statement of the person requesting inspection as to the identity of the owner (Tr. 102 l. 5 and 108 l. 10).

With request to Certificate 11378 in Exhibit 8, no "V5" brands were registered at all, but MOUNT NEBO CATTLE COMPANY was shown as owner as a result of the Certificates from Montana (Tr. 134 l. 7). The question becomes more intriguing with reference to Exhibit 13, Certificate 24342, Exhibit 14, Certificate 24380, Exhibit 15, Certificate 24387, Exhibit 16, Certificate 24388 and Exhibit 17, Certificate 11017. As to all of those exhibits, J. B. J. was shown as owner, in reliance on the statements of the persons requesting inspection (Tr. 143-148).

Even the State Brand Inspector was willing to rely on extraneous statements rather than on the brands as evidence of ownership. Although such extraneous statements themselves do not prove ownership, certainly it becomes painfully obvious that the existence of the brands are not evidence of ownership under these circumstances.

Without unduly repeating previous references, we again cite the circumstances concerning MR. BOSWELL's

use of the "V5" brand on the December 15 and December 20 loads even before anyone made claim to the "V5" brand and before there was any determination regarding whether the cattle should be claimed by J. B. J. (in view of the refinancing with Producer's Livestock MR. BOSWELL was seeking) or would subsequently be claimed in a turn around of position by BOSWELL and MR. ALLEN to be cattle of the subsequently formed MOUNT NEBO CATTLE COMPANY.

The Court has the most graphic presentation of all by viewing the photographs constituting Exhibits 19, 20, 21 and 85, which show animals branded both "V5" and "(-)". Of all the evidence in the record, these photos show without question the indiscriminate use of the "V5" brand, even on animals which clearly and unquestionably belonged to J. B. J. MR. BOSWELL claimed that the placing of the "V5" brand on those animals was inadvertent and an accident, and that MOUNT NEBO made no claim for said animals (Tr. 388 1. 30).

Further rebutting any presumption of ownership by reason of use of the "V5" brand is the testimony of Mr. Wallace Gardner, Senior Vice President of ZIONS FIRST NATIONAL BANK, plaintiff-respondent in this action. It was at his instance that the action was commenced, and his bank obviously had a stake in the controversy by reason of \$50,000.00 on loan to intervenor. The Court must keep in mind that MR. BOSWELL began using the "V5" brand on the December 15 load of animals approximately December 16, and it was not until the

meeting between BOSWELL, ALLEN and Gardner on New Year's Day, January 1, 1973, that plans were made for organizing MOUNT NEBO CATTLE COMPANY and financing that business through a loan at ZIONS. Thus, the original of the security agreement held by ZIONS, Exhibit 3, had no list of cattle attached as the language contemplated and no list was ever attached because they were to make the list as the invoices came in and the transactions in purchasing cattle were effected (Tr. 571 1. 19). The only record Mr. Gardner expected of the cattle covered by the security agreement would be the invoices which subsequently came in (Tr. 572 1. 1). Mr. Gardner began receiving invoices during the third week of January, reflecting cattle purchased for MOUNT NEBO (Tr. 573 1. 6). The cattle belonging to MOUNT NEBO were not actually in existence on January 1, for they were to be purchased with the loan advances and MR. ALLEN's investment (Tr. 574 1. 12).

Appellant urges strongly the conclusions which must be drawn from certain additional testimony. Having in mind that at least 74 head of cattle existed at the J. B. J. yards in Goshen, Utah to which intervenor and MOUNT NEBO CATTLE COMPANY subsequently made claim, we view with great interest the testimony of Mr. Gardner that no inspection of cattle was made by the bank in January, 1973 of any animals claimed by MOUNT NEBO, even when invoices began to arrive. We strongly urge that if intervenor on January 1, 1973 made claim to the 74 head which had previously been branded "V5", this

fact would have been made known to Mr. Gardner, Mr. Gardner would have wanted to see the cattle or at least would have admitted that such cattle existed under MOUNT NEBO. To the contrary, however, he neither made an inspection nor was he even made aware that MOUNT NEBO CATTLE COMPANY claimed any cattle whatever existing in the State of Utah at that time. These facts strongly militate against any claim by intervenor or plaintiff in this action that the 74 head comprising the December 15 and December 20 loads were to belong to MOUNT NEBO.

