

2001

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 Respondent

Utah Supreme Court

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**In the Supreme Court of the State of Utah** RECEIVED  
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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, Respondent  
and Cross-Appellant*

vs.

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

*Involuntary Defendants.*

DEC 5 1975

**BRIHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School**

Case No.  
13725

**BRIEF OF RESPONDENTS AND CROSS-APPELLANTS**

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

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**In The Supreme Court of the  
State of Utah**

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ZIONS FIRST NATIONAL BANK,

Plaintiff-Respondent,

vs.

FIRST SECURITY BANK OF UTAH, N.A.,

Defendant-Appellant,

et al.

Case No.

13725

**BRIEF OF RESPONDENTS AND CROSS-APPELLANTS**

**NATURE OF THE CASE**

The issues tried by the lower court were the issues of ownership of some 297 head of animals and a feed bill for said animals while said animals were under a wrongful attachment issued by Defendant and Appellant First Security Bank of Utah; Plaintiff and Respondent Zions First National Bank sued First Security Bank of Utah for wrongful conversion and return of its security interest in animals owned by its debtor, Intervenor and Respondents herein; Defendant and Appellant First Security Bank of Utah claimed a security interest in said wrongfully attached animals through its debtor, Involuntary Defendant J.B.J. Feedyards Inc., and Counterclaim for the feed bill for those animals.

## DISPOSITION IN THE LOWER COURT

The Honorable George E. Ballif, District Judge in the Fourth Judicial District Court of Utah County, sitting without a jury, granted Judgment on the attached animals as follows:

- (a) Don Allen and LaDeanne S. Allen, Intervenor, Respondents and Cross-Appellants, were the owners of 272 of the animals attached by Defendant First Security Bank of Utah; that said Intervenor received Judgment for the sale proceeds of said 272 head in the sum of \$114,459.07.
- (b) That Plaintiff Zions First National Bank of Utah has a valid and first lien upon the animals and the sale proceeds thereof as found to belong to Intervenor in the total principal and interest sum of \$56,179.43.
- (c) That Defendant First Security Bank of Utah has established its right to the animals, or their sale proceeds, of 5 animals.
- (d) That Defendant First Security Bank of Utah received Judgment, in the form of an offset, for the cost of feeding and caring for said attached animals in the sum of \$12,873.79; that said Judgment is subject to the reserved issue of damages between Intervenor and Defendant First Security Bank.
- (e) That no one proved ownership of 3 "no brand" animals.

## RELIEF SOUGHT ON APPEAL

Respondents, Plaintiff Zions First National Bank of Utah and Intervenor Don Allen and LaDeanne S. Allen, seek the affirmation of the Judgment of the lower court except for the following provisions in said Judgment, which Respondents seek reversal of as follows:

(a) Paragraph 2 of the Judgment where the lower court found no one had proven ownership to 3 of the "no brand" animals.

(b) Paragraph 6 of the Judgment holding Appellant First Security Bank of Utah was entitled to an offset in the sum of \$12,837.79 for the care and feeding of the attached animals.

In addition, Respondents appeal from the approval of the lower court to the Supersedeas Bond of Appellant First Security Bank of Utah; and the refusal of Appellant First Security Bank of Utah to deliver to Respondents the sum of \$73,991.99 of the sale proceeds of the Attached Animals held by First Security Bank of Utah since said Judgment was entered and belonging to Respondents.

### STATEMENT OF THE FACTS

For identification purposes, the parties will be referred to as follows:

Intervenors, Respondents and Cross-Appellants, referred to as "Intervenor";

Plaintiff and Respondent, referred to as "Zions";

Defendant and Appellant, referred to as "First Security";

Involuntary Defendant J.B.J. Feedyards Inc., as "JBJ";

Intervenor brand V5 Right Ribs referred to as "V5 RR".

Involuntary Defendants Joseph Ford & Sons, a partnership, James K. Ford, William Ford and William G. Boswell, all disclaimed any interest in the attached animals. None of the Involuntary Defendants are appealing from the Judgment of the lower court. Therefore, their counsel are not listed herein.

This case, while in the lower court, was popularly known as "The Bullship Case". It earned its name by reason of the fact over 200 bulls are wrongfully attached by First Security.



Intervenor, Don Allen, is a resident of Lewistown, Montana. For many years he has operated in the cattle business under the names of Mountain View Cattle Company and Don Allen Livestock Company, both proprietorships. In addition, he owns a Montana Corporation by the name of Central Montana Livestock Market Center which is licensed and bonded with the State of Montana and the U.S. Packers and Stockyards Act (TR 467 L 6-11).

During the year 1972, Intervenor purchased cattle in Montana through his business there and sold them to JBJ in Utah on a C.O.D. basis (TR 469 L 12). These animals were shipped from Montana with Montana Bills of Sale directly to meat packers in Utah or to the JBJ feedyards in Goshen, Utah (TR 556, 758-794). Mr. William G. Boswell handled the buying and selling of animals for JBJ (TR 300 L 12). In the early part of December, 1972, JBJ was experiencing financial difficulties with its financial institution, First Security. Sometime in the forepart of December, 1972, First Security stopped the cash flow of JBJ by dishonoring its checks (TR 427 L 10-15; 443 L 1-10). As a result, a load of cattle shipped 11-29-72 and a second load shipped 12-6-72 from Intervenor to JBJ were not paid for, the reason, the checks bounced (TR 427 L 16-30; 443 L 1-10).

Upon learning of the bounced checks, William G. Boswell advised Intervenor that JBJ was unable to pay for cattle any longer (TR 469). At that time one load was in process which was shipped C.O.D. on 12-15-72 containing 40 head. Another load was shipped by mistake on 12-20-72 containing 34 head (TR 499; 500; 502 L 3-7). Before either load arrived at the JBJ feedyards, Intervenor directed Mr. Boswell to mark them in some manner and set them aside and branded them V5 for identification purposes with a branding iron available; said brand then being open for registration (TR

442, 443). All 74 of these animals were sold within 30 days of their arrival and out of the JBJ feedyards before the wrongful attachment of First Security occurred (TR 354 L 14-16; TR 362 L 13). These last two loads were rejected by JBJ upon their arrival and branded with V5 (TR 381 L 26-30; 382 L 10-15) and held seperated for Intervenor (TR 391 L 1-4).

On 12-31-72 Intervenor flew to Utah. He consulted with various customers on 1-1-73 to see if the customers want to continue buying the special "bull program". They agreed that they did (TR 478, 479 L 1-11). At that time JBJ was out of this program because of no money to supply customers with animals (TR 469).

On 1-1-73, Intervenor formed a proprietorship with his wife known as Mt. Nebo Cattle Co. This business operated in Utah only (TR 473-476). At that time, Intervenor orally hired William G. Boswell as an agent and employed him on a commission basis (TR 477; 301 L 18-20). This oral Employment agreement was later reduced to writing (Exh 24). On 1-2-73, Intervenor, through his agent Mr. Boswell, applied for and obtained the brand V5 on the right ribs from the State of Utah; the brand was registered in the name of Mt. Nebo Cattle Co. (exh 4).

On 1-29-73 Intervenor pledged his existing and after-acquired cattle in Utah to secure his promissory note of \$50,000.00 payable to Zions. The Security Agreement provides for security of up to 200 head of animals to be branded V5 RR (exh 3). A financing statement was filed with the Secretary of State of Utah on 1-29-73 evidencing Don Allen and LaDeanne S. Allen doing business as Mt. Nebo Cattle Co. (exhs 1, 2 and 44).

The "Day of Infamy" was 2-7-73, when First Security obtained a Writ of Attachment from the Utah County Clerk

in Civil No. 38,191 and then levied upon all the assets of Intervenor, consisting of a bank account, accounts receivable, and cattle; together with assets of JBJ. The total value of the assets levied upon were valued at \$452,305.00; when the original indebtedness owed by its debtor, JBJ was \$218,200.00. The attachment was before judgment, without a notice or hearing of any kind without joining Intervenor as a party. A token "bond" of \$10,000.00 was filed in the form of a promissory note signed by First Security.