We further assert that ZIONS BANK had knowledge of the disputes between FIRST SECURITY and J. B. J., and that Mr. Gardner knew of MR. BOSWELL's affiliation with J. B. J. If ZIONS had intended to make any claim whatever to any cattle then existing in the J. B. J. yards at Goshen, the most natural reaction for a Senior Vice President of the bank with 35 years experience would have been to check out whether cattle so claimed were involved in the controversy between FIRST SECURITY and J. B. J. Mr. Gardner knew that FIRST SECURITY had taken some action against BOSWELL prior to January 1, 1973 (Tr. 575 1. 24). Mr. Gardner knew that the MOUNT NEBO cattle, when purchased, would be headquartered at Goshen (Tr. 577 1. 1). On or about December 13, 1972, Mr. Gardner's office had received a letter from FIRST SECURITY (Exh. 45) cautioning ZIONS not to pay any further checks on the J. B. J. account, and it was common knowledge that

J. B. J. and FIRST SECURITY were having difficulties (Tr. 621 1. 22). With all of that knowledge by Mr. Gardner, his actions were totally and diametrically opposed to any idea that either ZIONS or MOUNT NEBO would make claim of animals existing at that time in the J. B. J. yards at Goshen, and particularly the 74 head comprising the December 15 and December 20 loads. Notwithstanding the "V5" brand on those cattle, the Court must conclude that such cattle were not and are not the property of intervenor, and not subject to the lien of respondent.

III. THE SECURITY AGREEMENT HELD BY ZIONS WAS EITHER INVALID OR DID NOT ATTACH TO THE ANI- MALS IN QUESTION OR BOTH.

Earlier comments in this brief have made it clear that the legal issue between ZIONS and FIRST SECURITY does not involve conflicting priorities in the same collateral by reason of the same debtor's having granted two security interests. Either the cattle in dispute were those of J. B. J. subject to FIRST SECURITY's lien or they were cattle of intervenor subject to ZIONS' lien. Nevertheless, appellant argues that the position of ZIONS is substantially weakened with regard to a claim to any cattle, no matter what the other facts may be, by reason of serious defects in its documentation.

The original promissory note held by ZIONS, shown as part of Exhibit 3, has only a minor defect in that the date of January 2 was changed by some unknown person

to January 3 (Tr. 566 1. 30). The security agreement, itself, constituting the balance of Exhibit 3, was executed before any livestock description was filled in because the cattle had not been purchased (Tr. 568 1. 23 and 570 1. 11). The livestock description on the financing statement was filled in later along with the security agreement (Tr. 571 1. 10). The original of the security agreement had no list of cattle attached and no list was ever attached because the invoices representing purchases were to come in as the transactions were thereafter made (Tr. 571 1. 19), and the only record the bank had would be the invoices which subsequently came, which constitute the list called for in the security agreement (Tr. 572 1. 1).

The typewritten portion of Paragraph 1(a) of the security agreement shown as Exhibit 3 contains as the second sentence: "All livestock now owned or to be acquired in the life of our contract." Yet, neither Mr. Gardner (Tr. 572 1. 21) nor MR. ALLEN (Tr. 512 1. 25) had any understanding whatever of the life of the contract or the meaning thereof. Also, Mr. Gardner admitted that the cattle to be covered by the security agreement were not in existence on January 1, but were to be purchased with the loan together with the investment of MOUNT NEBO (Tr. 574 1. 12). Such facts render completely meaningless the "now owned" language typed into the security agreement. Since the collateral described in ZIONS security agreement was to be 200 head as per list attached, and no list was ever attached,

except by incorporation through reference the invoices for cattle purchased and received three weeks later, the security agreement as of January 1, 1973 attached to nothing.

The financing statement subsequently filed on January 29, 1973, after invoices started coming in for cattle claimed by MOUNT NEBO, has further serious documentary and legal defects. Section 70A-9-402 reads in part as follows:

(1) "A financing statment is sufficient if it is *signed by the debtor* and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral." . . .