Under the Writ of Attachment, 275 head of animals, mostly bearing the brand V5 RR were levied upon on 2-7-73 and 2-8-73; said animals being located at the JBJ Feedyards in Goshen, Utah, and transported by truck to the Lazy S. Cattle Co. Ranch in Elberta, Utah (TR 909 L 4-9; Exh 11). The Attachment and Levy was made before First Security examined the public records of the State of Utah either as to brand registration of V5 RR or the security registration of Zions (TR 908 L 26-30; 909 L 1-3). Mr. Roy Broadbent, an officer of First Security was made Sheriff's Keeper of these animals under the Writ of Attachment. Neither the Sheriff's Keeper nor First Security requested or obtained any brands from the attached animals either before or after they were unloaded and transported to Lazy S. Cattle Co. Ranch (TR 909 L 10-17).

An additional 67 head of cattle were attached at the ranch of Involuntary Defendants Ford (Exh 25). Mr. Ford was made the Sheriff's Keeper of these animals.

On 2-9-73 Intervenor filed a Motion to Quash First Security's Writ of Attachment in Civil No. 38,191. At that time Intervenor was advised First Security appraised value of Intervenor's attachment animals was the sum of \$70,000.00. Fearing a forced and lump sum sale and to a

market for which the animals were not purchased, Intervenor entered into a Stipulation with First Security in an attempt to mitigate their damages and while the Writ of Attachment was still in force (TR 451 L 21-27). The Stipulation provided for Intervenor to orderly sell attached animals for the highest possible price obtainable; for Intervenor to have the use of JBJ feedyard; for sale proceeds of attached animals to be deposited with First Security (Exh 93). From the outset, First Security failed to comply with the Stipulation by interference with sales attempted by Intervenor, failure to deliver possession of feedyards and feeding equipment. Neither Zions nor the Sheriff's Keeper entered into the Stipulation. The Stipulation was to expire at the dissolution of the Writ of Attachment (TR 451 L 21-27; Exh 93).

On 4-6-73, Judge Allen B. Sorensen, in Civil No. 38,191, made and entered an Order Quashing the Writ of Attachment. On that same day, both Intervenor and the Utah County Sheriff made demand upon Mr. Broadbent, Sheriff's Keeper and officer of First Security, and Mr. Ford the other Sheriff's Keeper; demanding the return of the balance of Intervenor's attached animals together with the sale proceeds of the animals already sold. (See Court Record). First Security and the Keepers refused to comply with those demands and others (TR 452 L 12-15). A copy of the Court Order Quashing the Writ of Attachment was served with these demands.

On 4-12-73 First Security transferred and attempted to sell 100 head of the attached animals bearing the brand V5 RR to Producers Livestock in North Salt Lake, Utah; but split the load and in violation with the Brand Law of Utah, shipped part of this load to E. A. Miller in Hyrum, Utah (Exh 11). This was in violation of the Sheriff's Demand, the

stipulation and the Brand Laws of Utah.

Exhibit 11 is Intervenor's summary of all the attached animals removed by First Security to the Lazy S. Cattle Co. Ranch; this exhibit is confirmed and agreed with by First Security (TR 221), and the Utah Brand Inspector (Exhs. 7, 8, 9). There were 275 head at this location. Intervenor's Exh. 25 is a summary of all attached animals at Ford Property, a total of 67 head. Exhs. 11 and 25 prove a total of 342 animals attached at these two locations.

The attached animals were identified, recognized and proved to belong to Intervenor by the following summary of the evidence:

- (a) Intervenor testified he purchased and paid for his attached animals in Montana and shipped them to Utah (TR 471 L 3-5; 487 L 15-19).
- (b) Intervenor made a physical inspection of attached animals the day after the Attachment and Levy, 4-9-73. He recognized many of the animals and the Montana brands on them in addition to the V5 brand (TR 492 L 21-30; 493).
- (c) The 342 attached animals bore the following brands:
 

V5 RR (Intervenor's brand) (Exh. 11)	241 Animals
Various Montana Brands (Exhs. 11, 25)	13 Animals
Animals without Brands (Exhs. 11, 25)	3 Animals
New born calves since Attachment (Exh. 11)	2 Animals
Attached animals that died (Exh. 11)	5 Animals
Balance belonged to Involuntary Defendants and third parties not in lawsuit	80 Animals

Total Attached Animals	342 Animals
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- (d) Other Inventories and physical examinations:

1. JBJ took inventory of their animals on 12-27-72 (TR 349).
  2. On 1-25-73, First Security and Defendants Ford separated the animals then at the JBJ feedyards; removed 167 head bearing brands identifying them as JBJ animals, except a few V5 animals, Ford animals and third party animals. 100 head of these were sold and delivered elsewhere and 67 taken to the Ford property (TR 190-197; Exh. 22).
  3. On 2-6-73, the day before the Attachment, William G. Boswell, as agent for Intervenor, took inventory for Mt. Nebo Cattle Co. of animals at JBJ feedyards (TR 352).
- (e) William G. Boswell testified no JBJ animals were purchased after 1-25-73 (TR 300 L 13-17).
- (f) There were either 4 or 5 animals that bore both Intervenor's Brand, V5 RR and JBJ brand, (-) (Exh 11, 25). These animals were double branded by mistake and never claimed by Intervenor. (TR 326, 388).
- (g) Utah State Brand Inspections (Exhs. 5, 6, 7, 8, 9, 10, 11, 12).
- (h) Intervenor purchased feed used for his animals at JBJ feedyards (TR 477).

After the Writ of Attachment was quashed 4-9-73, Intervenor tendered the feed bill in form of a bank cashier's check to the Lazy S Cattle Co. for the Intervenor's animals then remaining there and made demand upon it for the return of these animals to Intervenor. Lazy S Cattle Co. informed Intervenor it couldn't because the corrals the

animals were in were just leased to First Security and those corrals were locked and accessible to no one by First Security and refused to deliver the animals to Intervenor (TR 452 L 12-15).

Judgment was signed and entered by lower court on 6-4-74. On 6-4-74 the lower court filed an order staying execution on the judgment for a period of 7 days from 6-4-74 after which judgment may issue if no supersedeas bond has been filed. No supersedeas bond was filed within that period. On 6-12-74 at about 8:30 A.M. Intervenor made demand upon Utah County Clerk for sale proceeds of attached animals and received the same. At 10:00 A.M. on 6-12-74 Intervenor made demand on Mr. Broadbent at office of First Security Bank in Payson, Utah, for the sale proceeds of the attached animals which were on deposit at First Security. Mr. Broadbent and First Security refused to deliver the proceeds. At 11:24 A.M. on 6-12-74 First Security signed another "promissory note" for the Supersedeas Bond on appeal. This "bond" had no evidence of First Security Corporate authority for the execution of the "bond". Objections and exceptions were made to the lower court. The lower court approved the "bond".

## ARGUMENT

1. INTERVENOR AND ZIONS CONCLUSIVELY PROVED THEIR OWNERSHIP IN INTERVENOR'S WRONGFULLY ATTACHED ANIMALS THROUGH INCIDENTS OF OWNERSHIP AS FOLLOWS:

### A. BRANDING

There is no evidence that controverts the following facts:

- (a) That Mount Nebo Cattle Co. is the owner of the V5 RR

brand in the State of Utah; (b) that Don Allen and LaDeanne S. Allen, his wife, are the only owners of Mt. Nebo Cattle Co.; (c) that 241 of the attached animals bore the brand V5 RR, exclusive of 4 or 5 animals that had both V5 RR and (-), or double branded; these double branded animals were done so by mistake and all parties admit they belong to JBJ. There were Montana brands in addition to the V5 RR brand that identified the attached animals. In **American Jurisprudence Proof of Facts, Volume 1, Page 600** it states in part as follows:

“OWNERSHIP OF CATTLE. Elements of Proof. Proof of the following facts and circumstances tends to establish ownership of an animal:

ASSERTION BY WITNESS THAT HE IS THE OWNER

Acquisition by gift

PURCHASE OF ANIMAL—BILL OF SALE

Acquisition by descent

Acquisition under will

Taking of animal as a stray

Use of animal for profit, as by milking

Personal use of animal—for riding, hunting, etc.

FEEDING AND INCURRING OF EXPENSES FOR

FOOD CONSUMED BY ANIMAL

GIVING SHELTER OR INCURRING OF EXPENSE

OF SHELTER

Payment of taxes on animal

BRANDING WITH DISTINGUISHABLE MARK

Tagging and numbering

Ownership of animal's dam.”

One of the elements of proof of ownership in the above is  
BRANDING WITH A DISTINGUISHABLE MARK.