(3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor)

Address

* * * " (emphasis supplied)

It is clear that a financing statement requires the *name* of the debtor and the *signature* of the debtor. The Court will readily observe from a comparison of the pink financing statement copy, part of Exhibit 1 with the certified copy shown as Exhibit 2, that MOUNT NEBO CATTLE

COMPANY was named as debtor, but that the signatures were those of DON ALLEN and LaDEAN S. ALLEN, individually, without reference to the identity of MOUNT NEBO CATTLE COMANY. Designation of an assumed business name or the name of a proprietorship, without also designating the names of the individual proprietors as debtors, renders the financing statement invalid and fails to comply with the provisions of §70A-9-402(1). The policy of the law on this point is rather obvious. Corporations and partnerships are legal entities made the subject of public records in the event any persons desiring to inquire wish to know of the principal officers or partners. Proprietorships, however, constitute only an assumed trade name adopted by one or more individuals for a business which must otherwise be accounted for entirely on the personal level. A financing statement on file showing MOUNT NEBO CATTLE COMPANY as debtor provides persons who wish to inquire with absolutely no information whatever regarding the nature of the entity. The Secretary of State indexes the financing statements under the name of the debtor shown in box number 1 on the financing statement. The presence of individual signatures at the bottom of the page only compounds the error rather than assisting it. Any potential creditors of DON ALLEN, for example, would have no way of determining whether or not his cattle in the State of Utah were subject to a security interest because the filed financing statement did not show. In an effort to correct that substantial deficiency, an additional financing statement was filed by ZIONS

some time later (Tr. 566 1. 6). At the critical time for this lawsuit, however, ZIONS had a defective financing statement.

A rather persuasive precedent supporting the legal conclusion which appellant here urges on the facts recited above, is in the matter of *Matthew R. Leichter, Individually and d/b under the trade name and style of Landman Dry Cleaners, Bankrupt* (C. C. A. 2d Cir. 1972, 471 F. 2d 785). There it was held that a financing statement showing the name of a proprietorship and a designation of "d/b/a" or the like was defective and invalid under the Commercial Code.

Based on the foregoing, appellant asserts that respondent ZIONS had no duly perfected security interest in any cattle ,whether MOUNT NEBO or otherwise, and particularly it had no security interest of sufficient validity to permit it to make a claim against appellant for conversion of cattle as alleged in the complaint.

IV. INTERVENOR AND RESPONDENT FAILED TO SUSTAIN THEIR BUR- DEN OF PROOF WITH REGARD TO TITLE TO THE ANIMALS.

In order to demonstrate the failure of intervenor and respondent to sustain the burden of proof regarding title to the animals, it is necessary to review certain additional evidence (or lack thereof) for the benefit of the Court. Of most importance in this connection is the ab-

solite lack of evidence in the record regarding shipments of cattle from Montana by DON ALLEN for the benefit of MOUNT NEBO CATTLE COMPANY. Other than the claims to the much-disputed December 15 and December 20 loads, discussed at length earlier, and a few exceptional individual animals to which reference has been or will be made, the record contains no testimony and no documentary exhibits by which intervenor can show when, by whom and to whom animals were shipped for the benefit of MOUNT NEBO CATTLE COMPANY. Intervenor cannot trace any of such animals into the so-called "attached animals" which are the very substance of this lawsuit. The most fatal defect in the case of intervenor and respondent, therefore, consists not in an analysis of existing evidence, but rather the total lack of supporting evidence.

Commenting briefly on the few feeble attempts to tie in MOUNT NEBO CATTLE COMPANY animals with the exact animals in dispute, we proceed first to the testimony of MR. BOSWELL. Appellant candidly asserts that many many factors in the evidence tend to discredit the testimony of MR. BOSWELL. MR. BOSWELL testified that he had at no time any ownership interest in MOUNT NEBO CATTLE COMPANY and did not invest money therein (Tr. 301 1. 4), yet MR. BOSWELL had previously testified under oath in an affidavit filed in a separate case, but introduced in this matter as Exhibit 26, that he was engaged in the business of buying and selling livestock and was doing business

in the name of MOUNT NEBO CATTLE COMPANY (Paragraph 4, Exh. 26). He had no herds of his own for buying, selling or feeding (Tr. 330 1. 14). Notwithstanding a brief reference to title to the MOUNT NEBO cattle in DON ALLEN of Fairfield, Montana, the rest of the affidavit in Exhibit 26 contains no reference to MR. BOSWELL's supposed agency for DON ALLEN and all of the representations in that affidavit speak of MR. BOSWELL's business and a purported interference with his contractual relations with other persons or firms. These matters are typical of the inconsistencies in MR. BOSWELL's testimony.