**4-13-11 U.C.A. 1953 states as follows;**

“THE CERTIFIED COPY OF RECORDATION thus secured in the foregoing section shall be PRIMA



FACIE EVIDENCE OF THE OWNERSHIP of such animal 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 animal is involved or property to be proved." (Emphasis added).

The brand V5 RR is not only EVIDENCE OF OWNERSHIP but is also an IDENTIFICATION of the animals. Intervenor attempted at every opportunity to obtain all the brands on the attached animals for the above purposes. It is interesting that First Security meticulously avoided the brands and identifications in the Attachment process. (TR 192; 198; 200 L 7; 240; 262; 279). Mr. Broadbent, officer of First Security stated that the obtaining of the brands wasn't important. (TR 195 L. 22-30; 196 L 1

The Attached animals were purchased by Intervenor in Montana and shipped by him to Mt. Nebo Cattle Co. in Utah under the Montana Code. The Statutory duty of the Montana State Brand Inspector is set forth in 46-802 of the Montana Code as follows:

**"It shall be the duty of the State stock Inspectors and deputy state stock inspectors, upon the application of the owner of any such animal referred to in section 46-801, or the duly authorized agent of such owner, to inspect all such animals intended for removal or shipment as in this act provided, and to issue. his certificate of inspection therefore, if it shall appear with reasonable certainty that the applicant is the owner of such animal or the lawful right of possession thereof."**

Mr. Don Allen, Intervenor testified at the time of trial and in his deposition that he purchased the animals in Montana, obtained all necessary clearances from the State of Montana Inspectors, sent the animals on a truck with the Montana Clearances, which are the equivalent of a Bill of

Sale in Montana. Mr. Allen had to prove his ownership in the animals to the Montana Inspectors before he could ship them to Utah; and was given the equivalent of a Bill of Sale to ship them from Montana. This is another significant proof of ownership to the attached animals. The Utah Statute expressly accepts the Montana brand clearances as evidence of ownership when the animals come into Utah. A careful scrutiny of the Montana Clearances reviewed in the Don Allen Deposition and those in as exhibits show that approximately 70% of the Montana Brands on the attached animals together with the description of the animals are and have been identified as shipments by Intervenor from Montana to JBJ feedyards; the balance of the Montana Clearances went with the trucks directly to packers.

Thus, the Montana brands as well as the Utah brands, as inspected in Montana and Utah, declare the identity and ownership of the attached animals in the Intervenor.

#### B. PHYSICAL EXAMINATION AND RECOGNITION OF ANIMALS AND BRANDS

The JBJ feedyards was a public feedyard that serviced animals for numerous owners of animals. About 400 head belonging to a Mr. Hatch were being fed by JBJ at its feedyard in Goshen, Utah, just prior to the Attachment. There were several inventories and physical examinations on the attached animals prior to attachment by First Security on 2-7-73, 2-8-73 as follows:

1. JBJ inventory at the feedyards in question on 12-27-72.
2. On 1-25-73 First Security and Defendants Ford separated the animals then at the feedyards for the purpose of segregating JBJ animals from the V5 RR animals. At this time the JBJ animals were removed from the feedyards and taken to the Defendant Ford property; with a few exceptions, through error.

3. The day before the Attachment by First Security, William G. Boswell took an inventory of Intervenor's animals at the feedyard, on 2-6-73. Hence, the animals at the feedyards attached by First Security contained the animals of Intervenor.
4. Utah State Brand inspections in evidence and as testified to by the Utah Brand Inspector the attached animals bore the brand V5 RR, the various Montana brands, and a few with no brands.
5. Don Allen, Intervenor, testified that he inspected the animals the day after the attachment, 2-9-73 at their then locations and recognized the V5 RR brand on the Montana brands, and some of the animals he expressly recognized regardless of the brands.

#### C. PURCHASE AND PAYMENT OF ANIMALS ATTACHED.

Mr. Don Allen, Intervenor testified at length on direct and cross examination and in his deposition, that he purchased and paid for the attached animals. (TR 471 L 3-5).

#### D. PAYMENT OF FEED AND CARE OF ANIMALS

Mr. Don Allen and Mr. Garth Boswell both testified that Intervenor fed and paid for the feed of the Attached animals of Intervenor.

#### E. POSSESSION AND PROVIDING SHELTER

Mr. Allen and Mr. Boswell both testified at time of trial and in their depositions that Intervenor's animals were in the possession of Intervenor at the feedyards in question at time of Attachment, and provided care and shelter for them there.

### II. ZIONS SECURITY LIEN PERFECTED IN INTERVENOR'S ATTACHED ANIMALS

Exhibit 3 is the Security Agreement and Promissory note of Intervenor to Zions. The Security Agreement provides

for security of 200 head of animals with V5 brand; all livestock now owned or to be acquired in the life of contract; they are dated 1-3-73. Exh. 2 is the Financing Statement filed in Utah Secretary of State Office on 1-29-73. It discloses Mt. Nebo Cattle Co. is the Debtor and is signed for Mt. Nebo Cattle Co. by LaDeanne S. Allen and Don Allen. All of the attached animals were purchased by Intervenor, Mt. Nebo Cattle Co. during the month of January, 1973. First Security had knowledge of the Financing Statement before the Attachment. There is no evidence of JBJ money or animals going into the attached animals belonging to Intervenor. There were Mt. Nebo animals in existence and in Utah at time note and Security Agreement were signed.

III. FIRST SECURITY FAILED TO CARRY ITS BURDEN OF PROOF TO SHOW STANDING TO CHALLENGE OWNERSHIP OF INTERVENOR AND SECURITY INTEREST OF ZIONS IN INTERVENOR'S WRONGFULLY ATTACHED ANIMALS.

A. NO EVIDENCE OF JBJ MONEY TRACED INTO INTERVENOR'S WRONGFULLY ATTACHED ANIMALS AS FOUND BY THE COURT TO BELONG TO INTERVENOR.

First Security brought no affirmative evidence into court to prove and trace JBJ money into the attached animals found by lower court to belong to Intervenor. It presented no Bill of Sale, no Utah State Brand Inspection, no financial records of JBJ for First Security to prove their claim. First Security vigorously and unsuccessfully attempted to prove, by inference through Exhibit 74, that JBJ purchased over 3,000 animals over a period of time; that there was a shortage in JBJ and then by inference JBJ money had to be in the attached animals. Exhibit 74 was prepared and

testified to by Mr. Broadbent, officer of First Security. Intervenor called Mr. Sid Gilbert, a Certified Public Accountant, to examine the records of JBJ and Exhibit 74. Mr. Gilbert testified that many of the entries on Exhibit 74 were duplicate entries and some entries were taken from records other than JBJ's and not related to JBJ business transactions; and that there was no shortage of money or animals in JBJ according to their own records (TR). 946 L. 4-8

First Security attempted to prove that through Items 13 and 14, under "Purchases" on Exhibit 74, that these two loads consisting of 74 head were owned by JBJ because of an alleged delivery to the JBJ feedyards for JBJ. These animals were shipped C.O.D. by Intervenor to Utah of JBJ; these 2 loads were rejected by JBJ and not paid for; they were marked V5 for identification purposes for intervenor and at his request; they were purchased by Intervenor and had been sold by Intervenor and not at the JBJ feedyards prior to the attachment of First Security (TR 381 L 26-30; 382).

The question of passage of title to these animals does not relate to any of the attached animals. There were two loads of cattle, 74 head (Exh. 74, Items 13 and 14 under "Purchases") were shipped C.O.D. to JBJ; they were rejected by JBJ because they couldn't be paid for and marked with V5 upon their arrival. These animals were sold by Intervenor and were not a part of the attached animals. If the Uniform Commercial Code applied the following sections are applicable to this fact situation:

(1) 70A-2-401(4) UCA "A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

In this case there was a clear rejection by JBJ and title to those two loads never passed to JBJ.

(2) **70A-2-507(2)UCA** provides as follows: "**Where payment is due and demand on delivery** to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."

This section states no title passed until payment made because shipped C.O.D.

The Commercial Code has not repealed the branding laws of Utah. Article 4, Chapter 13 UCA expressly provides for the ownership identification of animals. This is the purpose of brands; they identify and prove ownership. The Utah branding laws prevail when applicable over commercial code provisions.