At the trial, MR. BOSWELL testified on a number of occasions that certain animals represented on the various brand inspection certificates introduced by Mr. Roach were cattle which belonged to MOUNT NEBO CATTLE COMPANY (See, generally, Tr. 304 through 328, and, specifically, for example, Tr. 318 1. 5). Yet, MR. BOSWELL later admitted that during 1973 he sold approximately 5,000 head of cattle for MOUNT NEBO and purchased about 200 head (Tr. 331 1. 19), and it was obvious that he was primarily responsible for purchasing and selling approximately 3,200 head of cattle for J. B. J. during 1972 (Exh. 74). Most of said cattle were purchased from Montana sources. Of the 5,000 MOUNT NEBO cattle, he had no idea of the identity of bulls, heifers, steers or cows, or the origin or sellers of the cattle (Tr. 339 1. 13, 340 1. 23). MR. BOSWELL had no knowledge of how many of the cattle were transferred

from one of DON ALLEN's other livestock companies. He recognized a few Montana brands, but paid no attention to the others (Tr. 341 1. 29 and 342 1. 5). MR. BOSWELL had no knowledge of the date and details of shipment and could not identify the animals in dispute with any particular shipment or invoice coming from Montana or any particular purchase date with reference to the animals on Certificate 11157 (Tr. 344 1. 20), Certificate 11186 (Tr. 357 1. 3), Certificate 11212 (Tr. 357 1. 11), Certificate 11261 (Tr. 358 1. 28), Certificate 11262 (Tr. 361 1. 14), Certificate 11371 (Tr. 364 1. 1), Certificate 11399 (Tr. 364 1. 26), Certificate 11377 (Tr. 365 1. 29) and Exhibit 10 (Tr. 367 1. 9). MR. BOSWELL also stated that he could not clearly segregate any animals shipped in January, 1973, from those animals in the two loads of December 15 and December 20, 1972 (Tr. 358 1. 28).

MR. BOSWELL had agreed with the FORDS to purchase the interests of the FORDS in J. B. J. FEEDYARDS, INC., and claimed after December 27, that the J. B. J. FEEDYARDS properties in Goshen were under his personal control (Tr. 380 1. 23). Yet, he admitted that no payment was ever made by him on the purported December 20 agreement for purchase of the FORDS' interests (Tr. 379 1. 22). MR. BOSWELL was not only a 50% stockholder of J. B. J., but was a vice president and director (Tr. 300 1. 2), and even when MOUNT NEBO CATTLE COMPANY was organized, he continued to be an officer and employee thereof (Tr.

334 1. 23) and never did cease being an agent for J. B. J. (Tr. 460 1. 4). MOUNT NEBO CATTLE COMPANY did not have possession of the J. B. J. FEEDYARDS (Tr. 433 1. 28), even during the disputed December 15 and December 20 shipments.

MR. BOSWELL testified that he supervised and participated in an inventory of animals at the J. B. J. properties in Goshen on December 27, 1972, for the purpose of establishing values as the foundation for his consummation of the purchase of the FORDS' interests in J. B. J. Many other individuals also participated in that inventory, which counted only the J. B. J. and separated out cattle belonging to others. MR. BOSWELL estimated that 1,200 head of cattle were present on that inventory date, of which approximately 400 head belonged to Mike Hatch (Tr. 351 1. 27). That left approximately 800 head of J. B. J. cattle, which was consistent with what should have been there based on the other records of J. B. J. and FIRST SECURITY. MR. BOSWELL subsequently attempted to change his testimony, after a Court recess and consultation with counsel, for later he said only 400 or 500 animals belonging to J. B. J. were present on December 27 (Tr. 378 1. 1). Apparently, the witness was reminded that his earlier response would be damaging to the case of intervenor, and thus his estimates in the later testimony reduced the number of J. B. J. cattle by approximately the number of cattle in dispute. This is a rather clear effort on the part of MR. BOSWELL to twist the facts for the benefit of in-

tervenor and respondent, and we assert that his earlier candid response which would result in 800 J. B. J. animals of December 27, 1972 is most reliable, particularly since it is confirmed by the other testimony and records.