In the case of **Pugh Stratton, 22 Utah 2d 190, 450 P2d 463**, this Court ruled that where animals are being bought and sold for purposes of resale (as in this case) the livestock act (Article 4, Chapter 13 UCA) applies and controls over the uniform Commercial Code. The case of **Wilson vs. Burrows, 27 Utah 2d 436, 497 P2d 240** is not controlling in this case because in the Wilson case there was a conditional sales contract for an entire ranch and buyer was permitted to mortgage the animals; in that factual situation the Commercial Code does apply; the Wilson case was not a purchase and sale for purposes of resale.

In addition, Intervenor retained title to the two loads of 74 head because he was operating his business under the United States Packers and Stockyards Act and regulations thereunder (TR 467 L 6-11).

The case of **In Re Samuels & Co. Inc. vs. Mahon, Fifth Circuit, 1973, 483 F2d 557** determined that the Uniform Commercial Code did not apply where cattlemen sold their animals to packers; that title remained in the cattlemen

owners until the checks that had been delivered to them for the animals were paid; the checks were not honored and cattlemen were entitled to value of animals; the case held that the US Packers and Stockyards Act applied, together with the regulations thereunder.

First Security did not trace any proceeds or assets of JBJ into the attached animals through these two loads for the reason that JBJ never received title under neither the Uniform Commercial Code, or Pugh vs. Stratton or under In Re Samuels & Co. Inc. vs. Mahon, all cited herein.

They testified as to 4 or 5 attached animals that had both V5 RR brand and the JBJ brand (-) among the attached animals. Intervenors admitted these animals were animals of JBJ and were misbranded through mistake (TR 326).

First Security failed to prove its standing to even challenge the ownership of Intervenor in the animals found by the lower court to belong to Intervenor.

#### B. NO EVIDENCE OF INCIDENTS OF OWNERSHIP OF JBJ IN INTERVENOR'S WRONGFULLY ATTACHED ANIMALS.

There is no evidence of payment by JBJ to attached animals found to belong to Intervenor. There is no brand or other physical identification by First Security of Intervenors' Attached animals to prove ownership in JBJ. There is no evidence of payment of feed, care or shelter by JBJ in Intervenor's attached animals. Intervenor had possession of his animals when they were attached, except for those wrongfully taken to Ford Ranch on 1-25-73 by First Security and Fords; these animals are identified in Exhibit 25.

#### IV. FIRST SECURITY NOT ENTITLED TO REIMBURSEMENT FOR FEED FOR INTERVENOR'S WRONGFULLY ATTACHED ANIMALS.

On 4-6-73 Judge Allen B. Sorensen, in Civil No. 38,191,

Quashed the Writ of Attachment of First Security as being unlawful. On that day, Intervenor and Sheriff of Utah County made demand on First Security and Mr. Broadbent, Sheriff's Keeper and an officer of First Security, for the return of the Intervenor's attached animals to Intervenor (see record). First Security and the Sheriff's Keepers refused to return them. Intervenor tendered the feed bill to Lazy S Cattle Co. Ranch, without admitting responsibility for the feed bill (Tr 452 L 12-15). Once again, Intervenor was refused his animals (TR 452).

**Rule 64D (b) URCP** provides in part as follows:

"The conditions of such undertaking shall be to the effect that if the defendant recovers judgment, or if the attachment is **WRONGFULLY ISSUED**, the **PLAINTIFF WILL PAY ALL COSTS** that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

The Attachment "Bond" furnished amount to a promissory note of First Security in the sum of \$10,000.00.

**Rule 64 C (f) (3) URCP** and **rule 64 C (1) URCP** both provide that plaintiff must return attached property or the said proceeds to the defendant upon the discharge of the Attachment.

**In 6 Corpus Juris, Attachment, Pages 370-373, Section 823**, states as follows:

"If an attachment suit is dismissed, the attachment discharged, or Defendant prevails on the final determination of the cause, the **expenses of keeping the property must be paid by Plaintiff**, and the officer has no lien on the property or its proceeds as against Defendant."