MR. BOSWELL had earlier attempted to rehabilitate the position of MOUNT NEBO CATTLE COMPANY by using MOUNT NEBO invoices to reflect sales of the cattle from the Lazy S Cattle Company yards which had been the subject of the sheriff's attachment. He admitted that he used the MOUNT NEBO form, even with the understanding that cattle were being sold pursuant to the stipulation and agreement which appears as Exhibit 93 (Tr. 416 1. 1). The invoice numbers in Exhibit 11 were originally described as MOUNT NEBO invoices, but the designation was changed to reflect sales from Lazy S prior to appellant's agreement to have that exhibit introduced in evidence as a summary of sales of the disputed animals (See, generally, MR. BOSWELL's testimony with regard to the invoices, Tr. 416 through 423, and, particularly, his admission that the MOUNT NEBO form was for his own records, even for sales handled by or for other people, Tr. 421 1. 2 and 423 1. 27).

MR. ALLEN also attempted to designate through very general testimony that the animals which he inspected at the Lazy S Cattle Company yards on February 9, 1973 were animals which he had purchased in Montana, thus attempting to identify them as MOUNT NEBO animals (Tr. 493 1. 5 and 494 1. 27). Yet, he admitted that he sold 20,000 or 25,000 cattle during the

year 1972 and could not tell whether any brands which he recognized on specific cattle pertained to cattle shipped from Montana prior to January 1, 1973 (Tr. 509 1. 11 and 510 1. 19). With reference to each of the animals which he recognized as being purchased from a neighbor, a friend or otherwise an identifiable source, he could not tell whether such animals were part of the shipments prior to January 1, 1973, thus making them J. B. J. animals very clearly, or were shipped subsequent to that time either as J. B. J. or as MOUNT NEBO cattle (Tr. 520 1. 2 and 521 1. 22). Since MR. ALLEN was not present during any of the branding of animals in Utah, he could not recognize a MOUNT NEBO animal, other than the fact that the "V5" brand had been placed on some animals (Tr. 522 1. 21).

It is evident that any attempt to identify specific animals through memory, with a failure to present documentary evidence regarding animals shipped for the claimed ownership of MOUNT NEBO, renders all of the testimony on behalf of intervenor and respondent totally unreliable with regard to ownership. MR. ALLEN and his counsel had ample opportunity to present the records documenting sales from any Montana source to MOUNT NEBO CATTLE COMPANY, but utterly failed to provide any meaningful records for the benefit of the Court. The oral testimony regarding ownership was so unreliable, as evidenced by the examples of testimony discussed above, that this Court has no reasonable alternative, but to declare unsupported by the evidence

the findings of the lower Court regarding ownership by intervenor and to reverse the lower Court's judgment.

In further support of that argument, appellant made a record in the lower Court which demonstrates rather convincingly that the reason for intervenor's failure to provide documentary evidence in support of his alleged chain of title is the fact that the documentary evidence would not support his claim. After some discussion between Court, counsel and appellant's witness, Mr. Broadbent, Exhibit 86 was received into evidence (Tr. 864 1. 5). That exhibit represents all of the records which appellant was able to obtain from intervenor and respondent relating to shipments by MOUNT NEBO CATTLE COMPANY of cattle into Utah from the period January 1, 1973 through February 7, 1973, the date prior to physical possession by the sheriff and subsequent taking of cattle in dispute to the Lazy S Cattle Company yards. The proposition is that if the attached cattle here in dispute, were, in fact, cattle belonging to MOUNT NEBO, then through use of MOUNT NEBO's invoices for the period prior to the attachment, we should be able to trace the Montana brands and determine whether those brands appeared on the attached cattle. If not, the cattle did not belong to MOUNT NEBO. Appellant made a painstaking search, comparison and analysis of the brands on cattle which were clearly those of MOUNT NEBO described in Exhibit 86, compared with the so-called "foreign" or "Montana" brands on all of the brand inspections pertaining to the cattle in dispute, most of

which are summarized on Exhibit 11. Out of the 267 head taken pursuant to the attachment, only 12 possible duplications of brands exist. This means that at the very least, 255 of the attached animals in dispute were clearly not those of MOUNT NEBO. It is the assertion of appellant that even the 12 animals bearing similar brands cannot unequivocally be identified as MOUNT NEBO. DON ALLEN may have purchased animals with a certain brand for shipment to J. B. J. in 1972 and purchased additional animals with the same brand or brands for shipment to MOUNT NEBO in 1973. Because of all of the circumstances asserted in this brief on behalf of appellant, such animals would be declared under the ownership of J. B. J. subject to appellant's lien.

To aid the Court in its analysis, we will briefly describe the 12 animals shown on Exhibit 86, which have brands in common with those shown on Exhibit 11 or other exhibits supporting Exhibit 11 and describing the animals in dispute sold from the Lazy S yards.

(1) Exhibit 87 is Fred Diamond's inspection certificate of April 16, 1973 for some of the cattle in the Lazy S property. One animal carried a brand which is a Bar Lazy SZ which is similar to a brand also shown on market clearance certificate 467504, part of Exhibit 86.

(2) On Exhibit 10, a Myles Roach inspection certificate, occurs one animal with a A/B, similar to a brand shown on Montana market clearance 469366, part of Exhibit 86.

(3) Exhibit 89 is the brand inspection certificate of Mr. R. C. Sessions pertaining to cattle sold out of the Lazy S yards on April 11, 1973, with specific reference to Mr. Sessions' Certificate 1647. Ten animals there reflected bear brands similar to brands on MOUNT NEBO invoices made part of Exhibit 86. One animal shows a *K4* which is similar to a brand shown on Montana livestock certificate 410726, Exh. 86.

(4) (5) (6) Three animals on Mr. Sessions' certificate bear an A with what appears to be an s to the lower right, a brand similar to a brand shown on Certificate 426042 on Exhibit 86.

(7) There is a J with a little figure on the right on Mr. Sessions' certificate which appears to correspond with one animal of similar brand on Montana certificate 373082, Exhibit 86.

(8) One animal with an R and a plus sign and what appears to be a 3 in Mr. Sessions' certificate appears similar to a brand on Montana certificate 464336, a part of Exhibit 86.

(9) (10) Two animals bearing an S with a curved bar underneath are similar to a brand on Montana certificate 469305, Exhibit 86.

(11) A brand appearing to be *EP* is similar to a brand on Montana certificate 464336, Exhibit 86.

(12) Finally, one animal with an LL with a curved bar underneath appears in Mr. Sessions' certificate similar to a brand in Montana certificate 41076, Exhibit 86.

With respect to all other animals under the attachment and in dispute in this case, no Montana brands appear on those animals which duplicate any brands on animals originating in Montana and purchased by DON ALLEN for MOUNT NEBO CATTLE COMPANY as reflected in Exhibit 86.

CONCLUSION

1. J. B. J. and FIRST SECURITY have demonstrated that all of the cattle in question, enumerated in Findings 15, 16, 18, 19, 20, 21 and 22, are cattle purchased by J. B. J. and made subject to the lien of FIRST SECURITY;

2. Intervenor and Respondent have failed to sustain any burden of proof whatever with regard to title to the animals;

3. This Court is both empowered and required to reverse the Findings, Conclusions and Judgment of the Trial Judge, who sat without a jury, and should require the entry of new Findings, Conclusions and Judgment awarding the disputed cattle and proceeds thereof to J. B. J., subject to the security interest of FIRST SECURITY;

4. This Court should further order that the proceeds held by the Clerk of the lower Court and obtained by Intervenor and Respondent in the amount of \$34,127.18 must be returned to FIRST SECURITY and that FIRST SECURITY may also apply to the outstanding indebtedness

of J. B. J. the additional funds it holds representing proceeds of the disputed cattle;

5. Costs should be awarded to Appellant.

Respectfully submitted,

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