**7 Corpus Juris Secundum, pages 477 and 480**, under subject Attachment states that if Attachment is dismissed, expenses of keeping property must, in general be paid by



Plaintiff. It further expressly provides that the expenses of keeping and preserving the property are taxed as costs and awarded to prevailing party. The case of **Beeman & Cashin Mercantile Co. vs. Sorenson, Wyoming, 1907, 89 P 745**, provides that the costs of keeping and caring for attached property when the suit is dismissed and attachment discharged, falls upon Plaintiff or the attaching party. There are cases that provide for costs on Attachment is a taxable cost: **Letz vs. Letz, Montana, 1950, 215 P2d 534**.

First Security relies upon a Stipulation signed by some of the parties, including Intervenor, but not including Zions (Exh. 93). This Stipulation reserves the rights of the parties to them, including damages and costs; was to remain in effect until the Court ruled on Intervenor's Motion to Quash the Writ of Attachment. Intervenor did not waive any rights including the cost of feeding.

#### V. LOWER COURT ERRED IN APPROVING LATE AND INVALID SUPERSEDEAS BOND ON APPEAL

Judgment in lower court signed and filed on 6-4-74. Lower Court stayed execution on Judgment for 7 days. The 7 days expired 6-11-74. On 6-12-74 at approximately 8:30 A.M. lower court signed order for payment to Intervenor. At 8:30 A.M. Intervenor made demand upon and received from Utah County Clerk the sale proceeds of Attached animals deposited there after the Attachment was quashed. At 10:00 A.M. on 6-12-74 Intervenor made demand on First Security for the money in its possession, the Stay Order having expired. First Security refused to deliver the money representing the sale proceeds of the attached animals in its possession. At the time of these demands, or the signing of the Court Order for payment to Intervenor there was no Supersedeas Bond filed as required by **Rule 73 (d) URCP**.

At 11:24 A.M. on 6-12-74 First Security filed another promissory note as a Supersedeas Bond; but there was no corporate acknowledgment of authority for the signing or filing of the "Bond". Objections were made to the lower court, but Intervenor's objections were overruled.

The lower court order authorizing the execution on the sale proceeds of Intervenor's wrongfully attached animals made it mandatory for First Security to release Intervenor's money. Once again, First Security refused to comply with an official order. The failure to file the Supersedeas Bond did not impair the right of First Security to perfect its appeal; but the failure to file the bond did give Intervenor the right to his long awaited money and property.

#### VI. INTERVENOR PROVED OWNERSHIP IN 3 NO BRAND ANIMALS

The Lower Court ruled that there were 3 animals that had no brand upon them and that no party had proved ownership to those 3 animals. Mr. Don Allen, Intervenor, testified in part as follows:

TR 494 Commencing Line 27. "There was some animals I could recognize. But there were several no brand bulls that I had purchased from the S & P Cattle Company that I had shipped down. They were Holstein cross bulls that had been fed in the feedlot, and they were in the group". TR 495 L 2-4. "And I think there was a half Simmental bull that I bought from my neighbor." \_\_\_\_\_

There was no other evidence by First Security or other parties contradicting this testimony. Mr. Boswell testified that all the JBJ animals had been branded prior to the Attachment. The only animals at the JBJ feedyard at time of Attachment were Intervenor's animals with a few branded with JBJ brand that were left behind by First

Security after they separated JBJ and Intervenor animals on 1-25-73. These no brand animals belong to Intervenor.

### CONCLUSION

The Lower Court should be upheld in all the Findings of Facts and Conclusions of Law, together with the Judgment therein except for paragraphs 2 and 6 of the Judgment. Intervenor and Zions conclusively sustained their burden of proof as to ownership of the intervenor's wrongfully attached animals; and Zions security interest therein; First Security failed to sustain its burden of proof to show standing to challenge the ownership and security interest in Intervenor's animals. This Court should reverse the lower court as to paragraph 2 of the Judgment relating to the 3 "no brand" animals and enter judgment for Intervenor for said animals. This Court should reverse the lower court as to paragraph 6 of the Judgment to order the payment of the feed bill of Intervenor's wrongfully attached animals by First Security, the wrong doer herein. This Court should reverse the lower court's approval of First Security's late and inadequate Supersedeas Bond and order First Security to pay the sale proceeds of Intervenor's animals to Intervenor immediately.

Costs should be awarded to Respondents and Cross-Appellants.

Respectfully submitted,

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